IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'D' NEW DELHI
BEFORE
SHRI G.D. AGRAWAL, VICE PRESIDENT
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA No.2892/Del/2017
Assessment Year: 2006-07

ITA No.2893/Del/2017
Assessment Year: 2006-07

ITA No.2894/Del/2017
Assessment Year: 2012-13

Krishan Kumar Modi, A-1, Maharani Bagh, New Delhi. (PAN: AANPM0159M)	**vs**	ACIT, Central Circle – 2, New Delhi.
Appellant		Respondent

ITA No.3951/Del/2017
Assessment Year: 2007-08

ITA No.3952/Del/2017
Assessment Year: 2008-09

ITA No.3953/Del/2017
Assessment Year: 2009-10

ITA No.3954/Del/2017
Assessment Year: 2010-11

ITA No.3955/Del/2017
Assessment Year: 2011-12

ITA No.3956/Del/2017
Assessment Year: 2012-13

ACIT, Central Circle –26, Room No. 323, E2, ARA Centre, Jhandewalan Extn., New Delhi110005	**vs**	Krishan Kumar Modi, A-1, Maharani Bagh, New Delhi-110054 (PAN: AANPM0159M)
Appellant		Respondent

Assessee by : Shri Ajay Vohra, Sr. Advocate
Shri Rohit Jain, Adv.
Ms Deepashree Rao, CA
Shri Vibhu Gupta, CA
Department by: Shri J.K. Mishra, C.I.T. DR

Date of hearing : 12.06.2019
Date of pronouncement : 05.07.2019

O R D E R

PER SUDHANSHU SRIVASTAVA, JM :

These appeals have been preferred both by the assessee as well as by the department for the different assessment years under consideration. As the issues were identical, they were heard together and are being disposed of through this common order for the sake of convenience.

2.0 Briefly stated, the facts, as culled out from the orders of the lower authorities, are that a search and seizure operation under section 132 of the Income Tax Act, 1961 (hereinafter called 'the Act') was carried out on 09.11.2011 at the residential premises of the assessee located at A-1, Maharani Bagh, New Delhi. During the course of search, the assessee was stated to have been shown certain papers which were in the possession of the search team. The said papers have been reproduced in the assessment order and also form part of paper book filed by the

assessee. As per the assessment order, the said information related to the bank account of the assessee in HSBC Bank, Geneva and was received under DTAA/ DTAC between India and other countries. The information, according to the assessment order, was that certain persons in India (including the assessee) held bank accounts in HSBC Private Bank (Suisse), SA, Switzerland. The statement of the assessee was recorded by the search team on 9.11.2011, copy whereof is placed at pages 35-49 of the assessee's paper book (in short "APB"). In the course of statement recorded under section 132(4) of the, though the appellant denied ownership of any such bank account, the assessee agreed upon to offer to tax income equivalent to US $11,46,368 to buy peace and avoid litigation.

2.1 On the basis of the aforesaid statement, in the return of income filed by the assessee on 28.07.2012 under section 139(1) of the Act for assessment year 2012-13, the assessee offered for tax Rs. 5,81,32,321/- as income under section 69A of the Act to cover the aforesaid offer of US$ 11,46,358. The said amount was computed by applying the conversion rate of Rs. 50.71 per dollar, as applicable in the relevant assessment year

2012-13. Along with the said return, following note was also filed by the assessee:

> *"1.During the course of search carried at the residential premises, statement of the assessee was recorded on 09.11.2011 under section 132(4) of the Income Tax Act, 1961 ('the Act)*
>
> *During the course of recording of the said statement, the applicant, on the basis of contents of a paper shown to him for the first time, merely in order to avoid entering into protracted/costly litigation with the Tax Department, agreed to voluntarily surrender income equivalent to US$ 11.46 lakhs mentioned therein. This voluntary surrender was without prejudice to the primary contention of the assessee that the said paper did not belong/pertain to the assessee. This fact was elaborately explained in the letter dated 09.02.2012 filed before JCIT (OSD), Jhandewalan, New Delhi, copy attached as Annexure 2.*
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> *In view of the aforesaid, the assessee has, suo moto, offered to tax Rs.5,81,32,321 in the return of income for the assessment year 2012-13 under section 69A of the Act, to specifically cover US$ 11,46,368 surrendered in the aforesaid statement. For the said purpose, the TT buying rate of State Bank of India as on 31.03.2012 has been adopted as the applicable exchange rate for conversion into Indian rupee as per Rule 115 of the Income Tax Rules, 1962.*

The aforesaid payment of tax is, it is reiterated at the cost of duplicity, is being made only in a spirit of cooperation and without prejudice to the main contention that the assessee is not aware of the nature/contents of the paper that was shown to him at the time of search and the said paper does not belong/pertain to him."

2.2 The aforesaid note was filed by the assessee before the assessing officer along with letter dated 30.11.2012, the relevant extracts whereof are also reproduced hereunder:

"It may also be pertinent to point out that for the reasons stated in the statement recorded on 09.11.2011, to avoid entering into protracted/costly litigation and in a spirit of cooperation, the assessee voluntarily and suomotu agreed to pay tax on income equivalent to US$ 11.46 lakhs mentioned therein.

It may be mentioned that subsequently, in the light of the aforesaid statement, the assessee, in the return of income for the assessment year 2012-13 offered for tax additional income of Rs.5,81,32,321 (equivalent to US$ 11.46 lacs by applying exchange rate @Rs.50.71 per dollar) and paid tax thereon. A copy of the return filed by the assessee for the assessment year 2012-13 along with computation of income is attached for your kind perusal and ready reference as Annexure 4.

It is again clarified that since the document, on the basis of which the aforesaid amount has been additionally offered for

tax, was confronted to the assessee during the course of search falling the previous year relevant to the assessment year 2012-13, the amount has been offered for tax in the said assessment year 2012-13 under section 69A of the Act [inadvertently mentioned as assessment year 2011-12 in the letter dated 9.02.2012]

The aforesaid additional income/disclosure has been, it is reiterated, made as part of statement under section 132(4) read with Explanation 5A under section 271(1)(c) of the Act, subject to there being no penalty and/or prosecution under the provisions of the Act."

2.3 Subsequently, pursuant to search under section 132 of the Act, proceedings under section 153A of the Act were initiated by the assessing officer vide separate notices dated 2.11.2012 for assessment years 2006-07 to 2011-12 and for assessment year 2012-13, the year of search, regular assessment was undertaken under section 143(3) of the Act.

2.4 During the course of proceedings under section 153A/143(3) of the Act for assessment year 2006-07, the assessing officer, on the basis of papers confronted to the assessee during the course of search, vide various notices/ questionnaires required the assessee to furnish information/ documents in respect of an alleged bank account maintained

with HSBC, Geneva, Switzerland bearing code BUP_SIFIC_PER_ID_5090158251. In the assessment order, it is mentioned that the information is in the form of a three page document reproduced on pages 3 to 8 of the assessment order. It is stated that the document was confronted to the assessee vide show-cause notice issued on 12.02.2015. Referring to the said document and the statement of the assessee recorded at the time of search, the assessee was required to explain why the balance shown as per the document the credits of Rs. 4,90,20,749/- (US $11,02,829) and Rs.18,79,579/- (US$ 43,539) appearing in the bank account may not be treated as income under section 69A of the Act for assessment years 2006-07 and 2007-08 respectively.

2.5 In response thereto, the assessee filed reply dated 23.02.2015, wherein the assessee repeatedly denied having maintained any such bank account with HSBC, Geneva and contended that no adverse inference should be drawn against the assessee merely on the basis of some loose unauthenticated pieces of paper in the possession of the Revenue shown to the assessee during the course of search, source whereof was also not known/ credible. The assessee alternatively also took the stand that the assessee has, to avoid litigation, in assessment

year 2012-13 already offered for tax Rs.5,81,32,321/- as income under section 69A of the Act to cover the entire amount of US$ 11,46,358. The assessee sought to justify the said disclosure. It was alternatively contented that in case the assessing officer were to tax the amount in assessment years 2006-07 and 2007-08, the assessing officer should exclude the amount declared in assessment year 2012-13, to avoid double taxation.

