

IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN
BEFORE S/SHRI CHANDRA POOJARI, AM & GEORGE GEORGE K., JM

I.T.A. No. 605/Coch/2005
Assessment Year : 1999-2000

<p>Smt. Farhana Sait, D/o Zakriah Sait L/h of late Shri Essa Ismail Sait, 170, Farhana Manzil, Club Road, Oottacamund-1 Tamil Nadu. PAN No.AMFPS9523D</p>	Vs.	<p>Assistant Commissioner of Income Tax, Circle- 2(1), Ernakulam.</p>
		(Respondent)

ITA Nos. 354 & 355/Coch/06, 419 & 420/Coch/07 and 449, 450, 451 and 453/Coch/07
Assessment Year : 1999-2000

<p>Income Tax Officer, Ward-2, Thodupuzha.</p> <p>Income Tax Officer, Ward-2, Thodupuzha.</p> <p>Income Tax Officer, Ward-2, Thodupuzha.</p> <p>Income Tax Officer, Ward-2, Thodupuzha.</p> <p>The Assistant Commissioner of Income-tax, Circle-1(1), Ernakulam.</p>	Vs.	<p>1 Shri Martin Johnny, Edakkatukudy House, Ramallur, Kothamangalam.</p> <p>2. Shri E.J.Sony, Edakkatukudy House, Ramallur, Kothamangalam.</p> <p>3. Shri James Mathew, Partner of M/s. Super Transport, Edakkatukudyil House, Kothamangalam.</p> <p>4. Shri Tomy Mathew, Partner of M/s. Mathai Sons, Kothamangalam.</p> <p>5. Shri E.M.Paul, Edakkatukudyil House, Ramallur, Kothamangalam.</p>
--	------------	--

The Assistant Commissioner of Income-tax, Circle-1(1), Ernakulam.		6. Shri E.M.Johnny, Edakkatukudyil House, Ramallur, Kothamangalam.
The Assistant Commissioner of Income-tax, Circle-1(1), Ernakulam.		7. Shri Mathai Xavier, Edakkatukudyil House, Ramallur, Kothamangalam.
The Assistant Commissioner of Income-tax, Circle-1(1), Ernakulam.		8. Shri Jose Mathew, M/s. E.V. Mathai & Sons, Kothamangalam.

Assessee by	Shri Mathew Joseph, CA
Revenue by	Smt. A.S. Bindhu, Sr. DR

Date of hearing	30/11/2018
Date of pronouncement	17/01/2019

ORDER

Per CHANDRA POOJARI, AM:

These appeals filed by the assessee and Revenue in the case of different assessees are directed against separate orders of the CIT(A)-II, Kochi and pertain to the assessment year 1999-2000.

2. Originally these appeals came up for hearing before this Tribunal on 03/03/2009 and were disposed of vide order dated 13/03/2009 wherein it was held as under:

"4. We have heard the Id. Counsel for the assessee and the learned Departmental Representative at length. The only issue is whether the sale consideration as found in the document has to be taken as accepted or as adopted by the authorities below has to be taken into consideration. After carefully considering the rival submissions and on perusal of the material available on record, we are of the view that the value of consideration as shown by the assessee in the return of income i.e. sum of Rs. 2.75 crores has to be adopted.

5. Under the scheme of Income Tax Act, in general, only revenue gains are taxable. Capital gain is exception to the general rule. The capital gains chargeable under this section are deemed to be the income as defined under section 2(24)(vi) of the Income Tax Act. To arrive at the full value of consideration, as per section 48 of the Act, the consideration received on account of transfer of capital asset is the starting point. Law is well settled that capital gains tax can be levied only if the capital asset has been transferred and money has been received or accrued in lieu of the transfer. We have to keep in mind that there is no relationship between the full value of the consideration and the market value of the asset so transferred. The full value of the consideration represents the amount which has been negotiated between the transferor and the transferee for the transfer of the capital asset. As such, it should not be referred to mean the adequacy or inadequacy of the consideration. The transfer may be by sale, exchange, extinguishment etc. which are treated as transfer for the purpose of levying capital gains tax.

6. Under the above circumstances, in this case, the assessee who was originally the proprietor of M/s. Kavitha Theatre, on 14.8.1998 converted the proprietary concern into a partnership firm, M/s. Kavitha Theatre. He retired from the firm on 18.10.1998. This amounts to transfer for the purpose of levy of capital gains tax and the value shown as full consideration was Rs. 2.75 crores. However, the Department arrived at the full consideration of Rs. 6.5 crores based on the statement recorded. However, the assessee has retracted the confession at the earliest opportunity. Further, the assessee's wife has also informed the Department about the surrounding circumstances under which the alleged sworn statement was obtained when the assessee was under the medical care in hospital for undergoing treatment, particularly with heavy doses of sedative medicines. This sworn statement cannot be a piece of evidence unless it is corroborated

with any other piece of evidence, materials gathered by the Assessing Officer.

7. Per contra, the full value of consideration as per the document, supports the case of the assessee which clearly speaks that the value of consideration is Rs. 2.75 crores only for the sale of Kavitha Theatre and not Rs. 6.5 crores. The documentary evidence clearly supports the assessee's case. Further, the eight partners in the partnership firm whose appeals are also off-shoot to the main appeal were heard together and are disposed off by this common order. Therefore, we direct the authorities to accept the sum of Rs. 2.75 crores as the sale value of consideration as shown by the assessee in the return of income for the purpose of levy of capital gains tax for the transfer of the capital asset i.e. Kavitha Theatre. The decision of the Hon'ble Supreme Court in the case of K.P.varghese Vs. I.T.O. and Another, 131 ITR 597 (SC) and CIT Vs. P.V.Kalyanasundaram, 294 ITR 49 (SC) clearly supports the case of the assessee. The sale value of consideration as shown by the assessee in the return of income is supported by the transfer transaction which represents the full value of consideration in the partnership deed. Hence that has to be accepted. The sworn statement which was made under the surrounding circumstances in a hospital particularly when the assessee was under treatment having sedative drugs also supports the case of the assessee. Subsequently, at the earliest point of time, the assessee retracts his statement which clearly proves that the statement was not made under the normal circumstances and was made under the mistaken facts and beliefs. Therefore, the true value of consideration is Rs. 2.75 cores for this transaction and not Rs. 6.5 crores. This has been amply proved by the documentary evidence including the partnership deed which is having more evidential value than any other document and particularly, the decision of the Hon'ble Supreme Court in the case of P.V.Kalyanasundaram, cited supra clearly supports the assessee's case. The Department also could not establish any presence of on-money over and above the full value of the sale consideration. Under the above facts and circumstances, we set aside the orders of the authorities below and allow the appeal of the assessee.

8. The appeal in the case of Essa Ismail Sait which is the main appeal is allowed, fixing the sale value of consideration at Rs. 2.75 cores as returned by the assessee.

9. As we have arrived at the sale value of consideration at Rs. 2.75 crores, other appeals of the partners i.e . 8 appeals which are at the instance of the Revenue have become infructuous.

10. In the result, the appeal filed by the assessee in ITA No. 605/Coch/05 is allowed and the appeals filed by the Revenue in ITA Nos. 354 & 355/Coch/06, 419 & 420/Coch/07 and 449, 450, 451 and 453/Coch/07 (8 appeals) are dismissed as infructuous."

3. Consequent to this, the Revenue had taken up the issue before the Jurisdictional High Court. After hearing the Departmental Representative, the Jurisdictional High Court by judgment in ITA Nos. 1771,1801,1804/2009, 7,13,14,34,35,45&50/2010 dated 20/10/2017 decided the issue as follows:

"2. This appeal is filed by the Revenue impugning the order passed by the Income Tax Appellate Tribunal, Cochin Bench in ITA No.605 of 2005 concerning the Assessment Year 1999-00. By the said order, the appeal filed by the respondent assessee was allowed by the Tribunal and this order is impugned by the Revenue framing the following questions of law for the consideration of this Court:

"1. Whether, on the facts and in the circumstances of the case and in the light of the admission by the assessee in the sworn statement, the Tribunal is right in law and facts in interfering with the assessment based on the admission in the sworn statement?

2. (a) Whether, on the facts and in the circumstances of the case and on a perusal of the sworn statement does not the sworn statement indicate —

i. The assessee is aware of right and wrong with regard to his own thoughts and actions?

ii. A clear and alert mind?

(b) If the answer to question 2(a) is in the affirmative, the Tribunal is right at all in ignoring the admission in the sworn statement?

(c) Should not the Tribunal have preferred admission by the assessee to the document relied on by the Tribunal and is not the order not preferring the admission absolutely perverse and against all canons of law?

(d) Justified in interfering with the assessment?

3. *Is not the Tribunal wrong to have relied on the decision in Varghese Case (131 ITR 597 (SC) which is altogether on a different issue.*

4. *Is not the order of the Tribunal against the principle laid down in 284 ITR 557?"*

3. *Briefly stated the facts of the case are that, the respondent assessee was the proprietor of Kavitha Theatre, Ernakulam, till 14.08.1998. On 14.08.1998, the assessee converted the proprietary concern into a partnership firm M/s Kavitha Theatre, Ernakulam, and retired from the firm on 18.10.1998. The assessee filed return of income for the Assessment Year 1999-00 declaring loss of Rs.2,65,320/- and claimed a refund of Rs.24,000/-. The return was processed under Section 143(1)(a) of the Act and refund was also allowed. Subsequently, the assessment was re-opened under Section 147 of the Act on the ground that the assessee had shown sale consideration for the sale of the property at Rs.2,74,95,000/- only while the actual sale consideration was Rs.6.5 crores. The Assessing Officer completed the assessment under Section 143(3) read with Section 147 on the differential total income of Rs.3,88,83,800/-. The assessee carried the matter in appeal before the Commissioner of Income Tax (Appeals), who confirmed the order of assessment. The matter was carried in appeal to the Tribunal and by the impugned order, the Tribunal allowed the appeal of the assessee, accepting the sale value as returned by the assessee. It is this order which is impugned by the Revenue.*

4. *Insofar as the remaining appeals are concerned, the relevant facts are that, in the meanwhile, dividing the total income assessed at the hands of the assessee as that paid by the partners of the firm, assessment was completed against the partners which was set aside by the first appellate authority. The order of the first appellate authority was impugned by the Revenue before the Tribunal. These appeals were also heard along with ITA No.605/2005 filed by the assessee mentioned above. On the basis that the appeal filed by the assessee has been allowed, the Tribunal disposed of the appeals of the Revenue on the basis that the appeals have become infructuous. It is this order that is challenged by the Revenue in the connected appeals filed.*

