

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G": NEW DELHI
BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 1488 to 1490/Del/2018
(Assessment Year: 2013-14 to 2015-16)

Neeraj Singal, W-29, Greater Kailash Part-II, New Delhi	Vs.	ACIT, Central Circle-3, New Delhi
(Appellant)		(Respondent)

Assessee by :	Shri S. K. Tulsian, Adv, Ashwani Kumar Adv, Ms Abha Agarwal CA, Ms Bhoomija verma Adv, Aditya Kumar CA , Adv Megha Todani and Rahul Chaurasia CA
Revenue by:	Shri S.S Rana CIT DR
Date of Hearing	23/10/2018
Date of pronouncement	10/01/2019

ORDER

PER BENCH

1. These are appeals filed by the appellant for assessment year 2013 – 14 to assessment year 2015 – 16 against the order of the learned Commissioner of income tax (appeals) – 23, New Delhi dated 29/12/2017 wherein certain additions made by the learned assistant Commissioner of income tax, Central Circle – 3, New Delhi were confirmed and further the income of the assessee for all these 3 years were enhanced by him by invoking the provisions of section 251 (1) (a) of the income tax act. Three issues are involved in these appeals, which are dealt with hereunder.
2. In all these three appeals, the following issues are raised.
 - i. Addition in the hands of the assessee on account of cash generated out of clandestine removal of Zinc and Scrap from Bhushan steels limited of which assessee is the managing director. Which is made by the ld CIT (A) invoking the powers of enhancements
 - ii. Addition on account of gift given to other based on a seized document
 - iii. Addition u/s 68 of the act and alleged expenses of commission thereon
3. Assessee appellant has also filed additional ground of appeal challenging the power of CIT (A) with respect to enhancement as under:-

i. The assessee has raised the following additional grounds of appeal in ITA No. 1488/Del/2018 for the Assessment Year 2013-14:-

“1. That the Ld. C.I.T.(A) acted beyond jurisdiction in enhancing income of Sri Neeraj Singal u/s 251(l)(a) of the Income-tax Act, 1961 (the 'Act') by assessing new sources of income beyond the record (i.e. the return of income and assessment order) and outside the subject matter of assessments appealed against.”

ii. The assessee has raised the following additional grounds of appeal in ITA No. 1489/Del/2018 for the Assessment Year 2014-15:-

“1. That the ld CIT(A) acted beyond jurisdiction in enhancing income of Sri Neeraj Singhal u/s 251(1)(a) of the Income Tax Act, 1961 (the 'Act') by assessing new sources of income beyond the recorded (i.e. the return of income and assessment order) and outside the subject matter of assessments appealed against.

2. That, without prejudice to the above, the ld CIT(A) erred in enhancing income of Sri Neeraj Singal on account of alleged unaccounted sale of scrap for A.Ys. 2014-15 and 2015-16 despite the fact that identical additional on the said count for the said years were already made by the ld AO in the hands of Bhushan Steel Ltd, thereby resulting in double addition.”

iii. The assessee has raised the following additional grounds of appeal in ITA No. 1490/Del/2018 for the Assessment Year 2015-16:-

“1. That the ld CIT(A) acted beyond jurisdiction in enhancing income of Sri Neeraj Singhal u/s 251(1)(a) of the Income Tax Act, 1961 (the 'Act') by assessing new sources of income beyond the recorded (i.e. the return of income and assessment order) and outside the subject matter of assessments appealed against.

2. That, without prejudice to the above, the ld CIT(A) erred in enhancing income of Sri Neeraj Singal on account of alleged unaccounted sale of scrap for A.Ys. 2014-15 and 2015-16 despite the fact that identical additional on the said count for the said years were already made by the ld AO in the hands of Bhushan Steel Ltd, thereby resulting in double addition.”

4. Brief facts of the case shows that Search and seizure operations u/s 132 of the Income Tax Act, 1961 (hereinafter ‘the Act’) were carried out in the Bhushan Steel Ltd. group of cases including the premises of the Assessee on 13.06.2014. Notices u/s 153A of the act was issued by the Assessing Officer on various dates in respect of A.Ys 2009-10 to 2014-15 and u/s 142(1) for A.Y. 2015-16. In response to that, Assessee filed his return of income. Details of incomes declared by the Assesses in their original returns and pursuant to notices issued u/s 153A for the years under consideration may be summarized as under:-

ASSESSMENT YEAR	ORIGINAL RETURN		RETURN PURSUANT TO NOTICE U/S 153A	
	Date of filing	Income declared	Date of filing	Income declared

		(Rs.)		(Rs.)
2013-14	31.07.2013	1,80,21,400	12.07.2016	1,80,21,400
2014-15	-	-	31.05.2015	1,51,31,310
2015-16	31.08.2015	2,05,15,560	-	-

5. Assessments u/s 153A r.w.s 143(3) for A.Ys 2010-11 to 2014-15 and u/s 143(3) for A.Y. 2015-16 were completed on 30.12.2016 by the Ld. A.C.I.T., Central Circle-3, New Delhi (hereinafter referred to as the 'A.O.')
- The details of the additions for the years under consideration are as under:

Particulars of Additions made by the A.O	A.Y. 2013-14	A.Y. 2014-15	A.Y. 2015-16	TOTAL
Addition u/s 68 of the Income tax act	14,89,49,226	93,05,14,648	32,52,37,610	1,40,47,01,484
Addition of expenses of Commission	89,36,954	5,58,30,878	1,95,14,257	8,42,82,089
Alleged unexplained gifts	-	-	68,01,000	68,01,000
Alleged undisclosed cash	-	-	12,50,000	12,50,000
TOTAL	15,78,86,180	98,63,45,526	35,28,02,867	1,49,70,34,573

6. Being aggrieved with the disallowances/additions made by the A.O., the Assessee preferred appeals in respect of the aforesaid years before the Ld. CIT (Appeals)-23, New Delhi. During the appellate proceedings before the Ld. CIT. (A), written submissions along with several details and documents in support of each of the grounds raised were filed. Ld. CIT. (A) passed a consolidated order dated 29.12.2017 disposing off the appeals for A.Ys 2013-14 to 2015-16. He confirmed all the addition except the alleged undisclosed cash of Rs 1250000/- .
7. In addition to the above, in the case of assessee , the Ld. CIT.(A) relying on the order dated 27.05.2015 of the Hon'ble Customs & Central Excise Settlement Commission in the case of Bhushan Steel Ltd. (BSL) (Sri Neeraj Singal, assessee appellant, being the Managing Director of BSL and a co-applicant before the Hon'ble Settlement Commission as supra) alleged that Sri Neeraj Singal was involved in the activity of clandestine diversion and sale of raw material (zinc) shown to have been purchased for consumption in the manufacturing process of Bhushan Steel Ltd.(BSL) and unaccounted selling of scrap generated in the Khapoli Factory of BSL. He further held that bogus transport charges were claimed in respect of such purchases of zinc in the books of Bhushan Steel Ltd. The Ld. CIT(A) observed that income generated in the form of cash due to (a) alleged clandestine diversion and sale of raw materials, (b) alleged claim of corresponding alleged bogus transportation charges and (c) alleged unaccounted sale of scrap, represented the unaccounted income of Sri Neeraj Singal and ought to be added, by way of enhancement to the assessed income (for the years under consideration) of Sri Neeraj Singal as per the following details:

Assessment Year	Cash generated out of sale of clandestinely	Cash generated out of expenses for (bogus) transportation to	Cash generated out of sale	Total (Rs. in crores)

	diverted Zinc (Rs. in crores)	factory (for clandestinely diverted zinc (Rs. in crores)	of scrap (Rs. in crores)	
2013-14	47.96	0.86	-	48.8200
2014-15	-	-	1.5964	1.5964
2015-16	-	-	1.9475	1.9475

8. The above amounts (enhancements in assessed incomes for A.Ys 2013-14 to 2015-16) were telescoped against the additions already made by the A.O. in assessments on account of addition u/s 68 of the act.
9. Therefore assessee has raised additional grounds of appeal for these three years as under :-
- (i) AYs 2013-14 to 2015-16: That the Ld. CIT.(A) acted beyond jurisdiction in enhancing income of Sri Neeraj Singal u/s 251(1)(a) of the Income-tax Act, 1961 (the 'Act') by assessing new sources of income beyond the record (i.e. the return of income and assessment order) and outside the subject matter of assessments appealed against.
- (ii) A.Ys 2014-15 & 2015-16: That, without prejudice to the above, the Ld. CIT. (A) erred in enhancing income of Sri Neeraj Singal on account of alleged unaccounted sale of scrap for A.Ys 2014-15 & 2015-16 despite the fact that identical additions on the said count for the said years were already made by the A.O. in the hands of Bhushan Steel Ltd., thereby resulting in double addition.
10. The Id CIT (A) has dealt with the above issue as under :-

“3.2 Regarding issue of enhancement of income, in case of Sh. Neeraj Singal, the AR submitted a reply vide letter dated 21.12.2017 which is combined for all the assessment years and is reproduced as under:

“This is with reference to the discussions held on the last date of hearing asking the Appellant to show cause as to why enhancement of income of equal amount be not made in the hands of Sh Neeraj Singal/Sh Brij Bhushan Singal in the light of the facts as discussed. In this connection, the following submissions are made for and on behalf of the Appellant: -

(1)(a) While it is a fact that the Appellant is a Managing Director of M/s Bhushan Steels Limited (BSL) and accordingly responsible for managing its affairs, the fact remains that BSL being a separate legal entity was operating independently with a clear demarcation drawn between his personal affairs and activities of BSL

(b) In this scenario and narration of facts, any act, if at all done or conducted in his capacity as the Managing Director of BSL would stand divorced from and have to be considered as such and not intermingled, with what to talk of extrapolation, to his personal affairs.

(c) *It may also be submitted that while the conclusions drawn and additions made with respect to the issues which form the basis for the issue of the enhancement notice u/s 251(2) of the Act are themselves being agitated separately, it should be submitted, of course without prejudice, that the decisions were made and instructions, again if any, conveyed in his capacity as the Managing Director of BSL, keeping the interests and operating scenario of the Company in mind and not his personal interests. The intention, if any and the knowledge which the Appellant had, with respect to the impugned activities had no relation to any of his acts done in a personal capacity. Moreover, there is no evidence, direct, indirect, circumstantial or even suggestive to abet a conclusion that the amount, if any generated from the impugned activities went into the personal coffers of the Appellant which conclusion, can at best be only termed as superficial and conjectural.*

(d) *Before going on to deal with the issue of the extent to which reliance can be placed on the statement of Sh Chander Kant Jadhav, (which, in any case, he has subsequently retracted), wherein he has allegedly deposed that he receives cash payments for the sale of scrap at the Khopoli Plant and which has not been accounted for in the books, it needs to be noted that whatever scrap is generated in the manufacturing process of BSL stands duly recorded in the books of accounts maintained. It may also be mentioned that the said Company, being subject to the rigors of Excise laws, maintains complete stock records as prescribed by the relevant rules and also files periodical returns wherein the amount of scrap generated and its sale is duly recorded. The Appellant Company is also not aware of the circumstances and basis in which the said statement was made by Sh Chander Kant Jadhav.*

(e) *Furthermore, it may also be submitted that the basis of the proposed enhancement viz the statement of Shri Chandel Kant Jadav has itself been subsequently retracted by him in a separate communication addressed to the Ld Assessing Officer wherein he has specifically denied any instance of scrap being sold for cash and not recorded in the books of account. He has also stated that at the time of survey u/s 133A of the Act he was in a very disturbed state of mind due overcome as he was by the sudden action taken by the Income Tax Authorities whereby he lost his mental balance and made the statement. The fact that the statement of Shri Chander Kant Jadhav did not represent the correct state of affairs is also further corroborated by the fact that two other employees at the Khopoli Plant of the Company viz. Shri Sudama Prasad and Shri Padam Kumar Aggarwal have denied the contents of the statement of Sh Chander Kant Jadhav and in fact have even contradicted the same on the same date. It may also be submitted here that Shri Chander Kant Jadhav has also reiterated the retraction in a statement recorded before Ld Assessing Officer on December 22, /-*

(f) *In this scenario wherein, there are conflicting and contradicting statements of various parties it is clear that the statement of Sh Chander Kant Jadhav, having been made under a state of extreme mental and heightened tension, did not reflect the true and correct state of affairs and accordingly no adverse inference can be drawn therefrom. Furthermore, the Appellant Company has also not been provided an opportunity to cross examine the persons whose statements form the basis for the conclusion drawn and consequent addition made by the Ld. Assessing Officer.*

(g) As regards the proposed enhancement on the basis of the alleged sale of Zinc purchased from M/s Hindustan Zinc Ltd in cash and the order of the Settlement Commission (Customs and Central Excise), it is submitted that the said issue is the subject of appellate proceedings and being challenged and argued separately based as they are on conflicting evidences and may we humbly submit, debatable propositions and interpretation of law. Moreover, with reference to the proceedings before the Customs and Central Excise authorities, it is again submitted and reiterated that at no stage was the fact of consumption of zinc or its consumption in the manufacturing activities ever disputed. The decision to approach the Settlement Commission was motivated only by a desire to obviate litigation which could have been time consuming and expensive and conserve energy and resources for the operations of the appellant company ensure its sustained growth and progress.