2.6 The assessing officer, in the assessment order dated 27.02.2015 under section 153A/ 143(3) of Act for assessment year 2006-07, however, did not agree with the aforesaid contentions of the assessee. The assessing officer held that the assessee has been evasive in his replies and that from the person- particulars mentioned in the documents, it is clear that the assessee opened and/or operated the account in HSBC Bank. It was observed that to verify the details, a reference has been sent to competent authorities in Switzerland and other countries through FT&TR division of the CBDT and the details are awaited. The denial of the assessee was held to be against human probability and the assessing officer proceeded to tax the aforesaid amount of Rs. 4,90,20,749/- equivalent to

US$11,02,829 by applying conversion rate of Rs.44.45 per dollar as income of the assessee under section 69 of the Act.

2.7 Vide separate but identical assessment order dated 27.02.2015 under section 153A/ 143(3) of the Act for assessment year 2007-08, the assessing officer proceeded to tax the Rs. 48,79,578/- equivalent to US$43,539 by applying conversion rate of Rs.43.17 per dollar as income of the assessee under section 69 of the Act. Apart from the said addition, in assessment year 2007-08, the assessing officer also made addition on account of interest that the assessee, according to the assessing officer, would have earned on the balance in the foreign bank account.

2.8 In the assessment for assessment year 2012-13 completed by the assessing officer under section 143(3) of the Act vide order dated 27.02.2015, the assessment year in which the assessee offered the amount for taxation, the assessing officer accepted the offer of the assessee and brought Rs. 5,81,32,321/- to tax equivalent to US $ 11,46,358 as declared in the return of income. This is despite that fact that in the assessment orders passed under section 153A r.w.s. 143(3) of the Act for the assessment years 2006-07 and 2007-08, addition of Rs.

4,90,20,749/- and 18,79,578/- as discussed supra, were made by the assessing officer under section 69 of the Act.

2.9 In the aforesaid background, the assessee filed appeals before the Ld. CIT (A) for assessment years 2006-07 and 2007-08 challenging the aforesaid addition/s made by the assessing officer. In the alternative, the assessee contended before the Ld. CIT (A) that in case the additions made by the assessing officer in assessment years 2006-07 and 2007-08 were to be affirmed by the Ld. CIT (A), then, to avoid double addition, the amount already offered for tax by the assessee in assessment year 2012-13 should be directed to be deleted. Before, the Ld. CIT (A), the assessee also challenged the validity of the assessment orders on various legal grounds.

2.10 During the first appellate proceedings, the Ld. CIT (A) called for the remand report of the assessing officer, particularly on the issue of double taxation of the amount. In Para 9.17 of the appellate order for assessment year 2006-07, the Ld. CIT (A) specifically noted that neither the AO nor the Addl. CIT provided any comments on the issue of double taxation of the same income in two different assessment years. The Ld. CIT (A) held that the document was confronted to the assessee and his

statement was recorded under section 132(4) of the Act wherein the assessee offered the amount as his income, which constitutes evidence found during the course of search. In Para 14.18, the Ld. CIT (A) noted that it may be possible that one argument in isolation may not be sufficient to prove the case of Assessing Officer (AO), however, if it is seen in totality with all the facts and circumstances of this case taken together, it can be concluded that the document belongs to the assessee. The Ld. CIT (A), while disposing of the appeals for assessment years 2006-07 and 2007-08, vide separate orders dated 27.03.2017, dismissed the legal objections of the assessee and upheld the validity of the assessment order. The Ld. CIT (A) also upheld the addition made by the assessing officer on the ground that since the addition was made by the assessing officer on the basis of document/information received under DTAA/DTC, which contained details of the assessee, such information was authentic. Further, in so far as the issue of year in which the amount was to be taxed, the Ld. CIT (A) held that the deposit in foreign bank account were rightly taxed by the assessing officer in the assessment years 2006-07 and 2007-08.The assessing officer held that section 69 of the Act would be applicable since

the assessee was found to have invested/ deposited the money in the bank account and section 69A of the Act was not applicable since the said section only applies to money, bullion, jewellery or other valuable article which is in the physical form where the year of acquisition cannot be identified. As regards the alternative contention of the assessee, the Ld. CIT (A), in separate appellate order dated 27.03.2017 for assessment year 2012-13, directed that the addition be retained on protective basis as in all likelihood the assessee may not accept the findings in assessment year 2006-07 and 2007-08 and may prefer second appeal. The addition was thus directed to be retained on protective basis, subject to the outcome of the further appeals.

2.11 It is in the aforesaid background that the present appeals have been preferred raising common grounds of appeal.

2.12 In grounds of appeal nos.1 to 1.2 for assessment year 2006-07, the assessee has challenged the order of the Ld. CIT (A) upholding the validity of the assessment order dated 27.02.2015, passed under section 143(3) r.w.s. 153A of the Act on the ground that the assessment was concluded without issuance and service of statutory notice under section 143(2) of the Act within the prescribed time limit and that the assessment having been

completed *de hors* any incriminating material/ document being found/ seized during the course of search conducted in the case of the assessee, the assessment was illegal and bad in law. Further, in grounds of appeal nos.2 to 2.3, the addition made under section 69 of the Act has been challenged on merits.

3.0 Before us, the ld. Sr. Counsel vehemently challenged the validity of the assessment order and filed detailed chart of issues summarising the legal and factual submissions on the aforesaid grounds. On the legal grounds, the ld. Sr. Counsel submitted that the impugned reassessment order passed under section 153A r.w.s. 143(3) is beyond jurisdiction and bad in law for the reason that the assessing officer failed to issue (leave aside serve) the mandatory statutory notice required under section 143(2) of the Act within the stipulated time period. It was submitted that notice under section 153A of the Act was issued to the assessee on 02.11.2012, requiring the assessee to furnish return of income for the assessment year 2006-07. In response thereto, the assessee vide letter dated 21.11.2012, filed return of income declaring income of Rs.1,09,95,049/- as declared in the original return. Subsequently, the assessing officer issued notice under section 142(1) dated 15.07.2013, but no notice was issued

under section 143(2) of the I.T. Act. It was submitted that notice under section 143(2) of the Act was, undisputedly, issued for the first time on 21.10.2013, which was served upon the assessee during the course of reassessment proceedings. It was contended that in terms of section 143(2) of the Act, notice under the said section should have been issued and served upon the assessee within a period of 6 months from the end of the financial year in which the return was furnished, that is, on or before 30.09.2013. However, the notice was issued on 21.10.2013, i.e., beyond the stipulated time period as provided in the said section. He contended that in the absence of issuance of notice under section 143(2) of the Act, assessment under section 143(3) read with section 153A/153C of the Act is invalid. He vehemently relied upon the decision of the Hon'ble Supreme Court in the case of CIT vs. Hotel Blue Moon: 321 ITR 362 (SC) and the Delhi High Court in the case of CIT vs. Pawan Gupta &Ors.: 223 CTR 487 (Del), apart from various other decisions referred in the chart. The Ld. Counsel, in fairness, submitted that the aforesaid issue is covered against the assessee by the decision of the Hon'ble Delhi High Court in the case of Ashok Chaddha vs. ITO: 337 ITR 399 (Del), though he tried to distinguish the said decision.