5. *We heard the learned Senior Counsel for the Revenue, Sri. Arun S. Raj, who was appointed to assist the court in ITA 1771 of 2009 on account of the absence of the assessee and Sri.Mohan, the learned counsel appearing for the assesseees in the remaining cases.*

6. *In the course of the hearing, the order passed by the Tribunal was read out to us. A reading of the order shows that while fixing the sale consideration at the amount as returned by the assessee, the Tribunal was primarily relied on the documents executed by the assessee himself and without properly considering the case of the Revenue. Further, the Tribunal has also not properly appreciated that it was the assessee who himself in his sworn statement admitted that Rs.6.5 crores was paid to him as the sale consideration. We are also not impressed with the inference of the Tribunal on the medical condition of the assessee at the time when he gave the sworn statement which was relied on by the Department. According to us, it was without examining the cases pleaded by the Revenue and the assessee in its entirety that the Tribunal has allowed the appeal of the assessee and fixed the sale value at the rate as returned by the assessee.*

7. *Therefore, we are of the view that the matter requires to be reconsidered by the Tribunal and fresh orders shall be passed duly advertent to the entire materials of the respective cases pleaded by both sides. As a consequence of this conclusion, necessarily, the remaining appeals filed by the assessee also will have to be restored to the file of the Tribunal for reconsideration.*

8. *Accordingly, without answering the questions of law framed for the consideration of this Court, these appeals are disposed of setting aside the order passed by the Tribunal and restoring the appeals to its files with a direction to consider the matters afresh and pass fresh orders in accordance with law."*

4. Hence, once again these appeals came up for hearing before this Tribunal.

The only issue now before us is with regard to assessment of understatement of sales consideration of Kavitha Theatre land at Rs. 6.50

crores as against the Rs.2.75 crores shown by the assessee in the return of income on the basis of sworn statement of the assessee, though it was retracted on later occasion.

5. The facts of the case are that the assessee, Shri Essa Ismail Sait alias Babu Sait, residing at No.35/250, Automobile Road, Mamangalam was running a

theatre called 'Kavitha Theatre' at Ernakulam since 1983. On 14.8.1998 he entered into a partnership with the following persons for converting his proprietary concern of M/s. Kavitha Theatre into a partnership concern of the same name i.e. M/s. Kavitha Theatre, Ernakulam.

- (1) E. M. Johny s/o. E. V. Mathai, aged 55 years
- (2) E. M. Paul s/o. E. V. Mathai, aged 53 years
- (3) Jose Mathews/o. E.V. Mathai, aged 46 years
- (4) Dr. Xavier Mathew s/o. E. V. Mathai, aged 45 years
- (5) James Mathew s/o. E.V. Mathai, aged 41 years
- (6) Tomy Mathew s/o. E. V. Mathai, aged 26 years
- (7) Martin Johny s/o. E. M. Johny, aged 23 years, and
- (8) E. J. Sony s/o. E. M, Johny, aged 21 years

As per the partnership deed dated 14.8.1998 all the aforesaid partners are residing at Kothamangalam. As per this partnership deed, the assessee had introduced into the partnership firm his capital in the form of Kavitha Theatre, in Sy. Nos.633/1, 633/2, 635/1 and 635/2 in the Ernakulam District, on an area of land of 87.990 cents consisting of the theatre and other buildings including the shop building in the premises, with all the machinery, furniture, fixtures and equipments therein. As per the clause (5) of the Partnership Deed the assessee had introduced into the firm the aforesaid assets totally valued at Rs.2,99,17,807/- along with the outstanding liability of Rs.13 lakhs owing to M/s. Sylcon by way of security deposit of Rs.7 lakhs and loan of Rs.6 lakhs. The

details of the valuation are given in the Schedule A attached to the deed of partnership. The schedule A reads as under:

“Share contribution of Essa Ismail Sait”

<u>Serial No.</u>	<u>Value of assets</u>	<u>Valuation</u>
1.	Land 87.990	2,75,00,000.00
2.	Building	2,92,301.92
3.	Interior decoration	4,006.26
4.	Sanitary fittings	632.91
5.	Electrical fittings	3,168.00
6.	Office Equipments	15,909.43
7.	Typewriter	1,514.25
8.	Fire Equipments	6.19
9.	Carpet	1,311.34
10.	Office furniture	68,992.63
11.	A/c Plant	4,54,254.59
12.	Projector fittings	35,427.94
13.	Generator	6,81,911.73
14.	Ultra Stereo	8,41,964.63
15.	Screen	<u>16,406.25</u>
		<u>2,99,17,007.37</u>

Less: Outstanding liability to Sylcon
(security deposit and loan) 7,00,000 +
6,00,000

13,00,000.00
Rs.2,86,17,807.37

5.1 It was seen that the assessee had introduced into the partnership firm the assets from Sl. Nos. 2 to 15 above (i.e. all the assets including the theatre building but excluding the land) at the written down values as appearing in the balance sheet as on 31.3.1998. In other words, the assessee had revalued only the land of 87.990 cents at Rs.2,75,00,000 as on 14.8.1998 appearing in the balance sheet as on 31.3.1998 at the book value of Rs.2,08,535/-. The clause '(9)' of the partnership deed provides that the assessee would discharge the

liability of Rs.27 lakhs (approximately) to the Dhanalakshmi Bank and a liability of Rs.10 lakhs to the Swargachithra Films as his personal liability. Thus, the net value of the capital introduced by the assessee in the firm in kind as on 14.8.1998 was Rs.2,86,17,807/-. The other partners of the firm had brought in the following amounts as initial capital:

1.	E. M. Johny	Rs. 10 lakh
2.	E. M. Paul	Rs. 12 lakh
3.	Jose Mathew	Rs. 10 lakh
4.	Xavier Mathew	Rs. 10 lakh
5.	James Mathew	Rs. 10 lakh
6.	Tomy Mathew	Rs.6.5 lakh
7.	Martin Johny	Rs.5.75lakh
8.	E. J. Sony	<u>Rs.5.75lakh</u>
		<u>Rs. 70 lakh</u>

5.2 After forming the partnership as above, the assessee gave a notice dated 11.9.1998 to the firm, M/s. Kavltha Theatre expressing his intention to retire from the said firm with effect from 15.10.1998. This notice was given by the assessee in terms of the clause 15 of the partnership deed dated 14.8.1998. In pursuance of this notice, the partnership was re-constituted on 18.10.1998 permitting the assessee to retire from the firm, and introducing another partner, Shri Saju Johny, s/o. E.M. Johny, aged 27 years into the firm with a capital contribution of Rs.6 lakhs. As per the clause 16 of the Partnership Deed it was provided that the assessee was entitled to the following amount from the assessee firm as specified in the Schedule 'A' of the Partnership Deed on that date:

Amount due to Sri Essa Ismail Sait - the retiring partner as on 18.10.1998

Balance as per Ledger A/c.	Rs.2,86,17,507
Less: Withdrawal from firm	<u>Rs. 70,00,000</u>
Balance	<u>Rs.2,16,17,507</u>
Add: Profit of share (sic) from the firm Upto the period 18.10.1998	<u>Rs. 1,50,000</u>
Total amount due to Shri Essa Ismail Sait	<u>Rs.2,17,67,507</u>
Less: Loan taken from Shri E.M. Johny and Other partners now adjusted as agreed	<u>Rs. 65,00,000</u>
Net Amount	<u>Rs.1,52,67,507</u>

The deed does not say when this amount would be paid to the assessee. It was also provided in the clause 20 of the deed that the assessee would sign any paper or document required for effecting any change/transfer of the title deed of the property of the partnership or any licence issued by any authority in connection with the affairs of the partnership business. Accordingly, the assessee had executed and registered on 21.10.1998 a deed for the transfer of the title of the landed property, in the name of the firm, M/s. Kavitha Theatre. As per this deed the assessee had disclaimed any right in the alleged property of M/s. Kavitha Theatre transferred to the firm already. The deed said that it was executed for the transfer of the "janmam" rights of the assessee in that property in the name of the firm Kavitha Theatre. The consideration shown in the deed in this regard was Rs.1,00,000/-. For the A.Y. 1999-2000, the assessee filed the return of Income on 11.11.1999 in the Income Tax Office, Division-II, Ernakulam, declaring NIL income. The computation of total Income as per this return was as under:

Income from Business	(-) Rs.22,92,332
<u>Long Term Capital Gains</u>	
Consideration received on transfer of 87.990 cents of land on M.G. Road, Kochi on 14/08/1998	Rs.2,75,00,000
Less: Expenditure on transfer	Rs. 5,000
Net consideration received	Rs.2,74,95,000
Less: Cost of acquisition	Rs. 2,08,535
Date of acquisition 1.1.1968	
Fair market value as on 1.4.1981	Rs. 70,31,720
Indexed cost	Rs.2,47,07,662
Capital gains on transfer	Rs. 27,87,338
Less: Exemption u/s. 54F In respect of the new house property purchased (75,00,000 x 2787338/27495000)	Rs. 7,60,321
Taxable Capital Gains	<u>Rs. 20,27,017</u>
Gross Total Income	(-) Rs. 2,65,315/-
Net Taxable income	NIL
T.D.S.	Rs.24,000
Tax refundable	Rs. 24,000

5.3 The return was accompanied by a Profit and Loss A/c. and Balance Sheet in respect of the proprietary concern, M/s. Kanmani Films, M.G.Road, Kochi. It was also accompanied by the Profit & Loss A/c. of the proprietary concern, M/s. Kavltha Theatre upto 13.9.1998 as per which there was a net profit of Rs.2,57,51,867/-. The net profit was on account of the credit of Rs.2,72,91,464/- by way of capital gains on transfer of land to the firm. This amount was credited in the P & L A/c. by adopting the value of land of 87.990 cents at Rs.2,75,00,000/- as per the Partnership Deed dated 14.8.1998 and reducing there-from the book value of the land of Rs.2,08,535/-. The return was also accompanied by a Balance Sheet of Shri Essa Ismail Sait as on 31.3.1999, which showed the assessee's assets and liabilities on 31.3.1999 as under:

BALANCE SHEET AS ON 31.3.1999

<u>LIABILITIES</u>		<u>ASSETS</u>	
Essa Ismail Sait - capital A/c.	4881745.06	Fixed Assets (As per schedule)	3173391.62
Essa Ismail Sait –current A/c	23956297.33	Loans & Advances (As per Schedule)	1308897.85
Essa Ismail Sait –Kanmani's A/c	1251056.00	Cash at Bank	20492996.56
Sundry Creditors (As per Schedule)	41845.80	Cash in hand	448602.46
		TDS-Income tax	24000.00
		J.M.H.E.S. Dharmasthapanam	477483.17
		H.E.A.M.S. Dharmasthapanam	239932.00
		<u>Investments:</u>	
		Federal Bank Share	5000.00
		Dhanalakshmi Bank Share	127500.00
		<u>Loss in Kanmani A/c.</u>	
		Op. Balance	3077206.01
		Add: For the year	755934.52
			3833140.53
	<u>30130944.19</u>		<u>30130944.19</u>