(h) To sum up the proposed enhancement on account of various issues, including alleges sale and zinc in cash by BSL, in the hands of the appellant is not justified in view of the following facts and reasons:-

(i) There is a clear cut dichotomy and divergence between the activities carried out and decisions made by the appellant in an official capacity and personal capacity with no cause for any intermingling of the two.

(ii) The basis on which the proposed action is being resorted to is itself being vehemently disputed by BSL in separate appellant proceedings based, as it is, on conflicting evidences and questionable surmises.

(iv) The very basis on which the action is proposed to be made viz. the statement of Sh. Chander Kart Jadav has itself been subsequently retracted by him both in a communication addressed to the Ld. Assessing Officer as well as in the statement recorded before the Ld Assessing Officer during the conclusion of the assessment proceedings.

(v) The issue of alleged sale of Zinc purchased from M/s Hindustan Zinc Ltd in cash and the order of the settlement Commission (Customs and Central Excise), being a contentious issue is being challenged and argued separately. Moreover, at no stage was the fact of consumption of zinc or its consumption in the manufacturing activities ever disputed. The decision to approach the Settlement Commission was motivated only by a desire to obviate litigation which would have been time consuming and expensive and conserve energy and

resources for the operations of the Appellant Company to ensure its sustained growth and progress.

(2) There is not an iota of evidence to even remotely suggest that the money, if any, allegedly received from the sale of scrap/zinc went into the personal coffers of the Appellant. Moreover no such evidence of any nature, even superficial, to suggest that such money(s) were diverted to the personal hands of the Appellant has even been unearthed during the course of search .

(3) As desired, copies of documents evidencing purchase of share on which LTCG has been claimed are being enclosed herewith. As regard the rationale for the

purchases of shares, the same was based on the expectation of capital appreciation as per the information available at that point of time.”

4.1 In the cases of M/s Bhushan Steel Ltd., vide letter dt. 09.02.2017(in AY 2009-10), the AO was also provided opportunity to attend the hearings and submit his version, if he wish to do

so, however, AO chose not to attend to the hearings.

4.2 In the cases of Neeraj Singal, vide letter dt. 07.02.2017(in AY 2010-11), the AO was also provided opportunity to attend the hearings and submit his version, if he wish to do so, however, AO chose not to attend to the hearings.

4.3 In the cases of Smt. Ritu Singal, vide letter dt., 25.05.2017 (in the AY 2015-16)the AO was also provided opportunity to attend the hearings and submit his version, if he wish to do so, however, AO chose not to attend to the hearings.

4.4 In the cases of Smt. Uma Singal, vide letter dt, 03.05.2017 (in AY 2015-16)the AO was also provided opportunity to attend the hearings and submit his version, if he wish to do so, however, AO chose not to attend to the hearings.

4.5 In the cases of Sh. Brij Bhushan Singal, vide letter dt., 03.05.2017 (in AY 2013-14) the AO was also provided opportunity to attend the hearings and submit his version, if he wish to do so, however, AO chose not to attend to the hearings.

501 I have considered the material on record including oral arguments of the AR, written submissions of the appellant/ AR and the (impugned) assessment order.

Background:

A. Clandestine diversion and sale in cash of raw material (shown to have been purchased for consumption in the manufacturing process), consistently for five years by/on behalf of Sh. Neeraj Singal (VC & MD of M/s Bhushan Steel Ltd.).

5.2.1 The Appellant(M/s Bhushan Steel Ltd/ or BSL, in short) is part of Bhushan Steel Ltd. BSL) group.The appellnat company is engaged among other things, in the manufacture of co a rolled coils & sheets, galvanized/galume and colour coated coils & sheets, precision tubes, nardened and tempered (H&T) steel, high tensile steel strips and large dia pipes. As per its website, the appellant has an existing steel production capacity of 5.6 million ton per annum. The appellant company was promoted by the Singal family. All along the promoters family kept najcrfy share holidng with them. As per the website of the appellant company, the shareholding c promoters as on 31.03.2006 and 31.09.2017 was 66.05% and 57.82 %, respectively. As stated above, Shri Brij Bhushan Singal(B B Singal) is non-executive Chairman and Shri Neeraj Singhal S/o. Shr Brij Bhushan Singal is Vice-Chairman & Managing Director (VC & MD) of the appellant company. As per Annual reports, the Turnover of the appellant company (BSL) is as under*

<i>S. No.</i>	<i>AY</i>	<i>FY</i>	<i>Sales without Excise duty (Rs. in lacs)</i>	<i>GP %</i>	<i>NP%</i>
<i>1</i>	<i>2009-'0</i>	<i>2008-09</i>	<i>495748</i>	<i>21.02</i>	<i>11.31</i>

2	2010-11	200S-10	564035	24.57	20.41
3	2011-12	2010-11	700046	28.72	19.65
4	2012-13	2011-12	994141	28.08	13.73
5	2013-14	2012-13	1074427	27.02	11.30
6	2014-15	2013-14	967583	22.38	0.99
7	2015-16	2014-15	1064577	18.05	-11.79

5.2.2 There was a Search & Seizure action of Central Excise Authorities on the premises belonging to the appellant company and its associates on 20.03.2013 because Intelligence collected by the Central Excise Authorities indicated that the appellant company and its associates were indulging in the availment of fraudulent CFNVAT credit on the quantities of zinc ingots purchased from the Haridwar plant of M/s Hindustan Zinc Ltd. (hereinafter referred to as HZL or 'the supplier') without actual receipt of the zinc ingots in the factory of the appellant located at Khapoli(Maharashtra). It was gathered that in order to save on transportation charges, the applicant company were normally procuring the required quantities of the zinc from the Tarapore (Maharashtra) Depot of the supplier and/or Chittorgarh/Udaipur in Rajasthan. Normally, for transportation, the appellant company had an FOR (Free on Road) agreement with the supplier. However, in respect of the invoices, where the applicant had availed fraudulent cenvat credit, the zinc was purchased from the Haridwar Plant of the supplier and the appellant had intentionally arranged their own transportation through another transporter, M/s Mewar Transport Company (Regd.).

5.2.3 Searches were conducted at various premises including the factory premises of the appellant company at Khapoli (Maharashtra), the residential premises of Assistant Vice- President (Finance Shri Pankaj Tiwari), premises of the transporters {M/s Mewar Transport Company(Regd.), Udaipur} and the premises of the traders namely Shri Sunil Kumar Gupta prop. M/s Sunil Metal Industries, Agra and Shri Sushil Kumar @Shely prop. M/s Shree Ram Overseas, Delhi to whom the appellant company had actually diverted the zinc purchased against the said cenvatable invoices.

5.2.4 During the course of search at the premises of M/s Sunil Metal Industries, Agra, the officers found two trailers standing in the premises. The drivers of the trailers informed the officers that they had transported consignment of zinc ingots from the Haridwar Plant of the supplier. As per the accompanied documents, the consignments were destined for the appellant company, however, the same were diverted to the premises of M/s Sunil Metal Industries (Prop. Sunil Kumar Gupta S/o Shrinath Gupta). Both the consignments together valued at Rs. 81.79 lakhs alongwith the trucks were seized by the officers of the Central Excise Department. Apart, from this, the officers also recovered cash, amounting to Rs. 26,50,000/-, which were seized under the belief that the same pertain to the sale proceed of the impugned goods.

5.2.5 During the course of search at the residence of Shri Sushil Kumar @Shely prop. M/s Shree Ram Overseas, Delhi, the Central Excise officers recovered incriminating documents. They also recovered cash amounting to Rs. 1,59,60,000/- which was placed under seizure. During the course of search at the godown premises of M/s Shree Ram Overseas (at Sahibabad Dairy Complex), the officers found a stock of 694 pcs of zinc ingot weighing 171783.44 kgs and valued at Rs. 23,54,131/-, which were seized by the officers as the concern person in the godown could not produce any documents related to the same.

5.2.6 Searches were also conducted at three office premises as well as godown premises of M/s Shree Ram Overseas and the officers seized the available quantities of stock at all the premises. Also incriminating records and CPUs/laptops, recovered from these premises were resumed for further investigation.

5.2.7 During the search at the premises of transporter {M/s Mewar Transport Co.(Regd.)}, Shri Salim Khan (Supervisor/Manager of the M/s Mewar Transport Company(Regd.) (Haridwar Branch)), informed the officers that most of the zinc loaded from the Haridwar Depot of the supplier, for the Appellant company, were used to be unloaded at Delhi, Agra and Aligarh, etc., as per the direction of Mr. Rajesh Sainani, partner of the transport company{ M/s Mewar Transport Company(Regd)}. He also handed over a rubber stamp of the appellant company which was used to stamp the challans showing (fake)receipt of the goods at the appellant's factory located at Khapoli. The officers also recovered records of M/s Aggarwal Cargo Movers, Rajasthan which, according to Sh. Salim Khan, were containing the actual details of the destination of the zinc loaded from Haridwar.

5.2.8 The {Shri Rajesh Sainani, partner M/s Mewar Transport Company(Regd.)} in his statement dated 20.03.2013 (before Central Excise Authorities), inter-alia informed that all the consignments of zinc ingots cleared from the Haridwar factory of the supplier, which were consigned in the name of appellant company, were being diverted and unloaded at Aligarh and Delhi under telephonic directions of the { Sh. B B Saxena, Mgr. of the appellant company i.e. M/s Bhushan Steel Ltd.}.

5.2.9 Search was also conducted at the residence of the {Shri Pankaj Tiwari, Asstt. Vice President of the appellant company i.e. M/s Bhushan Steel Ltd.} and incriminating documents as well as Indian currency valued at Rs. 6.20 lakh was recovered. As the Shri Tiwari could not explain the availability of the said cash, the same was seized by the officers,

5.2.10 During the search In the factory premises of the appellant company, the officers found shortage of 41.367 MT in the stock of zinc available in the premises, involving duty of Rs. 6,73,376/- (value to be much more).