3.1 The second legal argument taken by the Ld. Sr. Counsel was that since the assessment under section 153A of the IT Act has been completed after making additions de-hors any incriminating material/ document being found/ seized during the course of search, the assessment as well as the addition is clearly without jurisdiction and bad in law and relied upon the following decisions of the Supreme Court and the jurisdictional Delhi High Court:

- CIT vs. Singhad Technical Education Society: 397 ITR 344 (SC)
- PCIT v. MeetaGutgutia [2018] 257 Taxman 441 (SC) affirming the decision of the Delhi High Court in the case of PCIT vs. MeetaGutgutia: 395 ITR 526 (Del)
- CIT vs. Kabul Chawla: 234 Taxman 300
- CIT vs. Chetan Das Lachman Das: 254 CTR 392 (Del)
- CIT vs. Anil Bhatia: 211 Taxmann 453 (Del)
- CIT vs. Lachman Das Bhatia: 254 CTR 383 (Del)
- PCIT v. Vikas Gutgutia: 396 ITR 691 (Delhi)

3.2 Specific reliance was placed by the Ld. Sr. Counsel on the decision of coordinate Delhi Bench of the Tribunal in the case of Anurag Dalmia vs. DCIT: ITA 5395 of 2017, wherein the Tribunal quashed similar assessments completed under section 153A r.w.s. 143(3) of the IT Act for making addition on account of foreign bank account, on the basis of similar document . He further relied upon the following decisions, where assessments

framed under section 153A r.w.s. 143(3) of the IT Act, for making addition on account of alleged foreign bank account, merely on the basis of some unsigned/ undated/ unauthenticated piece of paper, which was not found during the course of search was quashed:

- BishwanathGarodia vs. DCIT: 76 taxmann.com 81 (Kol. Trib)
- Yamini Agarwal vs. DCIT: 83 taxmann.com 209 (Kol. Trib)

3.3 On the issue of statement of the assessee recorded during the course of search being regard as constituting incriminating material, the Counsel submitted that it is undisputed that during the course of search proceedings no document/information, much less anything incriminating, was found from the premises of the assessee in respect of the foreign bank account. It was contended that on careful perusal of section 132(4) of the IT Act, it is clear that the said section requires the authorized officer to record statement of a person in whose possession or control any "books of account, documents, money, bullion, jewellery or other valuable article or thing" is found and therefore, in order to constitute evidence under section 132(4) of the IT Act, statement must be of a person found to be in possession or control of any incriminating material. On the other

hand, in the present case, the assessee was not found to be in possession of the alleged papers and therefore, statement of the assessee cannot be regarded as search evidence in terms of section 132(4) of the IT Act. It was contended that even otherwise, statement cannot simply be the basis for making addition in the absence of material such as, books of account, documents, money, bullion, jewellery and the like being found or discovered during search. He relied upon the decision of the Delhi High Court in the case of PCIT vs. Meeta Gutgutia: 395 ITR 526, wherein it has been held thatsection 153A of the IT Act is an extremely potent power which enables the Revenue to re-open at least six years of assessments earlier to the year of search and is not to be exercised lightly. Thus, it is only if during the course of search under section 132 incriminating material justifying the re-opening of the assessments for six previous years is found that the invocation of section 153A would be justified. It was submitted that SLP preferred by the Revenue against the aforesaid decision has been dismissed in 257 Taxman 441 (SC). He further relied upon the decision of the Gujarat High Court in the case of PCIT vs. Somaya Construction Pvt. Ltd.: 387 ITR 529 and various other decisions. Insofar as the reliance placed by the

CIT(Appeals) on the decision of the Allahabad High Court in the case of CIT vs. Rajkumar Arora: 52 taxmann.com 172 is concerned, it was submitted that the decision of the jurisdictional High Court in Kabul Chawla (supra) is binding, in preference to the order of the Hon'ble Allahabad High Court.

3.4 In view of the aforesaid arguments, the Ld. Counsel contended the addition of Rs.4,90,20,749 made by the assessing officer in assessment year 2006-07 *de-hors* any material/document found during the course of search is clearly outside the scope of proceedings under section 153A of the IT Act and is, therefore, illegal and bad in law and hence calls for being deleted on this preliminary ground itself. He prayed that the assessment order be annulled on this ground.

3.5 On merits, the Ld. Sr. Counsel contended that the assessee repeatedly and categorically asserted that the assessee did not maintain any bank account with HSBC, Geneva. Further, it was also repeatedly submitted that no adverse inference should be drawn against the assessee merely on the basis of some loose unauthenticated pieces of paper in the possession of the Revenue, which were shown to the assessee during the course of search, source whereof was also not known/ credible. He

submitted that despite the fact that the assessee had no concern/ connection with the aforesaid piece of paper shown to him at the time of search, merely to avoid entering into protracted/ costly litigation with the Income Tax Department and particularly having regard to the fact that the tax liability on the basis of the said paper was informed at the time of search to be around Rs.2 crores, the assessee agreed to voluntarily offer for tax income equivalent to US $11.46 lacs. The said offer was made only in the spirit of settlement and to avoid litigation, without prejudice to the primary contention of the assessee that the said unsigned/ undated piece of paper did not belong/ pertain to him. The aforesaid facts were placed on record vide letter dated 09.02.2012 filed before JCIT (OSD), Jhandewalan Extension, New Delhi. He also referred to the note appended to the return of income and letter dated 30.11.2012 filed with the return. He submitted that the assessing officer, without taking into consideration the fact that the amount of US$ 11,46,368 was offered to tax by the assessee in the return of income filed for the assessment year 2012-13, merely to buy peace and to avoid litigation, made once again, addition of amount equivalent to US $11,02,829 in the assessment year under consideration.

3.6 The ld. Sr. Counsel further submitted that the entire case of the assessing officer is based on certain unsigned/ undated/ unauthenticated loose pieces of papers, which was for the first time shown to the assessee at the time of search and copy whereof was given subsequently at the time of recording of statement on 11.12.2014. Analyzing the said document, it was submitted that even the contents of the unsigned/ undated/ unauthenticated loose pieces of papers nowhere establish that the said papers and/ or amounts mentioned therein belonged/ pertained to the assessee. It was submitted that: (a) the paper nowhere refers to the name of any bank, leave aside containing complete particulars of the so-called bank in Geneva; (b) in the entire assessment order, the assessing officer has not mentioned the source wherefrom the aforesaid unsigned/ undated/ unauthenticated loose pieces of papers have been received; (c) in the assessment order it is vaguely mentioned that "document has been received as a part of tax information exchange treaty between Government of India and other countries", without even bothering to mention the name of the country from which the information has been received. He vehemently contended that the assessing officer failed to appreciate that :– (a) the assessee

repeatedly and categorically asserted that the alleged foreign bank account did not belong to the assessee; (b) none of the deposits, as alleged, related to the assessee; and (c) no transaction was made by the assessee, and therefore, the question of making any addition in the hands of the assessee could not at all arise. He submitted that the assessing officer erred in law in drawing adverse inference against the assessee merely on the basis of general particulars of the assessee (which are available in public domain) appearing in some unsigned/ undated/ unauthenticated loose pieces of papers, more so when the assessing officer had categorically admitted in para 10 of the impugned order that 'authentic information/communication' regarding the alleged foreign bank account was still awaited from the Swiss Authorities. He stated that even in the statement of the assessee recorded by the assessing officer on 11.12.2014 during the course of assessment proceedings, the assessee categorically asserted that the assessee did not own any bank account in HSBC, Geneva, Switzerland and categorically denied having any connection with the alleged bank account. He thus submitted that the assessee has time and again asserted that the assessee does not have any bank account in HSBC Bank, Geneva,

Switzerland and also stated that the paper does not appear to be "pertaining to any bank as name of the bank does not appear in this document". The assessee also clarified that the assessee has neither opened nor authorized anyone to open any bank account in HSBC Bank, Geneva and that the assessee had nothing to do with the unsigned/ unauthenticated pieces of paper. On the non-furnishing of the consent/declaration form, he submitted that the assessee had repeatedly and categorically asserted that since the alleged account in HSBC, Geneva, Switzerland did not belong/ pertain to him, the assessee was not at all competent to sign any form/ declaration in relation to the same. He then took us through assessment order and gave a para-wise rebuttal of the assessment order.