The particulars of the cash at Bank show that the assessee was having a total amount of Rs.2,04,92,996/- in his several bank accounts as on 31.3.1999. The particulars of the amounts in various banks are as under:

Federal Bank a/c.13458	227966
Dhanalakshmi Bank A/c.813	1259.93
Dhanalakshmi Bank a/c. 608	4548.22
Dhanalakshmi Bank	134.97
Central Bank of India	2913.33
Bank of India	130.10
Syndicate Bank	188350
Federal Bank a/c 1068	824.79
Dhanalakshmi Bank	62.66
Central Bank of India A/c.8786	629.79
Lord Krishna Bank	1052.59
Nedungadi Bank	965.00
Federal Bank A/c 1056	3696.46
SBI-Ooty	20467000.00

Bank & cash Balance: Kanmani

Federal Bank A/c No.1196	1101.44
Federal Bank. Madras	863.03
Central Bank of India	653.62
Union Bank of India A/c.21055	285.00
Union Bank of India	260.00
Central Bank, Madras No.1	90.42
Central Bank, Madras No.2	884.39
State Bank of India	346.00
Federal Bank	960.00
Cash in Hand	<u>171.66</u>
	<u>20492996.56</u>

5.4 After the filing of the return showing a loss, the assessing officer issued an intimation u/s. 143(1)(a) on 1.2.2002 accepting the loss returned and issuing a refund of Rs.31,680/-. Subsequently, the assessing officer issued a notice u/s.

148 on 7.6.2002 to reopen the income tax assessment in order to assess the capital gains from the sale of M/s. Kavitha Theatre at an amount of Rs.6.5 crores as against the declared sale consideration of Rs.2,74,95,000/- shown by the assessee in the return of income.

5.5 In the meantime, the DDI (Inv-II), Ernakulam received information that there was suppression of sale consideration in the document of transfer of the Kavitha Theatre. The DDI (Inv-II), Ernakulam thereupon issued a summons u/s. 131 to the assessee and took a sworn statement from him on 23.4.1999. The sworn statement was taken in the presence of the witness, Shri P.M. Abukoya. 20/565 Nambiyapuram, Palluruthy, Kochi-6 who was a personal aide of the assessee, when the assessee was staying in Dhanya Nursing Home, Palarivattom. (It is worth mentioning that the assessee at the relevant time was staying at a rented house in Ooty and was visiting Ernakulam frequently. At Ernakulam, the assessee was staying at Dhanya Nursing Home.). As per the sworn statement, the assessee had stated that he was engaged in the business of distribution of the film, *Chemmeen*, under the banner of Kanmani Films, which is his proprietary business. He stated that his sources of income included income from his proprietary concern, M/s. Kanmani Films and the interest on loan given to Smt. Sobhamony, Kizhakemadom Chitty Funds, Behind Padma Theatre, Ernakulam. He stated that he had advanced an amount of Rs.1 crore on pro-notes and cheques to Smt. Sobhamony. He stated that the rate of

interest of the advance was 18% per annum and that the interest was being received in cash every month. He stated that he had no other source of income. He replied to question No.3 that there was no amount due to him from others except the amount of Rs.1 crore advanced as stated earlier and the amounts due to him as per the books of accounts of M/s. Kanmani Films. He also stated that he had no liabilities to any one other than the trade liabilities in the books of M/s. Kanmani Films. The assessee stated that his main liability had been to Shri Siraj, Valiaveetil Financiers, Market Road, Ernakulam and that he had discharged those liabilities amounting to between Rs.1.25 crores and Rs.1.50 crores owing to that person during the last one year. He could not confirm whether this liability had been accounted in the books of accounts of his business or not. He further stated that he had discharged liabilities of nearly Rs.50 lakhs to other financiers during the last one year. He stated that as on 23.4.1999 he owned 35 cents of land at Ooty, which had been purchased six months back at a price of Rs.1 lakh per cent. He stated that he was constructing a house there. He also stated that the architect of the building was one Shri Jayachandran, Trivandrum and that the plinth area of the building was 4000 sq.ft. On the date of the sworn statement the foundation of the building had been completed and he had spent an amount of Rs.10 lakhs for the construction of the building till that date. He stated that he was paying rent for his residence at Ooty amounting to Rs.15,000/- per month. He further stated that he was having an expenditure for his personal purposes of Rs.60,000/- per month

excluding rent and that it was met out of his interest income. In answer to Question No.10, he stated that the Kavitha Theatre property was sold for Rs.6.5 crores out of which only Rs.3 crores had been accounted. It was stated that the accounted amount was received by cheques/drafts etc. while the balance money was received in cash on various dates. As regards the utilisation of the cash he stated in answer to question No.11 that the amount of Rs.3 crores had been utilised for repaying the unaccounted loan he had taken from Shri Siraj and several other smaller parties. The balance amount was utilised for the purchase of the Ooty property, for discharging the bank liabilities, HP liabilities for car and for his personal and living expenses etc. He also stated that he had invested about Rs.50 lakhs by way of deposits in the name of his wife, Smt. Farhana Essa Ismail Sait in the SBI, Ooty. He further stated that his wife had no independent source of income. This statement was retracted by the assessee and his wife Smt. Farhana Sait on 05/05/1999. From the Departmental records, it was seen that the Addl. DI (Inv.), had forwarded on 7.7.1999 a copy of the report of the DDI (Inv.-II), Ernakulam dt. 26.5.1999 along with a copy of the sworn statement taken on 23.4.1999 to the ACIT, Circle-I, Div.II, Ernakulam who was the assessing officer of the assessee. It was noted that the assessee had filed the return of income on 11.11.1999 declaring the sale consideration of the Kavitha Theatre at Rs.2, 75,00,000/- which in the sworn statement u/s. 131 the assessee had stated the sale consideration to be Rs.6.5 crores. It is seen that the DDI (Inv.-II), Ernakulam has again forwarded to the AO on 3.8.2000 a copy of his

report dt. 27.7.1999 addressed to the DI (Inv), Cochin on the same matter. The A.O. issued the notice u/s. 148 on 7.6.2002 in the light of the above facts to reopen the assessment proceedings to assess the full sale consideration of Rs.6,50,00,000/- in place of Rs.2,75,00,000/- disclosed by the assessee.

5.6 The Assessing Officer, after re-opening of the assessment u/s. 147 issued a notice u/s. 143(2) of the Act to the assessee for hearing the assessee's case. By the Assessing Officer's letter dated 22/01/2004, the assessee was asked to explain why his total income should not be worked out by taking into account the sale consideration of the Kavitha Theatre land at Rs.6,50,00,000/-It was seen that the assessee had replied to the above letter on 29/01/2004 stating as under:

"For A.Y 1999-2000 I have filed my return on 11.11.1999 (Receipt No. 110377), which should be treated as my correct state of affairs during that period. In your letter you have indicated the sales consideration for my M.G. Road property as Rs.6,50,00,000/- and have shown interest bearing deposits with Kizhakemadom Chitty Funds and SBI, Ooty. You have arrived at these findings based on a Sworn statement before the Dy. Director of Income Tax on 23.4.1999 which I find it very difficult to recollect. What I understand from my previous staff is that during that time I was undergoing treatment for severe depression and was hospitalized with Dhanya Nursing Home, Palarivattom. If at all I have given some statement that was not the correct state of affairs, which I have retracted and my staff has provided evidence to the concerned officers. A copy of the medical certificate which is in my possession is attached to this letter.

Sales consideration I have received for the M.G. Road property is Rs.2,75,00,000/- and not Rs. 6,50,00,000/-. Capital gain has to be worked on the amount of Rs.2,75,00,000/- and that has been disclosed in my I.T. return. From the sales consideration I would have given advances to my close people which I do not have any details. But no amount has been given

on interest and no people are coming and returning any money to me. You have also indicated that I am earning interest from SBI Ooty, but to my knowledge I do not have any deposit with SBI Ooty. I have purchased a property in Ooty for which a part of the sale consideration would have been sent to SBI Ooty. I am attaching copies of SBI Ooty statement for that period for your reference. Therefore I humbly request you not to complete the assessment for A.Y. 1999-2000 as proposed by you "

The Assessing Officer rejected the assessee's claim and adopted the sale consideration of Rs.6.5 crores in the working of capital gain on the transfer of the Kavitha Theatre. The Assessing Officer stated in paras 4 & 5 of the order as follows:

4. In order to verify whether the assessee was out of mind at the time of giving the sworn statement, an analysis of the sequence of events that happened in the transfer of the Kavitha Theatre may be necessary. As per a sale deed executed on 21.10.1998 and registered as document No. 3781/'98 of the SRO. Ernakulam. the assessee had sold the Janmam right to M/s. Kavitha Theatre, a partnership firm represented by Managing Partner Shri EM Johny. As per the recitals in the sale deed, the entire property comprising of 88,740 cents of land with the theatre building and a shopping building had been introduced as his share of capital in the partnership firm constituted on 14.08.1998 with the name M/s. Kavitha Theatre with Shri Essa Ismail Sait as Managing Partner and Mis. EM. Johny, CM Paul, Jose Mathew. Xavier Mathew. James Maihew. Tomy Mathew. Martin Johny and EJ. Johny as partners. While the firm was continuing, the document further states, Shri Essa Ismail Sait wanted to retire from the partnership and accordingly he retired from the partnership on 18.10.1998 and in his place Shri Saju Johny was admitted as a partner. It further states that the property¹ continues to be that of the partnership firm and that the seller himself has no longer any right therein. It is further stated that the document is being executed as a registered document as it is necessary to mutate the ownership of the property to the partnership firm in revenue records. It is also stated that by the sale document he is selling all his rights in the property for a mutually agreed price of Rs. 1 lakh received in cash. This sale deed evidently is a conscious attempt to avoid the provisions of Chapter XX-C. This property is worth nearly Rs. 12 crores and the total declared sale consideration is only Rs. 3 crores. By avoiding a normal sale deed, the assessee has circumvent the provisions of Chapter XX-C. All these transactions has happened during the period August 1998 to October 1998. The assessee has also managed to evade stamp duty. Unless a person is not in very sound and clear state of mind and very keen,

alert and intelligent, such a device cannot be evolved to tactfully evade the provisions of a well drafted Act. By this one instance itself, it can be seen that the assessee was in a very normal condition and his intelligence was working at a very high level. Hence the argument that the sworn statement was given in confused mind as he was undergoing treatment for depression has to be ruled out. Moreover, a bare perusal of the sworn statement shows that he had given a detailed convincing and cogent replies to the various questions raised. He has clearly stated the amount received and how he had spent the same. This can come only from a person of normal state of mind.