5.2.11 The {Shri Pankaj Tiwari, { Asstt. Vice President of the appellant company i.e. M/s Bhushan Steel Ltd.} in his statement dated 20.03.2013, inter-alia informed, that his job include managing a/c of funds and their utilization for procuring raw material, other store purchases a/c car etc; that zinc was used in galvanization process of their final products that the zinc was purchased from M/s Hindustan Zinc Ltd. and they were having an MOU for zinc on FOR basis;

that for transportation of zinc to the Khapoli and Orissa plant, the appellant company had arranged their own transportation through { M/s Mewar Transport Co-ops; Read.}). After going through the various evidences recovered by the officers during the course of investigation, Shri Pankaj Tiwari, Asstt. Vice President of the appellant company accepted that the appellant company availed input CENVAT credit on zinc ingot which was diverted to other destinations and not used by the applicant in the manufacturing of final products. He explained the entire modus operandi and admitted that the zinc ingot purchased from Haridwar plant of the supplier was exclusively transported through MTC {M/s Mewar Transport Company (Regd.)}; that the invoices issued were in the name of the applicant company, however, the goods were diverted to the traders at Agra, Aligarh and Delhi on his (Shri Pankaj Tiwari's) instructions or that of the (Sh. B.B. Saxena, Deputy Manager of the appellant company). The invoices were sent to the appellant company's factory through courier which were used for availing CENVAT credit.

5.2.12 Sh. Pankaj Tiwari categorically admitted that the said (mal)practice (of diversion of zinc, sale of the diverted zinc in cash (outside the books) and wrong claim of Cenvat) was in the knowledge of Sh. Shanker Batra, Executive Vice President (Commerce) of the appellant company and through him (Sh. Batra) (in the knowledge of) Sh. Neeraj Singal, Vice Chairman & Managing Director (VC & MD). The relevant question (nos. 10, 11 and 12) and answer of the statement of Sh. Pankaj Tiwari is reproduced as under:

"Q10. Please state the entire modus-operandi and for how long it has been going on? Also name the key persons / links involved in this duty scam?"

Ans. Sir, the Zinc Ingots purchased from HZL Haridwar are exclusively transported through Mewar Transport Company (MTC). HZL issues Invoice in the name of our Khapoli Plant which is given to Driver of MTC and GR is issued by MTC person at Haridwar showing the destination as Khapoli. But on the back side of GR (usually) the actual destination is mentioned by MTC staff on our telephonic instructions generally

passed on by myself or Mr. B.B. Saxena, Dy. Manager (materials) to either Mr. Rajesh Sainani or Latesh Sainani. The goods are then unloaded at Aligarh, Delhi. In Delhi we have understanding with one Mr. Sushil Kumar Agarwal alias 'SHELY', the owner of M/s Shree Ram Overseas and having his godown at Sahibabad Dairy where such ingots are diverted and unloaded, At Aligarh, we are having dealings with M/s Sunil Metal Udyog at D-67/D-68, Industrial Estate, Aligarh. Its owner Shree Nath Gupta resides at C 19, Kamla Nagar, Agra. After unloading of goods, payment are received in cash only and by me only. The respective Invoices I send to Khapoli plant through courier. I do not know the name of our company courier because Admin Section looks after the despatch work. Once such Invoice is sent through courier, without accompanying goods, the CENVAT credit is availed off by our Khapoli Plant.

As far as period is concerned, it is going on since beginning Le. when M/s HZL Haridwar started function sometime in the year 2008.

Q11. Being a qualified Chartered Accountant did not you know that it was illegal and against the law?

Ans. Yes, I know it was illegal amounting to evasion of government taxes.

Q12. Please explain the names of responsible persons of your company who were in know of things? Also explain as to how much money received by clandestine diversions was account for or distributed to whom? Who is the ultimate beneficiary out of this duty scam?

Ans. This diversion matter has been in the knowledge of my boss Mr. Shankar Batra EVP (Comm.) and through him to Mr. Neeraj Singal our VC & MD but the cash collected against this clandestine diversion was handed over by me direct to our cashier Mr. D.B. Gupta with indication / hint about the source of money. Cashier then used to pass on to Shree Neeraj Singal and therefore, he was the ultimate beneficiary of this scam."

5.2.13 The statement of Sh. Pankaj Tiwari is corroborated by the material recovered from the residence of the Sh. Pankaj Tiwari. The relevant question (no.14) and answer are reproduced as under:

"Q14, During search at your premises today, someday books were found and resumed as per S.No. 24 to 45 as Annexure of Panchnama dt. 20/03/2013. Please describe the same.

Ans. These day books reflect the daily accounting of cash transactions which are maintained by our cashier Shri D.B. Gupta. These entries also include the cash sales amounts received by me against sale of diverted Zinc ingot to Shri Sushil Kumar (Shely), and Mr. Shree Nath Gupta as I have already stated above in my statement. As an example, I can show you such entries made on page No.6, Page No. 7, Page No. 8, Page No. 9, Page No. 10, Page No. 11, Page no. 12 dated 07.07.2011 to 14.07.2011 of day book resumed vide S.No. 37. On all these days, I have clearly daily submitted to Guptaji Rs. 50.00 lacs daily. I have also signed all the pages, as such during these seven days, I have paid Rs.3.5 Cr. to our VC cum MD Mr. Neeraj Singal through our cashier. This has been usual practice of collecting cash through clandestine diversion and paying to the management. These day books are destroyed after certain period."

(emphasis supplied)

5.2.14 Investigations conducted by the Central Excise Authorities revealed that during the period from 16.08.2008 to 20.03.2013, the total quantity of zinc ingots supplied from the Q Haridwar plant of the applicant was in 758 consignment which involved central excise duty amounting to Rs. 24,17,42,090/-.

5.2.15 Enquiries were also made (by the Central Excise Authorities) from M/s Aggarwal Cargo Movers as well as the drivers of the trucks used for transportation of the said quantity of zinc

5.2.16 Sh. Natraj Sharma, Authorized Signatory/Accountant of M/s Aggarwal Cargo Movers in his statement dated 10.04.2013 inter-alia, informed that they were doing transportation business in association with M/s Mewar Transport Company (Regd.) and providing cargo vehicles to them as and when required; that all transactions with M/s Mewar Transport Company (Regd.) were in cash and the same were not mentioned in books of account; that the records of transactions were maintained in private documents some of which had been recovered and seized by the officers of the Central Excise Department.

5.2.17 Sh. Vijay Kr. Aggarwal, proprietor of M/s Aggarwal Cargo Movers in his statement, inter-alia confirmed, that the vehicles of their transport company were engaged in the transportation of zinc ingot form the Haridwar plant of the supplier to the destinations at Delhi, Agra and Aligarh on instruction of M/s Mewar Transport Co. (Regd.); that all these transactions were recorded in private documents and not in the books of account.

5.2.18 The owners/drivers of the trucks, used for transportation of the said consignments form the Haridwar plant of the supplier also confirmed that the zinc ingots transported from Haridwar plant was unloaded at Delhi, Agra and Aligarh and never transported to Khapoli (Maharashtra) plant of the appellant.

5.2.19 In a further statement recorded on 12.04.2013, Sh. Sunil Kumar Gupta, prop. Gupta Metal Industries, Agra, infer-alia, informed that he was regularly purchasing zinc ingots from Sh. Pankaj Tiwari, Asstt. Vice President of the appellant company; that all the transactions were in cash and no documents related to the purchase of zinc ingots were being procured by him.

5.2.20 Enquiries from various check posts were made in order to verify the veracity of purported transportation of the zinc ingot from Haridwar to Khapoli. Sh. K.D. Nipurte, Deputy Municipal Commissioner, Thane Municipal Corporation, after examination of the records confirmed that the truck shown to have transported zinc ingot from Haridwar to Khapoli had not passed through the check post during the given period. Some of the vehicles which had crossed the check post were shown to transport other items and not zinc ingot. Similarly, enquiries from the Nasik check post indicated that except for 4 nos. of trucks, no other truck shown in the appellant company's record had crossed the check post. Similarly, the staff at Shamlaji check post denied the crossing of the said consignments and informed that the vehicle passing through the check post were supposed to get the GR/LR stamped, and, if any GR/LR was found to be un-stamped then the transportation was doubtful.

5.2.21 On completion of the investigation, it has been stated by the Central Excise Authorities that the appellant was involved in fraudulent availing of CENVAT credit. The zinc ingot shown to have been purchased from the Haridwar unit of the supplier, without actual receipt of the goods as the said quantity of the zinc ingot was diverted by the appellant to the open market. Accordingly, the SCN was issued asking as to why:-

- i) Central excise duty amounting to Rs. 23,94,45,915/- availed as Cenvat credit on the Vedanta brand zinc ingots purchased from m/s Hindustan Zinc Ltd., Haridwar during the period from 16.08.2008 to 11.03.2013 on the basis of invoices only without receipt of goods in their factory and (without use of the same in the manufacture of final products) as the same were diverted elsewhere, should be not be demanded under the provisions of Rule 14 of Cenvat Credit Rules, 2004 (in short 'the CCR')

read with section (4) of section 11A [previously first proviso to section 11A(1)] of the Act, and as to why the duty amount of Rs. 12,00,00,000/- deposited by the appellant during investigation should not be appropriated against this liability.

(ii) Interest under the provisions of Rule 14 of CCR and read with Section 11AA (previously section 11AB) of the Act should not be demanded on the above said amounts of central excise duty availed off as irregular cenvat credit without receipt of good/inputs.

(iii) Penalty should not be imposed under the provisions of Rule 15 of the CCR read with Rule 25 of the Central Excise Rule, 2002 (in short 'the Rules') and Section 11AC of the Act in as much as the cenvat credit of duty was availed of by them by clandestinely diverting the goods and without using such goods in production of final products.

(iv) The goods seized at Aligarh on 20.03.2013, total weighing 55,995 MT of valued at Rs. 81,78,259/- should not be confiscated under the provisions of Rule 25(1) of the Rules and penalty should not be imposed under Rule 25.

(v) Central excise duty amounting to Rs. 6,73,376/- leviable on shortage of 41.367 MT zinc Ingots detected in their stock during search proceeding on 20.03.2013 should not be demanded and recovered under the provisions of Rule 14 of CCR read with Section 11A(1) of the Act and as to why the duty amount of Rs. 6,73,376/- paid by them during investigation should not be appreciated against this liability. Also, as to why they should not be penalized under the provisions of Rule 15(2) of the CCR read with Rule 25 of the Rules and Section 11AC of the Act.

(vi) The cash amount of Rs. 1,59,60,000/- seized and belonging to the appellant company as accepted by applicant no. 8 {Sh. Pankaj Tiwari AVP (Finance) of BSL} should not be confiscated under the provisions of section 121 of the Customs Act, 1962 as made applicable to Central Excise matters by virtue of section 12 of the Act and penalty should not be imposed under Rule 25 of the Rules.

5.2.22 The following persons were also called upon to show cause as to why penalty under section Rule 26 of the Rules should not be imposed on them.

(i) Shri B.B. Saxena, Dy. Manager of the appellant company, M/s Bhushan Steels Ltd.)