3.7 The Ld. Counsel stated that the addition made by the assessing officer under section 69 of the Act, merely on the basis of presumption that the assessee maintained an account with HSBC Bank, Geneva is legally unsustainable. He submitted that the loose extract of paper relied upon by the assessing officer (analyzed supra) only contains name of the assessee, his date of birth and there are some other particulars like some date of creation, PER ID, etc. Insofar as name, date of birth and address

is concerned, the assessee is a well-known industrialist and his particulars like name, address and date of birth are available in the public domain and there is no reason to draw any adverse inference simply because such particulars appear on some unsigned/ undated/ unauthenticated piece of paper. It was further submitted that merely on account of the said particulars appearing on the unsigned/ undated/ unauthenticated piece of paper, it cannot be inferred/ assumed that the documents pertain/ belong to assessee. Furthermore, it is emphatically reiterated that even in the statement recorded on 11.12.2014, the assessee clarified that he is not aware as to how his particulars appeared on the unsigned/ undated/ unauthenticated piece of paper. He further submitted that it is trite law that if an item of income, not admitted by an assessee, is to be assessed in the hands of the assessee, the burden to establish that such income is chargeable to tax is on the assessing officer. He submitted that with a view to assist the assessing officer and to reduce the rigours of the burden that lay upon the assessing officer, provisions of sections 68, 69, 69A to 69D of the IT Act have provided for certain deeming provisions, where an assumption of taxable income in the hands of the assessee is raised in the

absence of satisfactory explanation from the assessee. As these are deeming provisions, the conditions precedent for invoking such provisions, are required to be strictly construed. The facts and circumstances giving rise to the presumption have to be established with reasonable certainty. The assessing officer, it was argued, cannot first make certain assumption and thereafter apply the deeming provisions based on such assumption. Relying upon various judicial precedents, he submitted that to invoke the deeming fiction contained in sections 69/ 69A/ 69C of the IT Act, the condition precedent is that the assessee should be found to have actually made investment/ incurred expenditure by way of positive evidence. Unless such condition is found to exist, the assessing officer is not permitted to invoke the legal fiction of sections 69A/ 69C to make any addition in the hands of the assesse.

3.8 The Ld. Counsel submitted that in the present case, the assessing officer has proceeded to make addition under section 69 merely on the presumption that the assessee held an account with HSBC Bank, Geneva. In so concluding, the assessing officer has not placed on record any independent evidence gathered during the course of search/assessment to

either establish the assessee's ownership of the alleged bank account or the deposits made therein. He alternatively submitted that in the instant case, the allegation of the assessing officer is that the assessee maintained a foreign bank account, which represents nothing but 'money' in the form of a deposit and thereby addition if at all, could have been made under section 69A as against section 69 of the Act. He vehemently contested the double addition made in assessment years 2006-07 and 2007-08. He stated that even as per the loose unauthenticated pieces of paper, the date of creation of the profile in alleged bank account is reflected as 09.01.2001 and another date of creation is mentioned as 30.01.2001 and further, the amount of UD$ 11,02,829 is only reflected as 'carry forward balance' and is not a fresh deposit that had been made in the year under consideration. Thus, the question of making addition of such account in assessment years 2006-07 and 2007-08, the years under consideration, in the absence of any evidence to prove the year of such deposit/remittance, does not arise at all. He relied upon the following decisions:

- P. Soman: 196 Taxman 335 (Ker)

- CIT v. Premlal: 330 ITR 499 (P&H)

- Shankar R. Mhatre vs. ACIT: 117 ITD 241 (Mum)

- ITO vs. GhanshyamdasHassanand: 28 Taxman 219

- MasoomkhanShabbirkhan Pathan vs. DCIT: 7 ITR (T) 443 (Mum)

3.9 In the alternative, and without prejudice to the aforesaid contentions, the Ld. Counsel submitted that since the double addition made should be directed to be deleted. He submitted that it is trite law that double addition of the very same amount in two different assessment years is not at all permissible in law and in case the assessee offers a particular amount in one assessment year and the assessing officer seeks to tax the very same amount in a different assessment year(s), then, the assessing officer is duty bound, as a necessary consequence, to exclude the amount offered for tax in the former assessment year; otherwise the same would result in double taxation, contrary to law. In the context, he relied upon decision of the Supreme Court in the case of Bachul Lal Kapoor: 60 ITR 74 (SC) and Laxmipat Singhania vs. CIT: 72 ITR 291 (SC) and the Delhi High Court in the case of ACIT Vs. Precision Metal Work: 156 ITR 693 (Del).

4.0 On the other hand, the Ld. CIT-DR vehemently opposed the aforesaid contentions of the assessee. The Learned CIT-DR contended that there is no error in the order of the Assessing Officer making addition on account of the amount deposited in HSBC Bank Account/Geneva in Assessment Year 2006-07 and Assessment Year 2007-08. It was contended that the assessee had in his statement recorded under Section 132(4) of the Income Tax Act offered the said amount for taxation and offered the said amount subsequently in the return of income filed for the Assessment Year 2012-13. It was submitted by the Learned CIT-DR that the provisions of Sections 153A, 153B and 153C of the Income Tax Act, which have been introduced with effect from 01.06.2003 is different from the earlier scheme of Assessment of unclosed income under Chapter XIV-B of the Income Tax Act. It was contended that there is no requirement that the addition in the assessments under Sections 153A and 153C must be restricted to incriminating material found during the course of search. It was submitted that the provisions of Section 153A of the IT Act makes no reference to undisclosed income as was mentioned in the earlier Chapter XIV-B relating to

block assessment. In support of his contention, the Learned CIT-DR relied upon the following decisions:-

1. Gopal Lal Bhadruka Vs. DCIT 27 taxmann.com 167 (AP)
2. MadugulaVenu Vs. DIT 29 taxmann.com 200 (Del)
3. CIT Vs. Chetan Das Lachman Das [2012] 25 taxmann.Com 227 (Del)
4. Filatex India Ltd. 49 taxmann.Com 465 (Del)
5. Raj Kumar Arora, 52 Taxmann.com 172 (All)

4.1 The Learned CIT-DR further contended that though the aforesaid decisions of the Delhi High Court in the case of Anil Kumar Bhatia (supra), Chetan Das Lachman Das (supra) and Filatex India Ltd (supra) were referred to and relied upon before the Delhi High Court in the case of Kabul Chawla (supra), however, the High Court apparently reversed its earlier decision and held that the addition must be restricted to incriminating material. In supplementary written submissions, the Learned CIT-DR also relied upon the decision of the Kerala High Court in the case of Dr. A.V. Sreekumar V. CIT [2018] 90 taxmann.com 355 (Kerala), wherein the Kerala High Court, after considering the decision of the Delhi High Court in the case of Kabul Chawla, upheld the addition made in the Assessment completed under

Section 153A on the basis of the material already available with the department in the form of tax revision petition. Relying on the said decisions, the Learned CIT-DR submitted that there is no error in the order passed by the Assessing Officer making addition in respect of the amount found deposited in the HSBC Account/Geneva in Assessment Year 2006-07 and Assessment year 2007-08.

4.2 On merits, the Ld. CIT-DR placed heavy reliance upon the assessment order and the order of the Ld. CIT (A). He further relied upon the decision of the coordinate bench in the case of Parag Dalmia in ITA No.5499/ Del/ 2017 dated 26.02.2018 to contend that in the worst scenario the assessment may be set aside to the file of the assessing officer and the addition made should not be deleted.

5.0 We have carefully considered the rival submissions and have gone through the records. We first deem it appropriate to adjudicate grounds of appeal nos. 2 to 2.3 whereby the assessee has challenged the addition of Rs. 4,90,20,749/- made by the assessing officer under section 69 of the Act equivalent to US $11,02,829. On careful perusal of the records, it is noticed that the addition has been made on the basis of documents

which were available with the Revenue and were stated to have been received under DTAA entered into by India with other countries and confronted to the assessee at the time of search. The said documents, consisting of three pages, which were in foreign language along with its English translation have been reproduced in the assessment order and copies thereof have been placed by the assessee in the paper book. The documents are apparently undated and unsigned and do not even contain reference to any bank. It is, however, the case of the Revenue that the said documents pertain the foreign bank account of the assessee with HSBC, Geneva. On the other hand, the assessee challenged the authenticity of the aforesaid documents and vehemently contends that independent of the offer made in the return, no addition can be made on the basis of the said documents.