It is true that subsequent to the sworn statement, the assessee's wife Smt. Farhana Ismail Sait had sent a letter to the Department on 04.05.1999 alleging that the statement given by him on 23.04.1999 was not correct and that the assessee was not in his normal state of mind. Here it is strange to note that the assessee's wife had taken pains to inform the department that the sworn statement given by the assessee should not be acted upon, but she has not done anything to nullify the transfer of property at a paltry sum of Rs. 3 crores when the property was worth Rs. 12 crores. Had Rs. 3 crores been the correct consideration passed, she, who was careful enough to defend her husband from the I. T. Department, should have immediately taken action to nullify the transfer of the coveted Kavitha Theater Complex for such a meager sum. Thus putting two and two together, it can be very well seen that the actual consideration can be only Rs. 6.5 crores as has been admitted by him in the sworn statement and capital gain has to be determined accordingly."

Accordingly, the assessing officer determined the total income of the assessee as under:

I.	Business loss as claimed (-)	22,92,232	
Less: 1.	Retrenchment compensation		
	Disallowed	8,85,489	
	2. Donation disallowed	<u>3,200</u>	<u>8,88,689</u>
	Business Loss (-)		(-)14,03,543
II.	<u>Long Term Capital Gain:</u>		
	Sale consideration of 88.740 cents of land		6,50,00,000
Less:	Indexed cost of acquisition		
	Cost as on 1.4.81		70,39,220
	7039220 x 351/100		<u>247,07,662</u>
Add:	Expenses on sale	<u>5,000</u>	<u>247,12,662</u>
	Long term capital gain		<u>Rs. 402,87,338</u>
	Total Income		Rs. 388,83,795
	Rounded off to		<u>Rs. 388,83,800</u>

6. On appeal, the CIT(A) confirmed the additions.

7. Now the contention of the assessee is that the assessee owned 87.990 cents of land in which a building with a cinema theatre was situated. A portion of the building was let out on rent. In the year 1998, the assessee had decided to convert the proprietary business into a partnership firm. Accordingly, a firm was constituted on 14/08/1998 by inducting eight more persons as partners which was evidenced by a registered deed dated 14/08/1998. The incoming partners had brought their capital amounting to Rs. 70 lacs. The assessee had brought in the aforesaid land and building as his share capital in the firm which was recorded in the books of the firm as under:-

Land	2,75,00,000
Building	2,92,301
Other assets such as generator, a/c plant etc.	21,25.206
Total	<u>2,99,17,507</u>
Less: Outstanding liabilities to the tenant Sylcon as security and loan	<u>13,00,000</u>
Share capital of appellatant	<u>2,86,17,507</u>

7.1 In the light of the above, it was submitted that the land together with other capital assets became property of the partnership firm in which the assessee was also a partner. On the other hand, the assessee had transferred 87.990 cents of land belonging to him in favour of the firm for a consideration of Rs. 2,75,00,000 on 14/08/1998. The business carried on by the assessee was continued as a going concern. The assessee was the Mg. partner of the firm with 50% profit sharing right.

7.2 It was further submitted that no capital gains is chargeable in the cases where a partner brings a capital asset in to the firm as his capital on admission or the firm distributes a capital asset amongst the partners on dissolution or otherwise for a period prior to 01/04/1988 because transfer of capital asset did not take place in those transactions by virtue of clause (ii) of section 47 of the Act. According to the Ld. AR, clause (ii) of section 47 was omitted and enabling clauses (3) & (4) to charge capital gains in such cases were introduced in section 45 by Finance Act 1987 w.e.f 01/04/1988. As per clause (3) of section 45 profits and gains arising from the transfer of capital asset to the firm on 14/08/1998 is chargeable to tax. It was submitted that it was specifically stated in the said section that for the purpose of computing capital gains under section 48, the full value of the consideration on transfer shall deemed to be the amount recorded in the books of the firm. Accordingly, it was submitted that Long Term Capital gains of Rs 20,27,017/- was computed and declared in the return filed under section 139 of the Act. The computation is as under:

Full value of consideration on transfer of 87.99 cents of land being the amount Recorded in the books of firm as per section 45(3)	2,75,00,000
Less: Expense	5,000
Net consideration	2,74,95,000
Less: Indexed cost of acquisition	<u>2,47,07,662</u>
Capital gains	27,87,338
Less: Exemption under section 54 F for new house for Rs 75,00,000	<u>7,60,321</u>
Capital gains chargeable	<u>Rs.20,27,017</u>

7.3 In view of the above, it was submitted that profits and gains from transfer of a capital asset to the firm as share capital by a partner on admission can only

be charged as capital gains in the hands of partner under the provisions of section 45(3) and for the purpose of computation of such gain full value of consideration on transfer should be the value of the asset recorded in the books of the firm. The Ld. AR submitted that the assessing officer was not statutorily empowered to adopt value other than the value recorded in the books of the firm as full value of consideration. According to the Ld. AR, the adoption of Rs. 6,50,00,000/- in the assessment made under section 143(3) r. w. s 147 as full value of consideration in the computation of capital gains in respect of transfer of land by the assessee to the firm is not in order.

7.4 It was submitted that the CIT(A) while confirming the adoption of Rs 6.50 crores as full value of consideration on transfer, had overlooked the provisions of section 45(3) which is the only enabling provision to charge capital gains as income of the assessee in respect of transfer of capital asset to the firm and specifically the deeming provision therein to adopt the amount recorded in books of the firm as full value of consideration. According to the Ld. AR, the Apex Court's judgment in Sunil Sidharthbhai Vs. CIT (1985) (156 ITR 509), relied on by the CIT(A) in which examination by the assessing officer as to the genuineness of the transaction and formation of the partnership firm was justified, had been rendered for a period prior to 01/04/1988. Moreover, it was submitted that the genuineness of the partnership was examined by the Apex Court in a petition filed for Special Leave from the judgment and order dated

16/05/2005 of the High Court of Kerala in RCR No. 307/2004. The Apex Court vide judgment dated 08/08/2005 dismissed the SLP and held that the formation and the reconstitution of the firm M/s. Kavitha Theatre was valid. Hence, capital gains chargeable in the assessee's case can only be computed under clause (3) of section 45 of the Act. It was submitted that the decision of the CIT (A) on this count was rendered without appreciating the full facts and the position of law on the issue.

7.5 The Ld. AR submitted that the sworn statement was recorded on 23/04/1999 by the DDIT(Inv-II), Ernakulam from the assessee while he was admitted in hospital. On the next day i.e., on 24/04/1999 the assessee's wife Mrs. Farhana, vide, letter addressed to the DDIT had intimated that the assessee was not competent to swear any statement due to the influence of heavy doses of medicines administered on him and the assessee himself had written a letter on 05/05/1999 to the DDIT in which he retracted from all the statements together with reasons thereof. A certificate to that effect from the doctor dated 27/04/2009 was also submitted. Without taking into account the retraction and without making any further inquiry as to the genuineness of the reason for retraction, it was submitted that the assessing officer had initiated re-assessment proceedings under section 147 of the Act to assess the capital gains on the basis of consideration admitted in sworn statement recorded on 23/04/1999.

7.6 The Ld. AR objected to the Assessing Officer's finding that the sworn statement was given in a confused mind as the assessee's action to form a partnership and transfer the capital asset without paying stamp duty can be expected from a person having a very high level of intelligence. The formation of partnership was in 1998 and the statement was recorded in 1999. It cannot be said that a person with high level of intelligence will not become a person of confused mind later due to intake of heavy doses of medicine as a part of treatment.

7.7 Moreover, it was submitted that the identity of persons from whom the money received was neither stated by the assessee in the statement nor had it been obtained by the assessing officer with supporting evidence and no cross verification with the payer was made in the course of assessment to establish the reliability of statement especially when the person retracted from the statement within a fortnight and the alleged recipient of the payment is assessed to tax in Ernakulam. It was further submitted that the correct position in this regard, on appreciating relevant facts, was decided in the earlier order dated 13/03/2009. Hence, it was submitted that no capital gains can be chargeable on the basis of sworn statement recorded on 23/04/1999.

8. On the other hand, the Ld. DR referred to the grounds relating to the mental state of the assessee at the time of the recording the sworn statement from him

on 23/04/1999. The assessee was undergoing treatment, at that point of time. But, according to the Ld. DR, it was proven beyond doubt that he was a person of high intelligence and he could manage his affairs (regarding the sale of Kavitha Theatre) in such a manner as to circumvent the provisions of chapter XXC the IT Act. Moreover, the Ld. DR submitted that the High Court of Kerala had set rest this issue by rejecting the assessee's arguments on this issue and referred to the High Court's order dated 20/10/17:

"Further, the Tribunal has also not properly appreciated that it was the assessee who himself in his sworn statement admitted that Rs. 6.5 cr was paid to him as the sale consideration. We are also not impressed with the inference of the Tribunal about the medical condition of the assessee at the time when he gave the sworn statement which was relied on by the department. According to us, it was without examining the cases pleaded by the revenue and the assessee in its entirety that the Tribunal has allowed the appeal of the assessee and fixed the sale value at the rate as returned by the assessee".

8.1 The Ld DR. submitted that Shri Essa Ismail Sait was already showing Rs.2,04,67,000/- as cash at bank on 31/3/1999. According to the Ld. DR, Shri Sait had mentioned that the accounted amount was received by cheques/drafts etc. while the balance amount was received in cash on various dates. Had the sale consideration been only Rs.2,75,00,000/-, then the aforesaid investments could not have been made. It was submitted that the assessee had advanced a loan of Rs. 1 Cr. to Smt. Shobhamony, had discharged his loan liabilities, invested in the bank accounts and also purchased property at Ooty and the total of all these amounts far exceeded the sum of Rs 2,75,00,000/- disclosed as sale consideration by the assessee. It was submitted that the dates, mode and

quantum of the various loans advanced by the assessee, investments made in the bank accounts, liabilities discharged by the assessee accounted and appearing in the book as on 31/3/1998 and also the unaccounted liabilities of Shri Siraj and others, investments in the property at Ooty and various personal and domestic expenses met by the assessee did not tally with the corresponding particulars of the receipts amounting to Rs.2.75 Cr. received from the purchasers of Kavitha Theatre. The Ld. DR submitted that the assessee's own statement was in conformity with the real situation. As such, she placed reliance on the additional evidence in the form of following documents:

1. Advance of Rs. 1 Crore to Sobhamony. Sworn statement of Shobamony recorded by the TRO on 29/03/2005.
2. Power of attorney dated 16/06/1999 of Shobhamony authorizing the assessee to collect the amount due from the company, Kizhakemadom Chit Funds Private Limited.
3. Copy of form of Voluntary Disclosure of income of Rs.1,14,47,800/- by Shri Siraj dated 22/12/1997.
4. Sworn statement of the assessee's wife Smt. Farhana Sait dated 15/12/2004 made before TRO wherein she stated that Kavitha Theatre was sold for a consideration of Rs. 6.5 crores in F.Y. 1998-99.
5. Copy of details of savings bank account with SBI, Ooty as on 31/03/1999.