(ii) Shri Pankaj Tewari, Asstt. Vice President of the appellant company, M/s Bhushan Steel,

(iii) Shri Umesh Dutta, GM (Excise), of the appellant company M/s Bhushan Steel,

(iv) Shri Neeraj Singal, VC & MD of the appellant company,

(v) Shri P.K. Aggarwal, Vice President (Commercial) of the appellant company

(vi) Shri Padam Agarwal, Vice President (Commercial) of the appellant company

(vii) Shri Sunil Kumar Gupta, Prop. M/s Sunil Metal Industries

(viii) Shri Sushil Kumar @ Shely, Prop. M/s Shree Ram Overseas

- (ix) *M/s Agarwal Cargo Movers,*
- (x) *Shri Jai Shiv Agarwal, and Shri Shailendera Agarwal of M/s Agrawal Cargo Movers,*
- (xi) *M/s Mewar Transport Company(Regd)*
- (xii) *Shri Rajesh Sainani Partner M/s Mewar Transport Company(Regd.),*
- (xiii) *Shri Latesh Sainani, Partner M/s Mewar Transport Company(Regd.),*
- (xiv) *Shri Salim Khan Manager (Haridwar Branch) M/s Mewar transport*
- (xiv) *Shri Salim Khan Manager (Haridwar Branch) M/s Mewar Transport*

5.2.23 Sh. Pankaj Tiwari, Asstt. Vice President of the appellant Company was also called upon as to why the cash amounting of Rs. 6,20,000/- seized should not be confiscated under the provisions of section 121 of the Customs Act, 1962 as made applicable to Central Excise matters by virtue of section 12 of the act and penalty should not be imposed Rule 26 of the Rules.

5.2.24 The appellant moved to Custom and Excise Settlement Commission vide application filed on 06.05.2014. The persons mentioned in para 5.2.22 above also filed applications before the Customs and Central Excise Settlement Commission. In the settlement application, the appellant accepted a Central Excise duty liability of Rs. 11,91,72,494/- out of the total duty demand. The applicant has also accepted an amount of Rs. 2,84,82,857/- towards interest liability. The appellant had submitted that though there were documentary evidence regarding non-receipt of the zinc ingot, in respect of the 329 consignments but in the Show Cause Notice (SCN), it has been proposed to deny Cenvat credit in respect of all the 758 consignments of zinc ingot purchased by the appellant from the Haridwar unit of the supplier. The appellant submitted that the proposed denial of the Cenvat credit in respect of the balance consignment is based only on presumptive inferences and not supported by any documentary record. The evidence regarding diversion of the goods is also restricted only in respect of 329 consignments. Submitting as above, the applicant prayed for settlement of the case at admitted duty liability and for granting waiver from imposition of fine, penalty as well as from prosecution.

5.2.25 Shri Piyush Kumar, the Ld. Advocate represented the appellant company, S/Sh. Neeraj Singal, VC & MD of the appellant company, Pankaj Tiwari, Asstt. Vice President of the appellant company, B.B. Saxena, Dy. Manager of the appellant company, P.K. Aggarwal, VP (Com.), of the appellant company Padam Aggarwal, V.P. (Com.) of the appellant company and Umesh Dutta, GM(excise) of the appellat company submitted that the diversion of raw material (zinc) sourced from Haridwar plant of HZL did indeed take place to Delhi, Aligarh and Agra but this was limited to about 50% of the consignments that has been alleged in the SCN. He pointed out that the Directorate General of Central Excise Intelligence (DGCEI) had issued SCN alleging diversion in respect of 758 consignments. Out of this, the evidence produced by them were in respect of 329 contingments. The Central Excise department could not substantiate the diversion in respect of remaining consignments. He further submitted that if the production- consumption ratio was considered, his claim would further be substantiated. He conceded, however, that this was not readily available with him and sought time from the Bench to produce the

5.2.26 The Ld. advocate submitted that the details as per Annexure-9 were already a part of his admission and repeated that it was not denied that diversion had taken place. His submission was that the charge of diversion was true only for roughly 50% of the consignments (329 out of 758).

5.2.27 Similarly, Shri Jitendra Singh, the Ld. counsel representing the transporter and its partners admitted the charges relating to the transportation of the goods to Delhi, Agra and Aligarh and requested for lenient view in the matter of penalty, the Revenue however, pointed out that persons in question have a long record of dealing in offending goods and have been involved in about 163 cases of illegal diversion and the same has also been admitted in their statements.

5.2.28 At the conclusion of the hearing and keeping in mind the request of the Ld. Advocates, the Bench decided to give time till 26.02.2015 to enable the applicant and co-applicants to submit their reply on the issues arising in hearing on which they had sought time. The Bench directed that copy of their submission may also be provided to the Revenue.

5.2.29 Hearing in the case took place on 18.03.2015. Shri Piyush Kumar, the Ld. Advocate (for BSL, Shri Neeraj Singal, VC & MD of BSL and other officers of BSL) submitted that the entire duty liability was admitted. The appellant company, however, needed some time to make the payment. The hearing was adjourned for 25.03.2015. The Bench directed that the Ld. Advocate submit his admission of entire duty liability in writing before the next hearing. On 25.03.2015, Sh. Piyush Kumar, Advocate informed the Bench that the appellant had submitted a letter dt. 18.03.2015 confirming their acceptance of entire Central Excise duty liability (due to fraudulent claim of Cenvat credit); However, Sh. Jintender Singh (advocate representing other applicants) pointed out that the Cenvat credit of 2 trucks seized by the Excise Authorities during the investigation was not availed.

5.2.30 The Bench settled the Central Excise Duty in this case at Rs. 24,01,19,291/- (the amount in the show cause notice less Cenvat credit in respect of two trucks seized by the Excise Authorities during the investigation) plus interest (Rs. 2,84,82,857/-). The Bench imposed a Penalty of Rs. 1,00,00,000/- BSL on (the appellant). The Bench imposed fine of Rs. 2,00,000/- in lieu of confiscation of the goods seized at Aligarh on 20.03.2013, weightings 55.995 MT and valued at Rs. 81,78,259/-. The Bench also imposed a fine of Rs. 1,00,000/- in lieu of confiscation of the two trucks seized at Aligarh loaded with said diverted zinc ingots, as per panchanama dated 20.03.2013. The Bench also imposed a penalty of Rs. 2,00,000/- (Rupees two lakh only) each on i) M/s Mewar Transport Company (regd.), ii) Sh. Sunil Kumar Gupta (Prop. Sunil Metal Industries, Agra, iii) Sh. Sushil Kumar (Prop. Shree Ram Overseas, Delhi) and iv) Sh. Neeraj Singal, (VC & MD of the appellant company) (the co-applicants no. 1,5,6 and 13). The Bench also imposed a penalty of Rs. 25,000/- each on i) Sh. Rajesh Sainani (partner M/s Mewar Transport Company (regd.)), ii) Sh. Latesh Sainani (partner M/s Mewar Transport Company (regd.)), iii) Sh. B.B. Saxena (Deputy Manager of the appellant company), iv) Sh. Pankaj Tiwari, (Asstt. Vice President of the appellant company), v) Sh. Umesh Dutta {GM (Excise) of the appellant company}, vi) M/s Aggarwal Cargo Movers, vii) M/s Jai Shiv Aggarwal (HUF) (connected with M/s Cargo Movers), viii) Sh. Sailender Aggarwal (connected with M/s Aggarwal Cargo Movers) ix) Sh. P.K. Aggarwal {Vice president (commercial) of the appellant company} and x) Sh. Padam Agarwal, {Vice

president (commercial) of the appellant company} (the co-applicants nos. 2,3,7,8,9,10,11,12,14 and 15).

5.2.31 *The Bench held as under:*

“27. The Bench has carefully considered the record and submissions made by the Ld Advocates of the Applicant and co-applicants and Revenue at the time of hearing. The Bench observes that the applicant have made full and true disclosure, of their duty liability and have accepted the entire duty as demanded in the SCN along with interest. The application have already paid Rs. 14,76,55,356/- as per column 11 of their settlement application. Notwithstanding the disclosure it is clear from the facts of the case that the diversion of the raw material, zinc, from the Haridwar unit of the supplier through a separate transport company was a deliberate and planned exercise as the modus operandi including the transport mechanism, was entirely different from that adopted for those raw material which were received in the applicant’s Khapoli unit. Such deliberation is also evident from the statement of Shri SalimKhan, Manager of the Haridwar branch of the Mewar Transport Company, that he had a rubber stamp of the applicant company which was allegedly used to stamp the challans showing receipt of the goods at the applicant factory. Such planning obviously entailed the active participation of the transport company along with the applicant’s officials as well as other co-applicants. The large scale diversion of goods for five years implied knowledge and concurrence, if not participation, from the highest echelons of the . applicant company. The applicant company and the recipient company of diverted goods (co-applicants no. 5 and 6) were the direct beneficiaries of this activity. In view of the disclosure and admission made by the applicant and the co-applicants and their cooperation during the investigation as well as in the proceedings before the Commission and in view of the facts and circumstances of the case, the Bench hereby settles the case on the following terms and conditions....” (emphasis supplied)

5.2.32 *It may be seen from above (including above reproduced question and answer of Sh. Pankaj Tiwari) that Sh. Neeraj Singal, VC & MD of the appellant company (with the help of Sh. Pankaj Tiwari and other employees of the appellant company and associates like M/s Mewar Transport Company, M/s Sunil Mate! Industries, Agra and M/s Shree Ram Overseas, Delhi etc.) has been deeply involved in the mal-practice of diversion of zinc purchased by the appellant from Haridwar factory of M/s Hindustan Zinc Ltd., sale of the diverted zinc in cash (outside the books of a/c) and wrong claim of Cenvat) and he (Shri Neeraj Singhal) is ultimate beneficiary of the (unaccounted) cash generated in this fashion. The application of the cash is manifested in terms of (bogus) Long Term Capital Gain (LTCCG) earned in penny stocks through another mal-practice of generating capital gain by obtaining accommodation entries which shall be discussed(infra) in this order, in subsequent paragraphs.*

5.2.33 *Based on the above material, the AO disallowed the deduction on account of purchase of zinc from M/s Hindustan Zinc Ltd., Haridwar and payment to the purported transporter M/s Mewar Transport Co. (regd.) as under. This addition is contested vide this appeal.*

A.Y.	Addition on account of purchase expenses for clandestinely diverted	Addition on account of Transport expenses for clandestinely	Total (Rs. in crs.)
2009-10	13.59	0.41	14.00
2010-11	61.23	1.29	62.52
2011-12	86.80	1.73	88.53
2012-13	48.74	0.96	49.70
2013-14	47.96	0.86	48.82
Total			263.5

5.2.34. Cash generated out of the above stated clandestine diversion, sale in (cash and outside books of A/cs) as a deliberate and planned exercise for a period of more than 5 years and payment of bogus transport charges, being pocketed by Shri Neeraj Singhal, VC and MD of BSL is also issue of this order covered by notice of enhancement of income in cash of Neeraj Singhal.”

11. The Id AR has Submitted as under :-

ENHANCEMENT OF INCOME BY LD. CIT. (A) FOR A.Ys 2013-14 to 2015-16

1.1 The enhancement of income made by the Ld. CIT(A) has been challenged in the original Memorandum of Appeal filed by Sri Neeraj Singal vide G. No. 4 for A.Y 2013-14 and G. No. 3 for A.Y. 2014-15 & 2015-16. The said issue has also been agitated in Additional Grounds of Appeal filed by Sri Neeraj Singal for A.Ys 2013-14 to 2015-16 vide Ground Nos. 1 & 2.