5.1 Importantly, the assessee, while denying ownership of any foreign bank account, in his income tax return for assessment year 2012-13 offered for tax Rs. 5,81,32,321/- as amount equivalent to US $11,46,368. On the other hand, the assessing officer, apart from accepting the said offer in assessment year 2012-13, has also brought to tax US $

11,02,829 and US$ 43,539 in assessment years 2006-07 and 2007-08 respectively. In fact, by applying conversion rate of Rs.44.45 per dollar and Rs.43.17 per dollar in assessment years 2006-07 and 2007-08, the assessing officer taxed Rs.4,90,20,749 and Rs.18,79,578 in the said assessment years, aggregating to Rs.5,09,00,327, which is less than Rs.5,81,32,321 offered for tax by the assessee in assessment year 2012-13. There can be no dispute with the settled legal position that the very same amount cannot be taxed twice in two different assessment years, which contention has also been accepted by the Ld. CIT (A). Therefore, the very same amount equivalent to US $11,46,368 cannot, in our view, be taxed twice, once in assessment years 2006-07 and 2007-08 and secondly in assessment year 2012-13.

5.2 Now the primary question which arises for consideration before us is in which year the amount equivalent to US $11,46,368 should be subjected to tax, considering that the assessee has offered the amount for taxation in assessment year 2012-13 and contested the taxability when the assessing officer sought to tax the said amount (as converted in INR) in assessment years 2006-07 and 2007-08. It is noticed that in assessment years 2006-07, the assessing officer has made the

addition under section 69 of the Act, which is reproduced as under:

"69. Unexplained investments

Where in the financial year immediately preceding the assessment year the assessee has made investments which are not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of the investments or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the value of the investments may be deemed to be the income of the assessee of such financial year".

5.3 As per the aforesaid provisions of section 69, where the assessee is found to have made any investment not recorded in the books of account in any financial year and the assessee is not able to explain its source to the satisfaction of the assessing officer, then, the value of the investments is deemed to be unexplained income of the assessee in financial year in which investments were made. Therefore, for section 69 of the Act to be applied, the undisclosed investment must be found to be relating to any particular year and in that year, in the absence of

satisfactory explanation of the assessee value of investments is subjected to tax.

5.4 On the other hand, section 69A of the I.T. Act provides as under:

> *"Unexplained money, etc.*
>
> *69A. Where in any financial year the assessee is found to be the owner of any money, bullion, jewellery or other valuable article and such money, bullion, jewellery or valuable article is not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of acquisition of the money, bullion, jewellery or other valuable article, or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the money and the value of the bullion, jewellery or other valuable article may be deemed to be the income of the assessee for such financial year."*

5.5 The aforesaid section provides that where any money, value of bullion, jewellery or other valuable article is found in the ownership of the assessee which is not recorded in the books of account maintained by him, the same will be treated as his income for the financial year in which he is found to be its owner. In terms of the said section, all what is required to be proved is

that the assessee is owner of money or valuable article and it has not been recorded in the books of account and in that case, the amount is deemed to be the income of that financial year in which he is found to be its owner. The said section, thus, covers a situation where the assessee is, in any particular year, found to be owner of any undisclosed asset, but the year in which such asset is acquired is not known and by legal fiction, the value of such undisclosed asset is brought to tax in the year in which the assessee is found to its owner. The contention of the CIT(A) that the said section only covers physical asset is, in our view, too narrow interpretation of the said section since in that case, if the assessee is found to have made some investment and the year of investment is not known, then, the said investment cannot be taxed at all, not even in the year in which the assessee is found to be its owner.

5.6 In the present case, on perusal of the papers relied upon by the assessing officer, it is seen that there is reference to various dates. There is no specific date wherefrom the date of investment in the so-called bank account can be determined. As per the English translation, the date of creation of the profile of the so-called bank account is reflected as 09.01.2001 and

another date of creation is mentioned as 30.01.2001 and both the dates are much prior to assessment year 2006-07, the year under consideration. Moreover, it is noticed that the amounts reflected balances carried forward from earlier period and there is no reference to any deposition being made in the said bank account which could be related to any of the assessment years 2006-07 or 2007-08. Of course, there is reference to certain balances for the period November, 2005 to February, 2007, which has been relied upon by the assessing officer, but it is noticed that the said balances are merely balances and not any deposits. In this context, the Ld. Senior Counsel vehemently contended that if one were to strictly construe the document as it is, then, no addition could have been made in any of the assessment years under consideration since as per the document the account was created much earlier and there is no evidence of deposition of any amount in any of the assessment yeas beginning with assessment year 2006-07. It was contended that the assessee merely offered the amount to tax in assessment year 2012-13 to avoid litigation and if at all the said amount could only been taxed in the said year, being the year of search, as per the provisions of section 69A of the Act.

5.7 On thorough and serious consideration, we find substantial merit in the aforesaid contention of the Ld. Sr. Counsel that if at all the amount on the basis of the papers relied upon could only be taxed in year of search, when the said papers were, for the first time, confronted to the assessee. This is for the reason that the paper nowhere shows any amount being deposited in any of the assessment years beginning with assessment year 2006-07. Therefore, neither in assessment year 2006-07 nor in assessment year 2007-08, the two years in which additions have been made by the assessing officer, the assessee could be regarded as having made any investment and therefore, the provisions of section 69 of the I.T. Act cannot, in our view, be applied in those assessment years. Further, the documents relied upon actually refer to creation of account in earlier assessment year, much prior to assessment year 2006-07.

5.8 Furthermore, assessments for assessment years 2006-07 and 2007-08 were undisputedly made under section 153A of the Act in respect of non-abated assessments. In respect of non-abated assessments, the law laid down in CIT vs. Singhad Technical Education Society: 397 ITR 344 (SC) and PCIT vs. MeetaGutgutia: 395 ITR 526 (Del), CIT vs. Kabul Chawla: 234

Taxman 300 (Del) and other decisions of the jurisdictional High Court is that the addition should be made on the basis of any incriminating document found during the course of search. In MeetaGutgutia (supra), the High Court further held that statement recorded cannot be regarded as incriminating material found during search and cannot independently be the basis for making any addition. In the present case, there is no dispute that the papers relied upon by the assessing officer were not found during the course of search at the residential premises of the assessee and therefore, strictly speaking, the said papers cannot be the basis for making any addition in assessment years 2006-07 and 2007-08. In fact, in identical circumstances, coordinate benches of the Tribunal in the case of Anurag Dalmia vs. DCIT: ITA 5395 of 2017, BishwanathGarodia vs. DCIT: 76 taxmann.com 81 (Kol. Trib) and Yamini Agarwal vs. DCIT: 83 taxmann.com 209 (Kol. Trib), relied upon by the assessee, deleted similar addition made in assessment completed section 153A r.w.s. 143(3) of the Act.

5.9 On the other hand, the assessee offered for tax Rs.5,81,32,321/- as amount equivalent to US $11,46,368 in assessment year 2012-13 under section 69A of the Act, which

amount, as noticed above, is more than Rs. 5,09,00,327/- brought to tax cumulatively by the assessing officer in assessment years 2006-07 and 2007-08.In view thereof and the entirety of circumstances discussed in the preceding paragraphs, we are of the considered opinion that the addition of Rs.4,90,20,749 made by the assessing officer officer equivalent to US $ 11,02,829 in assessment year 2006-07 under section 69 of the Act and similar addition made in assessment year 2007-08, are not sustainable in law and the same are hereby directed to be deleted. We therefore, hold that the addition of Rs.4,90,20,749 in assessment year 2006-07 and similar addition of Rs.18,79,578 in assessment year 2007-08 are not sustainable in law and are hereby directed to be deleted. As a consequence the amount offered for tax by the assessee in assessment year 2012-13, being Rs.5,81,32,321, which was sustained by the Ld. CIT(A) on protective basis, is hereby directed to be restored on substantive basis in assessment year 2012-13.In the result, the grounds of appeal nos. 2 to 2.3 raised by the assessee in assessment year 2006-07 are allowed.

5.10 Further, in view of the addition made by the assessing officer having been deleted on merits, grounds of appeal nos. 1 to

1.2 challenging the validity of the assessment order are merely rendered academic in nature and the same are hereby dismissed as *in fructuous.*

5.11 In ground of appeal no.3, the assessee has challenged the levy of interest under section 234B of the I.T. Act, which is merely consequential in nature.

ITA No. 2893/ Del /2017 by Assessee for A.Y. 2007-08

ITA No. 3951/ Del /2017 by Revenue for A.Y. 2007-08

6.0 All the grounds raised in assessee's appeal in ITA No. 2893/Del/2017 are identical to the grounds raised in assessment year 2006-07 and our decision in the said appeal shall apply *mutatis mutandis* in assessment year 2007-08. For the reasons submitted while deciding appeal for assessment year 2006-07, addition of Rs.18,79,578 made by the assessing officer in assessment year 2007-08, the year under consideration, is hereby directed to be deleted. Accordingly, the grounds of appeal nos.2 to 2.3 raised by the assessee in assessment year 2007-08 are allowed. Further, in view of the addition made by the assessing officer having been deleted on merits, grounds of

appeal nos. 1 to 1.2 challenging the validity of the assessment order are merely rendered academic in nature and the same are hereby dismissed as infructuous. Ground of appeal no.3 challenging the levy of interest is merely consequential in nature.

6.1 Coming to Revenue's appeal in ITA No. 3951/ Del /2017, the Department has challenged that the action of the CIT(A) in deleting the addition of Rs.1,64,962/- made by the assessing officer on account of undisclosed interest income in HSBC Geneva. The facts in respect of the said issue are that in the assessment order passed under section 153A r.w.s. 143(3) of the IT Act, the assessing officer, apart from the addition on account of the deposits/ balances appearing in the alleged foreign bank account, made further addition of Rs.1,64,962/- (US$ 3,821.22 @ Rs.43.17) under section 69 of the IT Act on account of "interest" calculated @ 4% p.a. on the alleged balance appearing in the undisclosed foreign bank account.

6.2 On appeal, the Ld. CIT (A) deleted the addition made by the assessing officer holding that since no corroborative evidence has been brought out by the assessing officer to substantiate that the assessee has actually earned any interest

income, therefore, the addition made only on the basis of estimate and presumption is not sustainable.

6.3 In support of the aforesaid ground, the Ld. CIT-DR/ Departmental Representative heavily relied on the order of the assessing officer and contended that the addition of Rs. 1,64,962/- made on account of interest should be confirmed and the finding of the CIT(A) to this extent should be reversed. In rebuttal, the Ld. Senior Counsel vehemently argued that the addition on account of notional interest has been rightly deleted by Ld. CIT (A) since the said addition was made by the assessing officer in the absence of any bank statement or any other documents, merely on the basis of presumption that interest @4% p.a. would have been credited on the balance in the account, without even first establishing the existence of the alleged foreign bank account in the period under consideration. The Ld. Counsel contended that under the scheme of the Act, liability to pay tax is attracted at two points of time, viz., the accrual of the income or its receipt, but the substance of the matter is income. Thus, in the absence of any information, evidence or record, notional interest income cannot be added in the assessee's hands, merely on hypothesis, assumption,

conjectures & surmises. For the said proposition reliance was placed on the following decisions, wherein it has been held that no addition on account of interest can be made where no interest has in fact been charged by the parties within the terms of funds/loan advanced.

- CIT vs. Goyal M.G. Gases (P) Ltd.: 303 ITR 159 (Del.)
- B & A Plantations and Industries vs. CIT: 242 ITR 22 (Gau.)
- KeshrichandJaisukhlal vs. CIT: 248 ITR 47 (Gau.)
- Highways Construction Co. Pvt. Ltd vs. CIT: 199 ITR 702 (Gau.)
- Jwala Prasad Radha Krishna vs. CIT [1992]: 198 ITR 415 (All)
- CIT vs. Punjab Financial Corpn. Ltd.: 295 ITR 510 (P&H HC)
- CIT vs. South India Corpn. (Agencies) Ltd.: 293 ITR 237 (Chennai HC)
- CIT vs. Sanghi Finance and Investment Ltd.: 190 CTR 207 (MP)

6.4 We have considered rival submissions and the decisions relied upon by both the parties. We have already deleted the addition made in assessment year 2006-07 and also in assessment year 2007-08, therefore, on this ground itself the addition made by the assessing officer is liable to be deleted. Independent thereof, we note that in the instant case, the addition of Rs.1,64,962 has been made purely on notional basis on the premise that the assessee: (a) had alleged foreign bank account, which itself is under serious challenge; and (b) on such bank account, assessee earned interest @ 4%. We are of the view that the case of the assessee is on a much better footing vis-à-vis the facts in judicial precedents relied upon by the Ld.Counsel inasmuch as in the aforesaid cases there was at least some basis of taxation of notional amount/ interest, which was never realized/ received by the assessee, but in the case of the assessee, the so-called amount of interest brought to tax is totally without any basis and is clearly hypothetical/ imaginary.Since there is no evidence that the assessee actually received interest on the disputed deposit and just by figment of imagination it has been concluded that the assessee earned interest on such deposits @ 4% p.a., the impugned addition on account of notional

interest, has, even on merits, been rightly deleted by the CIT(A). For the said cumulative reasons, the Revenue's appeal on this ground stands dismissed.

ITA Nos. 3952 to 3956/ Del /2017 by Revenue for A.Y. 2008-09 to 2012-13

7.0 The above Revenue's appeals in ITA Nos. 3952 to 3956/ Del /2017 for assessment years 2008-09 to 2012-13 raise identical issue of taxability of interest in various years, which was deleted by the Ld. CIT(A). For the reasons stated in Revenue's appeal in ITA No.3951/Del/2017 for assessment year 2007-08, the Revenue's appeal are dismissed and the order of the Ld. CIT (A) deleting the addition of notional interest is upheld.

ITA No. 2894/ Del /2017 by Assessee for A.Y. 2012-13

8.0 In ground of appeal no.1, the assessee has challenged the protective addition of Rs. 5,81,32,321/- (US$ 11,46,368) offered to tax by the assessee in the return of income and substained by the Ld. CIT(A), despite confirming addition made in respect of the alleged balance in the foreign bank account in assessment years 2006-07 & 2007-08.In view of our detailed

finding in assessee's appeal for assessment year 2006-07 in ITA No. 2892/ Del/ 2017, we have deleted the addition of Rs.4,90,20,749 in assessment year 2006-07 and similar addition of Rs.18,79,578 in assessment year 2007-08 and as a consequence thereof, the amount offered for tax by the assessee in assessment year 2012-13, being Rs.5,81,32,321/- sustained by the Ld. CIT (A) on protective basis is hereby directed to be restored on substantive basis in assessment year 2012-13. This ground of appeal by the assessee is therefore dismissed.

8.1 In ground of appeal no.2, the assessee haschallenged the order of the Ld. CIT (A) directing the assessing officer to consider initiating penalty proceedings under section 271AAA of the Act, it would be open to the assessee to challenge the penalty, if at all levied, in the penalty proceedings, which are separate and independent and consequently, the ground raised in the present appeal is hereby dismissed as premature.

8.2 In ground of appeal nos. 3 to 3.4, the assessee has challenged the action of the assessing officer in making addition of Rs.1,12,89,646/- on account of alleged unexplained jewellery found during the course of search which has been confirmed in appeal by the CIT(Appeals). The brief facts resulting in the

aforesaid addition are that during the course of search at the residential premises of the assessee on 8/9.11.2011 and in continuation thereof on 20.12.2011, following jewellery was found/ seized:

	Gross Weight (Gms.)	Value (Rs.)	Remarks
Jewellery Found	38,748.28	10,19,95,614	Value of jewellery is as on the date of search
Jewellery Seized	6,716.70	1,12,89,646	As per annexure to Panchnama

8.3 On being confronted, the wife of the assessee, Mrs. Bina Modi, in her statement recorded on 20/21.12.2011 and also the assessee had during the course of assessment proceedings vide replies dated 08.12.2014, 29.12.2014 and 18.02.2015, explained that the jewellery found during the course of search primarily belonged to the assessee, his wife, Mrs. Bina Modi, and his daughter, Mrs. Charu Bhartia. Further, it was also explained that the total jewellery declared by the assessee and his wife, Mrs. Bina Modi, and their daughter, Mrs. Charu Bhartia, in their last wealth tax return for the assessment year 2011-12 was 46,634.842 gms, was much more than jewellery weighing

38,748.28 gms found during the course of search. The details of the jewellery so declared, is tabulated as under:

	Gross Weight (Gms.)	Value (Rs.)
Sh. K.K. Modi	1,708.650	65,70,041
Mrs. BinaModi	43,886.392	9,30,51,715
Mrs. CharuBhartia	1,039.800	62,55,850
Total	46,634.842	10,58,77,606

8.4 In the assessment order, the assessing officer, held that the assessee was unable to provide an item wise reconciliation of jewellery to the extent of 6,716.700 gms [valued at Rs.1,12,89,616/- by the Departmental valuer applying the rates prevailing on the date of search] and held the same to be taxable as undisclosed income of the assessee, which was confirmed in appeal before the Ld. CIT (Appeals).

8.5 During the course of hearing, the Ld. Senior Counsel vehemently contended that the addition deserves to be deleted in entirety at the very threshold itself for the simple reason that the

gross weight of jewellery declared by the assessee, his wife and daughter far exceeded the gross weight of jewellery found during the course of search and thus there could be no allegation any undisclosed income. In support of the aforesaid proposition, the Ld. Counsel placed heavy reliance on the CBDT Instruction No. 1916 dated 11th May, 1994, wherein the CBDT has specified the basic limits up to which the jewellery found would be treated as explained for tax purpose and consequently, the same could not be subjected to seizure. The relevant Instruction is re-produced as under:

> *"INSTRUCTION NO: 1916 DATE OF ISSUE: 11/5/1994*
>
> *Instances of seizure of jewellery of small quantity in the course of operations under Section 132 have come to the notice of the Board. The question of a common approach to situations where search parties come across items of jewellery, has been examined by the Board and following guidelines are issued for strict compliance:-*
>
> *(i) In the case of a wealth-tax assessee, gold jewellery and ornaments found in excess of the gross weight declared in the wealth-tax return only need be seized.*
>
> *(ii) In the case of a person not assessed to wealth-tax, gold jewellery and ornaments to the extent of 500 gms. per*

married lady, 250 gms. per unmarried lady and 100 gms. per male member of the family, need not be seized.

(iii) The authorized officer may, having regard to the status of the family and the customs and practices of the community to which the family belongs and other circumstances of the case, decide to exclude a large quantity of jewellery and ornaments from seizure. This should be reported to the Director of Income-tax/Commissioner authorizing the search at the time of furnishing the search report.

(iv) In all cases, a detailed inventory of the jewellery and ornaments found must be prepared to be used for assessment purpose.

3. These guidelines may please be brought to the notice of all the officers in your region."

8.6 On the basis of the above, it was contended that the aforesaid Instruction is squarely applicable to the facts of the case of the assessee since the gross weight of jewellery declared by the assessee and his wife exceeds the gross weight of jewellery found during the course of search and accordingly the entire jewellery weighing 6,716.700 gms stood fully disclosed before the tax authorities.Apart thereof, the Ld.Counsel also placed reliance on the following decision, where it has been held that no addition

can be made on account of jewellery which is within the tolerable limit stipulated in the aforesaid CBDT Instruction:

- CIT V. Mohinder Lal Haryani: 307 ITR 348 (Del.)
- CIT vs. Satya NarainPatni: 269 CTR 466 (Raj)
- CIT vs. RatanlalVyaparilal Jain: 339 ITR 351 (Guj)
- ACIT vs. Gopi Lal Mor: 21 SOT 29 (Jodh)
- ACIT vs. Rameshchandra R. Patel: 89 ITD 203 (Ahd)

8.7 Further, in so far as the allegation of the assessing officer that the jewellery found short during the course of search could not be reconciled, it was submitted by the Ld. Counsel that some of the jewellery items found during the course of search do not match with the items specified in the valuation reports attached with the wealth tax returns since the assessee has a big family, the items of jewellery of the family members gets mixed and therefore, it may not be possible to correlate/ match each and every item of jewellery found with the description of jewellery mentioned in the valuation report attached with the wealth tax return. Further, it was also emphasized that the aforesaid facts/ reason for mismatch of jewellery items was also mentioned by the wife of the assessee, Smt. Bina Modi, in her statement dated 20.12.2011 and also by Mrs. Charu Bhartia in her statement dated 9.11.2011, wherein they stated that jewellery items of various family members got mixed on various occasions, part of

jewellery is being used by daughter-in-laws, part of jewellery is ancestral and part of jewellery has been reprocessed. It was also submitted that the assessee, to the extent available, provided details of jewellery that was re-made/ converted in the previous year relevant to the assessment year 2012-13 during the assessment proceedings and most of the items, stood reconciled.Even without considering the above, the Ld. Counsel submitted once the jewellery disclosed by the assessee (and his family members) far exceeds the jewellery physically found during the course of search, no addition could have been made merely on the ground that the description of some of the jewellery items could not be matched/ reconciled.In support, the counsel placed reliance on various decisions, some of which are as under:

- Smt. Krishna Wanti Batra vs. Assistant Commissioner of Income tax: 149 Taxman 36 (Del)
- GaurishankerOmkarmal vs. ITO: 37 TTJ 353 (Ahd.)
- DCIT vs. Arjun DassKalwani: 101 ITD 337 (Jodh.)
- Sh. Arvind Agarwal and Sh. Subhash Agarwal: I.T.A. Nos. 455, 277, 278 & 443/Ind/2013 (Indore)

8.8 It was further argued that the Board, in the Instruction issued, has emphasized on the gross weight declared in the wealth-tax return rather than the description. This is for the

reason that the Board recognized the above factors, which normally leads to description of the jewellery not matching with the return and that in clause (iii) of the above Instruction, the Board has further clarified that having regard to the status of the family, customs and practices of the community to which the family belongs, even larger quantity of jewellery may be treated as disclosed. Meaning thereby, that having regard to the status of the family, larger quantity of jewellery, larger than the one declared in the wealth tax return, may not be seized.The Ld.Counsel submitted that the assessee belongs to an affluent business family and is a veteran industrialist and controls various companies under the control/ management of KK Modi group which has varied business interests. It was submitted that the assessee is more than 70 years old and got married way back in the year 1961 and that the assessee and his family members give/ receive jewellery as gift on various ceremonies/ occasions/ festivals. Thus, having regard to the aforesaid factors relating to the status of the assessee's family, jewellery weighing 6,716.700 gms cannot be considered as undisclosed.

8.9 On the basis of the above, it was vehemently contended that the case of the assessee was squarely covered by

the aforesaid decisions, in so far as the total jewellery *(both in terms of weight and value)* declared by the assessee and his family members far exceeds the jewellery physically found during the course of search and thereby benefit of such excess jewellery declared should be allowed and addition cannot be made merely on the ground that the assessee could not lead evidence for conversion or remaking of the jewellery. It was also pointed out that most of the jewellery predominantly belonged to Mrs. Bina Modi, wife of the assessee and the assessing officer has merely proceeded to presume that the entire jewellery found short belonged to the assessee, without appreciating that jewellery belonging to the assessee's wife and daughter also formed a part of the jewellery that was found and seized during the course of search conducted in the case of the assessee and accordingly, the addition made solely in the hands of the assessee was not at all justified, more so when the value of jewellery declared by the assessee and his family members in the wealth tax returns filed for assessment years 2012-13 and 2013-14 has been consistently accepted by the assessing officer after due application of mind and no addition has been made on account of unexplained jewellery.

8.10 In rebuttal, the Ld. Departmental representative vehemently relied on the orders of the lower authorities.

8.11 We have carefully considered the rival submissions and the relevant material and ratio of the orders and judgment relied by both the parties, at the very outset, we note that undisputedly the quantum of jewellery declared in the wealth tax returns of the assessee and his family members was much higher than the jewellery found during the course of search. CBDT Instruction dated 11-5-1994 provides that no seizure should be made in the search for the jewellery held by the ladies at 500 gms, girls at 250 gms and males at 100 gms each. Though the Instruction speaks of not seizing the same, the extended meaning of the same shows the intention that the jewellery is to be treated as explained one and is not to be treated as unexplained for the purpose of Income-tax Act. This instruction came to be considered by several Benches all over India in which it has been held that it would be relevant for the purposes of making addition as well. The Hon'ble Rajasthan High Court in the case CIT v. Kailash Chand Sharma 147 Taxman 376 has upheld this view. When this instruction is applied to the facts of the case, we observe that the possession of gold jewellery of

38,748.28gms, which is far less than declared jewellery of 46,634.842 gms it cannot be held to be unexplained.

8.12 Further, in so far as the allegation of mismatch of description of jewellery, we are of the view that it is well-known fact that Indian ladies keep changing design of jewellery from time to time. Further, the said fact was also stated by the assessee's wife during the course of statement recorded during the course of search and evidence in support of such remaking/conversion was also filed before the assessing officer, which was not all considered. Having in mind detailed explanation rendered by the assessee we are inclined to treat the entire jewellery found with assessee as fully explained.

8.13 In similar circumstances, the coordinate Delhi Bench of the Tribunal in the case of Smt. Krishna Wanti Batra (supra), deleted the addition. In that case, pursuant to search in the premises of the assessee, Revenue found jewellery worth Rs.13,89,530. The assessee stated that a part of jewellery belonged to her daughters-in-law and married daughter. The Assessing Officer found the entire jewellery except for value of Rs.1,66,348 as explained and consequently added the aforesaid amount to the income of assesse. The assessment was confirmed

on appeal by the Commissioner (Appeals). On further appeal to the Tribunal, the assessee contended that the addition made was totally unjustified as she had, in her return of wealth for the assessment year 1984-85, filed on 13-11-1984, i.e., much before the search, disclosed jewellery having gross weight of 2,888.8 gms, which was more than the total jewellery found during the course of search. In this regard, the Tribunal further held that the assessee was entitled to benefit of weight of jewellery disclosed in the returns as it is a well-known fact that Indian ladies keep changing design of jewellery from time to time. Accordingly, the Tribunal directed the addition made in the hands of the assessee to be deleted. The relevant findings of the Tribunal in this regard are reproduced as under:

> *"……..*
>
> *4. Shri R.K. Khiwani, CA, during the course of hearing of appeal, submitted that addition made is totally unjustified as the assessee in her return of wealth for the assessment year 1984-85 filed on 16th Nov., 1984, i.e., much before the search, had disclosed jewellery having gross weight of 2,888.8 gms. which was more than total jewellery found in the search. However, instead of considering aforesaid latest return or valuation report, the AO wrongly considered valuation report for assessment year 1978-79 and thus did*

not give benefit of item disclosed which had slight variation in the description. The Revenue authorities should have given benefit of weight of jewellery disclosed while determining the jewellery possessed by the assessee and her family members. The learned counsel for the assessee further explained that the assessee had 2,888.8 gms. gross and 2779.300 gms. net weight of jewellery as per her return. The jewellery found at the time of search was much less as per the following details:

Gross weight (in gms.)	*Net weight (in gms.)*
1483.000	*1428.100*
1238.800	*1214.400*
124.300	*124.300*
2846.100	*2766.800*

It was explained that above explanation was duly submitted before the AO but was not objectively considered by her. The AO went by order passed under section 132(5) which is only a summary assessment. Detailed explanation filed on 18th Nov., 1985, was also not considered. He drew my attention to valuation report filed in the case of the assessee for assessment year 1984-85 as also detailed explanation available at pp. 104 to 113 of the paper book. The learned Departmental Representative relied upon impugned orders of the Revenue authorities.

5. I have given careful thought to the rival submissions of the parties advanced before me. It is well known that order under section 132(5) is to be passed within three months of

the seizure to decide in a summary manner whether the seized assets are to be released or retained. Such an order has limited scope and in most of the cases, these are passed to retain the seized assets. Similar is the position of an order passed under sections 132(11) and (12) of the IT Act. I am, therefore, of the view that Revenue authorities were not justified in sustaining addition in dispute solely on the basis of finding recorded in orders passed under sections 132(5) and (12) of IT Act. The detailed explanations of the assessee are not shown to be objectively considered by the Revenue authorities. It is further not clear from record as to why benefit of jewellery disclosed by the assessee in assessment year 1984-85 in the return of wealth submitted before the date of search, was not allowed. Likewise limited benefit has been allowed to other family members and not as claimed by them.

6. It is further clear from record that jewellery of value of Rs.13,89,530 was found from the premises subjected to search. It has been admitted by the Revenue that above jewellery belonged not only to the assessee but to her daughters-in-law and her unmarried daughter. Jewellery of value of more than Rs.12 lakhs has been accepted as explained. The addition in dispute has been made on account of slight variation in description of jewellery disclosed in the reports filed with the return and reports of the Departmental valuers prepared at the time of search. Here again Revenue authorities went back to report for assessment year 1978-79 without considering latest report for assessment year 1984-

85. In my view assessees were entitled to benefit of weight of jewellery disclosed in the returns as it is well-known fact that Indian ladies keep changing design of jewellery from time to time. Having in mind detailed explanation rendered by the assessee (copies available at pp. 104 to 113 of the paper book) I am inclined to treat the entire jewellery found with assessee as fully explained. The addition made in the hands of the assessee for undisclosed income, is unjustified and is directed to be deleted.

7. In the result, the assessee's appeal is allowed."

8.14 In view of the aforesaid, considering the quantum of jewellery declared in the wealth tax returns, quantum of jewellery found and jewellery mismatched, statement of wife of assessee Mrs. Bina Modi and also the status of the assessee's family, we are of the view that there was no warrant to treat part of the jewellery as undisclosed. Accordingly, the addition of Rs.1,12,89,616/- made in the hands of the assessee on account of undisclosed jewellery, is unjustified and is directed to be deleted.

9.0 In the final result, assessee's appeals in ITA No. 2892/Del/2017 for A.Y. 2006-07, ITA No. 2893/ Del/2017 for A.Y. 2007-08 and ITA No. 2894/ Del /2017 for A.Y. 2012-13 are

partly allowed and the Revenue's appeals in ITA Nos. 3951 to 3956/ Del /2017 for A.Y. 2007-08 to 2012-13 are dismissed.

Order pronounced in the open court on 05.07.2019.

Sd/- **Sd/-**

(G.D. AGRAWAL) **(SUDHANSHU SRIVASTAVA)**
VICE PRESIDENT **JUDICIAL MEMBER**

Dated: 5th JULY, 2019
'GS'

Copy forwarded to: -

1) Assessee
2) Respondent
3) CIT(A)
4) CIT
5) DR

By Order

ASSTT. REGISTRAR

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	

Date of dispatch of the Order	