8.2 Further, the Ld. DR submitted that in Ground No. 4, the assessee has alleged that the sworn statement was recorded without obtaining written permission of the physician of the nursing home. This is not true. The certificate of the physician is available in the file. Dr. Ajith Bhaskar, MBBS, DPM who

treated the assessee states that he was under treatment from 1990. During this entire period from 1990 to 23/04/1999 when the sworn statement of the assessee was recorded, assessee has been leading a normal life – attending press conferences, award functions, distributing films, running the theatre and his other business etc. The statements given by the assessee on 23/04/1999 are that of an intelligent person with a clear mind. The retraction statement given on 05/05/1999 is only an afterthought.

8.3 The Ld DR submitted that the sworn statement given by assessee and his wife Farhana Sait, the witness who signed the sworn statement, Shri Abu Koya who was a close associate of Essa Sait have all along been saying that Shri Essa Sait owes money to Mr. Siraj, Valiya Veetil Financiers and out of the money he owes to Siraj, substantial portion of it was cleared out of the proceeds of Kavitha Theatre.

8.4 According to Ld. DR, the retraction statement dated 5/5/1999 seems to be only an afterthought. The matter having been taken by the Investigation Wing, the assessee on being enquired by the officers of the Wing declared the correct facts. Thereafter, retracted the statement, raising some not very strong medical grounds.

8.5 She strongly objected to the Ground No.8 of the assessee which is on the finding of the CTT(A) that the witness has not given any statement to the mental condition of the appellant. The assessee states that the witness is only a 'witness' to the fact that it was signed by the person making the statement. Here the point is that the witness Shri Abu Koya is a close associate of Shri Babu Sait. He has been with him through thick and thin. He is aware of all the affairs- both business and personal of the assessee. It is in that context that the CIT(A) said that the witness has not mentioned anything about the mental conditions of the assessee.

8.6 She submitted that Shri Essa Sait in his sworn statements has listed how money was spent by him. He has stated that 6.5 Cr. was the total sale consideration received for sale of Kavitha Theatre. She explained that the following evidence will show how the money was spent by assessee:

- 1) VDIS declaration by Shri Siraj, Valiya Veettil Financiers, Market Rd. Ernakulam –Rs. 1.14 Cr.

- 2) Farhana Sait's letter to Assistant Commissioner of IT (refer to page No. 4, wherein she lists out the property held by Shri Babu Sait). She states 'Kavitha Theatre – sold for Rs.6 Cr. in the year 98'.

- 3) Farhana Sait's sworn statement. The questions she answered on investments in Ooty property. She says, Shri Essa Sait spend Rs.35 lakhs for the construction of a 4000 sq. ft. house by the name Farhana Mansion. She also states that he had invested Rs. 97 lakhs in her name in SBI, Ooty. Smt. Farhana Sait has no source of income other than what is provided by Shri Babu Sait.

- 4) The sworn statement of Smt. Shobhamony, wherein she has admitted having accepted Rs. 1 Cr. from Essa Sait and a registered document evidencing the transaction of Rs.1 Cr. entered into between Shobhamony and Essa Sait. Shri Essa Sait was paying interest @ 18% on this 1 Cr. from Feb. 1999.
 - 5) Bank statement of Shri Essa Sait during the period from 1/8/98 to 31/3/2000
 - 6) Evidence for Rs.55,00,000/- through TT from his bank account at Kochi.
 - 7) FD of Rs.1,50,00,000/- through TT from his bank account at Kochi.
 - 8) She also drew our attention to the balance sheet as on 31/03/1999. It clearly shows an amount of Rs.2,04,67,000 at SBI, Ooty as bank balance as on 31/3/99 and to TDR in the name of Farhana Sait on 23/12/98. Rs.75,68,671/- is credited in the A/c of Farhana Sait maturity proceeds of a TDR.
9. In reply to Ld. DR's submissions, the Ld. AR submitted as follows:

1. Advance of Rs 1 Crore to Shobhamony

- i) Sworn statement of Shobhamony recorded by the TRO on 29/03/2005.

It was stated that she was conducting chitty business and received Rs. 1 Crore from Ismail Sait in three instalments of 25 lacs, 50 lacs and 25 lacs.

It was also stated that she had returned Rs 37 lacs in instalments out of the advance. With regard to a Question about the present status of the liability (as on 29/03/2005) it was replied that she was having no idea about the present position of the liability and presently had no contacts

with Shri Ismail Sait. This statement does not indicate the date of receipt and date of repayment of money and it cannot, therefore, be presumed on the strength of this statement that the advance of Rs. 1 Crore to Smt. Shobhamony was made out of the alleged amount Rs. 6.50 Crores.

It may also be noted from the sworn statement recorded on 23/04/2009 from Shri Ismail Sait that the details of utilisation of the alleged Rs.6.50 crores stated as answer to Question No.11 does not contain the amount of Rs. one crore paid to Shobhamony.

ii) Power of Attorney dated 16/06/1999 of Shobhamony.

This document was produced by the department to prove that the advance of money to Smt. Shobhamony was out of the alleged amount Rs 6.50 Crores. By this document Smt. Shobhamony authorized Shri Ismail Sait to recover money from her debtors in lieu of advance of Rs. 1,00,00,000/- received from Shri Ismail Sait. The date of receipt of advance was not mentioned in this deed. It is true that interest due from February 1999 is stated to be pending on 16/06/1999. But it does not mean that advance was made in February 1999. Further Shri Ismail Sait in reply to Q. No. 2 of the statement recorded on 23/04/1999 had stated that interest at 18 per cent is being received in cash in every month. It cannot, therefore, be presumed on the strength of this document that the

advance of Rs. 1 Crore to Smt. Shobhamony was out of the alleged amount Rs. 6.50 crores. Further, the following mistakes are noticed in this document.

a. The document is written and notarised on 16/06/1999. However, Smt. Shobhamony, the person who writes the document, is seen to have signed the document prior to the date of the deed. The date written in first page below the signature and above the name is 31/05/1999 .

b. There are no witnesses. The space provided for that purpose is kept blank.

c. No acceptance of power of attorney from the side of Shri Ismail Sait and his signature is absent in the document.

d. The power of attorney is not registered and hence is not legally valid.

In the light of the above defects it cannot be considered the aforesaid evidence as a valid one and it appeared to be prepared by Smt.

Shobhanony for her personal interest without the knowledge of Shri Ismail Sait.

iii). Liabilities to Shri Siraj discharged.

The additional evidence produced by revenue namely copy of Form of Voluntary Disclosure of income of Rs.1,14,47,800/- by Shri Siraj dated 22/12/1997 did not show that he had given loan to Shri Ismail Sait and received back any amount from Shri Ismail Sait during the FY 1998-99 or 1999-00 . Hence no inference can be reached regarding utilisation of the alleged Rs 6.50 Crores on the strength of this document.

iv). Additional evidence such as sworn statement and letter dtd.15/12/2004 of Smt. Farhana Sait.

a) Smt. Farhana Sait was the ex-wife of Shri Ismail Sait and got legal \divorce on 21/03/2002. During the FY 1998-99, Shri Ismail Sait had purchased 35 cents of land in Ootacamund for Rs 35 lacs and gifted 17 cents to Smt. Farhana. She had constructed a residential house in the gifted property with assistance from Ismail Sait and utilising own funds. The tax Recovery Officer had attached this property on 10/02/2005 in connection with recovery of tax arrears of Shri Ismail Sait. The sworn statement was recorded on 10/02/2005 by the TRO. The letter dated 15/12/2004 of Smt. Farhana addressed to the ACIT, Circle I(I), Ootacamund was also in connection with the recovery of tax arrears of

Shri Ismail Sait. Since Smt. Farhana was having no property other than the residential house, her primary object is to get the property vacated from the attachment. All her statements before the Income tax department can, therefore, be regarded as one made for the sole purposes of avoiding attachment and sale of her residential house, The additional evidence produced by the Dept. such as sworn statement recorded by the TRO and letters written by Smt. Farhana with a view to safeguard her personal interests may not be taken as evidence of having received Rs 6.50 Crores by the ex-husband on the alleged sale of Kavitha theatre building in FY 1998-99.

It may also be noted that in the letter dated 15/12/2004 to ACIT, Ooty, Smt. Farhana has stated that Kavitha theatre was sold for a huge sum of about four or five crores and the exact amount is not known to her. This cannot be taken as conclusive evidence of having received on money as her statement and amount varies from time to time.

iv) Cash in SBI Ootacamund Rs.2,04,67,000/- disclosed in Balance Sheet as at 31/03/1999 .

The balance of SB Account in SBI Ooty as on 31/03/1999 as per bank statement comes to Rs.9298/- only. The deposit in SBI shown in the Balance Sheet as on 31/03/1999 at Rs.2,04,67,000/- is inclusive of the

Savings Bank account and term deposit which was out of the amount drawn from the capital account credit balance in the firm. The details are itself in the partnership deed dated 18/10/1998.