1.2 The impugned issue has been discussed by the Ld. CIT. (A) at pages 116-134 and pages 367-380 of the appellate order. As discussed in para 1.4 supra, the Ld. CIT.(A) has enhanced the income of Sri Neeraj Singal *interalia* for A.Ys 2013-14 to 2015-16 (the years under consideration) on account of alleged income generated from (a) alleged clandestine diversion and sale of raw materials (zinc) shown to have been purchased for consumption in the manufacturing process of Bhushan Steel Ltd.(BSL), (b) alleged claim of corresponding bogus transportation charges and (c) alleged unaccounted sale of scrap generated in the Khapoli Factory of BSL, mainly relying on the order dated 27.05.2015 of the Hon’ble Customs & Central Excise Settlement Commission and statements of several persons recorded by the Excise Authorities in course of search by the DGCEI on 20.02.2013 in the case of Bhushan Steel Ltd. Group as per the following details:

Assessment Year	Cash generated out	Cash generated out	Cash generated	Total (Rs. in crores)
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	of sale of clandestinely diverted Zinc (Rs. in crores)	of expenses for (bogus) transportation to factory (for clandestinely diverted zinc (Rs. in crores)	out of sale of scrap (Rs. in crores)	
2013-14	47.96	0.86	-	48.8200
2014-15	-	-	1.5964	1.5964
2015-16	-	-	1.9475	1.9475

The above amounts (enhancements in assessed incomes for A.Ys 2013-14 to 2015-16) were telescoped against the additions already made by the A.O. in assessments of Sri Neeraj Singal etc. as per the following details:

Table 12:

A.Y	Total enhancement in income (Rs. in Crores)	Additions made on account of addition u/s 68 (Rs. in crores)	Income surrendered due to cash advance (surrendered during earlier search on 03.03.2010) (Rs. in crores)	Total (Rs. in Crores) (C1)+(C2)	Effect of enhanced income (B)-(C3) (Rs. in crores)
(A)	(B)	(C1)	(C2)	(C3)	(D)
2013-14	48.8200	15.7886180	-	15.7886180	33.0313820
2014-15	1.5964	98.6345526	-	98.6345526	Nil
2015-16	1.9475	34.4751867	-	34.4751867	Nil

The income of Sri Neeraj Singal was thus enhanced by the Ld. CIT (A) u/s 251(1)(a) as per the table supra.

1.3 Re: No power of CIT(A) to enhance the assessment by assessing new sources of income outside subject matter of assessment:

1.3.1 In regard to the above, it is submitted that the taxability of the aforesaid alleged incomes have not been considered at all by the Ld. A.C.I.T, CC-3 in the assessment orders u/s 153A/143(3) of Sri Neeraj Singal dated 30.12.2016 for A.Ys 2010-11 to 2015-16. The said alleged incomes do not constitute the subject matter of assessments

i.e. the same have neither been offered by Sri Neeraj Singal in his returns of income for A.Ys 2010-11 to 2015-16 nor is there any whisper regarding the taxability or otherwise of the aforesaid alleged source of income in the assessment orders passed by the Ld. A.O u/s 153A of the Act for the years under consideration.

1.3.2 In this regard, reference is craved to the following judgments wherein it was held that the CIT.(A) has no power to enhance the assessment by assessing new sources of income outside the subject matter of assessment appealed against; that the CIT.(A)/AAC, in his appellate powers, cannot make addition in respect of a source of income neither disclosed by the assessee in his return nor considered by the ITO:

- CIT Vs. Shapoorji Pallonji, (1962) 44 ITR 891 (SC) (pages 644-648 of PB-5): The Hon'ble Supreme Court held that the AAC cannot enhance assessment on sources not disclosed in return or not considered by ITO in assessment. Held as under:

“In view of the provisions of ss. 34 & 33B by which escaped income can be brought to tax, there is reason to think that the view expressed uniformly about the limits of the powers of the AAC to enhance the assessment has been accepted by the legislature as the true exposition of the words of the section. If it were not, one would expect that the legislature would have amended s. 31 and specified the other intention in express words. The IT Act was amended several times in the last 37 years, but no amendment of s. 31(3) was undertaken to nullify the rulings. In view of this, s. 31 should not be interpreted differently from what has been accepted in India as its true import, particularly as that view is also reasonably possible. On the facts and in the circumstances of the case, the AAC was not competent to enhance the assessment of the appellant.”—Shapoorji Pallonji Mistry vs. CIT (1958) 34 ITR 342 (Bom) : (1958) 11 TAX (3) - 149 : TC7R.580 affirmed

- CIT Vs. Rai Bahadur Hardutroy Motilal Chamaria (1967) 66 ITR 443 (SC) (pages 649-654 of PB-5): The Hon'ble Supreme Court held as under:

“The AAC has no jurisdiction, under s. 31(3), to assess a source of income which has not been processed by the ITO and which is not disclosed either in the returns filed by the assessee or in the assessment order, and therefore the AAC cannot travel beyond the subject-matter of the assessment. The power of enhancement under s. 31(3) is restricted to the subject-matter of assessment or the source of income which have been considered expressly or by clear implication by the ITO from the point of view of the taxability of the assessee”.—CIT vs. Shapoorji Pallonji Mistry (1962) 44 ITR 891 (SC) : TC7R.576 and CIT vs. McMillan & Co. (1958) 33 ITR 182 (SC) : (1957) TAX 10(3) - 313 : TC7R.653 applied. [para 9]

- CIT Vs. Union Tyres (1999) 240 ITR 556 (Del) (pages 655-659 of PB-5): The Hon'ble Jurisdictional High Court held as under:

“The first appellate authority is invested with very wide powers under s. 251(1)(a) and once an assessment order is brought before the authority, his competence is not restricted to examining only those aspects of the assessment about which the assessee

makes a grievance and ranges over the whole assessment to correct the AO not only with regard to a matter raised by the assessee in appeal but also with regard to any other matter which has been considered by the AO and determined in the course of assessment. However, there is a solitary but significant limitation to the power of revision, viz. that it is not open to the AAC to introduce in the assessment a new source of income and the assessment has to be confined to those items of income which were the subject-matter of original assessment. Applying the above well settled principles of law to the facts of the instant case, the Tribunal was justified in holding that in calling for a remand report on the four points the AAC had exceeded his jurisdiction. While computing the total business income of the assessee, the AO had estimated the sales at an enhanced figure and had applied a higher rate of gross profit. Thus, the only matter dealt with by the AO in the assessment order was the estimation of profits and gain of the business of the assessee. None of the four points raised in remand report had any bearing on the question of estimation of either the sales or the gross profit rate. It is evident that the AAC had his doubts about the capacity of the assessee to raise finances for the purchase of goods and show a huge turnover in the very first year of his business. In other words, the enquiry ordered by the AAC was to satisfy himself about the source of investment by the assessee. It is axiomatic that failure to prove the sources of investment will result in addition in the hands of the assessee under a different provision of law and will not have much relevance in the estimation of sales and gross profit rate adopted by the AO. Any addition on account of unexplained investment would constitute a new source of income which was not the subject-matter of assessment before the AO and, therefore, it was not open to the first appellate authority to direct the AO to conduct enquiry on the said four points".—[CIT vs. Shapoorji Pallonji Mistry](#) (1962) 44 ITR 891 (SC) : TC 7R.576 and [CIT vs. Rai Bahadur Hardtroy Motilal Chamaria](#) (1967) 66 ITR 443 (SC) : TC 7R.590 applied. [paras 11 & 12]

- CIT Vs. National Company Ltd. (1993) 199 ITR 445 (Cal) (pages 660-663 of PB-5):

The Hon'ble Kolkata High Court held as under:

"In view of the finding given by AAC in connection with the appeal for the asst. yr. 1962-63 that a part of the income was not liable to be assessed for the asst. yr. 1962-63, it fell for consideration for the subsequent year. However, the assessment in question was made by the ITO long before the appellate order for the asst. yr. 1962-63 was passed. It was thus not an item considered by the ITO in the assessment for the asst. yr. 1963-64 AAC was not therefore, competent to enhance the assessment taking this income which was not considered by the ITO at all."—[CIT vs. Shapoorji Pallonji Mistry](#) (1962) 44 ITR 891 (SC) : TC7R.576 applied. [paras 7 & 8]

- CIT Vs. Associated Garment Makers (1992) 197 ITR 350 (Raj): The Hon'ble Rajasthan High Court held as under:

"A perusal of ss. 246 to 251 makes it clear that wide powers are given to the appellate authority, but these powers are circumscribed to the assessment order in the matters arising therefrom or a matter arising out of the proceedings; even the appellate authority can suo motu consider the questions arising therefrom but there is no provision to go beyond the matter arising out of the proceedings before the assessing authority, more particularly for which separate provisions are made in the Act. The Tribunal had elaborately discussed the provisions of the Act and the case law on the subject and has rightly come to the conclusion that new sources not mentioned in the

return or considered by the ITO are beyond the scope of powers of the AAC. The AAC has, after issuing notice, himself considered the new material and has gone into new sources of income, which he had no jurisdiction to do. In fact, one fails to understand as to why, when the order was brought to the notice of the Commissioner, he himself proceeded into this direction when he had ample powers under other provisions of this Act. There are various other provisions under the Act which can be invoked in cases of escaped income or in such situation where the new sources had been left to be considered, but that would not give powers to the AAC to transgress his (appellate) jurisdiction.”—[CIT vs. Rai Bahadur Hardtroy Motilal Chamaria](#) (1967) 66 ITR 443 (SC) : TC7R.590 and [CIT vs. Shapoorji Pallonji Mistry](#) (1962) 44 ITR 891 (SC) : TC7R.576 relied on (Paras 7 & 8).

- Sterling Vs. ITO (1975) 99 ITR 236 (Kar): The Hon’ble Karnataka High Court held as under:

“It is not open to the AAC to travel outside the record, i.e., the return made by the assessee or the assessment order of the ITO with a view to find out new sources of income and the power of enhancement under s. 31(3) of the Act is restricted to the sources of income which have been the subject-matter of consideration by the ITO from the point of view of taxability.”[para 7]

1.3.3 The following propositions further emerge from the judgments of the Hon’ble Supreme Court in CIT Vs. Shapoorji Pallonji, (1962) 44 ITR 891 (SC) and CIT Vs. Rai Bahadur Hardtroy Motilal Chamaria (1967) 66 ITR 443 (SC):

- (i) That the C.I.T.(A) has no jurisdiction to travel beyond the subject matter of the assessment or beyond the record, i.e. the return of income and the assessment order; and his power of enhancement relates only to that income which has been subjected to the process of assessment.
- (ii) That the process of assessment includes not only taxing an income but also holding that a particular income is not taxable.
- (iii) That, therefore, the C.I.T.(A) can tax the income which the A.O had, expressly or by clear implication, considered and held to be not taxable – irrespective of the question whether the income falls under a head with regard to which an appeal has or has not been preferred. However, the C.I.T.(A) cannot tax an item of income, the taxability of which had not been considered at all by the A.O.

1.3.4 In view of the aforesaid judicial pronouncements, it is submitted that Sri Neeraj Singal having not disclosed the alleged incomes from the impugned sources in his returns of income for the impugned years and the Ld. A.O, having not considered such alleged income from the point of view of taxability, the Ld. C.I.T.(A) had no jurisdiction to make enhancement on the said count. Accordingly, the Ld. C.I.T.(A) acted beyond the

jurisdiction conferred on him u/s 251 of the Act in enhancing the total income of Sri Neeraj Singal for A.Ys 2010-11 to 2015-16 by Rs. 253.11 crores (net enhancement after telescoping being Rs. 113.44 crores). The enhancement of income on the said count by the Ld. C.I.T.(A) and the corresponding tax-demand illegally fastened upon Sri Neeraj Singal is clearly unsustainable in the eyes of law and hence, deserves to be quashed at the very threshold on jurisdictional grounds.

1.4 Re: Impugned enhancement on account of alleged unaccounted sale of scrap leading to double addition of the same income in the hands of BSL and again in the hands of Sri Neeraj Singal:

1.4.1 That further, for A.Ys 2014-15 & 2015-16, is pertinent to note the Ld. C.I.T(A) enhanced the income Sri Neeraj Singal *inter alia* on account of alleged unaccounted sale of scrap generated in the manufacturing process of BSL despite the fact that identical additions on the said count for the said years were already made by the A.O in the hands of Bhushan Steel Ltd., thereby resulting in double addition of the same income in the hands of two different assesseees.

1.4.2 In this regard, it is submitted that whatever scrap was generated in the manufacturing process of BSL stands duly recorded in the books of accounts of BSL. The said company, being subject to rigors of Excise Laws, maintains complete stock records as prescribed by the relevant rules and also files periodical returns wherein the amount of scrap generated and sale thereof stands duly recorded. Sri Neeraj Singal is neither aware of the circumstances under which the said statement was made by Sri Chandrakant Jadhav nor has anything to do with the generation of scrap in BSL or alleged unaccounted sale thereof in his personal capacity. Even if for argument's sake it is assumed without conceding that scrap generated in the manufacturing process of BSL was sold outside books, the proceeds arising therefrom would be the property of Bhushan Steel Ltd. and not that of Sri Neeraj Singal. The A.O having dealt with the said issue in the assessment order of Bhushan Steel Ltd. and having made additions on the said count in the hands of Bhushan Steel Ltd., the same cannot once again be considered in the hands of Sri Neeraj Singal by way of enhancement of his income by the Ld. CIT(A).

1.5 Re: Retracted statement has no evidentiary value unless subjected to cross-examination:

1.5.1 That, without prejudice to the above, it may further be noted that the impugned enhancement on account of alleged unaccounted sale of scrap in the hands of Sri Neeraj Singal for A.Ys 2014-15 & 2015-16 has been made by the Ld. CIT(A) on the basis of statement of Sri Chandrakant Mahadev Jadhav, employee of Bhushan Steel Ltd. recorded u/s 131 on 13.06.2014 and hand written noting in his personal diary seized in course of survey action. It has already been discussed earlier that statement recorded u/s 131 does not have evidentiary value. Further, Sri Chandrakant Jadhav retracted from his original statement on 30.11.2016. Vide the said retraction, he specifically denied any instance of scrap being sold for cash outside books of BSL. He also stated that at the time of survey u/s 133A of the Act he was in a very disturbed state of mind and was overcome by the sudden action taken by the Income tax Authorities whereby he lost his mental balance and made the impugned statement. The fact that the statement of Sri Chandrakant Jadhav did not depict the correct state of affairs is further corroborated by the fact that two other employees at the Khapoli Plant of BSL viz. Sri Sudama Prasad and Sri Padam Kumar Aggarwal have denied the contents of the statement of Sri Chandrakant Jadhav and have in fact contradicted the same on the very same date. In this scenario, wherein there are conflicting and contradicting statements of various parties, it is clear that original statement of Sri Chandrakant Jadhav having been made under a state of extreme mental pressure and subsequently retracted, did not reflect the true state of affairs and accordingly, no adverse conclusion against the assessee can be drawn therefrom. Further, Sri Chandrakant Jadhav reiterated his retraction in his statement recorded u/s 131(1) before the A.O on 22.12.2016. Copy of statement of Sri Sudama Prasad & Sri Padam Kumar Aggarwal and retraction of Sri Chandrakant Jadhav is enclosed at *pages 179-181, 182-189 & 191 respectively of PB-6.*

1.5.2 In view of the judgments cited earlier, it is submitted that the original statement of Sri Chandrakant Jadhav having been retracted by him subsequently, does not hold any evidentiary value insofar as Sri Neeraj Singal is concerned. Without prejudice, even in the original statement, Sri Chandrakant Jadhav has nowhere alleged that the proceeds generated from alleged unaccounted sale of scrap were pocketed by Sri Neeraj Singal in his personal capacity (statement of Sri Chandrakant Jadhav has been reproduced at pages 295-299 of the CIT(A)'s order). Decisions, if any, with respect to the affairs of BSL were taken by Sri Neeraj Singal, in his capacity as MD of BSL. As such, no adverse inference can be drawn against Sri Neeraj Singal solely on the basis of the original statement of employee of BSL which was subsequently retracted. As discussed

earlier, in case the Revenue Authorities wanted to rely on the retracted statement of Sri Chadrakant Jadhav, it was incumbent upon them to provide an opportunity of cross-examination of the said person to Sri Neeraj Singal before drawing any adverse inference against him. The relevant case laws in support of the above proposition have already been cited earlier in this submission while dealing with the retraction of Sri Ankur Agarwal and the same may kindly be considered here.

1.6 Re: Complete dichotomy and divergence between activities carried out and decisions made by Neeraj Singal in official capacity and personal capacity:

1.6.1 Without prejudice to the above, it is further submitted that Sri Neeraj Singal, being the Managing Director of M/s. Bhushan Steel Ltd. (BSL) was responsible for managing its affairs. BSL being a separate legal entity was operating independently and there was a clear demarcation between the personal affairs of Sri Neeraj Singal and the activities of Bhushan Steel Ltd. Accordingly, any act, if at all done or conducted by Sri Neeraj Singal in his capacity as the Managing Director of BSL would stand divorced from and have to be considered as such and not intermingled with his personal affairs.

1.6.2 The impugned issues w.r.t which additions have been made by the Ld. CIT(A) while enhancing the income of Sri Neeraj Singal (viz. alleged clandestine diversion of zinc, claim of alleged bogus transportation expenses, alleged unaccounted sale of scrap) have themselves been challenged in appeals filed in the case of Bhushan Steel Ltd. and form the subject matter of consideration in that case. The same have no relevance insofar as the personal assessment of Sri Neeraj Singal is concerned.

1.6.3 As regards the proposed enhancement on the basis of alleged sale of zinc purchased from M/s. Hindustan Zinc in cash and order of Hon'ble Settlement Commission (Customs & Central Excise), it is submitted that the said issue is subject matter of appellate proceedings in the case of Bhushan Steel Ltd. and is being challenged and argued separately therein, based as they are on conflicting evidences and debatable propositions and interpretation of law. The decision to approach the Settlement Commission (Customs & Central Excise) was motivated only by a desire to buy peace and avoid protracted litigation which would have been detrimental to the growth and progress of Bhushan Steel Ltd. Accordingly, the said issues pertain to Bhushan Steel Ltd. only and have no relevance in the personal assessment of Sri Neeraj Singal. There is no evidence, whether direct, indirect, circumstantial or even suggestive to arrive at a

conclusion that the amounts, if at all generated from the aforesaid alleged activities went into the personal coffers of Sri Neeraj Singal.

1.7 Re: No inflow of alleged sale proceeds of alleged clandestinely diverted zinc to the personal coffers of Sri Neeraj Singal:

1.7.1 It is pertinent to note that in the proceedings before the Customs and Central Excise Authorities and before the Hon'ble Settlement Commission (Customs & Central Excise), at no stage was the fact of consumption of zinc in the manufacturing process of BSL ever disputed. Zinc is an intergral part of the manufacture of certain specialized steels in BSL and its consumption is a regular feature in BSL's operations. The consumption pattern has remained stable over various years varying only with reference to the quantity, composition, size and other specification of the finished product. Zinc is used for the galvanization of the final product with a view to provide a protective coating so as to prevent it from corrosion and wear and tear as a result of exposure to natural elements. The products manufactured by BSL are liable to excise duty and accordingly, BSL also claims credit for duty paid on inputs/capital goods and service tax paid on input services.

1.7.2 Certain irregularities were perceived by the DGCEI, New Delhi in the case of BSL for A.Ys 2009-10 to 2013-14 wherein it was alleged that Zinc purchased from Hindustan Zinc Ltd. (HZL) was not used for manufacture of finished goods but was allegedly diverted for sale outside books in cash for the purpose of availing irregular CENVAT credit in BSL during the period from August 2008 to February 2013. Although the aforesaid additions were disputed and denied, BSL with a view to buy peace of mind and avoid protracted litigation and to direct efforts & conserve energy towards more efficient operations of business, decided to approach the Customs & Central Excise Settlement Commission, New Delhi with a view to settle the matter once for all. A review of the entire proceedings before the Excise Authorities and the Hon'ble Settlement Commission would make it crystal clear that at no stage was the fact of consumption of Zinc in the manufacturing process of BSL or the consumption ratio of zinc in the manufacturing process ever challenged or its consumption records brought into question.

1.7.3 The production activities of BSL being governed by and subject to Excise laws required maintenance of exhaustive documentation with regard to the stock and consumption of

all raw materials/ consumables used in the production process as well as the finished goods. The quantum and details of the activities carried out by BSL are also reported in the periodical returns filed before the Excise Authorities in terms of the rules and procedures prescribed under the Excise laws. At no stage whatsoever, any error or shortcomings or wrong doing in such records maintained by BSL was noticed by the Excise Authorities. Infact, the issue before the DGCEI and the Hon'ble Settlement Commission only revolved around the alleged wrongful availment of CENVAT credit and not on any discrepancy in the consumption of zinc. Therefore, even if it is presumed that the Zinc purchased by BSL from HZL was diverted and sold outside the books of accounts, the fact also remains that Zinc was actually used in the manufacturing activities carried out by BSL. Disregarding the consumption of Zinc purchased from HZL would lead to a situation where goods have been produced and sold without a corresponding consumption which is a statistical improbability and practical impossibility. Thus even if, for argument's sake the diversion and out of books sale of Zinc is accepted, then Zinc was also purchased outside the books which was then used in the production/manufacturing activities of BSL whereby both the legs viz. an alleged sale and purchase outside the books would have a domino and cancellation effect on each other.

- 1.7.4 In view of the above, in the absence of any challenge to the consumption of Zinc in the manufacturing activities of BSL, no addition on account of alleged sales proceeds of the allegedly diverted Zinc in the hands of Sri Neeraj Singal is sustainable, for even if it were to be held that Zinc purchased from HSL was sold outside the books, the same would have been balanced by a contra purchase outside the books wherein the two transactions would cancel out leading to no inflow/ accretion to the personal coffers of Sri Neeraj Singal.

In summation, the enhancement made by the Ld. CIT(A) in the hands of Sri Neeraj Singal deserves to be quashed at the very threshold on jurisdictional ground i.e., the same being outside the subject matter of assessment in the case of Sri Neeraj Singal and hence beyond the jurisdiction of the Ld. CIT(A). Without prejudice, the impugned issues form the subject matter of appellate proceedings in the case of Bhushan Steel Ltd. and have nothing to do with the personal assessment of Sri Neeraj Singal, there being complete dichotomy and divergence between the activities carried out and decisions made by Sri Neeraj Singal in his personal capacity and official capacity as

MD of BSL. Even on merits, the impugned additions being based on retracted and controversial statement of employee of BSL and surrender made before the Hon'ble Settlement Commission (Customs & Central Excise) in the case of BSL with a view to buy peace and avoid protracted litigation, is clearly unsustainable.”