10. We have heard the rival submissions and have also carefully gone through various case laws cited by the parties in this case. On 14/08/1998, the assessee had introduced into the partnership firm his capital in the name of M/s. Kavitha Theatre in Sy. Nos. 633/1, 633/2, 635/1 and 635/2 on an area of land of 87.990 cents, consisting of theatre and other buildings for a sale consideration of Rs.2.75 crores. Later on, the partnership firm was re-constituted on 18.10.1998 wherein the assessee retired from the partnership and introduced another partner into the firm with a capital contribution of Rs. 6 lakhs. On 21/10/1998, the assessee executed and registered sale deed, transferring his right over the said landed property which was introduced as capital in the form of M/s. Kavitha Theatre for a consideration of Rs.2.75 crores. However, the DDI(Inv.)-II, Ernakulam found that the sale consideration of the said property was Rs.6.5 crores. Thereafter, DDI(Inv.-II), Ernakulam issued summons u/s. 131 of the Act and recorded the sworn statement of the assessee on 23/04/1999 in the presence of the witness, Shri P.M. Abukoya, 20/565, Nambiyapuram, Palluruthy, Kochi-6 who was a personal aide of the assessee when the assessee was staying in the Dhanya Nursing Home, Palarivattom. In answer to Question No. 10, the assessee stated that he had sold Kavitha Theatre for Rs.6.5 cores out of which

only Rs. 3 crores had been accounted and balance money was received in cash. He also stated in reply to Question No. 11 that amount of Rs. 3 crores had been utilized for repaying the unaccounted loan he had taken from Shri Siraj and other persons. The balance amount was also used for purchase of Ooty property for discharging bank liabilities, liabilities for car and for his personal and living expenses etc. It was also stated that the assessee had invested about Rs.50 lakhs by way of deposits in the name of his wife, Smt. Farhana Essa Ismail Sait in the SBI, Ooty. He had also stated that he had advanced an amount of Rs. 1 crore on pro-notes and cheques to Smt. Sobhamony at the rate of 18% per annum. He also stated that had discharged loan amount of Rs. 1.25 crores and Rs.1.50 crores to Shri Siraj, Valliyavettil Financers, Market Road, Ernakulam during the last one year. He further stated that he had discharged liabilities of nearly Rs.50 lakhs to other financiers during the last one year. He also stated that as on 23/04/1999 he purchased 35 cents of land at Ooty at the rate of Rs.1 lakh per cent for construction of house which was entrusted to Shri Jayachandran and had spent an amount of Rs.10 lakhs so far.

10.1 On the basis of the above, the Assessing Officer came to the conclusion that the sale consideration of M/s. Kavitha Theatre was Rs.6.5 crores instead of Rs.2.75 crores declared by the assessee. He considered the same amount as sale consideration for determining the capital gain at Rs.4,02,87,338/- as against the declared capital gain at Rs.20,27,017/-.

10.2 The contention of the Ld. AR is that the statement recorded by DDI(Inv.-II), Ernakulam on 23/04/1999 u/s. 131 of the Act has no evidentiary value as it is not supported by any corroborative material. Under section 131 of the Act, the income tax authority is empowered to examine on oath. Section 131 of the Act confers power to the income tax authority to record the statement in the course of proceedings before them. The power invested u/s. 131(1) is only to make enquiries and investigation and not basically meant to voluntary disclosure or surrender of concealed income. As per section 31 of the Indian Evidence Act, 1878, admissions are not conclusively proved as against admitted proof. In the absence of rebuttable conclusion, admission bind the maker when these are not rebuttable or retracted. It was held by the Supreme Court in the case of Pullengode Rubber Produce vs. State of Kerala (91 ITR 18) that an admission is an extremely important piece of evidence but it cannot be said that it is conclusive and the maker can show that it was incorrect. In the case of Satinder Kumar (HUF) vs. CIT (106 ITR 64), the High Court of Himachal Pradesh held that the admission made by an assessee constitute a relevant piece of evidence but if the assessee contends that in making the admission, he had proceeded on a mistaken understanding or on misconception of facts or untrue facts, such admission cannot be relied upon without considering the aforesaid contention. In the case of Avadh Kishore Das vs. Ram Gopal AIR 1979 (SC) 861, it was held that evidentiary admissions are not conclusive proof of the facts admitted and may be explained or shown to be wrong but they do raise an estoppel and shift

the burden of proof to the person making the admission. The Supreme Court further held that unless shown or explained to be wrong, they are an efficacious proof of the facts admitted. Thus, the burden to prove "admission" as incorrect is on the maker and in case of failure of the maker to prove that the earlier stated facts were wrong, these earlier statements are suffice to conclude the matter. If retraction is proved sufficiently, the earlier stated facts loose their effect and relevance as a binding evidence and the authorities cannot conclude the matter on the basis of the earlier statements alone. However, bald retraction of earlier admissions will not be enough even after retraction. Such statements cannot automatically become nullified. If the assessee proves that the statement recorded u/s. 131 was involuntary and it was made under coercion or during their admission, the statement recorded u/s. 131 has no legal validity.

10.3 In view of the above, the CBDT issued circular in F. No. 286/98/2013-IT(Inv.II) dated 18th December 2014 stating as follows:

"Instances/complaints of undue influence/coercion have come to notice of the CBDT that some assessees were coerced to admit undisclosed income during Searches/Surveys conducted by the Department. It is also seen that many such admissions are retracted in the subsequent proceedings since the same are not backed by credible evidence. Such actions defeat the very purpose of Search/Survey operations as they fail to bring the undisclosed income to tax in a sustainable manner leave alone levy of penalty or launching of prosecution. Further, such actions show the Department as a whole and officers concerned in poor light.

2. I am further directed to invite your attention to the Instructions/Guidelines issued by CBDT from time to time, as referred above, through which the Board has emphasized upon the need to focus on

gathering evidences during Search/Survey and to strictly avoid obtaining admission of undisclosed income under coercion/undue influence.

3. In view of the above, while reiterating the aforesaid guidelines of the Board, I am directed to convey that any instance of undue influence/coercion in the recording of the statement during Search/Survey/Other proceeding under the IT Act, 1961 and/or recording a disclosure of undisclosed income under undue pressure/coercion shall be viewed by the Board adversely."

From the above Circular, it is amply clear that the CBDT has emphasized on its officers to focus on gathering evidences during search/survey operations and strictly directed to avoid obtaining admission of undisclosed income under coercion/under influence. Keeping in view the guidelines issued by the CBDT from time to time regarding statements obtained during search and survey operations, it is undisputedly clear that the lower authorities have not collected any other evidence to prove the impugned consideration received by the assessee.

10.4 In the present case, it was explained that the assessee was seriously sick and was in hospital when the statement was recorded on 23/04/1999. This statement was later retracted by the assessee vide letter dated 05/05/1999 addressed to DDIT(Inv.-II), Ernakulam stating that he was not mentally fit to give statement which was supported by a medical certificate dated 27/04/1994 issued by Dhanya Nursing Home, Palarivattom. There was also a letter dated 04/05/1999 written by his wife, Smt. Farhana Sait to the Department stating that the statement given by the assessee on 23/04/1999 was not correct as the

assessee was not in a normal state of mind. Without commenting on the authenticity of the retraction statement by his wife, we are of the opinion that there is no corroborative evidence to support the claim made by the Assessing Officer.

10.5 Before us, the Ld. DR filed a copy of the sworn statement of Smt. Shobhamony recorded by TRO dated 29/03/2005 wherein she stated that she was doing chitty business and received Rs.1 crore from the present assessee in three instalments, Rs.25 lakhs, Rs.50 lakhs and Rs.25 lakhs. It was stated that she had returned Rs.37 lakhs in instalments out of the advance. Regarding the present status of the liability as on 29/03/2005, it was stated that she was having no idea about the present position of the liability and presently had no contacts with Shri Ismail Sait. Her statement does not indicate the date of receipt of money and it cannot be said that the assessee had given Rs.1 crore to Shobhamony out of the alleged on-money received by him. Further, the statements recorded by TRO in different proceedings after making admissions, have no relevance to the assessment proceedings which cannot be relied upon for sustaining any addition towards alleged on-money received by him. Further, the Ld. DR strongly relied on the power of attorney of Shobhamony dated 16/06/1999 alleged to be issued in favour of the assessee. We have carefully gone through this additional evidence filed by the Ld. DR. The document was written and notarized on 16/06/1999. However, as seen from the power of

attorney of Sobhamony, though she signed the document on 31/05/1999, there was no witness to the document, the space provided for that purpose was kept blank and no signature of Shri Essa Ismail Sait was found. Being so, it cannot be considered as valid document and has no relevance to the addition made by the Assessing Officer.

10.6 With regard to VDIS declaration of income by Shri Siraj, it was not the declaration by the assessee. On the other hand, he was third party to the declaration. In the VDIS declaration dated 22/12/1997, Shri Siraj had declared income of Rs.1,14,47,800/-. This does not show that the assessee had given money to Shri Siraj and received back any amount from him out of the unaccounted sales consideration of the impugned landed property. Being so, the VDIS disclosure does not show any nexus between the assessee and Shri Siraj with reference to the receipt of on-money. Therefore, it cannot be considered as supporting document to sustain the addition made by the Assessing Officer.

10.7 With regard to the sworn statement of Smt. Farhana Sait before TRO on 15/12/2004, she, being the ex-wife of Ismail Sait who got divorced on 21/03/2002, it was stated that in the financial year 1998-99, the assessee had purchased 35 cents of land in Ootacamund and gifted 17 cents to Smt. Farhana. This statement was recorded by TRO on 10/02/2005 and the assessment order was passed on 29/03/2004. In the sworn statement, it was stated that she had

constructed a residential house in the said gifted property with assistance from Ismail Sait and utilizing own funds. The landed property was attached by TRO on 10/02/2005 in connection with recovery of tax arrears of the present assessee, Shri Essa Ismail Sait. In the letter written by Smt. Farhana Sait to ACIT, Circle-1(1), Ooty dated 15/12/2004, it was stated that she had no connection with the recovery of tax arrears of Shri Ismail Sait. The purpose of her statement and her letter was nothing but to avoid recovery of tax arrears of Shri Ismail Sait. She also stated in the letter that Shri Ismail Sait had sold the impugned property for a consideration of Rs. four to five crores which does not specify the exact amount of sales consideration. Even otherwise, uncorroborative statements collected after the assessment by the TRO cannot be an evidence for sustenance of addition made by the Assessing Officer.

10.8 The Ld. DR also relied on the Bank account with SBI, Ooty wherein there was a balance of Rs.2,04,67,000/- as on 31/03/1999. The assessee has filed balance sheet as on 31/03/1999 along with original return of income as on 11/11/1999. This is not a new document to be considered in re-assessment. In our opinion, the details of this Bank account were also made available to the Assessing Officer. He had considered it and it was also explained before the CIT(A) that the balance amount in the SBI Bank account arose out the amount received from Kavitha Theatre drawn from the credit balance in the firm as partner. These details were also incorporated in the reconstitution of the partnership deed dated 18/10/1998. Therefore, this bank statement also does not support the case of the Department.

10.9 At this stage, it is pertinent to refer to the judgment of the Supreme Court in the case of Vinod Solanki (2009) (233) ELT 157 observed as under :

"22. It is a trite law that evidences brought on record by way of confession which stood retracted must be substantially corroborated by other independent and cogent evidences, which would lend adequate assurance to the Court that it may seek to rely thereupon. We are not oblivious of some decisions of this Court wherein reliance has been placed for supporting such contention but we must also notice that in some of the cases retracted confession has been used as a piece of corroborative evidence and not as the evidence on the basis whereof alone a judgment of conviction and sentence has been recorded. [see Pon Adithan vs. Dy. Director, Narcotics Control Bureau (1999) 6 SCC 1]

10.9.1 Yet again in Romesh Chandra Mehta vs. State of West Bengal (1969) 2 SCR 461 although this Court held that any statement made under ss. 107 and 108 of the Customs Act by a person against whom an enquiry is made by a customs officer is not a statement made by a person accused of an offence, but as indicated hereinbefore, he being an officer concerned or the person in authority, s. 24 of the Indian Evidence Act would be attracted.

10.9.2. It has been similarly held by the Hon'ble Supreme Court in the case of K.T.M.S. Mohd. & Anr. vs. Union of India (1992) (197 ITR 196) as under:

"We think it is not necessary to recapitulate and recite all the decisions on this legal aspect. But suffice it to say that the core of all the decisions of this Court is to the effect that the voluntary nature of any statement made either before the customs authorities or the officers of Enforcement Directorate under the relevant provisions of the respective Acts is a sine qua non to act on it for any purpose and, if the statement appears to have been obtained by any inducement, threat, coercion or by any improper means, that statement must be rejected brevi manu. At the same time, it is to be noted that, merely because a statement is retracted, it cannot be recorded as involuntary or unlawfully obtained. It is only for the maker of the statement who alleges

inducement, threat, promise, etc. to establish that such improper means have been adopted. However, even if the maker of the statement fails to establish his allegations of inducement, threat, etc., against the officer who recorded the statement, the authority, while acting on the inculpatory statement of the maker, is not completely relieved of his obligation at least subjectively to apply its mind to the subsequent retraction to hold that the inculpatory statement was not extorted. It thus boils down to this that the authority or any Court intending to act upon the inculpatory statement as a voluntary one should apply its mind to the retraction and reject the same in writing. It is only on this principle of law that this Court, in several decisions, has ruled that, even in passing a detention order on the basis of an inculpatory statement of a detenu who has violated the provisions of the Foreign Exchange Regulation Act or the Customs Act, etc., the detaining authority should consider the subsequent retraction and record its opinion before accepting the inculpatory statement lest the order be vitiated. Reference may be made to a decision of the Full Bench of the Madras High Court in Roshan Beevi vs. Jt. Secretary to the Government of Tamil Nadu, Public Deptt. etc. (1983) Mad LW (Crl.) 289 : (1984) 15 ELT 289 : AIR 1984 NOC 103, to which one of us (S. Ratnavel Pandian, J.) was a party."

10.9.3 The ratio that emerges from the aforesaid decisions is that once a statement is retracted, the contents stated in the retracted statement must be substantially corroborated by other independent and cogent evidence. It has been consistently held by various courts that a sworn statement cannot be relied upon for making any addition and must be corroborated by independent evidence for the purposes of making assessments.

10.9.4 As regards the arguments of the Id. DR, we are of the view that the statement recorded u/s. 131 cannot be independently used for making any addition in the hands of the assessee and the said statement cannot, in our view, be the sole basis for making any addition and must be independently corroborated by evidences. Thus, on a careful reading of the decisions of the

Hon'ble Supreme Court referred before us, we are of the view that the legal position that emerges is that a sworn statement, though binds the assessee, it cannot be the sole basis for making the assessment. It is open to the assessee to show the circumstances in which confessional statements were recorded and once the assessee proves that confessional statements were recorded under threat and coercion and retracts from the same, the confessional statements cannot be the sole basis for making assessments or for making any addition in the hands of the assessee. The contention of the Ld. AR is that statements of the assessee recorded on 23/04/1999 by Dy. Director of IT (Inv.)-II, Ernakulam were not his voluntary statements but were recorded by the Dy. Director of IT (Inv.) under threat and coercion. The learned DR, however, contended that the statements of the assessee recorded on 23/04/1999 were the voluntary statements of the assessee and there is nothing on record to establish that the assessee was threatened to give the statements. It was further contended that had there been threat, the assessee should have reported the matter to the higher authorities. The statements have subsequently been retracted. Under sub-s. (1) of s. 131 of the IT Act, statement can be recorded by the IT authorities mentioned therein, that too only if some proceeding is pending against the assessee on the date of the recording of the statement. The Dy. Director of IT (Inv.) can also record the statement of any person under sub-s. (1A) of s. 131 for the purposes of conducting any pre-search enquiries before he takes action under s. 132 of the IT Act. Since in the present case, no

proceedings were pending against the assessee, no statements have been recorded under s. 131(1) of the IT Act by any IT authority. It was contended by DR that there is a search action u/s 132 of the Act in the case of Shri Jose Mathew on 14-10-1998 and consequent to this statements of present assessee Shri Essa Ismail Sait was recorded u/s.131(1A) of the Act by Dy. Director of IT (Inv.) in connection with enquiry contemplated under s. 132 of the IT Act. Therefore, the statements recorded by the Dy. Director of IT u/s 131 were valid statements and must be for consideration and also for the purpose of reopening the assessment.

10.9.5 On a careful consideration of the aforesaid submissions of parties , we are of the view that statements were recorded u/s. 131 of the Act by Dy. Director of IT (Inv.-II), Ernakulam, in relation to search action u/s 132 of the Act in the case of Shri Jose Mathew on 14-10-1998 and these statements were valid statements and could be used for the purpose of assessment of present assessee provided they are supported by corroborative documents.

10.9.7.1 For this purpose, we place reliance on the judgment of Kerala High Court in the case of Amway India Enterprises vs. Union of India and another (262 ITR 428) held as under:

“Section 131 of the Income-tax Act, 1961, grants power to the Assessing Officer, during the course of assessment proceedings, to issue summons for discovery or inspection or for production of books of account as the case may be as are vested in the civil court. On the other hand, section

131(1A) empowers the specific officer referred to therein including the Deputy Director to exercise the power under sub-section (1) notwithstanding the fact that no proceedings are pending before such authority and the summons so issued could be for the purpose of conducting an enquiry or investigation thereto provided he had reason to suspect that any income has been concealed or is likely to be concealed by a person or class of persons within his jurisdiction. If there is any reason to suspect concealment of income of any class of persons within his jurisdiction then he can exercise the power vested in him under section 131. In order to invoke the power under section 131 read with section 131(1A) the person to whom the summons is issued need not be within the jurisdiction of the officer concerned. On the other hand, if the officer concerned has reason to suspect that any person or class of persons in his jurisdiction is likely to conceal the income then he can invoke section 131 calling for the details from whomsoever concerned as empowered under section 131(1A)."

It is clear from the above judgment that DDIT(Inv.-II) could record the statement u/s. 131 of the I.T. Act by invoking the provisions of 131(1A) of the Act.

10.9.7.2 The Division Bench of the Hon'ble Madhya Pradesh High Court in the case of Arjun Singh vs. Assistant Director of Income Tax (246 ITR 363) specifically considered the issue whether the power under s. 131(1A) was exercisable independently or in aid of the proceedings under s. 132 of the IT Act.

Noting such controversy on p. 390, the Court observed as follows :

"But, under sub-s. (1A) of s. 131 of the Act, the statutory officer or the Director General, or Director or Dy. Director empowered by the Board or Asstt. Director or the authorised officer referred to in sub-s. (1) of s. 132 of the Act, before he takes action under cls. (i) to (v) of that subsection, if he has reason to suspect that any income has been concealed or is likely to be concealed by any person or class of persons within his jurisdiction, then, for the purposes of making any enquiry or investigation relating thereto, it shall be competent for him to exercise the powers conferred under sub-s. (1) on the IT authorities referred to in that sub-s. notwithstanding that no proceedings with respect to

such person or class of persons are pending before him or any other IT authority. The officers, i.e., the officers mentioned in sub-s. (1) of s. 131 are also possessed of the power of the Civil Court regarding discovery, production of evidence, etc., in relation to the judicial proceedings before them in regard to the assessment and there was no question of repetition of those officers performing judicial function in sub-s. (1A) of s. 131 of the Act, but the power under s. 131(1A), is exercised notwithstanding that no proceedings with respect to such person or class of persons are pending before him or any other IT authority, for the purpose of the items enumerated in cls. (i) to (v) mentioned therein. But under the power of such search and seizure under s. 132 of the Act, the concerned authority cannot exercise power as enumerated in cls. (a), (b), (c) and (d) of s. 131(1) of the Act, on the basis of the reasons to believe consequent upon information in his possession in regard to the undisclosed income or property in regard to the income or property which is concealed or is likely to be concealed. Sub-s. (1A) of s. 131 of the Act empowers him or makes him competent for exercise of power, in his jurisdiction, as conferred under sub-s. (1) of s. 131 on the authorities mentioned under sub-s. (1A) for proceeding against such person or class of persons for making enquiry or investigation relating to concealed income provided he has reason to suspect. Thus, the power under s. 131(1A) cannot be said to be an independent power in itself but is the power for the purpose of making enquiry and investigation relating to any income which has been concealed or is likely to be concealed by any person or class of persons, equipping him with the powers regarding discovery, production of evidence, etc., as provided under sub-s. (1) of s. 131 of the Act. The expression 'before he, i.e., authorised officer, takes action under cls. (i) to (v) of s. 132(1) of the Act' is material and relevant, that is the power regarding discovery, production, etc., as provided under sub-s. (1) of s. 131 can be exercised by the authorised officer before exercise of the power of search and seizure in cls. (i) to (v) of s. 132(1) of the Act. In fact, it is in the process of search and seizure if concealment of the income by some or other person or group of persons is found. The power under sub-s. (1A) of s. 131 is only an enabling power regarding discovery, production of evidence, etc., before entering into the actual exercise of search and seizure under s. 132 of the Act. Such a power under s. 131(1A) cannot be exercised for the purpose of reopening of the assessment under s. 147 of the Act."

10.9.8 In the aforesaid case, the Hon'ble Court thus held that powers under sub-s. (1A) of s. 131 is only an enabling power before entering into actual exercise of search and seizure under s. 132 and such a power cannot be

exercised for the purposes of reopening the assessment under s. 147 of the IT Act. The said decision is clearly applicable to the facts of the present case since in the present case, it has been brought on record by the learned DR that the Dy. Director of IT (Inv.) recorded statements of the assessee so as to cause enquiry in exercise of power u/s. 132 of the Act in the case of Shri Jose Mathew on 14-10-1998. In view of the aforesaid legal position, it clearly emerges that statements of the assessee was recorded by the Dy. Director of IT (Inv.) u/s. 131 were valid statements in the eyes of the law and, therefore, the same could be relied upon if it is supported by the corroborative materials.

11. Further, in the case of CIT vs. S. Khader Khan Son (300 ITR 157), the Madras High Court held as follows:

"The principles relating to section 133A of the Income Tax Act, 1961, are as follows: (i) an admission is extremely an important piece of evidence but it cannot be said that it is conclusive and it is open to the person who made the admission to show that it is incorrect and that the assessee should be given a proper opportunity to show that the books of accounts do not correctly disclose the correct state of facts; (ii) in contradistinction to the power under section 133A, section 132(4) enables the authorized officer to examine a person on oath and any statement made by such person during such examination can also be used in evidence under the Income-tax Act. On the other hand, whatever statement is recorded under section 133A of the Income-tax Act it is not given any evidentiary value obviously for the reason that the officer is not authorised to administer oath and to take any sworn statement which alone has evidentiary value as contemplated under law; (iii) The expression "such other materials or information as are available with the Assessing Officer" contained in Section 158BB of the Income-tax Act, 1961, would include the materials gathered during the survey operation under Section 133A; (iv) The material or information found in the course of survey proceeding could not be a basis for making any addition in the block assessment; (v) Finally, the word "may" used in Section 133A (3)(iii) of the Act, viz., "record the statement of any person which may be useful for, or relevant to, any

proceeding under this Act, as already extracted above, makes it clear that the materials collected and the statement recorded during the survey under Section 133A are not conclusive piece of evidence by itself.

A survey was conducted in the premises of the assessee-firm. One of the partners in his sworn statement offered an additional income of Rs.20 lakhs for the assessment year 2001-02 and Rs.30 lakhs for the assessment year 2002-03. However, the said statement was retracted by the assessee-firm in its letter dated August 3, 2001, stating that the partner from whom a statement was recorded during the survey operation under section 133A, was new to the management and he could not answer the enquiries made and as such he agreed to an ad hoc addition. The Assessing Officer based on the admissions made by the assessee, which were directly relatable to the defects noticed during the action under section 133A of the Act, recomputed the assessment. The order was set aside by the Commissioner of Income-tax (Appeals) and this order was upheld by the Tribunal. On appeal to the High Court:

“Held, dismissing the appeal, that in view of the scope and ambit of the materials collected during the course of survey action under section 133A shall not have any evidentiary value. It could not be said solely on the basis of the statement given by one of the partners of the assessee-firm that the disclosed income was assessable as lawful income of the assessee.”

11.1 On further appeal by the Department in Civil Appeal No. 13224 of 2008 and 6747 of 2012 dated 20/09/2012, the Supreme Court held as follows:

“Heard Counsels on both sides. Leave granted. Civil Appeal filed by the Department pertains to 2001-02. In view of the concurrent findings of the fact, this Civil Appeal is dismissed.”

Hence, the ratio laid down by the Madras High Court was confirmed by the Supreme Court.

12. From the foregoing discussion, the following principles can be culled out:

(i) An admission is extremely an important piece of evidence but it cannot be said that it is conclusive and it is open to the person who made the admission to show that it is incorrect and that the assessee should be given a proper opportunity to show that the books of accounts do not correctly disclose the correct state of facts, vide decision of the Apex Court in Pullangode Rubber Produce Co. Ltd. v. State of Kerala [(1973) 91 I.T.R. 18];

(ii) In contradistinction to the power under section 133A, section 132(4) of the Income-tax Act enables the authorised officer to examine a person on oath and any statement made by such person during such examination can also be used in evidence under the Income-tax Act. On the other hand, whatever statement is recorded under section 133A of the Income-tax Act it is not given any evidentiary value obviously for the reason that the officer is not authorised to administer oath and to take any sworn statement which alone has evidentiary value as contemplated under law, vide Paul Mathews and Sons v. Commissioner of Income-tax [(2003) 263 I.T.R. 101];

(iii) The word "may" used in Section 133A (3)(iii) of the Act, viz., "record the statement of any person which may be useful for, or relevant to, any proceeding under this Act, makes it clear that the materials collected and the statement recorded during the survey under Section 133A are not conclusive piece of evidence by itself.

(iv) Finally, the statement recorded by DDIT(Inv.-II), Ernakulam on 23/04/1999 u/s. 131 cannot be the basis to sustain the addition since it is not supported by corroborative material.

13. Even otherwise, in the case of CIT vs. P.V. Kalyanasundaram (282 ITR 259), the Madras High Court held as under:

"Assessment was made on the assessee under section 158BC of the Income-tax Act, 1961 for the period April 1, 1988 to December 8, 1998. The assessee has purchased land on October 26, 1998. The land was registered for Rs.4.10 lakhs. During the course of the search certain notings had been found. The assessee stated that he did not remember for what purpose he had made notings, which was confirmed by the

assessee in a subsequent statement recorded on December 11, 1998. The land was purchased from one R. The purchasers' statement was also recorded on the date of search, i.e., December 8, 1998. R admitted that he had received Rs.34.85 lakhs but subsequently in an affidavit he mentioned that the sale consideration received was Rs.4.10 lakhs. In a further sworn statement R again stated that he had received Rs.34.85 lakhs. In the cash flow statement for the assessment year 1999-2000, i.e. block period April 1, 1988 to December 8, 1998, the Assessing Officer adopted the sum in the cash flow relating to purchase of land at Rs.35.45 lakhs as against Rs.4,69,995 disclosed by the assessee in his cash flow statement. This resulted in an addition of Rs.30,75,005 as undisclosed income for the block period. The Commissioner(Appeals) noted that due to the conflicting nature of the statements given by the seller, his statement could not be relied upon and hence he deleted the addition made by the Assessing Officer. Aggrieved by the order of the Commissioner (Appeals) the Revenue filed an appeal before the Income-tax Appellate Tribunal. The Tribunal dismissed the Revenue's appeal and confirmed the order of the Commissioner(Appeals). On appeal to the High Court:

Held, that the burden of proving actual consideration in such a transaction was that of the Revenue. The Assessing Officer did not conduct any independent enquiry relating to the value of the property purchased. He merely relied on the statement given by the seller. The deletion of the addition was justified."

13.1 This judgment travelled to the Supreme Court in the case of CIT vs. P.V. Kalyanasundaram (2006) (294 ITR 49) wherein it was held that in the absence of enquiry, the Assessing Officer is not justified in making any assessment towards purchase consideration of landed property on the basis of the statement of third party who gave conflicting statement. In the present case, the statement of Shri Ismail Sait who was in hospital, was retracted later. It was retracted by his wife Smt. Farhana Sait and the Department has not brought on record any conclusive proof in the form of corroborative materials that the consideration exchanged

between the parties was at Rs.6.5 crores instead of Rs.2.75 crores as disclosed by the assessee.

14. In our opinion, the Assessing Officer has made the addition only on the basis of sworn statement though it was retracted later by the assessee as well as by his wife. The enquiry conducted by the Assessing Officer does not prove that the assessee has actually received unaccounted onmoney on sale of the impugned property. In the sworn statement recorded from purchaser Shri Jose Mathew on 14-10-1998on 13/10/1998 by the ADIT, Ernakulam who is partner, Kavitha Theatre has answered to Question No. 5 stated as follows:

"Q. No. 5 Recently have you entered into any agreement to buy or sell any property or have you bought or sold any property?"

Ans. Our group has entered into an agreement to buy Kavitha theatre, Ernakulam with the owner Sri Babu. I have also signed in the agreement. The consideration is Rs.2.5 crores out of which less than one crore has been paid as advance. The agreement is to hand over the property before October, 1998. Myself along with my brothers E.M. Johny, E.M. Paul and Xavier Mathew have joined in the partnership firm along with Babu. We had joined the firm representing our group. I do not know whether the agreement has been registered with Income Tax Appropriate Authority. The details of these are with Sri E.M. Johny who is looking after the accounts of Kavitha Theatre. Apart from this we have property in Pollachi measuring 58 acres of which I am holding the Power of Attorney for sale. The income from this is accounted. The arrangements for sale was done by me. During the last three years myself and my wife has not purchased or sold any other property."

15. Being so, it cannot be said that there was on-money received by the assessee from the sale of landed property viz Kavitha Theatre over and above the sale consideration disclosed by the assessee. The consideration shown in

sale deed being a registered document by the registering authority, is to be considered as real one which is acted upon by the parties. Hence, the consideration disclosed therein is to be considered to determine the tax liability of the parties. In the present case, evidence collected by the authorities was not sufficient to establish the stand that the consideration exchanged between the parties was Rs.6.50 crores instead of Rs.2.75 crores. Accordingly, we allow the ground taken by the assessee. The appeal of the assessee is allowed.

16. Coming to the other appeals, they are in relation to the payment of on-money to Shri Ismail Sait. Since we have deleted the addition in the hands of the assessee, these appeals by the Revenue are dismissed as infructuous.

17. In the result, the appeal of the assessee is partly allowed and the appeals of the Revenue are dismissed.

Order pronounced in the open Court on this 17th January, 2019.

sd/-
(GEORGE GEORGE K.)
JUDICIAL MEMBER

sd/-
(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Place: Kochi
Dated: 17th January, 2019
GJ

Copy to:

1. Smt. Farhana Sait, D/o Zakriah Sait, L/h of late Shri Essa Ismail Sait, 170, Farhana Manzil, Club Road, Oottacamund-1 Tamil Nadu.
3. 1Shri Martin Johnny, Edakkatukudy House, Ramallur, Kothamangalam.

4. Shri E.J.Sony, Edakkatukudy House, Ramallur, Kothamangalam.
6. Shri James Mathew, Partner of M/s. Super Transport, Edakkatukudyil House, Kothamangalam.
7. Shri Tomy Mathew, Partner of M/s. Mathai Sons, Kothamangalam.
8. Shri E.M.Paul, Edakkatukudyil House, Ramallur, Kothamangalam.
9. Shri E.M.Johnny, Edakkatukudyil House, Ramallur, Kothamangalam.
10. Shri Mathai Xavier, Edakkatukudyil House, Ramallur, Kothamangalam.
11. Shri Jose Mathew, M/s. E.V. Mathai & Sons, Kothamangalam.
12. Assistant Commissioner of Income Tax, Circle-2(1), Ernakulam.
13. Assistant Commisisoner of Income Tax, Circle-1(1), Ernakulam.
14. Income Tax Officer, Ward-2, Thodupuzha.
15. The Commissioner of Income-tax(Appeals)-II, Kochi.
16. The Pr. Commissioner of Income-tax, Kochi
17. D.R., I.T.A.T., Cochin Bench, Cochin.
18. Guard File.

By Order

(ASSISTANT REGISTRAR)
I.T.A.T., Cochin