12. The Id DR reiterated the facts stated by the Id CIT (A) and supported his order. He extensively read the order of the Id CIT (A) on this issue. He submitted that the learned CIT has not made enhancement on any new source of income, but is the same source of income, which has been earned by the company and enjoyed by the assessee.
13. Both the parties submitted that identical issues in case of the same assessee has been heard by the coordinate bench in 1478/Del/2018 ITA No 1412 to 1414/Del/2018 ITA Nos. 1476 to ITA Nos. 1482, 1485 to 1487/Del/2018 and orders are awaited. They also agreed that whatever decision in those appeals is rendered shall cover these issues in these appeals. Both the parties also vehemently stated that it should bind this bench also.
14. We have carefully considered the rival contentions and perused the order of the Id CIT (A). The identical issue in case of the assessee has been decided by the coordinate bench in case of assessee for AY 200-11 to 2012-13 in ITA No 1478/Del/2018 ITA No 1412 to 1414/Del/2018 ITA Nos. 1476 to ITA Nos. 1482, 1485 to 1487/Del/2018 dated 31/10/2018 where it has been dealt as under :-

“103.3 As discussed above and in subsequent paragraphs, proceeds of clandestine diversion and sale in cash of raw material shown to have been purchased for consumption in the manufacturing process, and cash generated out of payments for (bogus) transportation of this material which was consistently going on for a period of about five years as a deliberate and planned exercise, was going for the personal benefit of Sh. Neeraj Singal and hence forms part of his income. Apparently, the same has not been disclosed. Therefore, for A.Y. 2009-10, the A.O. of Sh. Neeraj Singal (which incidentally is the same officer who is AO of M/s Bhushan Steel Ltd.) is directed under section 150(1) to examine the case under section 147/148, independently and in case the conditions under relevant sections are found to be satisfied, the proceedings may be initiated notwithstanding anything contained In section 149 subject to provisions of section 150(2).”

“125. As regards to the enhancement of income by the ld. CIT(A) is concerned. It is noticed that the ld. CIT (A) considered new sources of the income, which were outside the subject matter of assessment framed by the AO, therefore, the ld. CIT (A) acted beyond jurisdiction u/s 251 of the Act. It is also noticed that the ld. CIT(A) relied upon the order dated 27.05.2015 of Settlement Commission and the statements of the persons recorded by DGCEI in search on 20.02.2013 in the case of BSL group. However, the same cannot be categorized as incriminating material found in the course of search at the premises of the assessee for unabated assessment years 2010-11 to 2012-13. It is also relevant to point out that the then ld. CIT(A) deleted the additions on account of diversion of raw material and alleged transport expenses in the hands of the BSL for unabated assessment years 2009-10 and 2010-11, on the ground that no incriminating material was found in respect thereto in the course of Income-tax search on 13.06.2014. In the

present case, as the enhancement was based on the order of the Settlement Commission dated 27.05.2015 received much after issuance of notice u/s 153A of the Act after the search dated 13.06.2014. The same could not be categorized as incriminating material found during the course of search. Therefore, the ld. CIT(A) had taken a contrary stand in the case of the assessee i.e. Sh. Neeraj Singal vis-à-vis the BSL by enhancing the income on the same count, in the absence of incriminating material. It is also relevant to point out that the enhancement on account of alleged sale of scrap in the hands of the assessee was made by the ld. CIT(A) on the basis of statement of one Sh. Chandrakant Mahadev Jadhav, employee of BSL recorded u/s 131 of the Act on 13.06.2014 and hand written nothing in his personal diary. However, the said person retracted from his original statement on 30.11.2016. Therefore, the ld. CIT(A) was not justified in enhancing the income on the basis of the said statement.

126. On a similar issue, the Hon'ble Apex Court in the case of CIT, Bombay Vs Shapoorji Pallonji Mistry (1962) 44 ITR 891 held as under: "In an appeal filed by the assessee the Appellate Assistant Commissioner has no power to enhance the assessment by discovering new sources of income not mentioned in the return of the assessee or considered by the Income-tax Officer in the order appealed against."

127. A similar view has been taken by the Hon'ble Supreme Court in the case of CIT(Central), Calcutta Vs Rai Bahadur Hardutroy Motilal Chamaria (1967) 66 ITR 443 wherein it has been held as under: "The Appellate Assistant Commissioner has no jurisdiction under section 31(3) of the Indian Income-tax Act, 1922, to assess a source of income which is not disclosed either in the returns filed by the assessee or in the assessment order. It is not therefore open to the Appellate Assistant Commissioner to travel outside the record, i.e. the return made by the assessee or the assessment order of the Income-tax Officer, with a view to finding out new sources of income and the power of enhancement under section 31(3) is restricted to the sources of income which have been the subject-matter of consideration by the Income-tax Officer from the point of view of taxability. In this context "consideration" does not mean "incidental" or "collateral" examination of any matter by the Income-tax Officer in the process of assessment. There must be something in the assessment order to show that the Income-tax Officer applied his mind to the particular subject-matter or the particular source of income with a view to its taxability or to its non-taxability and not to any incidental connection."

128. Similarly, the Hon'ble Jurisdictional High Court in the case of CIT Vs Union Tyres (1999) 240 ITR 556 (supra) held as under: "The first appellate authority is invested with very wide powers under section 251(1)(a) of the Income-tax Act, 1961, and once an assessment order is brought before the authority, his competence is not restricted to examining only those aspects of the assessment about which the assessee makes a grievance but ranges over the whole assessment to correct the Assessing Officer not only with regard to a matter raised by the assessee in appeal but also with regard to any other matter which has been considered by the Assessing Officer and determined in the course of assessment. However, there is a solitary but significant limitation to the power of revision, viz., that it is not open to the Appellate Assistant Commissioner to introduce in the assessment a new source of income and assessment has to be confined to those items of income which were the subject-matter of original assessment."

129. A similar view has been taken by the Hon'ble Calcutta High Court in the case of CIT Vs National Company Ltd. (1993) 199 ITR 445 wherein it has been held as under:

“Before the Supreme Court, the question was whether, in an appeal filed by an assessee, the Appellate Assistant Commissioner can find a new source of income not considered by the Income-tax Officer and assess it under his powers granted by section 31 of the Indian Income-tax Act, 1922.

There the Supreme Court, after considering several decisions, held that, in enhancing the assessment for any year, the Appellate Assistant Commissioner cannot travel outside the record, that is to say, the return made by the assessee and the assessment order passed by the Income-tax Officer with a view to finding out new sources of income not disclosed in either. The Supreme Court also observed that there are other provisions like sections 34 and 33B which enable escaped income from new sources to be brought to tax after following the special procedure. The powers of the Appellate Assistant Commissioner extends to matters considered by the Income-tax Officer, and if a new source is to be considered, then the power of remand should be exercised. By the exercise of the power to assess fresh sources of income, the assessee is deprived of the finding by two Tribunals and one right of appeal. Accordingly, the Supreme Court dismissed the appeal of the Revenue in that case.

In our view, the principles laid down in the aforesaid decision by the Supreme Court would apply to the facts of this case. The Appellate Assistant Commissioner was not competent to enhance the assessment taking an income which income was not considered by the Income-tax Officer at all.”

130. Since, in the present case also, the ld. CIT(A) enhanced the income in the absence of any incriminating material found during the course of search and considered a new source of income which was outside the subject matter of the assessment framed by the AO or the grounds agitated by the assessee in its appeal before the ld. CIT(A). Therefore, the enhancement made u/s 153A r.w.s. 251 of the Act was not justified and accordingly the same is deleted. “

15. In the present case additional grounds of appeal raised by the appellant challenges the enhancement made by the learned Commissioner of income tax appeals. As per the provisions of the income tax act, competence of the Commissioner (Appeals) ranges over the whole assessment and it is open to him to correct the Assessing Officer not only with regard to a matter raised by the assessee but also with regard to a matter which has been considered by the Assessing Officer and determined in the course of the assessment. Therefore in that decision rendered by the coordinate bench it has been held that this issues were neither in the return of income of the assessee and nor in the assessment proceedings considered by the ld AO, hence , not in the assessment order, therefore they are beyond the scope of provision of section 251 (1) (a) of the act . We respectfully follow that decision and hold that issues of enhancement of income were neither in the return of income and nor in the assessment proceedings or assessment orders for all these years; Therefore, beyond the scope of provision of section 251 of the act.

16. The Honourable Kerala High court has considered all the divergent views on the issue in [2017] 399 ITR 524 in CIT V B P Sherafudin and held as under :-

“43. Now, we may examine the authorities that also have dealt with the powers of the appellate authority but seem to have taken a divergent path.

44. In CIT v. Rai Bahadur Hardtroy Motilal Chamaria [1967] 66 ITR 443 (SC) a three-judge Bench of the Supreme Court has observed that it is only the assessee who has a right conferred under section 31 to prefer an appeal against the order of assessment made by the Income-tax Officer. If the assessee does not appeal the order of assessment becomes final subject to any power of revision that the Commissioner may have under section 33B of the Act. Therefore, it would be wholly erroneous to compare the powers of the appellate authority with the powers possessed by a court of appeal, under the Civil Procedure Code. The Appellate Assistant Commissioner is not an ordinary court of appeal. It is impossible to talk of a court of appeal when only one party to the original decision is entitled to appeal and not the other party, and because of this peculiar position the statute has conferred very wide powers upon the appellate authority once an appeal is preferred to him by the assessee.

45. Chamaria goes on to hold that the appellate authority has no jurisdiction under section 31(3) of the Act to assess a source of income not processed by the Income-tax Officer "and which is not disclosed either in the returns filed by the assessee or in the assessment order," and therefore the appellate authority cannot travel beyond the subject-matter of the assessment. In other words, the power of enhancement under section 31(3) of the Act is restricted to the subject-matter of assessment or the sources of income considered expressly or by clear implication by the Income-tax Officer from the viewpoint of the taxability of the assessee.

46. A question regarding powers of the first appellate authority came up for consideration before the Supreme Court recently in CIT v. Nirbheram Daluram [1997] 224 ITR 610 (SC). Following the earlier decisions in Kanpur Coal Syndicate and Jute Corporation of India, the Supreme Court reiterated that the appellate powers conferred on the Appellate Commissioner under section 251 could not be confined to the matter considered by the Income-tax Officer, as the Appellate Commissioner is vested with all the plenary powers which the Income-tax Officer may have while making the assessment.

47. Indeed, examining Daluram's holding, a Division Bench of the Delhi High Court in CIT v. Union Tyres, Delhi [1999] 240 ITR 556 (Delhi) has observed that Daluram did not comment whether these wide powers also include the power to discover a new source of income. So, Union Tyres concludes that the principle of law laid down in Shapoorji and Chamaria still holds the field.

48. *The principle emerging from various pronouncements of the Supreme Court, Union Tyres observes, is that the first appellate authority is invested with very wide powers under section 251(1)(a) of the Act and once an assessment order is brought before the authority, his competence is not restricted to examining only those aspects of the assessment about which the assessee makes a grievance and ranges over the whole assessment to correct the Assessing Officer not only regarding a matter raised by the assessee in appeal but also regarding any other matter considered by the Assessing Officer and determined in assessment.*

49. *There is a solitary but significant limitation, according to Union Tyres, to the power of revision : It is not open to the Appellate Commissioner to introduce in the assessment a new source of income and the assessment must be confined to those items of income which were the subject-matter of the original assessment.*

50. *In course of time, Union Tyres was doubted. In CIT v. Sardari Lal and Co. [2001] 251 ITR 864 (Delhi) [FB], the same issue whether the appellate authority has the power under section 251 to discover a new source of income was referred to a Full Bench. After examining the authorities holding the fielding on that issue, the learned Full Bench has held that the inevitable conclusion is that whenever the question of taxability of income from a new source of income is concerned, which had not been considered by the Assessing Officer, the jurisdiction to deal with the same in appropriate cases may be dealt with under section 147, or section 148, or even section 263 of the Act if requisite conditions are fulfilled. It is inconceivable, according to Sardari Lal, that in the presence of such specific provisions, a similar power is available to the first appellate authority. Eventually, Sardari Lal upheld the decision in Union Tyres.*

51. *Undeniably, the precedential position on the powers of the first appellate authority under section 251 undulates. There are seeming contradictions. But, as held by Union Tyres, and as affirmed on reference by Sardari Lal, there is a consistent judicial assertion that the powers under section 251 are, indeed, very wide ; but, wide as they are, they do not go to the extent of displacing powers under, say, sections 147, 148, and 263 of the Act.*

52. *Therefore, we are in respectful agreement with the view taken by the Full Bench of the High Court of Delhi in Sardari Lal. As a corollary, we hold that the Tribunal's deleting the enhancement of Rs. 22,15,116 and cancelling the order of the Commissioner of Income-tax (Appeals) on that issue call for no interference."*

17. In view of above discussion, decision of the coordinate bench in assessee's own case for AY 2010-11 to 2012-13, we are of the opinion that the Id CIT (A) does not have any jurisdiction to travel beyond the subject matter of the assessment or beyond the record i.e. return of income and the assessment order, and his power of enhancement relates only to that income which has been subjected to the process of assessment. The income enhanced by the Id CIT

(A) was not a matter of consideration before the Id Assessing Officer as it was neither the part of return of income nor the part of the assessment proceeding of the order, therefore, the Id CIT (A) according to us cannot tax the item of income which has not been considered at all by the Id Assessing Officer.

18. Even otherwise, it has been stated that the identical addition has been made in the hands of the companies and therefore even otherwise, it amounts to double addition.
19. In view of this respectfully following the decision of the coordinate bench the enhancement made by the Id CIT(A) is set aside and hence, enhancement of Rs. 48.82 crores for AY 2013-14, Rs. 1.59 crores for AY 2014-15 and Rs. 1.94 crores for AY 2015-16 is deleted. Accordingly, all the additional grounds of appeal raised by the assessee as well as the impugned additions in the respective ground of appeal for respective years also stands deleted.
20. The second issue involved in these appeals is for Assessment Year 2015-16 wherein, an addition of Rs. 6801000/- is made by the Id Assessing Officer on account of alleged unexplained gifts given by the assessee are added to the total income of the assessee as unexplained expenditure. The Id Assessing Officer has dealt with the whole issue as under:-

“5. *UNEXPLAINED GIFTS:-*

5.1 *During the course of search certain incriminating documents were found and seized from business premises of M/s BSL Group, Bhikaji Cama Place New Delhi. Pages from 92 to 95 of Annexure A-14, contain details of some gifts given to different persons. Scanned copy of page 92 (for illustration) of these documents is presented hereunder:*

<i>S No.</i>	<i>Item</i>	<i>Quantity</i>	<i>Amount per piece</i>	<i>Total amount</i>
1.	<i>Diamound Set(2 lac)</i>	8	20000.00	1600000.00
2.	<i>Diamond set (1.5 lacs)</i>	8	150000.00	1200000.00
3.	<i>Braclet</i>	14	80000.00	11200000.00
4.	<i>Gold coins (8 gms)</i>	46	25000.00	1150000.00
5.	<i>Watch (25-30). I phone IV</i>	2	30000/33800	
6.	<i>Speaker & I phone IV combo</i>	3 set		
7.	<i>Rolex Watch</i>	1		

5.2 *During the course of assessment proceeding notice u/s 142(1) of the I.T. Act, 1961 was issued to assessee and in this notice assessee was asked to produce inter-alia the reasons and business exigency of these transactions and the source & accounting of such expenditure in the relevant books.*

5.3 *In response notice u/s 142(1), the AR of assessee submitted that these pages are computer generated sheets without date / signature and nothing has been materialised out of such notings and no expenses have been booked in the books of*

accounts on account of entries made on these sheets. Further, section 292C of the I.T.Act, 1961 provides that

- a. *In the case of books of account, documents or assets found during search, it may be presumed that such books of account, documents or assets belong to the person searched, the contents of such books of account and documents are true.*
- b. *The objective of making the presumptions available to the Income Tax authorities as to the books of account, other documents or assets found during search belonging to the person from whose possession or control the same have been found, is to make the person to own such books of account, other documents or assets so as to require him to explain the nature and contents of such material found from his possession. The objective is to place the burden on the assessee so that he may not be permitted to take the plea without cogent evidence that such material does not belong to him or he does not know how such material has come into his possession or contents thereof are incorrect.*
- c. *This concept is in line with the principle given under India Evidence Act. As per section 110 of Indian Evidence Act, 1872, burden of proof as to the actual ownership of a thing lies on the person from whose custody it was found. Section 110 of Indian Evidence Act, 1872 reads as under:-*

When the question is whether any person is owner of any thing of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.”

- d. *Assessee is required to offer a reasonable explanation regarding the nature of such books of account or documents found in his possession or control and if the same is claimed to be belonging to somebody else, then also assessee is required to explain as to whom the same belong and as to how the same has come into his possession & that too by leading evidence.*

5.4 *However, the contents of these documents suggest that some gifts have been given to some persons by Shri Neeraj Singal / Shri B B Singal since the heading of such gifts mentions “summary of gift item’s as per Honb MD Sahib” and “list for MD Sahib . It is apparent that such gifts have been given either by Shri Neeraj Singal or by Shri B B Singal out of their unaccounted income since the source for the same could not be explained by the AR of the assessee. The total amount of such transactions mentioned on page 92 comes at Rs.51.37 lakhs and those mentioned on page 93 to 95 comes at Rs.84.65 lakhs. Thus, the source of this expenditure of Rs. 1,36,00,000/- could not be explained by the AR of the assessee during the course of assessment proceedings. Further, in view of the above facts, and as per presumption u/s 292C of the I.T.Act as mentioned in above paras the half of this amount i.e Rs.68.01 lacs is added back to the total income of Shri Neeraj Singal as his undisclosed income. (Rest half of this amount is added back to the income of Shri BB Singal in A.Y. 2015-16. Penalty proceedings u/s 271AAB of the Income-tax Act, 1961 has been initiated separately.*

(Addition of Rs.68,01,000/-)”

21. The Id CIT(A) dealt with the issue at para No. 92.1 of the order as under:-

Vide ground No. 5 the appellant contested the addition made by the ld AO in respect of alleged unexplained gifts. The case of the ld AO is that from the perusal of the seized material, it is apparent that the gifts have been given and therefore, onus is upon on the appellant to prove that there were explained sources for purposes of these gifts items. However, the appellant is contesting that these were only proposed gifts but never given. I have perused the seized documents. Page No. 92 of Annexures A-14 contains the heading as under:-

Summary of gift items as per Hon. MD Sahib”

92.2 The apparent is that these gifts have been made. It does not give any indication that this list was only made and not executed. The onus of appellant cannot be treated as discharged only by counter averment which is apparently not supported by the contents of the seized material. Of course, it is bald averment without any supporting evidence.

92.3 In view of the above discussion, this ground (No. 5) of the appeal is dismissed.”

22. The ld AR has submitted that the addition has been made based on computer-generated notings without any date and signature and nothing has been materialized out of such notings. He further stated that nothing on that page shows that there is any expenditure incurred by the assessee. Even otherwise that list was preparation merely to a decision making process of the company at the relevant time. However, due to the financial difficulty such paper was not acted upon. He further stated that even otherwise in the hands of the assessee it does not have any financial implications. He further stated that there is no evidence that such gifts have been given by the assessee to anybody. In view of this, it was submitted that the ld Assessing Officer as made the addition without any evidence. He further stated that there is no reference to whom these gifts are given. He further stated that even otherwise such loose paper does not have any relevance.
23. The ld CIT DR supported the order of the lower authorities.
24. We have carefully considered the rival contentions and find that the impugned addition has been made for AY 2015-16 in the hands of the assessee based on notings on loose sheet of paper found during the course of search at the business premises of M/s. Bhusan Steel Ltd. The paper is computer-generated sheet, which has been reproduced by the ld Assessing Officer in his order. The context in which the paper is written categorically shows that it is a summary of gift item as per managing director of the company. It is also true that the said paper is undated and unsigned. In view of this, it is also not known that even if there is such transaction to which year it belongs. There is no indication that on what basis the ld Assessing Officer has made the addition in AY 2015-16. Even otherwise, it did not have any reference whether such gifts are already given or are proposed to be given. During the course of search no corroborative evidence were found of purchase of such material. Naturally, these items are neither manufactured by the company nor traded in by it and therefore,

necessarily to be procured/ purchased from outside. No such corroborative evidence was found. Now this issue is squarely covered in favour of the assessee by the decision of the honorable Delhi High Court in CIT, Central – 3, New Delhi vs. Sri Praveen Juneja in ITA number 57/2017 dated 14/07/2017 wherein the honorable High Court on the identical facts and circumstances when a loose paper was found during the search from the assessee and the learned AO made an addition without corroborating the same to substantiate the addition and nor the CIT – A, has called for any remand report seeking corroborative evidences, if any, The honorable High Court further held that the whole addition was based on surmises and conjectures and that too, on the basis of a single document without making any further enquiry and no attempt was made by the AO to find out if in fact it constituted the relevant expenses of the company of which the assessee was a director. Further, even the order of the learned CIT – A also did not make any enquiry or directed the AO to make further enquiry to cooperate the addition. Therefore, respectfully following the order of the Honourable high court, we do not have any option but to reverse the finding of the lower authorities and direct the learned assessing officer to delete the addition. Accordingly, the addition of INR 6 801, 000/- is deleted. Accordingly, ground number 4 of the appeal for assessment year 2015 – 16 is allowed.

25. Now we come to the last issue of the addition under section 68 for all the 3 years and alleged unexplained cash credit and on account of alleged commission expenditure on presumption basis. Both the parties submitted before us that this issue has already been dealt with in two bunches of appeals of the assessee and his family members i.e. for assessment year 2010 – 11 to assessment year 2012 – 13, dealt with in ITA numbers 1412, 1413, 1414, 1476, 1477, 1478, 1482, 1485, 1486 and 1487/Del/2018 where in such issue in the hands of the family members and the assessee are dealt with. . It was further submitted that the arguments are also been raised in case of the family member of the assessee vide ITA number 1415 – 1417, 1483 and 1484, 1479 – 1481/Del/2018 for assessment year 2013 – 14 to 2015 – 16. They also confirmed that the facts and circumstances of the addition made in those cases as well as in this cases are identical. It was further pressed by the parties that whatever decision taken in those appeals shall be binding for decision of this appeal is.
26. We have carefully considered the rival contentions and perused the orders of the lower authorities. Identical issue has been considered by the coordinate bench in its decision dated 31/10/2018 in ITA number 1412 – 1414, 1476, 1478, 1482, 1485 – 1487/Del 2018 and ITA number 1415 – 1417, 1483 and 1484, 1479 – 1481/del/2018 dated 07/12/2018. In all those appeals above, impugned addition has been deleted. Therefore, for the same reason and respectfully following the decision of the coordinate benches in those cases, we also held that

addition under section 68 and consequent addition of expenses are required to be deleted. Accordingly, we direct the learned assessing officer to delete the above addition for all the 3 years. Accordingly, all the grounds relevant to the addition under section 68 of the income tax act in the appeal of the assessee for all the 3 years are allowed.

27. In view of this, the grounds concerning all the above 3 issues in all the 3 years are allowed and all other grounds are merely academic in nature and therefore they are dismissed.
28. In view of this, all the three appeals of the assessee are partly allowed.

Order pronounced in the open court on 10/01/2019.

-Sd/-

(BHAVNESH SAINI)
JUDICIAL MEMBER

-Sd/-

(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 10/01/2019
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi