

INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "B": NEW DELHI  
BEFORE SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER  
AND  
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER  
(Through Video Conferencing)

ITA No. 5401 to 5406/Del/2019  
(Assessment Year: 2006-07 to 2011-12)

DCIT, Circle-I, LTU, New Delhi	Vs.	Dalmia Bharat and Industries Ltd, 11 <sup>th</sup> & 12 <sup>th</sup> Floor, Hansalaya, 15, Barakhamba Road, New Delhi PAN: AAACD2281K
(Appellant)		(Respondent)

CO No. 112 to 117/Del/2019  
ITA No. 5401 to 5406/Del/2019  
(Assessment Year: 2006-07 to 2011-12)

Dalmia Bharat Sugar & Industries Ltd. 11 <sup>th</sup> & 12 <sup>th</sup> Floor, Hansalaya, 15, Barakhamba Road, New Delhi PAN: AAACD2281K	Vs.	DCIT, Circle-I, LTU, New Delhi
(Appellant)		(Respondent)

Revenue by :	Ms. Nidhi Srivatava, CIT DR
Assessee by:	Shri S. K. Tulsian, Adv Ms. Ananya Rath, Adv Ms. Abha Aggarwal, CA Shri Lakshya Budhiraja, CA
Date of Hearing	18/06/2021
Date of pronouncement	13/09/2021

O R D E R

PER PRASHANT MAHARISHI, A. M.

01. These are the six appeals filed by The Deputy Commissioner Of Income Tax Circle -1 LTU , New Delhi [ The Id AO ] in the case of Dalmia Bharat Sugar & Industries Ltd. [the Assessee] against the orders dated 29.03.2019 passed by the Ld. Commissioner of Income Tax (Appeals)-22, New Delhi [The Id CIT(A)] for A.Ys 2006-07 to 2011-12. The Id CIT (A) allowed the appeals of the assessee made

before him against orders passed u/s 153C r.w.s 143(3) of the Income-tax Act, 1961 [The ACT] dated 30.03.2015 by the Ld. Ld AO.

02. Assessee has filed 6 cross objections [CO] in these appeals filed by the learned AO.
03. Since the issues involved in the Appeals and Cross-Objections for all these Assessment Years (A.Ys) are based on common facts and are interconnected, parties also made common submission before us, therefore all these appeals and Cos are disposed of by this common order.
04. The learned AO has raised the following grounds of appeal in ITA No. 5401/Del/2019 for the Assessment Year 2006-07:-

"1. Ld. CIT (A) erred both in law & on facts in deleting the addition on account of cash transaction of Rs. 22,80,39,000/- in assessee's hands on protective basis, only on the basis that cash book found in Pen drive do not belong to assessee company, sole basis of such finding was order of Hon'ble Settlement Commission u/s 245 D(4) of the I.T.Act in case of Yadu Hari Dalmia, Gautam Dalmia, Puneet Dalmia & Jai Hari Dalmia, without realizing the facts that on the basis of same cash book found in pen drive, these 4 individuals accepted unaccounted income of Rs. 90 Crores & that employees of the company who maintained such cash book of unaccounted cash transaction namely Joy deep Basu, N. K. Berry, Sanjay Mitra & Director of company Sh. Puneet Dalmia accepted such unaccounted transactions in their statements and such order of settlement commission do not categorically state whether such 90 crores covers all entries in such unaccounted cash book whose total according to director's of assessee company was Rs. 649.18 crore.

2. Whether Ld. CIT (A) erred both on facts & in law in deleting addition of Rs. 22,80,39,000/- merely on the basis of order of Hon'ble Settlement Commission, without appreciating that entire order of Settlement Commission is silent on the source of such unaccounted income as to how such huge income was earned by 4 individuals when there was clear proof in the cash book found in pen drive that such unaccounted income was generated in companies run by the group namely Dalmia Bharat Sugar & Industries Ltd. [erstwhile Dalmia Cement(Bharat) Limited] which was the holding company."

05. The assessee has raised the following grounds of appeal in CO No. 112/Del/2019 for the Assessment Year 2006-07:-

"1. That, the Ld. CIT(A) while correctly deleting the addition of Rs. 22,80,39,000/- made by the A.O on the basis of the alleged entries in the pen-drive seized from the premises of Sri Joydeep Basu by recording a categorical finding that

*impugned entries in the seized pen-drive do not belong to the Assessee- Company but to the applicants before the Hon'ble Settlement Commission (i.e. Sri Yadu Hari Dalmia & Sri Gautam Dalmia), erred in not quashing the Assessment Order in the case of the Assessee-Company for lack of valid jurisdiction u/s 153C of the Act."*

06. Identical grounds are raised by the parties for other Assessment years also.
07. It is important to note down the history of the case and corporate restructuring/reorganization has been carried out in the group concern.
- a. The Assessee, M/s. Dalmia Bharat Sugar & Industries Ltd, is a part of the Dalmia Group of Companies. Originally, M/s. Dalmia Cement (Bharat) Ltd. (PAN AAACD2281K) was incorporated in the year 1951.
  - b. W.e.f 07.09.2010, its name was changed to M/s. Dalmia Bharat Sugar & Industries Ltd.
  - c. Prior to 01.04.2010, Dalmia Bharat sugar industries (earlier known as Dalmia Cement (Bharat) Ltd.) was interalia engaged in the business of manufacturing of cement and sugar, power generation, refractory trading, magnesite, travelling agency business etc.
  - d. Under a scheme of arrangement and demerger approved by the Hon'ble High Court of Madras vide its order dated 29.07.2010,
    - a. its cement business was demerged to Avnija Properties Ltd.,
    - b. refractory business was demerged to Dalmia Bharat Enterprises Ltd.
    - c. Thermal power business was transferred to DCB Power Ventures Ltd. (a sub-subsidiary of Dalmia Bharat Enterprises Ltd) effective from 01.04.2010.
  - e. On 31.12.2010, the name of M/s. Avnija Properties Ltd. was changed to M/s. Dalmia Cement (Bharat) Ltd. (PAN AADCA9414C) and it became a wholly owned subsidiary of Dalmia Bharat Enterprises Ltd. [now known as Dalmia Bharat Ltd. (DBL)]. Its name stands changed to Dalmia Cement (Bharat) Ltd. (PAN AADCA9414C) w.e.f 31.12.2010.

- f. Assessee company herein is Dalmia Bharat sugar industries Ltd i.e. DBSIL (i.e. erstwhile Dalmia cement Bharat Limited-PAN AAACD2281K).
- g. Search and seizure operations u/s 132 of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') was conducted in the 'Dalmia Group of cases' including the cases of Dalmia Bharat Enterprises Ltd & the Dalmia cement Bharat the limited (new) and the premises of the directors/promoters namely Mr. Yadu Hari Dalmia & Mr. Puneet Dalmia of the Dalmia Group Companies on 20th January 2012, 27 & 28<sup>th</sup> January 2012.
- h. Search proceedings in case of the group were concluded on 17th March 2012.
- i. Assessee Company was not covered under the search action.
- j. Searches were also conducted at the residences of employees of group companies on 27th and 28th January 2012. Bank lockers mostly held in the names of the following employees of group company i.e. Dalmia Bharat Enterprises Ltd were also subjected to search:
  - (i) Shri Sanjay Mitra
  - (ii) Shri N. K. Berry
  - (iii) Shri Joydeep Basu
- k. There is no dispute that none of the aforesaid persons is employees of the Assessee Company.
- l. However, one pen drive was seized from Mr. Joydeep Basu containing some data its taxability is the cause of disagreement between revenue and the assessee.

08. Brief facts of the case shows that

- i. The Ld. A.O per order u/s 153C/143(3) dated 30.03.2015 for the A.Ys 2006-07 made an addition on 'protective basis' of Rs 22,80,39,000/- on account of alleged total receipts (after extrapolation) purportedly recorded in a cash book contained in a pen drive. This pen drive was seized in course of search from the

premises of Sri Joydeep Basu, an employee of group company, M/s Dalmia Bharat Enterprises Ltd of Rs 22,80,39,000/- .

- ii. identical addition was made on substantive basis in the case of another group company m/s Dalmia Cement (Bharat) Ltd. (DCBL) by the Ld. DCIT, CC-2, New Delhi for A.Ys 2006-07 vide order passed u/s 153A/143(3) on 31.03.2014.
- iii. Further identical additions on protective basis were also made by the Ld. DCIT, CC-2, New Delhi vide orders passed u/s 153A/143(3) for A.Ys 2006-07 to 2012-13 in the case of Sri Joy deep Basu.
- iv. Further identical additions on protective basis were also made by the Ld. DCIT, CC-2, New Delhi vide orders passed u/s 153A/143(3) for A.Ys. 2011-12 & 2012-13 in the case of Dalmia Bharat Enterprises Ltd.
- v. Thus, Revenue based on the above pen drive seized has made Substantive addition in the hands of one assessee i.e. Dalmia cement Bharat Limited. Protective addition is made in the hands of three different assessee namely [1] Mr. Joydeep Basu, from whom pen drive was seized, [2] Dalmia Bharat Enterprises Limited and [3] Dalmia Sugar & Industries Limited [Assessee before us].
- vi. Mr. YaduHari Dalmia along with three other applicants filed a petition before Income tax Settlement commission owning the contents of pen drive and disclosing a sum of Rs 90 Crores. Assessee claims that all impugned amounts involved in these appeals are included by Mr. Yadu Hari Dalmia and Mr. Gautam Dalmia in their application before Income tax Settlement Commission [ITSC]. ITSC passed an order u/s 245D (4) on 13/02/2015. It held that the contents of the impugned cashbook in the seized pen-drive belonged to Sri Yaduhari Dalmia & Sri Gautam Dalmia, (i.e. the promoters of the Dalmia group of companies) in their individual capacity. The ITSC vide its final order u/s 245D(4) had accepted the disclosure made by the said Mr. Yaduhari and Mr. Gautam Dalmia on the basis of the impugned pen-drive and the said order has attained finality by virtue of provision of section 245-I of the Act.
- vii. Further Substantive addition in the hands of Dalmia Cement Bharat Limited and protective additions made in the hands of [1]

Shri Joydeep Basu & [2] Dalmia Bharat Enterprises Limited were deleted by the Ld. CIT (A)-29, New Delhi vide separate orders passed in April & May 2015.

- viii. Reasons for deletion of addition is that Income-tax Settlement Commission had held that the contents of the impugned cash book in the seized pen-drive belonged to Shri Yaduhari Dalmia & Sri Gautam Dalmia, in their individual capacity.
- ix. Further in all these cases, against orders of the Id CIT (A) for all these assessee for All these assessment years [i.e. AY 2006-07 to 2011-12], revenue has not filed any second appeal before the Income tax Appellate Tribunal.
- x. The ITSC vide its final order u/s 245D(4) had accepted the disclosure made by the said Mr. Yaduhari Dalmia and Mr. Gautam Dalmia on the basis of the impugned pen-drive and the said order has attained finality by virtue of provision of section 245-I of the Act.
- xi. Revenue has also not challenged the order of the Income tax Settlement commission before Honourable High court. Further, there is no allegation that such order is obtained by applicants by frauds or misrepresentation of facts.
- xii. Thus, the
  - a. Appellate orders passed by the Ld. CIT (A)-29 in the cases of Dalmia cement Bharat Limited, Dalmia Bharat Enterprises Limited, and Mr. Joydeep Basu deleting identical substantive & protective additions made based on the impugned pen-drive, and
  - b. order of settlement commission passed in the case of four applicants Shri Yaduhari Dalmia and Others where contents of pen drive was held to be belonging to them and disclosure made therein by the applicants of Rs 90 Crores was held to be full and true

has been accepted by the Department as final and conclusive.

09. Despite, Ld AO having accepted the order of the Ld. CIT(A)-29 deleting identical substantive additions in the case of Dalmia Cement Bharat Limited and the protective additions in the cases of Dalmia Bharat Enterprises Limited and Mr. Sri Joydeep Basu on the ground

that the contents of the impugned cash book in the seized pen-drive belong to the promoters of the Dalmia Group in their individual capacity and not to any of the companies of the Dalmia Group, deletion of identical protective additions in the case of the Assessee on identical grounds by the Ld. CIT(A)-22 is challenged by the Department in the present appeals before us.

10. As in the case of the Assessee, the Ld. CIT (A) while deleting the quantum additions made by the Ld. A.O. did not adjudicate on the legal ground raised by the Assessee challenging the jurisdiction assumed by the Ld. A.O. u/s 153C of the Act, but deleting the quantum additions made on protective basis by the Ld. A.O., the Assessee has agitated the jurisdiction assumed by the Ld. A.O. u/s 153C vide its Cross-Objections.
11. As stated, a pen drive was found from the premises of Mr. Joydeep Basu. On the content of pen drive, statements of the employees of the group companies were recorded. Based on data contained in the pen drive as well as statements of employees of the group, LD AO in case of Dalmia cement Bharat limited held that the pen drive contains the data belonging to Shri Puneet Dalmia, which shows details of unaccounted cash received, and cash payment. Statement of suppliers of bags was also recorded. The AO of that company was also of the view that cement is the only business of the group earning money and therefore the cash is generated from cement business. Therefore, the learned AO of Dalmia cement Bharat Limited extrapolated the data of the pen drive and made an addition to the total income of Dalmia cement Bharat limited on substantive basis.
12. Similar additions were made on protective basis in the hands of two different assesses [1] Dalmia Bharat Enterprises Ltd [2] Mr. Joydeep Basu.
13. However, before the additions on substantive basis or on protective basis are made in the hands of Dalmia cement Bharat Limited, Dalmia Bharat Enterprises Ltd, Mr. Joydeep Basu, four applicants assesses namely Mr. Yaduhari Dalmia, and Mr. Gautam Dalmia filed an application before the income tax settlement commission on 28/10/2013. They offered an unaccounted income of ₹ 90 crores based on the pen drive found from Mr. Joydeep Basu, cash found etc.

14. Income tax Settlement commission admitted the application of the applicant on 1/11/2013 u/s 245D (1). Revenue submitted report u/s 245D (2B) of the act on 2/12/2013. In this report revenue challenged the application itself being invalid, gave its report on data contained in pen drive and cash seized. Settlement commission passed an order u/s 245D (2C) of the act on 18/12/2013. Settlement commission passed the final order u/s 245D (4) on 13/2/2015 accepting the disclosure of income made by Mr. Dalmias. Thus, the matter before the settlement commission reached finality.
15. However, the learned assessing officer in case of Dalmia cement Bharat the limited passed order u/s 153A read with Section 143 (3) on 30 March 2014 making similar addition on substantive basis. He also passed similar orders in case of Dalmia Bharat Enterprises Ltd and Mr. Joydeep Basu making same additions on protective basis on 31/3/2014.
16. The learned AO DCIT, Circle – 1, LTU, New Delhi issued notices u/s 153C on the basis of satisfaction note dated 25/3/2014 contending that the impugned pen drive and the content thereof belonging to Dalmia Bharat sugar industries Ltd.
17. The same officer has also held in case of three different assesses that the pen drive as well as data contained therein is belonging to Dalmia Bharat Enterprises Ltd, Dalmia Bharat cement Ltd and Mr. Joydeep Basu.
18. On appeal, in all these three cases before the learned CIT – A – 29, New Delhi, the additions were deleted. The learned CIT – A in those cases noted that
  - a. the impugned addition is forming part of the settlement commission order,
  - b. ITSC is a higher forum,
  - c. ITSC has recorded a categorical finding that the entries in the cash book and that of the pen drive belonged to Shri Y H Dalmia and Sri Gautama Dalmia
  - d. Income contained in the pen drive was owned by Sri Yaduhari Dalmia and other applicants

e. Pen drive does not belong to those assesses in whose hand substantive addition as well as protective additions are made.

19. Admittedly, the revenue has not challenged these orders of the learned CIT (A). These facts were also confirmed by the learned Asst Commissioner of income tax circle – 1, Trichy to the learned CIT (A) 22 in confirming that no second appeal has been preferred by revenue against the order of CIT (A), 29 in case of Dalmia cement Bharat Limited as well as Dalmia Bharat Enterprises Ltd and Mr. Joydeep Basu.
20. However, Id AO of assessee was of the view that the pen drive as well as the data contained therein belongs to the assessee. Therefore, he issued notices u/s 153C on 31/3/2014 for assessment year 2006 – 07 to assessment year 2011 – 12 based on the satisfaction note dated 25/3/2014 received from The Deputy Commissioner Of Income Tax, central circle – 2 contending that the impugned pen drive and the content thereof belong to the assessee company. The assessee questioned the notices and requested the learned AO to provide the basis for arriving at the satisfaction that these materials belong to the assessee. The AO on 4/2/2015 gave the statement of Mr. Joydeep Basu and the data/transactions recorded in the pen drive stating that these transactions belong to the assessee. The AO was also relying on an email communication from another employee of Dalmia Bharat Enterprises Ltd , Mr. Sanjay Mitra, contained in the above pen drive where there was a proposal to buy back the shares of assessee company as well as of another company i.e. OCL being bought back from GFL. Thus, it was stated by the AO that the pen drive and the contention of the pen drive belong to the assessee company.
21. The assessee objected to the above notice on 16/2/2015 stating that pen drive was also simultaneously alleged to be belonging to [1] Messer's Dalmia cement Bharat Limited and [2] Dalmia Bharat Enterprises Ltd and [3] Mr. Joydeep Basu and substantive and protective additions have been made in the hands of various assesses on the basis of the very same pen drive. Therefore it cannot be said that such pen drive also belong to the assessee. Assessee also submitted that The settlement commission has already held that the pen drive in the data contained in the pen drive belonged to Mr. Y H Dalmia and Mr. Gautam

Dalmia as per order dated 13/2/2015. Assessee also drew attention of the learned AO about the order of the settlement commission, the orders of the assessment in case of Dalmia cement Bharat Limited, orders in the case of Dalmia Bharat Enterprises Ltd and Mr. Joy the Basu. It was also submitted that according to the provisions of Section 245I of that the order of the settlement commission shall be conclusive and final as to the matter stated therein. It was submitted that the matter is similar in all those cases of all these assessee is which are also considered by the AO in the case of the assessee.

22. The learned assessing officer rejected objections of the assessee. He made an identical addition in the hands of the assessee on protective basis for assessment year 2006 – 07 to 2011 – 12 by passing an order u/s 153C read with Section 143 (3) on 30<sup>th</sup> of March 2015. Identical sum was added in the hands of assessee, which were added in the hands of [1] Dalmia Bharat Enterprises Ltd and [2] Mr. Joydeep Basu on protective basis and [3] Dalmia cement Bharat Ltd on substantive basis. Learned assessing officer passed an order u/s 153C of the income tax act wherein the addition of ₹ 228,039,000/- was made in the hands of the assessee whereas the assessee originally filed its return of income at ₹ 613,939,731 /- which was assessed u/s 143 (3) or u/s 250 of the act at ₹ 71,17,88,899/- assessing income of the assessee at ₹ 939,827,900/-. Identical additions were also made in the hands of the assessee for assessment year 2007 – 08 to 2011 – 12.
23. The assessee preferred an appeal before the learned CIT – A challenging the order of the learned AO. Assessee contended that the
- i. satisfaction recorded by the assessing officer in the case of searched person was not brought on record by the AO of the assessee and only a summary was provided to the assessee.
  - ii. impugned pen drive did not belong to the assessee since the same was neither seized from the possession of the assessee nor any of its promoters but from the residence of Mr. Joydeep Basu
  - iii. Mr. Basu is not at all related to the assessee or an employee of the assessee
  - iv. Provisions of Section 153C are not satisfied.

- v. Same addition and been made in the case of numerous assesses holding that the pen drive and data contained therein belonging to those assesses also.
- vi. additions are made in the hands of various assesses on protective basis and on substantive basis which are deleted by the learned CIT – A in those cases
- vii. Such orders of Id CIT (A) in those cases have not been challenged before the higher forum and therefore they have become final.
- viii. There is no independent application of mind by the learned assessing officer as the part of the order reproduces the orders passed in another assessee and Id AO merely concurs with that view without giving any reasons.
- ix. Issue is squarely covered by the decision of the settlement commission which has already become final and therefore same addition cannot be made in the hands of the assessee which has already been included in the settlement petition of other assesses.
- x. On quantum, extrapolation of the figures recorded in the pen drive is beyond the jurisdiction of the AO.
- xi. Commenting on the data in pen drive, inflows have been taxed however, that the outflow has not been granted as deduction.
- xii. addition has been made with respect to the over invoicing of taking material on the basis of the statement of the two different persons behind the back of the assessee neither the copy of such statements were provided nor the opportunity of cross-examination was also given and therefore there is a clear-cut violation of the principles of natural justice.

24. The learned CIT – A passed an order on 29 March 2019 for assessment year 2006 – 07 to 2011 – 12 deleting the addition holding that the settlement commission vide order dated 13/2/2015 has already categorically found that the entries in the cash book and 125 pages of seized pen drive on the basis of which the impugned addition has been made in the hands of the assessee belonged to Mr. YH Dalmia and Mr. Gautam Dalmia. Hence, addition made in the hands of the assessee was liable to be deleted as the matter has become final. He also noted that the CIT – A – 29 has passed the orders in the case of [1] Dalmia

cement Bharat Ltd [2] Dalmia Bharat Enterprises Ltd and [3] Mr. Joydeep Basu and deleted all the substantive and protective additions. These orders of Id CIT (A) -29 have not been challenged before the higher forum. Therefore, these orders of the learned CIT – A in those cases have become final. Further, the order of the settlement commission has not been also challenged by the revenue and therefore the addition in the hands of the assessee cannot be made.

25. However, learned CIT appeal did not adjudicate the other grounds of the assessee is arguments regarding satisfaction note raised as per ground number 1, the issue that the material do not belong to the assessee as per ground number 2 and non application of mind as per ground number 3. Therefore, the assessee is also aggrieved as the learned CIT – A did not adjudicate on the legal arguments with respect to the validity of the assessment challenged before him.

26. On the merits and legal grounds Id Cit (A) held as under :-

“6. The relevant portion of the AO is as under:

The AO has framed-assessment. by placing reliance on the statement of the various officials recorded during search and survey operations, findings, observations of the DCIT, Central Circle - 26, New Delhi in the assessment order of Dalmia Cement Bharat ltd for the AY 2006-07 in connection with the proceedings u/s 153A of the Act in the case of the assessee company for AY 2006-07.

AO observed that a pen drive was found from residence of Joydeep Basu, an employee of Dalmia Group. The said pen drive contained details of various unaccounted cash transactions. AO observations regarding it are as under:

Cash Transactions:-A perusal of data contained in the pen drive reveals that it contains complete data of cash transactions, which was being maintained out of the books. It is observed that substantial amount of cash was received and paid to different parties on day-to-day basis. Different sheets of pen drive contain data for the period 03.11.2005 to 31.03.2006, 01.04.2006 to 29.05.2006, 10.08.2006 to 10.10.2006 and 01.04.2007 to 01.07.2011. i.e. the complete details of inflow and outflow are available for the F.Y. 2007-08, 2008-09, 2009-10, & 2010-11. However, for F.Y. 2005-06, 2006-07 and F.Y. 2011-12 part details are available. In the absence of the

complete data for these financial years, extrapolation has to be done on the basis of the available information.

S. No.	Financial Year	Assessment Year	Fresh inflow of cash
1	2005-06	2006-07	22,80,39,000
2	2006-07	2007-08	22,32,39,870
3	2007-08	2008-09	19,77,19,669
4	2008-09	2009-10	59,70,62,329
5	2009-10	2010-11	97,66,34,440
6	2010-11	2011-12	80,78,23,293
7.	2011-12 (up to January, 2012	2012-13	64,90,84,323
	Total		367,96,02,924

The year-wise computations of the net receipts after extrapolation come out are as under:

The AO relying on the finding of the AO, CC-2, made addition of the aforesaid sum in the hands of the appellant in various years on protective basis.

#### FINDING:

7. The only issue involved in this case pertains to addition on account of cash books entered in pen-drive of Rs.22,80,39,000/-. I have gone through the finding of the AO, submission of the appellant and have considered the facts and evidences available on record.

7.1 I have also perused the order of Settlement Commission dated 03.03.2015, issued under section 245D (4), in respect of settlement application filed by S/Sh. Yadu Hari Dalmia, Gautam. Dalmia, Puneet Dalmia, Jai Hari Dalmia, (Directors in Dalmia group) and I have also gone through the order of CIT(A)-29, New Delhi in the case of Dalmia Cement Bharat Limited - searched entity, wherein aforesaid additions were made on substantive basis. I have also gone through the order of CIT (A)-29, New Delhi in the case of Dalmia Bharat Limited - searched entity, wherein aforesaid additions were made on substantive basis.

7.2 It would be useful to refer to the facts and findings recorded by CIT(A)-29 in his order in Appeal no. 136/2014-15/CIT(A)-29, AY 2006-07, wherein the aforesaid addition made

on substantive basis has been discussed threadbare in detail. Extract from same is as under:

I have also perused the order of Settlement Commission dated 03.03.2015, issued -under section 245D(4), in respect of settlement application filed by S/Sh Yadu Hari Dalmia, Gautam Dalmia, Puneet Dalmia, Jai Hari Dalmia, (Directors in Dalmia group).

I have also CIT-in (Central) report dated 16.05.2014, 07.07.2014 and 12.09.2014 wherein CTT-m (Central) on the basis of evidence and statement recorded during the search of key employees etc. have time and again emphasized that:-

(a) the entries in cash book and 125 pages found in pen drive which was seized from the residence of Mr. Joydeep Basu, belonged to the appellant only

(b) the cash of Rs.13,75,88,000 seized from various lockers belongs to the appellant and not to S/Sh. Yadu Hari Dalmia and Gautam Dalmia and '

(c) therefore the disclosure' of Rs.90 cr. (made by the 2 applicants namely S/Sh Yadu Hari Dalmia and Gauthm Dalmia, on the basis of entries recorded in the cash book and 125 pages found in the seized pen drive and the cash found in the lockers of employees, should not be accepted

6.1 It is noted that the Hon'ble Settlement Commission, after considering the CIT, Central (HI) various reports dated 16.05.2014, 07.07.2014,12.09.2014 and 17.09.2014 and also after giving the department the opportunity of verifying the entries recorded in cash book and 125 pages found in the pen drive with the cash book (on the basis of which Rs.90 cr. was surrendered by the 2 applicants held that both:

(i) the entries in the cash book and other documents (125 pages) found in the pen drive seized from the residence of Mr. Joydeep Basu and

(ii) the cash found in the lockers held in the name of the employees, belonged to S/Sh. Yadu Hari Dalmia and Gautam Dalmia

The relevant gist of para 9 of settlement order dated 03.03.2015 on both the above issue reads as under.” ...we have carefully considered the submissions made by the counsel of the applicants and the CIT (DR). We have also gone through the various details, written submissions, and reports filed by both the parties during the course of the various proceedings in these cases. We would like to record our findings and decisions on the various issues involved in the case of the above-mentioned four applicants as hereunder A. Issues pertaining to the seized pen drive

".....We are given to understand that the department has taken a definite stand that the seized pen drive pertains to Dalmia group of Cos. in particulars. Dalmia Bharat Enterprises Lid, and Dalmia Cement Bharat Ltd. as two additions of Rs.84 crores and Rs.55 crores have been made in both the cases in the assessment order passed under section 153A/143(3) for the Assessment Year 2011-12 on substantive /protective basis, apart from making an addition for Rs.3,67,96,02,924 in Assessment Years 2006 to 2012-13 in both the cases on protective/substantive basis on account of the cash book entered in the pen drive. It is understood that the above companies have filed appeals- against the above assessment orders, which are stated to be pending before the Income Tax appellate Tribunal. We may mention that the above two companies of Dalmia group have not filed any settlement applications before the ITSC. Hence, we refrain from giving any finding in respect of the ownership, information contained in the seized pen drive other than disclosed in these application, pertaining to the above two companies and their implications from income tax angle. However, we cannot ignore or brush aside the explanation/clarifications furnished by the above applicants, particularly in respect of 125 pages of the above seized pen drive of which printouts were

furnished to the applicant by the department, as the applicants have compared and correlated various transactions appearing in the cash book in the seized pen drive vis-a-vis the settlement applications filed in their cases, particularly with reference to the working and basis of the unaccounted income arising from the same, which mainly constitutes the additional income offered by the above applicants before the commission.. It is true that the CIT (DR) and. the AO have brought to our notice certain transactions, particularly with reference to certain investments in shares and mutual funds made by the Dalmia group of companies, appearing in the seized pen drive, which are however, claimed to be appearing in the disclosed balance sheets of the said companies. As regards some payments appearing in the name of "JR" account, it has been mentioned by the applicants in their comments that the said transactions are figuring in the cash flow of the applicants. Similarly, various receipts appearing in different names are also stated to have been taken into account in the cash flow. It may not be out of place to mention here that on the basis of the said seizure pen drive, the department has made several additions on a protective basis in the hands of Sh Joydeep Basu also. To our specific aueru made during the course of the present proceedings, whether, the commission should ignore the additional income offered by the applicants, having correlation with various transactions appearing in pages 1-125, which have owned up as discussed earlier in the seized pen drive. in view of the departments consistent stand that the seized pen drive belongs to Dalmia group of companies only; there was no affirmative and categorical response from the side of the department In view of the facts and circumstances of the case as discussed above, we accept the disclosure made in the SOF of the applicants Sh. Yadu Hari Dalmia and Sh Gautam Dalmia including 125 pages of the pen drive.

6.2 From the perusal of the order of Settlement Commission since a categorical findings have been given by the Hon'ble Settlement Commission (which

is a body superior to the undersigned) that the entries in the cashbook and 125 pages which is found in the pen drive on the basis of which addition of Rs.3,67,96,02,924 is made in the hands of the appellant in Assessment Years 2006-2007 to 2012-13 and also cash in the lockers are held to be belonging to S/Sh Yadu Hari Dalmia and Gautam Dalmia and not to the appellant, hence the AO's action in adding Rs.22,80,39,000 made on the basis of pen drive (cash book and 125 pages) does not appear to be on sound footing.

It is also pertinent to mention here that while giving the above finding the department was given the due opportunity to verify the transactions recorded in the cash book and 125 pages in Pen drive, (on the basis of which the AO has made the additions in the year under consideration) with the entries in the cash book which was filed by the 2 applicants (on the basis of which they surrendered Rs.90 crore) no adverse findings were brought to the notice of the Hon'ble Settlement Commission.

Hence, in view of the above findings of the Settlement Commission that the entries in the cash book and 125 pages found from the files stored in the pen drive, seized from the residence of Mr. Joydeep Basu, does not belong to the appellant, the addition of Rs.22,80,39,000 made in the appellant's hand on the said "pen drive" deserves to be deleted.

8.1 In the result, the appeal is allowed.”

7.3 During the course of appellate proceedings, AR of the appellant further submitted that the department has not preferred any appeal against the following orders;

- Order of the settlement commission dated 03.03.2015, issued under section 245D(4), in respect of settlement application filed by S/Sh. Yadu Hari Dalmia Gautam Dalmia, Puneet Dalmia, Jai Hari Dalmia (Directors in Dalmia group)
- Various orders passed by CIT (A)-29 in respect of all substantive and protective additions made by AO, CC-26 on basis of entries found in the cashbook in the pen drive seized, in the hands of Dalmia Cement Bharat Limited and Dalmia Bharat Limited.

7.3.1 It is further submitted that income tax department has accepted the finding that all the transactions recorded in cashbook found in the pen drive belong to the two promoters. Therefore, these findings have become final and absolute, the protective addition made in the hands of appellant do not survive.

7.4 During the appellate proceeding a letter dated 24.01.2019 was also sent from my office to ACIT, Circle 1(1), Tiruchirapally, Tamil Nadu, present AO of Dalmia Cement Bharat Limited and Dalmia Bharat Limited to confirm whether any appeal has been filed by the income tax department against the aforesaid orders. The ACIT, Circle 1(1), Tiruchirapally, Tamil Nadu has vide his letter dated 31.01.2019 confirmed that no appeal has been filed before any appellate authorities in respect of the orders of CIT(A)-29, Delhi.

7.5 On perusal of the above findings as well as the order passed by the Hobbie Settlement Commission dated 03.03.2015, issued under section 245D(4), in respect of settlement application filed by Sh. Yadu Hari Dalmia, Gautam Dalmia, Puneet Dalmia, Jai Hari Dalmia, (Directors in Dalmia group) and appellate orders passed by CIT(A)-29, Delhi in the other cases of Group Companies, I find that entries in the cash book found in the pen drive does not belong to the appellant. As in the appellant's hand only protective addition is made and substantive addition made in the case of Dalmia Cement(Bharat) Ltd. Has already been deleted by CIT(A)-29, therefore, following the order of Ld. CIT(A), the addition of Rs.22,80,39,000/-, is not sustainable. Therefore, the addition made in the appellant's hand is deleted.

7.6 Since, the addition made by the AO is deleted, therefore, appellant's arguments regarding satisfaction note recorded is academic in nature, therefore are not being adjudicated."

27. Therefore, the learned assessing officer aggrieved with the above order has preferred this appeal before us. The assessee aggrieved with the order of the learned CIT – A with respect to not deciding legal grounds on the Lack of valid jurisdiction u/s 153C of the act as well as raising the grounds that orders are without jurisdiction, non-est and void ab initio.
28. Meanwhile the assessee has raised an additional ground for assessment year 2006 – 07 and 2007 – 08 as Under:-

A.Y. 2006-07

*"That without prejudice to the primary ground raised by the Assessee earlier in its Memorandum of Cross Objections, the assessment framed by the A.O u/s 153C r.w.s 143(3) of the Income-tax Act, 1961 (the Act) for A.Y 2006-07 is beyond the scope of section 153C of the Act inasmuch as A.Y. 2006-07 is beyond the period of six Assessment Years (being A.Y. 2008-09 to A.Y. 2013-14) to be reckoned with reference to the date of receiving of the seized assets/books of account/documents by the A.O having jurisdiction over the Assessee in terms of the first proviso to section 153C(1) of the Act and such seized assets/documents could come into the possession of the AO of the Assessee only after the recording of satisfaction by the A.O of the searched person which in the instant case is 25.03.2014 and hence the Assessment so framed u/s 153C for A.Y. 2006-07 is barred by limitation, without jurisdiction, non-est and void ab-initio."*

A.Y. 2007-08

*That without prejudice to the primary ground raised by the Assessee earlier in its Memorandum of Cross Objections, the assessment framed by the A.O u/s 153C r.w.s 143(3) of the Income-tax Act, 1961 (the Act) for A.Y 2007-08 is beyond the scope of section 153C of the Act inasmuch as A.Y. 2007-08 is beyond the period of six Assessment Years (being A.Y. 2008-09 to A.Y. 2013-14) to be reckoned with reference to the date of receiving of the seized assets/books of account/documents by the A.O having jurisdiction over the Assessee in terms of the first proviso to section 153C(1) of the Act and such seized assets/documents could come into the possession of the AO of the Assessee only after the recording of satisfaction by the A.O of the searched person which in the instant case is 25.03.2014 and hence the Assessment so framed u/s 153C for A.Y. 2007-08 is barred by limitation, without jurisdiction, non-est and void ab-initio.*

29. The learned authorised representative submitted that all these two grounds raised in the two assessment years are challenging the limitation holding that assessment orders for assessment year 2006 – 07 and 2007 – 08 are barred by limitation. He further submitted that these additional grounds are purely legal in nature and no enquiry on facts is required as all the facts are already on record. Therefore, relying upon the decision of the Honourable Supreme Court in case of National Thermal Power Co Ltd versus CIT [229 ITR 383], he submitted that the question of law arises for which facts are on record of the authorities the question should be allowed to be raised if it is necessary

to assess the correctly tax liability of an assessee in accordance with the law. Therefore he submitted that these additional grounds may be admitted and adjudicate.

30. The learned departmental representative vehemently objected to the additional ground raised by the assessee and submitted that these grounds were never raised before the lower authorities and therefore cannot be now admitted.
31. We have carefully considered the rival contention and perused the additional ground raised by the assessee where we find that these additional grounds are purely raising the question of law for which the facts are on record. It challenges the foundation of the order stating that the orders passed by the learned assessing officer are barred by limitation. Therefore, we admit the additional grounds for both the Assessment years.
32. On coming to the CO and Appeal of Revenue, learned authorised representative extensively referred to the facts of the case. He also referred to the order of the settlement commission passed in case of Sri YH Dalmia and Shri Puneet Dalmia. He further referred to the assessment orders in case of Mr. Joydeep Basu and Dalmia cement (Bharat) Limited for assessment year 2006 – 07. He further referred to the assessment order paragraph number 12.4 at page number [6] wherein the assessment proceedings of Dalmia cement (Bharat) Limited for assessment year 2006 – 07 on the same issue was reproduced by the learned assessing officer. He further referred to page number 12 of the assessment order wherein question number 10 pertaining to the statement recorded of Mr. Joydeep Basu is reproduced wherein the question was asked that a pen drive was found from his possession seized by the search party and to whom this pen drive particularly belongs. In case it belongs to him what are the contents of the pen drive. In the response to that question, he categorically replied that pen drive belongs to him and it contains the data belonging to Dalmia group. He therefore submitted that whether on the basis of this pen drive proceedings u/s 153C can be initiated or not in case of the assessee. He specifically submitted that this pen drive does not belong to the assessee and therefore no proceedings u/s 153C can be initiated in the case of the assessee. Even otherwise he submitted that Shri YH Dalmia

and Sri Puneet Dalmia has filed an application before the settlement commission wherein all these information contained in the pen drive are considered and a disclosure of ₹ 90 crores have been made by them. He further submitted that before the settlement commission, the detailed enquiry was conducted by the Commissioner of income tax and after that, the settlement commission has settled the matter with respect to the above pen drive in the hands of Sri Y H Dalmia and Sri Puneet Dalmia. He further referred to the order of the learned CIT – A wherein in para number 7 he has dealt with this issue. He submitted that the learned CIT – A has deleted the addition precisely for the reason that such settlement application filed by four applicants of Dalmia family has been accepted and final order passed by ITSC, in all these cases these additions were made on substantive basis and these additions have been deleted in the hands of those assessee by the order of the learned CIT – A – 29. He further referred to paragraph number 7.3 of the order of the learned CIT – A where he referred the order of the settlement commission dated 3/3/2015 wherein the two orders

(1) order of settlement commission dated 3 March 2015 u/s 245 (D 4) in respect of settlement application for filed by the four individuals and

(2) various orders passed by CIT – A – 29 in respect of all substantive and protective additions made by the assessing officer – CC – 26 based on entries found in the cashbook in the pen drive seized in the hands of Dalmia cement Bharat Limited and Dalmia Bharat Limited wherein the revenue has been deleted

Thus, revenue has accepted that the findings that all the transactions recorded in cashbook found in the pen drive belong to the two promoters and therefore these findings have become final and absolute and therefore the protective addition made in the hands of the appellant did not survive. He further referred to paragraph number 7.4 of the order wherein the learned CIT – A made a specific reference to query to the assessing officer of Dalmia cement Bharat Limited and Dalmia Bharat Limited to confirm whether any appeal has been filed by the income tax Department against the aforesaid orders of the Id CIT (A) 29. The learned AO of that assessee has sent a letter dated 31/1/2019

confirming that no appeal has been filed before any appellate authority in respect of the orders of CIT – A – 29, New Delhi. He submitted that for these reasons the learned CIT – A has deleted the addition in the hands of the assessee, which was made on protective basis. He also referred to letter written by the Id CIT (A) to the Id AO, Replies of the Id AO to CIT (A) based on inquiry from SEBI and other parties. In the remand, report there is no adverse inference by the Id AO but has accepted the pointed question of Id CIT (A). He submitted that on this count, there is no infirmity in the order of the learned CIT – A and therefore the addition could not have been made in the hands of the assessee and therefore the order of the learned CIT – A deserves to be upheld. He thuds stated that there is no infirmity in the order of the Id CIT (A) in deleting the addition on the merits of the case.

33. With respect to the challenge to the jurisdiction assumed by the learned assessing officer u/s 153C of the income tax act, submission of the Id AR is that

- i. He referred to detailed the date chart and submitted that on 20 January 2012 to 28 January 2012 there is a search and seizure operation u/s 132 in Dalmia group of cases and also the premises of the directors of the company along with the employees of Dalmia Bharat Enterprises Limited. The assessee was not at all covered in the search action. There was a pen drive seized from the premises of employee of another group concern Shri Joydeep Basu on 28<sup>th</sup> of January 2012. On 17<sup>th</sup> of March 2012, search operations on Dalmia group concluded. On 28<sup>th</sup> of October 2013, Shri YH Dalmia and Mr. Goutam Dalmia filed an application before the settlement commission u/s 245C offering an undisclosed income of ₹ 90 crores covering purported entries in the cash book contained in the impugned pen drive seized from the premises of Mr. Basu. On 1 January 2013, the settlement commission, after being satisfied that the applicant had filed the condition u/s 245C (1) allowed the applicants to be proceeded with the application u/s 245D (1) of the act. On 2/12/2013, revenue furnished the report u/s 245D (2B) covering the alleged entries in the impugned pen drive and alleging that the applicant had not made a full and true disclosure. On 12/12/2013, applicants filed the rejoinder on clarifications on issues

raised in the report of CIT u/s 245D. On 18<sup>th</sup>/12/2013, settlement commission passed an order u/s 245D (2C) declaring the applicants' applications as not invalid. The impugned pen drive was acknowledged by the CIT in his report. On 31<sup>st</sup> of January 2014, revenue submitted its report u/s 245D (3) seeking permission to make further inquiries.

- ii. He further submitted that meanwhile, On 25<sup>th</sup> of March 2014, satisfaction note recorded by the learned Deputy Commissioner Of Income Tax Centre Circle (2) [ AO of the searched person] contending that the contents pertaining to the impugned pen drive pertaining to assessment year 2006 – 07 to 2010 – 11 belong to the assessee company.
- iii. On 27<sup>th</sup> of March 2014, the satisfaction was recorded by the assessing officer of the assessee company holding that the pen drive and contents thereof belonging to the Assessee Company and initiated proceedings u/s 153C for assessment year 2006 – 07 to 2011 – 12.
- iv. In case of Dalmia cement Bharat limited for assessment year 2006 – 07 to 2012 – 13 substantive additions were made based on the data contained in the cashbook found in the impugned pen drive. In case of Dalmia enterprises, Bharat limited for assessment year 2011 – 12 and 2012 – 13 and in the case of Mr. Basu for assessment year 2006 – 07 to 2012 – 13 protective additions were made of the same income.
- v. On 31<sup>st</sup> of March 2014, notice u/s 153C was issued to the assessee company alleging that the impugned pen drive and the content thereof belong to the assessee company.
- vi. Meanwhile on 16 May 2014 the revenue filed rule [9] report u/s 245D (3) before the settlement commission in the case of those applicants.
- vii. In addition, on 26<sup>th</sup> may 2014 the settlement commission directed the learned CIT to verify the cashbook submitted by the applicants with the parallel cashbook that of the impugned pen drive seized by the Department.
- viii. On 7 July 2014, the CIT submitted his report for verification wherein apart from challenging the treatment of certain entries in

the cashbook and working filed by the applicants, no dispute was with respect to the data contained in application with the data contained in the pen drive.

- ix. On 16<sup>th</sup> of February 2015, the assessee filed an objection to the issuance of notice u/s 153C contending that Department has failed to prove that the impugned pen drive for the content belong to the assessee company, more so when the said pen drive was also Simultaneously alleged to be belonging to its sister concerns i.e. [1] Dalmia cement Bharat Limited and [2] Dalmia Bharat Enterprises Limited as well as [3] Mr. Joydeep Basu.
- x. Consequently ultimately on 30 March 2015 the assessment orders u/s 153C read with Section 143 (3) for assessment year 2006 – 07 to 2012 – 13 identical duplicating the orders already passed in case of Dalmia cement Bharat Limited for all these years was passed.
- xi. These additions were deleted by the learned CIT – A which is in dispute before us. The learned authorised representative submitted that the grounds of the objections of the assessee with respect to the assumption of jurisdiction u/s 153C of the income tax act were not adjudicated by the learned CIT – A.

34. On the issue of the validity of the orders passed u/s 153C of the act he submitted that

- i. For assessment year 2006 – 07 and 2007 – 08 the assessment framed u/s 153C and 143 (3) are beyond the scope of the provisions of Section 153C of the income tax act and are barred by limitation. He submitted that the satisfaction note for assessment year 2006 – 07 and 2007 – 08 were recorded by the assessing officer of the searched person on 25<sup>th</sup> of March 2014 and the satisfaction of the assessing officer of the assessee was recorded on 27<sup>th</sup> of March 2014. He referred to page number 8 – 9 of the paper book where these satisfaction notes are placed. He also referred to the satisfaction note recorded by the Deputy Commissioner of income tax, large taxpayers unit, New Delhi dated 27<sup>th</sup> of March 2014 stating that the satisfaction note is recorded by the assessing officer of the assessee. He further referred to the provisions of Section 153C of the income tax act stating that the

date of search in case of the person other than searched person shall be considered from the date of receiving of the books of accounts or documents of assessee or requisition by the assessing Officer having jurisdiction over such other persons. Therefore, he submitted that the date of search in the present case would be 25<sup>th</sup> of March 2014 and the [6] assessment years for which the assessment of reassessment can be reopened considering that date. Therefore according to him the [6] assessment years that can be covered by the provisions of Section 153C read with Section 153A would be starting from assessment year 2008 – 09 to assessment year 2013 – 14. Therefore, he submitted that the assessment order passed u/s 153C for assessment year 2006 – 07 and 2007 – 08 are barred by limitation. For this proposition he referred the decision of the honourable Delhi High Court in CIT versus RRJ securities Ltd (2016) 380 ITR 612, SSP aviation Ltd versus Deputy Commissioner Of Income Tax (2012) 346 ITR 177, Principal Commissioner Of Income Tax versus sarvar Agencies Private Limited (2017) 397 ITR 400 and host of other judicial precedents of the coordinate benches. Therefore, he submitted that the assessment order passed u/s 153C of the act for assessment year 2006 – 07 and 2007 – 08 are barred by limitation and therefore the learned CIT – A is not correct in not adjudicating this issue before him.

- ii. For assessment year 2011 – 12 he submitted that no satisfaction is recorded by the Deputy Commissioner of income tax CC – 2 i.e. the assessing officer of the searched person for initiation of proceedings u/s 153C of the act for the said year and therefore the same is without jurisdiction. He referred to the satisfaction note recorded by the assessing officer of the searched person dated 25<sup>th</sup> of March 2014 and noted that as per para number 5 of the satisfaction note it is categorically stated that satisfaction is recorded for assessment year 2006 – 07 to 2010 – 11. He further referred to the satisfaction note dated 27<sup>th</sup> of March 2014 by the assessing officer of the assessee also. Therefore, his submission was that for assessment year 2011 – 12 on perusal of the satisfaction note dated 25<sup>th</sup> of March 2014 recorded by the assessing officer of the

searched person it is clear that he has categorically excluded assessment year 2011 – 12 from his satisfaction with respect to the alleged ownership of the data in the impugned pen drive by the assessee company. Therefore, the submission was that the learned assessing officer of the assessee could not have initiated proceedings u/s 153C of the act, as no such satisfaction exists for assessment year 2011 – 12. Therefore the proceedings initiated by the learned assessing officer for assessment year 2011 – 12 is vitiated and deserves to be quashed at very threshold for the lack of jurisdiction.

35.

On the merits of the issue he submitted that the

- i. pen drive is seized from the residence of Mr. Basu who is neither a member of the Dalmia family or the employee of the assessee.
- ii. Assessee is requesting the assessing officer to give the copy of the pen drive however instead of giving that he has been given a copy of 125 pages of the printouts in the month of October 2013 and therefore he submitted that the genuineness, authenticity and reliability of the said pen drive on the basis of which additions have been made on the assessee are in question.
- iii. assessing officer of the searched person should record a satisfaction in terms of the provisions of Section 153C of the act that such valuable article, things, or books of accounts or documents seized or requisitioned belongs to a person other than the searched person. He submitted that there is nothing, which even remotely shows that this pen drive belonged to the assessee company.
- iv. even before any such satisfaction note are recorded by the concerned assessing officers, Sri Y H Dalmia and Mr. Gautam Dalmia, the applicants had filed a settlement application before the income tax settlement commission on 28/10/2013 owning of the entire content of the impugned cash book contained in the pen drive seized from the premises of Mr. Basu. Based on that they have offered an additional income of ₹ 90 crores. Thus, even before the recording of the satisfaction that this pen drive belonged to the assessee; the settlement commission was seized of the

matter where the ownership of the pen drive was owned by the applicants before the settlement commission.

- v. In proceedings before settlement commission the learned CIT representing revenue wherein computed the undisclosed income of rupees 495 crores on the basis of the entries in the seized pen drive by considering only the receipts side of the cash book. Considering this aspect the settlement commission proceeded with the matter and ultimately accepted the disclosure made therein by the applicant.
- vi. settlement commission is vested with the exclusive jurisdiction to exercise the powers and perform the function of an income tax authority in relation to the matters covered by the case before it. Therefore, the learned assessing officer had no jurisdiction to utilize the impugned pen drive for recording the satisfaction in the instant case.
- vii. even before the assessment orders u/s 153C read with Section 143 3) for assessment year 2006 – 07 to 2011 – 12 making the impugned addition in the hands of the assessee on the basis of the content of the cash book in the seized pen drive have passed on 30/3/2015 however the settlement commission vide its final order u/s 245D (4) dated 13/2/2015 already held that the entries in the impugned cash book in the seized pen drive belonged to the applicants before the settlement commission i.e. Mr. Y H Dalmia and Mr. Gotham Dalmia and the disclosure of ₹ 90 crores made by the said applicant including the entries in the impugned cash book in the seized pen drive was full and true disclosure made by them.
- viii. He extensively referred the order of the settlement commission placed in paper book and specifically referred to para number 9 of the order of settlement commission.
- ix. referred to the provisions of Section 245 – I wherein it has been provided that every order of settlement commission passed under subsection (4) of Section 245D shall be conclusive as to the 'matter' stated therein and no matter covered by such order shall save as otherwise provided in this chapter, be reopened in any proceedings Under this act or Under any other law for the time being in force. Therefore, he submitted that the order passed by

the settlement commission is final and conclusive as to the 'matter' stated therein and such finding of fact and order of settlement commission cannot be challenged now by the assessing officer.

- x. it is not the case of the revenue that they have challenged the order of the settlement commission before the higher authority or there is any allegation that the such order has been obtained by fraud or misrepresentation of facts. For this proposition, he referred to the decision of the honourable Delhi High Court in case of Sukhmani Associates private limited versus ITSC (2004) 189 CTR (Del) 103. He therefore submitted that the impugned cashbook in the seized pen drive was very much constituted the part of the 'matters' covered by the order of the settlement commission. Therefore, according to him the entire proceedings initiated u/s 153C of the act is illegal and contrary to the provisions of Section 245F read with Section 245D (6) and Section 245I of the income tax act and deserves to be annulled at the very threshold.

36. He further submitted that even the requisite condition of provisions of Section 153C are also not satisfied as the pen drive could not be said to be belonging to the assessee. He reiterated that there is no search carried out on the assessee under the provisions of Section 132 of the income tax act. Alleged pen drive has been seized from the premises of Mr. Basu who is not at all connected with the assessee. He submitted that the AO of the searched person has recorded for satisfaction that the entries in the pen drive belong to Dalmia cement Bharat Limited and substantive additions have been made therein. Protective additions were made in the hands of Dalmia Bharat Enterprises Ltd and Mr. Basu. He extensively referred to the assessment order passed in case of all these persons. Therefore e-submission was that when it is clearly held that the entries in the impugned pen drive belong to Dalmia cement Bharat Limited and having made substantial addition on the said basis in the hands of Dalmia cement Bharat Limited the learned assessing officer of the searched person could not have Simon tenuously arrived at a definite satisfaction that the entries therein belong to the assessee company. He also referred to the fact that it is not the case that was part of the data belongs to the assessee and part of the data belong to some other parties. To prove this point he submitted that the addition

made in the hands of the assessee, in the hands of other parties are identical. He therefore submitted that it is not a case where the joint ownership of a particular document is shown by the revenue. He therefore submitted that mere surmises and conjectures could not take place of the satisfaction for this proposition he relied upon the decision of the honourable Delhi High Court in case of Pepsi foods private limited versus ACIT 367 ITR 112. He further referred to the satisfaction note and stated that it is clearly mentioned in the satisfaction note that the pen drive reveals that it contains complete details of inflow and outflow of the finance related to the family members and the group companies for the four financial years. Therefore, he submitted that the satisfaction note clearly admits that the impugned pen drive was found from the provisions of the employee of group company and it contains debtor relating to but not belonging to the family members in the group companies. He further stated that in the group company there is no specific reference of the assessee company. Therefore he submitted that without bringing on record any cogent material to rebut the presumption that the seized pen drive does not belong to the such person but to somebody else and without specifying the basis for arriving at the conclusion or satisfaction that it belongs to the assessee company the learned assessing officer has recorded satisfaction and proceeded to make assessment order u/s 153C of the act is specifically referred to the decision of the honourable Delhi High Court in case of PepsiCo India Holdings private limited (supra saying that the assessing officer should not confuse the expression belongs to with the expression relates to refers to. He therefore submitted that the satisfaction recorded by the AO of the searched person is defective and rather nonexistence.

37. He further submitted that in the case of the assessee the learned assessing officer has made a protective addition whereas substantive addition has been made in some other assessee's case. He submitted that though the practice of making a protective addition in the case of regular assessment proceedings has found judicial acceptance however making a protective addition in search cases itself is vitiated. He referred to the decision of the honourable Bombay High Court in case of DHFL venture capital fund versus ITO 358 ITR 471 wherein the

protective addition is considered and it is held that it lacks the jurisdictional requirement for reopening of an assessment u/s 147 of the act. He also supported this view by the decision of the honourable Gujarat High Court in case of Vinodbhai Jivrajbhai Rabadiya versus ITO (2020) 114 taxmann.com 535. He therefore submitted that identical situation applies to the provisions of Section 153C of the act. Therefore, the protective addition made in the hands of the assessee also lacks the jurisdictional requirement.

38. He further contested the addition stating that the copy of the satisfaction note has recorded by the AO of searched person was not provided to the assessee despite specific request by the assessee. He stated that merely a summary thereof was provided by the AO as per letter dated 4/2/2015 he referred to the page number 22 – 23 of the paper book. He submitted that the copy of the satisfaction notice provided to the assessee only after filing the cross objection before the coordinate bench. He further submitted that despite this fact assessee responded to the letter dated 4/2/2015 of the assessing officer as per letter dated 16/2/2015 which is placed at page number 20 – 21, 22 – 23 and 24 – 27 of the paper book wherein it was specifically objected that specific noted not meet the requirement of the provisions of Section 153C of the act, the pen drive is not seized from the assessee and therefore the whereas city of the ownership of the pen drive is not known to the assessee, the documents could only belong to one person and not to the many person unless specifically proved, unless it is proved that the documents seized did not belong to the searched person the provisions of Section 153C cannot be invoked against the assessee and further the AO has failed to show and establish that the assessee was owner of the pen drive. He submitted that despite this objection raised before the assessing officer it was not disposed of by him by a speaking order that is mandatorily required to address and failure to do so is fatal to the proceedings initiated u/s 153C of the act.

39. He further referred to the satisfaction note and submitted that the assessing officer of the assessee after receiving the satisfaction note dated 25/3/2014 of the AO of the searched person added an observation about the email of Mr. Sanjay Mitra dated 24 March 2011 and imputed that it belongs to the assessee. He submitted that Mr. Sanjay Mitra is

not the employee of the assessee, even otherwise the proposal relates to the buyback of certain shares, which has never taken place. He submitted that such a fact has been confirmed by the learned assessing officer in the remand report submitted by the AO he specifically referred to page number 31 – 38 of the paper book. He further submitted that mere mention of the name of the assessee cannot lead to the conclusion that the alleged pen drive belonged to the assessee so as to justify the action Under is Section 153C of the act.

40. He further referred to question number 10 of the statement recorded of Mr. Basu u/s 132 (4) on 27/1/2012 which is placed at page number 85 – 95 of the paper book stating that the pen drive belong to him in the debtor contained therein related to the Dalmia group. When confronted Sri Puneet Dalmia in statement recorded, u/s 131 of the act has categorically admitted that the entries recorded therein pertain to certain cash transactions undertaken by him and his family in their personal capacity and not to Dalmia cement Bharat Limited or the Romney enterprises Bharat Limited. Therefore, the ownership of the pen drive has already been established and now it cannot be said that the pen drive belonged to the assessee. Thus he submitted that the satisfaction of the learned assessing officer of the assessee that the impugned pen drive belong to the assessee company is based on no material except the isolated mention of the assessee shares in a communication in the alleged pen drive. He therefore submitted that mere mention of the name of the assessee could not lead to a conclusion that the alleged pen drive belonged to assessee so as to justify the initiation of proceedings u/s 153C of the act for over these years.

41. He even otherwise submitted that the purported email, which is used by the learned assessing officer for recording the satisfaction, did not result in to any transaction and therefore merely for that reason it cannot be said that the pen drive belonged to the assessee.

42. He further submitted that that merely because the seized material or documents bear the name of the assessee somewhere but actually did not belong to the assessee therefore any issuance of notice u/s 153C is without jurisdiction because the provisions of Section 153C can be applied only where the particular money bullion jewelry et cetera

actually belonged to the assessee. He submitted that in this case AO confused himself with the expression belongs to with the expression relates to refer to that the seized material has to be shown to be belonging to the assessee and not merely pertaining to the assessee. He relied upon the several judicial precedents on this issue of the various High Courts. Prominently among members Pepsi foods private limited versus ACIT (2014) 367 ITR 112 (Del), PepsiCo India Holdings private limited versus ACIT (2015) 370 ITR 295, principal Commissioner of income tax versus Index Security private limited 304 CTR 67, CIT versus Renu constructions private limited 399 ITR 262

43. he further submitted that in the instant case the AO of the assessee has made certain reference in the satisfaction note with respect to certain correspondences over and above the satisfaction note dated 27 three 2014 but has not independently verified the impugned pen drive to arrive at an independent satisfaction that it belongs to the assessee and is a bearing on the determination of the total income of the assessee. He further submitted that the order passed by the learned assessing officer is ad verbatim reproduction of the order passed in case of Dalmia cement Bharat limited without any independent application of mind by the assessing officer. He further submitted that the deputy Commissioner of income tax, Circle – 1 (LTU) as per his own admission was in total agreement with the finding of the learned Deputy Commissioner of income tax central circle – 2 in the case of Dalmia cement Bharat Limited wherein the letterhead made substantive addition on the basis of the impugned seized material with a categorical finding that the impugned pen drive belonged to Dalmia cement Bharat Limited. Therefore, he submitted that on the basis of the same material it could not have been said by him that it belongs to the assessee company.
44. He further extensively referred to the statement of Mr. Puneet Dalmia and Mr. Basu and Mr. Berry to show that that the various transactions of the receipt and payment of the cash is found in the alleged pen drive are nothing but personal transaction of Dalmia family which was offered as additional income before the settlement commission.
45. Even on the quantum of addition which is challenged in the grounds of appeal of the Id AO he submitted that That

- i. The order of the Hon'ble ITSC allegedly does not categorically state whether the disclosure of Rs. 90 crores covers all the entries in the impugned cashbook found in the seized pen-drive.
- ii. total of the entries in the unaccounted cashbook as per the Director of the Assessee Company was Rs. 649.18 cr as against the disclosure of Rs. 90 crores made by the Applicants before the Hon'ble ITSC.
- iii. Employees of the company who maintained such cashbook of unaccounted cash transaction namely Joydeep Basu, N.K. Berry, and Sanjay Mitra & Director of the company Sh. Puneet Dalmia accepted such unaccounted transactions in their statements.
- iv. order of the Hon'ble ITSC is allegedly silent on the source of such unaccounted income as to show such huge income was earned by four individuals when there is allegedly a clear proof in the cashbook found in the pen-drive that such unaccounted income was generated in companies run by the group.
- v. He submitted that Thus, the Department, while categorically admitting that the disclosure of unaccounted income of Rs. 90 crores by the Applicant-individuals (i.e. Sri Y.H. Dalmia & Sri Gautam Dalmia) before the ITSC was made on the basis of the same cash book found in the seized pen-drive on the basis of which the impugned additions have been made in the hands of the Assessee herein, has doubted whether all the entries in the impugned cash book were considered by the Applicants in their working of additional income of Rs. 90 crores, considering the fact that the total receipts recorded in the impugned pen-drive as per the Director of the Assessee Company was Rs. 649.18 crores. In other words, the adequacy of the disclosure of Rs. 90 crores made by the Applicants before ITSC on the basis of the impugned cash book in the seized pen-drive and accepted as such by the ITSC vide order u/s 245D(4) dt. 13.02.2015 has been doubted by the Department given that the total receipts recorded in the impugned cashbook (totally overlooking the corresponding outflow) allegedly stood at a much higher figure. Further, the order u/s 245D(4) of the ITSC holding that the entries in the impugned cash book belong to the Applicants and not to the Dalmia group of companies has

also been challenged and contradicted by the Department by alleging in the G.O.A that there is a clear proof in the cash book found in the pen-drive that such unaccounted income was generated in the companies run by the group.

- vi. He submitted that Id AO at page 42(para 8.27) & page 45 (para 8.34) of the Assessment Order u/s 153C/143(3) for A.Y. 2006-07 in the case of the Assessee herein has reproduced and relied upon the following observations made by Ld. DCIT, CC-2 in the order u/s 153A/143(3) in the case of Dalmia Cement Bharat Limited :

"8.27.....Sri Puneet Dalmia attended on 12.11.2013, but did not attend on the next date of hearing. Instead, he had chosen to file the application to Settlement Commission and, hence, could not be called upon to explain the transactions. It is also pertinent to mention that the other family members, Sh. Yadu Hari Dalmia (father of Sh. Puneet Dalmia), Sh. Jai Hari Dalmia (uncle of Sh. Puneet Dalmia) and Sh. Gautam Dalmia (cousin of Sh. Puneet Dalmia) have also gone to settlement commission disclosing an amt of Rs. 45 cr each in the hands of Sh. Yadu Hari Dalmia and Sh. Gautam Dalmia. In total, the four members have disclosed Rs. 95.0 crores. However as clearly seen from the details mentioned in the preceding paras, (contents of the cashbook), the cash receipt is much higher than the amounts disclosed by these four family members. All these events show that the assessee company's management and directors did not want to explain the contents of the cashbook and preferred to go to settlement commission.

8.34...Further, it has been observed from the application of the individuals u/s 245C of the Act filed before the Settlement Commission that an overall disclosure of around Rs. 90 crore has been made by them. However, aggregate receipts as per the parallel cash book amounts to Rs. 367 crore over the period of 6 yrs. Thus, considering the facts of the case in entirety, it is concluded that Rs. 367 crores requires to be added in the hands of DBCL, being income from undisclosed sources."

Thus, he submitted that higher sums are disclosed then the amount of income contained in the data in pen drive.

- vii. Submitted that A.O has thus made total protective additions of Rs. 3,67,96,96,02,924/- for A.Ys 2006-07 to 2012-13 (of which A.Ys

2006-07 to 2011-12 are the years under appeal) in the case of the Assessee herein by:

1. Considering only the inflow recorded in the impugned cashbook and totally ignoring the corresponding outflow.
2. Extrapolating the figures of receipts for the years for which part data is available for arriving at the total inflow of the said years.
3. Excluding the inflow of cash from other lockers from the receipt side.

viii. Referred to reply of revenue in Rule [9] before ITSC stating that :-

**(A)** Rule 9 Report dated 15.05.2014 forwarded to the Hon'ble ITSC by the Ld. CIT(C)-III on 16.05.2014 (copy of the Rule 9 Report is enclosed at *pages 692-701 of the PB*) wherein:

- (i) At para 3.1 of the Report, reference has been made to the seizure of the impugned pen-drive from the premises of an employee of DBEL i.e. Sh. Joydeep Basu.
- (ii) At para 5, it has been stated that the disclosure of additional income was made by the Applicants before the Hon'ble ITSC on the basis of the contents of the impugned pen-drive.
- (iii) At para 5.1(i), it has been stated that the pen-drive is named as TD DBEL and the impugned data is saved in .xls sheets by the name of 'DCB ACCTS LATEST' and 'DCB ACCT OLD' – these are the same xls sheets relied upon to by the A.O for the purpose of making the impugned protective additions in the hands of the Assessee herein.
- (iv) At para 5.5 reference has been made to the addition of Rs. 367 crores made in the hands of DCBL on the basis of the alleged 'parallel cash book'- once again proving that the additions made in the hands of the Assessee herein u/s 153C (on replication from the order of DCBL) and the disclosure of undisclosed income by the two Applicants before the Hon'ble ITSC rely upon the same set of entries/ documents.
- (v) At para 5.7, the Department has alleged that the 'parallel cash book' belongs to the Dalmia Group and that disclosure of Rs. 95 crores (total disclosure made by all four Applicants before the Hon'ble ITSC) made on the basis of such 'parallel cash book' cannot be considered as full and true and that the said disclosure has not been correlated with the data in the pen-drive – thus the question of adequacy of disclosure made by the Applicants on the basis of the

impugned cash book also arose in course of the settlement proceedings.

- (vi) At para 5.8, the Department has suggested an undisclosed income of Rs. 495 crores in the hands of the Applicants as against disclosure of Rs. 95 crores made in their Settlement Applications. The figure of Rs. 495 crores has been arrived at by the Department by adding up all the entries of the credit side of the 'parallel cash book' (including the transfer of cash amongst different lockers) and totally ignoring the corresponding outflow.
- ix. He further referred to various charts placed before settlement commission by revenue and assessee both tabulating the figures of amount of entries in cash book and offer made by the assessee as disclosure before ITSC. He therefore submitted that ITSC after considering the various reports dated 16.05.2014 , 07.07.2014 , 12.09.2014, 17.09.2014 filed by the CIT(C)-III and after giving the Department an opportunity of verifying the entries recorded in the 'parallel cash book' of the pen-drive with the cash book submitted by the Applicant-Individuals (on the basis of which Rs. 90 crores was surrendered by the two Applicants) vide order u/s 245D(4) dated 13.02.2015 held as under:
- (i) That the entries in such 'parallel cash book' in the pen-drive seized from the premises of Sri Joydeep Basu belonged to the Applicants.
- (ii) That the Applicants had compared and correlated various transactions appearing in the cash book in the seized pen drive vis-à-vis the settlement applications filed in their cases, particularly with reference to the working and basis of the unaccounted income arising from the same, which mainly constituted the additional income offered by the Applicants before the Commission.
- (iii) That the disclosure of Rs. 90 crores made in the SOF on the aforesaid basis was thus accepted.
- x. He extensively referred the order of ITSC in this case and submitted that Revenue's allegation that the order of ITSC does not categorically state whether the disclosure of Rs. 90 crores by

the Applicants covers all the entries in the impugned cash book in the seized pen-drive is factually incorrect. He submitted at para 9 of the order u/s 245D(4) it has recorded a clear and categorical finding that the applicants have compared and correlated various transactions appearing in the cash book in the seized pen drive vis-à-vis the settlement applications filed in their cases, particularly with reference to the working and basis of the unaccounted income arising from the same, which mainly constitutes the additional income offered by the above applicants before the Commission and the disclosure made by the Applicants on the said basis was accepted by ITSC. Thus, there is no leakage of any sum found in the data contained in pen drive.

xi. Further on Ground no 1 of the Id AO, he submitted that Directors of the Assessee-Company had admitted to total receipts recorded of Rs. 649.18 crores in the impugned cash book (as against disclosure of Rs. 90 crores before the ITSC) indicated that all the entries in such unaccounted cash book may not have been considered by the Applicants and that the order of the ITSC was silent on this aspect, he extensively referred to the order of the ITSC and submitted that this aspect has been considered at page 23 of the order of ITSC

46. In the end, he submitted that this issue even otherwise on merits is covered in favour of the assessee by the decision of Honourable Gujarat High court in the case of B. Nanji Enterprise Ltd. Vs. DCIT [2017] 84 taxmann.com 155 (Gujarat), the Hon'ble Gujarat High Court held that where sum seized from bank locker of assessee company during search was disclosed by director of company as his unaccounted income in application for settlement before Settlement Commission which was allowed by passing of final order of settlement and tax was also paid on such income, same could not be added to income of assessee-company.

47. In view of this he submitted that the cross objection of the assessee should be allowed as the proceedings u/s 153C of the income tax act was initiated by the learned assessing officer is without any basis. It

was further stated that the learned CIT – A has erred in not deciding the same but deciding the issue on other aspects.

48. The learned CIT DR vehemently supported the order of the learned assessing officer and submitted that
- i. reliance by the assessee on the order of the settlement commission is devoid of any merit as assessee is not a party before the settlement commission and only the two individuals for the petitioner's/applicant's before the settlement commission and therefore the order of the settlement commission heavily relied upon by the learned authorised representative and the learned CIT – A in his order do not apply to the assessee. The assessee cannot take shelter under the order of the learned settlement commission, as assessee is not at all a party before it.
  - ii. The order of the settlement commission applies to the parties before it and not to the issue in these appeals. She further submitted that the provisions of Section 245 (5) and the provisions of Section 245 (D) apply only to the applicant and a specific to that assessee and not to anybody else. The company is a different entity was not in the list of the applicant before the settlement commission.
  - iii. She further referred the page number 17 of the assessment order and submitted that annexure A – 3 is containing page number 12 125 pages which reflects the cash transactions of the Dalmia group and individual party was account position which enables control and monitoring receivable etc. She submitted that these documents belong to the assessee and these are not the only documents impounded from the pen drive.
  - iv. She further referred the order of the settlement commission and submitted that there are four different individual applicants before the settlement commission and none of them has referred to any of the company assessee.
  - v. She further referred to page number 729 of the paper book, which is the order of the settlement commission where there is a reference of the pen drive. She submitted that these pen drives are referred to in case of the individuals, which cannot be extrapolated to the case of the group companies.

- vi. She further submitted that the case of the assessee that there is no name of the assessee is devoid of any merit as there is a reference of a mail received from Mr. Sanjeev Mitra where the name of the assessee is mentioned and there is a reference to the buyback of some shares. Thus, the pen drive belongs to the assessee company.
- vii. She further submitted that before the settlement commission, there was no reference of the other companies including the assessee and therefore the order of the settlement commission does not apply.

In view of this, it was submitted that the order of the learned CIT – A is not sustainable in law.

49. In rejoinder and dealing with the appeal of the revenue, the learned authorised representative submitted that the
- i. learned CIT – A has relied upon the decision of the learned CIT – A – 29 in the case of Dalmia cement Bharat Limited wherein the substantive additions have been made. He extensively referred to the appellate order and submitted that following the order of the settlement commission the addition has been deleted. He further submitted that the order of the learned CIT – A – 29 has been accepted by the revenue wherein the substantive addition has been deleted. He stated that this fact has been verified by the learned CIT – A with respect to the report of the assessing officer of Dalmia cement Bharat Limited who clearly state that no further appeal has been preferred and therefore the order of the learned CIT – A – 29 deleting the addition on substantive basis in the hands of Dalmia cement Bharat Limited has become final. He submitted that such substantive addition has been deleted by the learned CIT – A – 29 in case of Dalmia cement Bharat Limited holding that the contents of the cash book in the seized pen drive belong to the two promoters in such finding of the CIT – A – 29 has been accepted by the Department but not challenging the same in further appeal, in the protective addition in the hands of the assessee the appeal of the revenue does not survive.
  - ii. He further submitted that when the substantive addition has been knocked down there is no reason of keeping the addition in the

hands of the other party where the protective addition has been made.

- iii. He submitted that since the settlement commission vide its final order u/s 245D (4) dated 13/2/2015 has recorded a categorical finding that the entries in the impugned cash book in the seized pen drive belonged to the promoters of the Dalmia group in their individual capacity the same entries any income arising there from cannot be once cannot be said to belonging to assessee and taxed in the hands of the assessee u/s 153C of the income tax act.
- iv. He stated that the order of the settlement commission has been accepted by the revenue not challenged before any of the authority and not assailed that it is obtained by the fraud or misrepresentation etc. Therefore, the matter, which is covered in the decision of the settlement commission, cannot be agitated once again by the revenue.
- v. He further submitted that the learned assessing officer has made the total protective addition spanning over assessment year 2006 – 07 to assessment year 2011 – 12 in case of the assessee by considering only the inflow recorded in the impugned cash book and totally ignoring the corresponding outflow. Further, the AO has extrapolated the figures of receipt for the year for which party ties available for arriving at the total inflow of the said years and excluding the inflow of cash from other bloggers from the receipt site. Therefore, even on the merits the learned assessing officer is computation of the total income is not sustainable.
- vi. He further referred to the argument of the learned departmental representative that the amount of disclosure made before the settlement commission is not full and true and submitted that in rule 9 report dated 15/05/2014 forwarded to the settlement commission by the learned CIT © – III refers to the complete working of the above sum. He referred to paragraph number 3.1 of the report wherein the reference is made to the impugned pen drive. He referred to paragraph number 5 wherein has been stated that the disclosure of additional income was made by the applicants before the settlement commission based on the content of the impugned pen drive. He further referred to the various Excel

sheets mentioned in the report to show that a complete analysis of the impugned pen drive was made and Year wise sum involved in that cashbook was taken into consideration by the settlement commission. On the basis of table 5 submitted in his written submission on which is also reconciliation of the amount stated in rule 9 report of the learned CIT – A based on which the settlement commission agreed for the disclosure of ₹ 90 crores he submitted that details of the entries of the perils cash book including the dates and the receipts matches with the excel sheets position with the data to be related by the assessing officer at page number 10 and 11 of the assessment order. Therefore he submitted that the cashbook refers to the same cashbook based on which the impugned addition is been made in the hands of the assessee. He therefore submitted that there is no infirmity in any of the figures of disclosure made by the applicants before the settlement commission and addition made in the hands of the assessee in these years. He further referred to the report of verification u/s 245D (3) dated 7/7/2014 before the settlement commission during the course of settlement proceedings. He further referred to the findings of the settlement commission in the order passed u/s 245D (4) which is placed at page number 758 – 760 of the paper book and 763 and 766 of the paper book to show that the disclosure made in the statement of facts of the applicants Mr. YH Dalmia and Sri Gotham Dalmia included 125 pages of the pen drive.

- vii. With respect to the claim of the learned CIT DR that the settlement commission does not refer to the name of the assessee company and therefore the assessee company is not entitled to get the benefit of the order of the settlement commission, the learned authorised representative submitted that at para number 9 of the order of the settlement commission has categorically held that the applicants have compared uncorrelated various transactions appearing in the cash book in the seized pen drive vis-a-vis the settlement application filed in the case particularly with reference to the working and basis of the unaccounted income arising from the same which mainly constitutes the additional income offered by the above applicants before the settlement commission and the

disclosure made by the applicants on the said basis was accepted by the settlement commission. Therefore it was submitted that the amount involved in a particular document has already been offered before the settlement commission and due tax has been paid thereon therefore it is not necessary that name of the assessee should have specifically been taken before the settlement commission. In view of this, he submitted that appeal of the learned assessing officer deserves to be dismissed.

50. We have carefully considered the rival contention and perused the orders of the lower authorities. We have also gone through the extensive written submission made by the learned authorised representative and paper books presented before us. We have also gone through the order of the settlement commission produced before us in case of four applicants who are belonging to Dalmia family and also the orders of the Commissioner of Income Tax (Appeals) passed in case of Dalmia cement Bharat Limited , Dalmia Bharat Enterprises Limited and Mr. Joydeep basu where in the identical additions are deleted. We have also considered and perused various judicial precedents cited before us by the sides.

51. Now the questions arising before us in this group of appeals are as Under:-

- i. Whether assessment framed u/s 153C read with Section 143 (3) for assessment year 2006 – 07 and 2007 – 08 are barred by the limitation.
- ii. Whether the assessment order passed for assessment year 2011 – 12 u/s 153C is without jurisdiction and void ab initio as no satisfaction has been recorded by the assessing officer of the searched person
- iii. whether the pen drive seized from the premises of one of the employees of the group concern can be said to be 'belonging to' the assessee when four different applicants have owned it before the settlement commission and settlement commission has accepted the above proposition after considering the objections of revenue before it and thereafter accepting the disclosure made by those four applicants passed an order settling the dispute and accepting additional income offered.

- iv. As the satisfaction recorded by the AO of the searched person with respect to the impugned pen, drive does not mention that these pen drive 'belongs to' the assessee company. Thus requirement of the provisions of Section 153C is not fulfilled as learned assessing officer of the searched person has merely expressed and without any evidence. Thus additions in the hands of the assessee on protective basis have been made on defective satisfaction with respect to the pen drive belonging to the assessee and consequent assessment orders passed u/s 153C of the act are not valid
- v. whether the orders passed by the learned assessing officer are bad in law as those orders are passed as an ad verbatim copy, of the order in case of another assessee, i.e. Dalmia cement Bharat Limited and therefore these orders are passed without any independent application of mind.
- vi. Whether the assessee can take up a plea order of the settlement commission was conclusive u/s 245I of the act and where income covered in the pen drive has been accepted by the settlement commission as belonging to the four different applicants and accepting the disclosure, can now the assessing officer make the similar addition out of the same pen drive in the hands of the assessee on protective basis.
- vii. Whether the assessment order passed in the case of the assessee on protective basis is sustainable, as identical substantive and protective additions were made on the basis of the same material i.e. pen drive in case of group companies, which have been deleted by the learned CIT – A, 29 on the ground that entries in the cash book and 125 pages found in the seized pen drive belongs to the promoters and not to these companies. The revenue has accepted such orders of the learned CIT – A, 29 in the case of the group companies and it has not been challenged, therefore, on the identical facts the orders passed by the learned assessing officer are not sustainable.
- viii. When the additions made in the hands of the other entity on substantive basis is deleted by the learned CIT – A, can the protective addition in the hands of the assessee is still sustainable.

- ix. Even otherwise, it is presumed that pen drive belongs to the assessee, manner of protective addition in the hands of assessee is correct, jurisdiction u/s 153C is correctly assumed in the case of assessee, despite deletion of substantive addition, still whether the disclosure made before ITSC covers the amount of data involved in the pen drive.

52. Now we first address the first question that whether the assessment order passed for assessment year 2006 – 07 and 2007 – 08 are sustainable and are not beyond the scope of the provisions of Section 153C of the act and whether such assessment years are barred by the limitation or not.

- i. The facts, at the cost of repetition, shows that the search took place u/s 132 of the income tax act in case of Dalmia group of cases on 20 January 2012 which got concluded on 17<sup>th</sup> of March 2012 and on 28<sup>th</sup> of January 2012 and impugned pen drive seized from the premises of one of the employees of the group concern Shri Joydeep Basu. The assessee was not part of the search.
- ii. On 25<sup>th</sup> of March 2014, the satisfaction note was recorded by the Deputy Commissioner Of Income Tax, Central Circle – 2 being the assessing officer of the searched person, contending that the contents pertaining to the impugned pen drive pertaining to assessment year 2006 – 07 to 2010 – 11 'belong to' the assessee company.
- iii. On 27<sup>th</sup> of March 2014, satisfaction was recorded by the assessing officer of the assessee company i.e. The Deputy Commissioner Of Income Tax, Circle – 1, LTU holding that the pen drive and contents thereof 'belongs to' the assessee company and initiated proceedings u/s 153C of the act for assessment year 2006 – 07 to 2011 – 12.
- iv. Consequently, notice u/s 153C of the act was issued by the assessing officer for assessment year 2006 – 07 to 2012 – 13 on 31<sup>st</sup> of March 2014.
- v. The assessee challenged this issue before the learned CIT – A that in case of the person other than the searched person the provisions of Section 153C provides that the six assessment

years to be counted from the date of receiving the books, documents or assets seized or requisitioned by the Id AO. This date is date of satisfaction recorded by Id AO of the assessee .e. on 27/03/2014. Thus, six years are to be reckoned from that date.

- vi. Such [6] assessment years for which assessment can be made are AY 2008-09 to 2013-14. Thus AY 2006-07 and 2007-08 are beyond the purview of assessment u/s 153C rws 153A of the Act.
- vii. The provision of section 153C as it stood in 2014 provides as under :-

Assessment of income of any other person.<sup>2</sup>

153C.<sup>3</sup>[(1)] Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, where the Assessing Officer is satisfied that any money, bullion, jewellery or other valuable article or thing or books of account or documents seized or requisitioned belongs or belong to a person other than the person referred to in section 153A, then the books of account or documents or assets seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person <sup>3a</sup>[and that Assessing Officer shall proceed against each such other person and issue notice and assess or reassess the income of the other person in accordance with the provisions of section 153A, if, that Assessing Officer is satisfied that the books of account or documents or assets seized or requisitioned have a bearing on the determination of the total income of such other person for the relevant assessment year or years referred to in sub-section (1) of section 153A] :]

<sup>4</sup>[**Provided** that in case of such other person, the reference to the date of initiation of the search under section 132 or making of requisition under section 132A in the second proviso to <sup>5</sup>[sub-section (1) of] section 153A shall be construed as reference to the date of receiving the books of account or documents or assets seized or requisitioned by the Assessing Officer having jurisdiction over such other person :]

- viii. These provisions were amended by the Finance Act 2017 with effect from 1/4/2017 as under :-

**Assessment of income of any other person.** <sup>77</sup>

<sup>78</sup> **153C.** <sup>79</sup>[(1)] <sup>80</sup>[Notwithstanding anything contained in [section 139](#), [section 147](#), [section 148](#), [section 149](#), [section 151](#) and [section 153](#), where the Assessing Officer is satisfied that,—

- (a) any money, bullion, jewellery or other valuable article or thing, seized or requisitioned, <sup>81</sup>belongs to; or
- (b) any books of account or documents, seized or requisitioned, pertains or pertain to, or any information contained therein, relates to,

a person other than the person referred to in [section 153A](#), then, the books of account or documents or assets, seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person] <sup>82</sup>[and that Assessing Officer shall proceed against each such other person and issue notice and assess or reassess the income of the other person in accordance with the provisions of [section 153A](#), if, that Assessing Officer is satisfied that the books of account or documents or assets seized or requisitioned have a bearing on the determination of the total income of such other person <sup>82a</sup>*[for six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made and]* for the relevant assessment year or years referred to in sub-section (1) of [section 153A](#)] :]

<sup>83</sup>**Provided** that in case of such other person, the reference to the date of initiation of the search under [section 132](#) or making of requisition under [section 132A](#) in the second proviso to <sup>84</sup>[sub-section (1) of] [section 153A](#) shall be construed as reference to the date of receiving the books of account or documents or assets seized or requisitioned by the Assessing Officer having jurisdiction over such other person :]

- ix. The Hon'ble Delhi High Court in the case of CIT Vs. RRJ Securities Ltd. [2016] 380 ITR 612 (Delhi) held at para 24 of the order that in terms of proviso to Section 153C of the Act, a reference to the date of the search under the second proviso to Section 153A of the Act has to be construed as the date of handing over of assets/documents belonging to the Assessee (being the person other than the one searched) to the AO having jurisdiction to assess the said Assessee. Further proceedings, by virtue of Section 153C(1) of the Act, would have to be in accordance with Section 153A of the Act and the reference to the

date of search would have to be construed as the reference to the date of recording of satisfaction. It would follow that the six assessment years for which assessments/reassessments could be made under Section 153C of the Act would also have to be construed with reference to the date of handing over of assets/documents to the AO of the Assessee. The Hon'ble High Court finally ruled as under:

"In this case, it would be the date of the recording of satisfaction under Section 153C of the Act, i.e., 8th September, 2010. In this view, the assessments made in respect of assessment year 2003-04 and 2004-05 would be beyond the period of six assessment years as reckoned with reference to the date of recording of satisfaction by the AO of the searched person. It is contended by the Revenue that the relevant six assessment years would be the assessment years prior to the assessment year relevant to the previous year in which the search was conducted. If this interpretation as canvassed by the Revenue is accepted, it would mean that whereas in case of a person searched, assessments in relation to six previous years preceding the year in which the search takes place can be reopened but in case of any other person, who is not searched but his assets are seized from the searched person, the period for which the assessments could be reopened would be much beyond the period of six years. This is so because the date of handing over of assets/documents of a person, other than the searched person, to the AO would be subsequent to the date of the search. This, in our view, would be contrary to the scheme of Section 153C (1) of the Act, which construes the date of receipt of assets and documents by the AO of the Assessee (other than one searched) as the date of the search on the Assessee. The rationale appears to be that whereas in the case of a searched person the AO of the searched person assumes possession of seized assets/documents on search of the Assessee; the seized assets/documents belonging to a person other than a searched person come into possession of the AO of that person only after the AO of the searched person is satisfied that the assets/documents do not belong to the searched person. Thus, the date on which the AO of the person other than the one searched assumes the possession of the seized assets would be the relevant date for applying the provisions of Section 153A of the Act. We, therefore, accept the contention that in any view of the matter, assessment for AY 2003-04 and AY

2004-05 were outside the scope of Section 153C of the Act and the AO had no jurisdiction to make an assessment of the Assessee's income for that year."

- x. While rendering the aforesaid decision, the Hon'ble Delhi High Court relied upon the judgment of the Coordinate Bench of the Court in the case of SSP Aviation Ltd. v. Deputy Commissioner of Income Tax: (2012) 346 ITR 177 (at pages 72-84 of the Case laws Compilation) wherein it was held as under:

"14.....In case of the searched person, the date with reference to which proceedings for assessment or reassessment of any assessment year within a period of six assessment years shall abate, is the date of initiation of search under Section 132 or requisition under Section 132A. However, in case of other person such date will be the date of receiving the books of account or documents or assets seized or requisition by the Assessing Officer having jurisdiction over such other person. In the case of other person, the question of pendency and abatement of proceedings of assessment or reassessment to the six assessment years would have to be examined with reference to such date"

- xi. Similarly Hon'ble Delhi High Court in the case of Pr. CIT Vs. Sarwar Agency P. Ltd. (2017) 397 ITR 400 (Del) [para No 10] further held that the amendment in section 153C of the Act by Finance Act, 2017 with effect from April 1, 2017 to the effect that the Block Period for the person in respect of whom the search was conducted as well as the "other person" would be the same six assessment years immediately preceding the year of search is prospective.
- xii. Reference is further craved to the Memorandum explaining Finance Bill 2017 in which it is provided that Amendment in Section 153C shall apply in respect of searched conducted or requisition made on or after 1st day of April 2017.
- xiii. Thus, it is apparent that Assessment year which can be assessed u/s 153C of the act in this case is only from AY 2008-09. Thus, the assessments made by the Id AO u/s 153C of the act for AY 2006-07 and 2007-08 are beyond time prescribed

u/s 153C of the act and are quashed. Thus, First question is answered in favour of the assessee.

53. Second question is whether the assessment order passed for assessment year 2011 – 12 u/s 153C is without jurisdiction and void ab initio, as no satisfaction has been recorded by the assessing officer of the searched person. The facts on this issues shows that

- i. Assessee has contended that in so far as A.Y. 2011-12 is concerned, on a perusal of the Satisfaction Note dated 25.03.2014 recorded by the Ld. DCIT, CC-2 i.e. the A.O of the searched person which is placed at pages 8-9 of the Paper book it may be seen that he has categorically excluded A.Y. 2011-12 from his satisfaction with respect to the alleged ownership of the data in the impugned pen drive by the Assessee-Company.
- ii. Satisfaction note by the Id AO of the searched person is as under :-

25.03.2014

**SATISFACTION NOTE**

(Dalmia Bharat Sugar and industries Ltd)

A search & seizure operation was carried out in the case of M/s Dalmia cases on 20.01 2012, 27 01.2012 & 28.01 2012 by, the Investigation Wing Unit -Vi (1), New Delhi

2. The case of M/s Dalmia Cement (Bharat) Ltd. having PAN AADCA9414C, has been centralized u/s 127 of the Act vide order C No. 6086-A/CIT-I/TRY/2012-13, dated 19.11.2012 to Central Circle-18, New Delhi, which has subsequently been transferred to Central Circle-02, New Delhi vide order F No. CIT (Central)-III/2013-14/943, dated 18.07.2013.

3. During the course of search at the residential premises of Sh. Joydeep Basu, one of the employee of the Dalmia Bharat Enterprises Ltd. (Dalmia group of companies), a pen drive was found and seized. A perusal of data contained in the pen drive reveals that it contains complete details of inflow and outflow of the finance related to the family members and the group companies for the four financial years, i.e. F.Y. 2007-08 to F.Y 2010-11 However, for the F.Y. 2005-06, 2006-07 and F.Y. 2011-12, part details of transactions are available. After extrapolation for these financial years, the year-wise computations of the net receipts come out are as under:

SNo	Financial Year	Assessment Year	Fresh inflow of cash
1	2005-06	2006-07	22,80,39,000
2	2006-07	2007-08	22 32 39 870
3	2007-08	2008-09	19,77,19,669
4	2008-09	2009-10	59,70,62,329
5	2009-10	2010-11	97,66.34,440
6	2010-11	2011-12	80,78,23,293
7	2011-12 (up to January, 2012)	2012-13	64,90.84,323
	TOTAL		367,96,02,924

4. Further, during the course of assessment proceedings of M/s Dalmia Cement (Bharat) Ltd (PAN AADCA9414C), it is seen that the original name of the company was M/s Dalmia Cement (Bharat) Ltd (PAN AAACD2281K) which was incorporated in the year 1951. On 01/04/2010, the name of the company was changed to M/s Dalmia Bharat Sugar & Industries Ltd and the whole business of Dalmia Cement (Bharat) Ltd was transferred to this entity. On 29.07.2010, the cement business of the group was transferred from Dalmia Bharat Sugar & Industries Ltd to M/s. Avnija Properties Pvt. Ltd. On 31.12.2010, the name of M/s. Avnija Properties Pvt. Ltd was changed to M/s. Dalmia Cement (Bharat) Ltd (PAN AADCA9414C).

5. As mentioned above, the name of the company M/s Dalmia Cement (Bharat) Ltd was changed to M/s Dalmia Bharat Sugar & Industries Ltd, which was having cement business from FYs 2005-06 to 2009-10, i.e. AYs 2006-07 to 2010-11, which is assessed to tax with DCIT, LTU.

6. After going through the data of the seized pen drive, I am satisfied that the contents pertaining to AY 2006-07, 2007-08, 2008-09, 2009-10 and 2010-11 belong to the company M/s Dalmia Bharat Sugar & Industries Ltd. As the company is assessed to tax with you, notice u/s 153C of the Income tax Act, 1961 may kindly be issued in the case of M/s Dalmia Bharat Sugar & Industries Ltd.

(GP Singh)

DCIT, Central Circle-2, New Delhi

iii. Further it is also necessary to examine the satisfaction recorded by the assessing officer of the assessee which is as Under:-

## **Satisfaction Note**

Dalmia Bharat Sugar and Industries Ltd.

27.03.2014

The pen-drive is received from DCIT, CC -2. New Delhi along with the satisfaction note.

The DCIT, CC-2 in its Satisfaction note dated 25.03.2014 has stated that the contents in the given pen-drive belongs to M/s Dalmia Bharat Sugar and Industries Ltd which is assessed to tax by DCIT-LTU Delhi. This pen-drive was seized from the residential premises of Sh. Joydeep Basu one of the employees of the Dalmia Bharat Enterprises Ltd (A Dalmia Group of company) during the course of search and seizure operation by Investigation wing VI(I), New Delhi in Dalmia Group of cases on 20.01.2012; 27.01.2012 and 28.01.2012. He further communicated in his satisfaction note vide para 4 as under:-

“Further, during the course of assessment proceedings of M/s Dalmia Cement (Bharat) Ltd (PAN AADCA9414C), it is seen that the original name of the company was M/s. Dalmia Cement (Bharat) Ltd. (PAN AAACD2281K) which was incorporated in the year 1951. On 01.04 2010, the name of the company was changed to M/s Dalmia Bharat Sugar & Industries Ltd and the whole business of Dalmia Cement (Bharat) Ltd. was transferred to this entity On 29.07.2010, the cement business of the group was transferred from Dalmia Bharat Sugar & Industries Ltd. to M/s Avnija Properties Pvt Ltd. On 31 12.2010, the name of M/s Avnija Properties Pvt. Ltd was changed to M/s Dalmia Cement (Bharat) Ltd. (PAN AADCA94HC)

On perusal of the appraisal report on search initiated on 20.01.2012 in Dalmia Group of cases prepared by Dr. Vikram Singh Sharma, ADIT (Inv) Unit-VI(I), Delhi reveals that Sh. Joydeep Basu from whose premises the pen-drive was seized had -during the course of statements recorded stated that the transactions recorded in the pen-drive were out of book transactions of Dalmia Cement Bharat Ltd.

On examination of the pen-drive, certain files were seen therein In these MS-xls sheet sheet path, H:/Confidentail Files/Account Files /Main Files, /DCB ACCTS OLD.xls it is observed that substantial amount of cash was received and paid to different parties on day-to-day basis. These Sheets contain data for the period of 01.11.2005 to 31.03.2006, 01.04.2006 to 29.05.2006, 10.08.2006 to 10.10.2006 and 01.04.2007 to 01.07.2011. Whereas data for FY 2007-08 to FY 2010-11 it could not be being beyond the date of search. Further, in the pen drive a communication from Sanjay Mitra read as under:-

"deepaksher@gif.co.in

March 24, 2011

Dear Asher Ji,

Further to my yesterday's phone call, communicating your Secretary to arrange our discussion on further actions on Dalmia matters.

Please note that GFL is currently holding 1,91,881 shares of DBSIL (CMP Rs.25/- per sh,, CMV Rs.48 lacs) and 1,12,950 shares of OCL (CMP Rs. 104/- per sh., CMV Rs.117 lacs ). We propose to buy back the same during the first week of April by way of market transactions. After the closure of the arrangement an amount of Rs. 594 lacs (approx - on today's market price) would be receivable from your end, the same will be taken by us in the form of an ICD in Cradle Finance, as has been discussed and agreed by your Sh Jain Sahab and Puneet Dalmia. The balance sheet of Cradle Finance Is attached herewith for your perusal.

Please confirm the above.

Thanks and regards,

Sanjay Mittra "

"DBSIL-' is the abbreviation for Dalmia Bharat Sugar and Industries Ltd. the share of which is held by another company abbreviated as "GFL". In the statement "We propose to buy bock the same during the first week of April by way of market transactions" the words "We propose to bay buck the same" clearly establish that the transaction arc in respect of the Assessee company "Dalmia Bharat Sugar and Industries Ltd shares' which the person belonging to the Assessee organization speaks of buying back. Therefore, it is established that the pen-drive and the

contents of the pen drive belong to the Assessee company i.e. the Dalmia Bharat Sugar and Industries Ltd.

From the contents mails, accounts etc as seen in the pen-drive and mentioned in the satisfaction note of DCIT, CC-2, Delhi also I am satisfied it is a fit case for initiating proceedings for reassessment by issue of notice u/s 153C of the IT Act. The notices for AYs 2006-07 to 2011-12 are accordingly issued.

(Virendra Kumar Sheran)

Deputy Commissioner of Income Tax,

LTU, New Delhi

- iv. Therefore, it is apparent that the assessing officer of the searched person has specifically excluded assessment year 2011 – 12 in his satisfaction. The provisions of Section 153C enables the revenue authorities to investigate into the contents of the documents seized which belongs to a person other than the person searched so that it can be asserted whether the transaction of the income embedded in the document has been accounted for in the case of the appropriate person or not. The machinery provided in Section 153C merely facilitates enquiry regarding the existence otherwise of undisclosed income in the hands of the person other than the searched person. The satisfaction of assessing officer of the person searched is only with respect to whether the specified assets belongs to the person other than the searched person and specified documents relates to the person other than the searched person. It is not necessary that AO of the searched person will also decide the assessment years for which the AO of the person other than the searched person will look into. Responsibility of the AO of the searched person is only to show that the material and the specified assets belong to the other person. Thereafter it is the responsibility of the AO of the other person to verify that material and specified assets to determine for which year same are taxable. Based on this the AO of the other person will issue notices to the other person. Otherwise, the satisfaction recorded by the AO of searched person will determine the assessee ability of income any assessment year in the hands of the other person. If the proposition canvassed by the

learned authorised representative is accepted then the AO of the other person, will simply become a postman for issuance of notice u/s 153C of the act. That is not the mandate of the law. Therefore the argument of the learned authorised representative is rejected that when the AO of the searched person has specifically not included assessment year 2011 – 12, the authority of the assessing officer of the other person is curtailed in issuing notice for assessment year 2011 – 12 and hence the assessment order passed Under Section 153C of the act for assessment year 2011 – 12 is liable to be quashed. Hence, we reject this argument of the learned AR. In view of this, we are of the opinion that the assessment order passed for assessment year 2011 – 12 cannot be quashed at least on this count. Thus, second question is answered against the assessed.

54. Question no 3, 4 and 5 that arises are

- a) whether the pen drive seized from the premises of one of the employees of the group concern can be said to be belonging to the assessee when four different applicants have owned it before the settlement commission and settlement commission has accepted the above proposition after considering the objections of revenue before it and thereafter accepting the disclosure made by those four applicants passed an order settling the dispute and additional income offered.
- b) As the satisfaction recorded by the AO of the searched person with respect to the impugned pen drive does not mention that these pen drive belongs to the assessee company the requirement of the provisions of Section 153C is not fulfilled because the learned assessing officer of the searched person has merely expressed and without any evidence in the hands of the assessee protective additions have been made therefore the defective satisfaction with respect to the pen drive belonging to the assessee and consequent assessment orders passed u/s 153C of the act are not valid.
- c) whether the orders passed by the learned assessing officer are bad in law as those orders are passed and back to copy of the order in case of another assessee i.e. Dalmia cement Bharat Limited and therefore these orders are passed without any independent application of mind.

55. The facts show that the pen drive seized from the premises of Sri Joydeep Basu who is an employee of the group company i.e. Dalmia Bharat Enterprises Ltd. The assessing officer of Searched person as per satisfaction note dated 25<sup>th</sup> of March 2014 has categorically recorded a satisfaction in paragraph number [6] of the satisfaction note as Under :-

"6. After going through the data of the seized pen drive, I am satisfied that the contents pertaining to AY 2006-07. 2007-08, 2008-09. 2009-10 and 2010-11 belong to the company M/s Dalmia Bharat Sugar & industries Ltd As the company is assessed to tax with you, notice u/s 153C of the Income tax Act, 1961 may kindly be issued in the case of M/s Dalmia Bharat Sugar & Industries Ltd."

56. Even before the satisfaction is recorded by the assessing officer of the searched person one Shri YH Dalmia and Sri Gautam Dalmia, the directors and promoters of the Dalmia group of companies filed settlement application before the Income Tax Settlement Commission u/s 245C (1) of the act on 28/10/2013 owning of the entire content of the impugned cash book contained in the pen drive seized from the premises of Mr. Basu and offered an additional income of ₹ 90 crores. Therefore, when the satisfaction is recorded by the assessing officer of the searched person on 25<sup>th</sup> of March 2014 the ownership of the above pen drive was owned by these two persons. The revenue was also aware that the content of the pen drive were owned by these two persons before recording of the satisfaction. It was also shown to us that the revenue has also used the data contained in the alleged pen drive and the accounting entries contained therein at the time of furnishing of the report u/s 245D (2B) on 02/12/2013 to alleged that the these two persons has not made any untrue disclosure of income. The income tax settlement commission after analysis of the report of the revenue and the reply of the applicant before it, reached at a conclusion that the claim made by the revenue was not acceptable and accepted the application of the applicants by passing an order u/s 245D (2C) on 18<sup>th</sup>/12/2013 copy of which is placed in the paper book page number 677 – 691. At page number 13 of the order of the settlement commission passed u/s 245D (2C) has also noted that the disclosure made by the applicants on the basis of the impugned pen drive and undisclosed income of ₹ 495 crores was worked out by the learned CIT before it by only considering the receipt side and excluding the entries on the payment side. Thus it is apparent that at the time of recording the satisfaction on 25<sup>th</sup> of March 2014 in the case of the assessee the impugned pen drive and the content thereof already constituted part of the proceedings of the record

related to the settlement proceedings in case of two different applicants. It is very clear that settlement commission is also on one of the mechanism of settlement of dispute, which has accepted that the content of the pen drive belonged to the applicants before it. Further as per final order u/s 245D (4) dated 13 February 2015 the settlement commission has already held that the entries in the impugned cash book in the seized pen drive belong to the applicants before the settlement commission and the disclosure of ₹ 90 crores made by the said applicant including the entries in the impugned cash book in the seized pen drive was 'full and true'. Thus, it is apparent that one of the income tax authorities has already held that the pen drive belongs to the applicants and the income containing wherein is only to the extent of ₹ 90 crores. Even despite this, the learned assessing officer of the searched person has recorded satisfaction that the content of the pen drive 'belonged to' the assessee. The order of the settlement commission, which is placed before us in paragraph number 9, has accepted the above disclosure containing 125 pages of the pen drive data. The learned assessing officer of the searched person has recorded the satisfaction that these data belongs to the assessee company. We find that the satisfaction of the higher forum that is the settlement commission will naturally prevail over the opinion of the learned assessing officer of the searched person. This is also because before the settlement commission the revenue is also represented by highest officials and gives its own report with respect to the disclosure made by these persons after detailed investigation about leakage of any income. Furthermore, the order of the settlement commission has not been challenged by the revenue before the higher forum. It is also not been contested before the settlement commission that the pen drive does not belong to the applicants but to some other person and more precisely the assessee. In view of this, we are not in a position to accept that the pen drive 'belonged to' the assessee company.

57. Our view is further strengthened by the fact that if the pen drive 'belong to' the assessee company, the learned assessing officer could not have made an addition in the hands of the assessee on protective basis. He should have made it on substantive basis. He made it on substantive basis in the hands of another person. It is very unusual that if that pen drive 'belongs to' the Assessee Company and addition is made in the hands of somebody else on 'substantive bases. That itself shows that the satisfaction of the learned assessing officer of searched person in holding that pen drive belong to the assessee is defective.

Had the pen drive belong to the assessee only, the addition would have been made in the hands of the assessee on 'substantive basis' and could not have been made on 'protective basis' in the hands of anybody else. The satisfaction of 'belonging to' is an exclusive satisfaction with respect to one person unless in case of joint holding of the property or joint ownership of certain documents. That is not the case here.

58. In the instant case, admittedly there was no search carried out on the assessee company. The alleged pen-drive was purportedly seized from the premises of Sri Joydeep Basu (who was an employee of Dalmia Bharat enterprise Ltd and not the Assessee Company) in the course of the inter-connected search and seizure operations carried out on various dates in the cases of Dalmia cement Bharat Limited, Dalmia Bharat Enterprises Ltd, the promoters of the Dalmia Group and the employees of Dalmia Bharat Enterprises Ltd. The A.O of the searched person viz. the Ld. DCIT, CC-2, New Delhi, (being the common A.O for all persons covered under the impugned search & seizure operations i.e. (i) Dalmia cement Bharat Limited, (ii) Dalmia Bharat Enterprises Ltd, (iii) promoters & employees of the group) after considering the alleged entries in the pen-drive and the statements of various persons recorded in the course of search held that the entries in the pen-drive belonged to Dalmia cement Bharat Limited and made substantive additions of the alleged inflow (after extrapolation) recorded in the cash book contained in the said pen-drive in the hands of Dalmia cement Bharat Limited for A.Ys 2006-07 to 2012-13. The Ld. DCIT, CC-2 also made similar protective additions in the hands of the other searched entities i.e. (i) Dalmia Bharat Enterprises Ltd & (ii) Sri Joydeep Basu. The learned authorised representative also produced Copies of Assessment Orders passed u/s 153A/143(3) of the Act in the cases of Dalmia Cement Bharat Limited, Dalmia Bharat Enterprise Limited & Sri Joydeep Basu for A.Ys 2006-07 to 2011-12, which are placed at pages 120 to 537 of the paper book. Thus, having clearly held that the entries in the impugned pen-drive belonged to Dalmia cement Bharat Limited which is one of the persons covered in the inter-connected search actions under his jurisdiction and having made substantive additions on the said basis in the hands of Dalmia cement Bharat Limited, the Ld. DCIT, CC-2 could not have simultaneously arrived at a definite conclusion / satisfaction that the entries therein 'belonged' to Assessee Company. It is surprising that on same data addition on substantive basis is made in the hands of one assessee (i) Dalmia cement Bharat Limited and Protective addition are

made in the hands of three assessee (i) Dalmia Bharat Enterprises Limited (ii) Mr. Joydeep Basu and (iii) Assessee i.e. Dalmia Bharat Sugar and Industries Limited.

59. The provisions of Section 153C provides for a clear-cut satisfaction of the AO of the searched person that documents seized from him does not belong to him but to some other person and then he supposed to handover such documents etc to the assessing officer of the person to whom the said document belongs to. It is that satisfaction that the document in fact belongs to somebody else there must be some material available with the assessing officer before he arrives at the satisfaction that the seized document does not belong to the searched person but to somebody else. Further the satisfaction note itself must clearly display the reasons based on the conclusion that the AO of the searched person was satisfied that the seized documents belongs to a person other than searched person. Thus, he has to first justify that the document found during the course of search does not belong to the person searched. Then he has to find and record a satisfaction that it belongs to another person. Thus, he cannot throw away material to assessing officers of multiple persons and say that this material belongs to many persons. Such a kind of vague satisfaction is not permitted. The decision of the honourable Delhi High Court on this issue in Pepsi foods private limited versus ACIT 367 ITR 112 has clearly held that surmises and conjectures cannot take the place of satisfaction. It is further held that the satisfaction note itself must display the reasons on the basis for the conclusion that the assessing officer of the searched person is satisfied that the seized documents belong to a person other than the searched person. In the present case, the assessing officer of the searched person has made multiple additions in multiple assesses on the basis of same seized documents taken out from the pen drive and that too on substantive basis and protective basis in different assesses. This fact itself shows that the satisfaction recorded by the AO of the searched person that the material belongs to the assessee is not sustainable in law.
60. We further test the satisfaction recorded by the AO of the searched person dated 25<sup>th</sup> of March 2014 does not display any reason or material or any basis for conclusion that the pen drive does not belong to the searched person but to the assessee. Both the satisfaction note of AO of the person searched and AO of the assessee are reproduced above in the satisfaction note he has clearly mentioned that the pen drive reveals that it contains complete details of inflow and outflow

of the finance related to the family members in the group companies for the four financial years. Thus, he specifically mentions that the data related to the family members and the group companies and not has specifically referred the name of the assessee company. He does not also mention the reason that why that pen drives did not belong to the person searched. Such a satisfaction definitely suffers from some infirmities.

61. The AO of the assessee has recorded a satisfaction that there is an email from one Mr. Sanjay Mitra dated 24<sup>th</sup> of March 2011 in the pen drive where there was a proposal of transactions of shares. Based on this the AO held that the contents of the mail, accounts et cetera as seen in the pen drive and mentioned in the satisfaction note of the AO of the searched person he also satisfied that it is a fit case for initiation of proceedings u/s 153C of the act.
62. The content of the mail is as Under:-

"deepakakasher@gfl.co.in

March 24, 2011

*Further to my yesterday's phone call, communicating your Secretary to arrange our discussion on further actions on Dalmia matters.*

*Please note that GFL is currently holding 1,91,881 shares of DBSIL (CMP Rs. 25/- per sh., CMV Rs. 48 lacs) **and 1,12,950 shares of OCL** (CMP Rs. 104/- per sh., CMV Rs. 117 lacs.) We propose to buy back the same during the first week of April by way of market transactions. After the closure of the arrangement an amount of Rs. 594 lacs (approx.-on today's market price) would be receivable from your end, the same will be taken by us in the form of an ICD in Cradle Finance, as has been discussed and agreed by your Sh. Jain Sahab and Puneet Dalmia. The balance sheet of Cradle Finance is attached herewith for your perusal.*

*Please confirm the above.*

*Thanks and regards,*

*Sanjay Mitra."*

63. Based on the above the AO noted that DBSIL is the abbreviation for Dalmia Bharat sugar industries Ltd, the shares of which is held by another company abbreviated as GFL. In addition, there are transactions of buy back of the shares. The claim of the assessee is that this is merely a conjecture and surmises are no such transaction is taken place. The assessee has also submitted that there are certain flaws in the conclusion drawn by the AO and therefore on this basis the impugned satisfaction recorded by the learned

assessing officer that the pen drive belongs to the assessee company is based on no material.

64. On careful perusal of the same, it is noted that it is a communication addressed by the employee of the group company and not of the assessee. Further content of the email is merely a proposal as it is specifically mentioned that there is a proposal to buy back certain shares of the assessee company and another company. Further the content of the mail shows that one company GFL is holding 1,91,881 shares of the assessee company and 1,12,950 shares of OCL . There was a proposal to buy back the shares from GFL by the companies who shares are held naturally. By the logic given by the learned assessing officer it can also be said that the same pen drive in which this is found also refers to another company who shares are also held by GFL i.e. OCL and therefore this pen drive also belongs to OCL. Further, the transaction has not at all taken place it is merely a proposed transaction. If there would have been a buyback, it would have been reflected in the books of accounts of the assessee company, as well as the shareholder. No such evidences are brought on record and the learned authorised representative has stated that there is no such transaction, which is taken place. Further, in the remand report of the assessing officer, which is placed, on record dated 5 October 2010 has categorically says that there is no such buy back of the shares. This statement made by Id AO in remand report based on the information obtained from SEBI, which has clearly stated that no such buy back has taken place. Report of SEBI is also the part of the remand report of Id AO. Therefore there is a categorical admission of the AO that there is no such transaction which is taken place, the only email found where the name of the assessee is mentioned, it cannot be held that the entry belongs to the assessee from which this mail was found.
65. It is further to be seen that the pen drive was seized from the possession of one Mr. Joydeep Basu. In his statement recorded u/s 132 (4) on 27/1/2012 years categorically stated that this pen drive belong to him and contain the data relating to the Dalmia group. Further based on the printout of the content of the pen drive shown to Mr. Puneet Dalmia in his statement recorded u/s 131 (1A) on 17 February 2012, he has categorically stated that the pen drive contains the entries recorded pertaining to cash transaction undertaken by him and his family in their personal capacity and not belonging to Dalmia cement Bharat Limited or Dalmia enterprises Bharat limited. The settlement commission also held that entries in the impugned cashbook belong to the

promoters in the individual capacity and accepted the disclosure thereon. The content of the impugned pen drive in all these proceedings have never been claimed by the person from whom pen drive was found and the person who owned the pen drive belonging to the assessee company.

66. Interestingly a contention has been raised that in the hands of the assessee protective assessments/additions have been made based on the entries recorded in the impugned pen drive seized from the possession of 3<sup>rd</sup> party by invoking the provisions of Section 153C of the act. It is argued that the protective assessment can only be made where the assessing officer has a doubt as to the person in whose hand the income is taxable or also the year in which is taxable. It is also claim that such an exercise is permissible only in the case of the regular assessment. The argument is placed that in case of reopening of the assessment where the specific satisfaction is to be recorded that the income of the assessee escaped assessment i.e. u/s 148 of the act there cannot be any protective assessment. Because if there is a doubt that income has escaped assessment, reopening proceedings cannot be initiated in the case of an assessee. For this proposition, the reliance has been placed by the learned authorised representative in the case of DHFL venture capital fund versus ITO 358 ITR 471 (Bom) wherein the honourable High Court on the question of the validity of making a protective assessment by taking recourse to the provisions of Section 148 has negated such an action. This corollary was brought into as and argument by the learned authorised representative with respect to the provisions of Section 153C of the act wherein there has to be specific finding that the impugned material or the seized assets belong to the assessee. He submitted that the phrase 'belong to' the assessee is equivalent to 'income has escaped' the assessment u/s 148 of the act. Both are definite finding. The argument is that if the assessing officer is in 'doubt' in both the cases, he cannot resort to this Section. Clearly, in the case, the learned assessing officer has made a 'protective addition' in the hands of the assessee and 'substantive addition' in the hands of Dalmia cements Bharat Limited. This clearly shows that the learned assessing officer is clearly 'in doubt' about 'belonging' – of the pen drive as well as the content of the income in the data contained in that pen drive with respect to the assessee in whose hands it is to be charged. Thus it is clear that the recourse to the provisions of Section 153C has been made by the learned assessing officer despite he being 'in doubt' and merely to take care of a contingency that whereas in future upon the deletion of the corresponding

'substantive addition' in the hands of the other assessee. This is also supported by the decision of the honourable Delhi High Court in case of PepsiCo (supra) where the 'satisfaction' is required to be of clear nature. Therefore it is clear that there is no clear-cut satisfaction recorded by the learned assessing officer that the material i.e. pen drive 'belonged to' the assessee as well as the content of the income therein is to be charged to tax in the hands of the assessee.

67. It is very interesting feature that has been noted during the course of hearing that the order passed by the assessing officer in the case of the assessee is an ad verbatim reproduction of the order of the learned Deputy Commissioner of income tax, central circle – 2 in the case of Dalmia cement Bharat Ltd. The assessment order passed by the learned assessing officer in case of all the assessment years makes the following reference:-

"11. A letter dated 09.03.2015 was sent to DCIT, Central Circle-26 (prior to cadre restructuring, designated as DCIT, Central Circle-2, New Delhi), New Delhi requesting him to provide copy of search assessment order for the relevant assessment years. The Ld. DCIT, Central Circle-26, New Delhi vide letter dated 09.03.2015 provided copies of assessment orders of Dalmia Cement Bharat Ltd. (PAN AADCA9414C) and Dalmia Bharat Enterprises Ltd. (PAN AAJCS7366K) for the A.Ys 2006-07 to 2011-12.

11.1 I have placed reliance on the statement of the various officials recorded during search and survey operations, findings, observations of the DCIT, Central Circle-26, New Delhi in the assessment order of Dalmia Cement Bharat Ltd. for A.Y. 2010-11 in connection with the proceedings u/s 153C of the Act in the case of the assessee company for A.Y. 2010-11.

.....

12.4. The Ld. Deputy Commissioner of Income Tax (AO) Central Circle-26, New Delhi while passing assessment order in the case of M/s. Dalmia Cement (Bharat) Ltd. for A.Y. 2010-11 on the same issue has given his findings which are reproduced hereunder:-  
....."

The above facts clearly show that the learned assessing officer has merely copied and paste the assessment order in the case of Dalmia cement Bharat Limited. The learned assessing officer in this case has simply relied on the statement of the various of issues recorded during the search and survey operations findings and observation of the assessing officer in case of that assessee. He has also applied the same finding, which have been reached by the learned assessing officer of the different assessee. Thereafter he held that he is in total agreement with the findings in the case of Dalmia cement Bharat

Limited and makes an addition on identical basis on protective basis in the hands of the assessee company i.e. Dalmia's Bharat sugar industries Ltd. This is a clear indication that the assessing officer of the assessee has not applied his independent mind to the various facets and the facts and evidences collected during the course of the search that whether they belong to the assessee or the income contained therein is to be taxed in the hands of the assessee. Such a vague satisfaction coupled with borrowed satisfaction in the assessment order itself demonstrates non-application of mind by the AO and complete reliance on the opinions and findings of another officer. This clearly shows that the learned assessing officer has clearly abdicated responsibility, which is cast on him to determine whether the receipt is income and is taxable in the hands of the assessee only or not. This also suffers from a basic inherent defect that the decision is been taken by somebody else and which is accepted by the learned assessing officer without any independent application of mind and more so for sticks such findings in the assessment order itself and then holding that he is in total agreement with the above findings. There is no independent reasoning given by the assessing officer of the assessee.

68. We have also analyzed the statement of Mr. Puneet Dalmia recorded on 17<sup>th</sup> of February 2012, Jaydeep Basu on 27 January 2012, Mr. NK Berry on second of February 2012, Mr. Sanjay Mitra once 27<sup>th</sup> of January 2012 and once again on seventh of February 2012. On careful reading of the statements, it is apparent that Mr. Puneet Dalmia has categorically answered that the content of the pen drive belongs to him and his family in their personal capacity and has nothing to do with Dalmia cement Bharat Limited or Dalmia Bharat Enterprises Ltd. The statement of Mr. Joydeep Basu has categorically stated that pen drive belonged to him and that the contained therein belonging to Dalmia group. Mr. N K Berry has categorically stated that that belongs to Dalmia brothers Enterprises Ltd. There is no such group company by the name of Dalmia brothers Enterprises Ltd. Further Mr. Sanjay Mitra stated that this belongs to Dalmia group as well as Dalmia Bharat Enterprises Ltd on 27<sup>th</sup> of January 2012 and on seventh of February 2012, he stated that he does not know whom these transactions belong to. In the proceedings before the settlement commission each and every entry in the impugned cash book was analyzed by the applicant by offering an additional income and by the revenue contesting that there is no full and true disclosure by the applicants the categorical finding that has been reached by the settlement commission is that this pen drive and that the content therein

belonging to the assessee applicant before it. This was also accepted by the revenue before the settlement commission. Therefore, it is not correct for the assessing officer to hold that the pen drive belonged to the assessee along with the data content therein and the income thereof is chargeable to tax in the hands of the assessee on protective basis.

69. In view of above facts, the question number [3] is answered in favour of assessee that the pen drive does not belong to the assessee company wherein for different applicants have owned it before the settlement commission and the settlement commission has accepted the content of the pen drive data contained therein and the income comprised in those documents chargeable to tax in the hands of those four applicants accepting the amount of disclosure made by them. Further question number [4] he also answered that the satisfaction recorded by the assessing officer of the person searched does not fulfill the requirement of provisions of Section 153C of the act as it is a defective satisfaction for the reasons given above. Issue number [5] that the assessment order framed u/s 153C read with Section 143 (3) for assessment year 2006 – 07 to 2011 – 12 in case of the assessee are ad verbatim copies of the orders of the learned Deputy Commissioner of income tax, central circle – 2 in the case of Dalmia cement Bharat Limited and therefore there is no application of independent mind by the learned assessing officer on the facts and the materials available before him while taxing the income in the hands of the assessee on protective basis. Therefore the consequent assessment order passed u/s 153C of the act for assessment year 2006 – 07 to 2011 – 12 are also not sustainable in law.
70. Now we go to the question number [6] that Whether the assessee can claim that order of the settlement commission was conclusive u/s 245I of the act and where income covered in the pen drive has been accepted by the settlement commission as belonging to the four different applicants and accepting the disclosure, can now the assessing officer make the similar addition out of the same pen drive in the hands of the assessee on protective basis. The contention of assessee is that the order of the settlement commission is final as provided u/s 245I of the act and conclusive as to the 'matter' stated therein and no matter covered by such order shall, save as otherwise provided Under Chapter XIX A. In any proceedings Under this act or Under any other law for the time being in force, can be questioned. It is also submitted that only remedy lies Under the provisions of Section 245D (6) wherein it has been stated that the

order passed by the settlement commission shall be void if it is subsequently found by the settlement commission that it has been obtained by fraud or misrepresentation of facts. Therefore the contention of the assessee is that when the income involved in the data contained in the pen drive has already been held to be chargeable to tax in the hands of the four applicants before the settlement commission, now, this income cannot once again either on protective or for any other basis, be charged to tax in the hands of any other assessee. For this proposition the assessee has relied on the decision of the honourable Allahabad High Court in CIT versus Srimati Disksha Singh 13 taxmann.com 29, Honourable Delhi High Court in Sukhmani associates private limited versus settlement commission 189 CTR 103. Thus, it was argued that the order made by the settlement commission u/s 245I of the act was conclusive and final. When the act provides that the order shall be final and conclusive, the final judgment of the final decision of the settlement commission does not lose its force and cannot be called in question or Under any provisions of this act or Under any law save as otherwise provided u/s 245D (6). Therefore, since the content of the impugned cash book in the seized pen drive constituted part of the 'matters' covered by the settlement commission and on the basis of which the final order has been passed, which has been accepted by the revenue by not challenging it before the higher forum, as well as not showing that it has been obtained by fraud or misrepresentation of the facts, now, the department does not have any authority to challenge that this income is 'belonging to' and chargeable to tax in the hands of different person than the four applicants before the settlement commission.

71. We have carefully analyzed the arguments of the learned authorised representative, which at first instance looks forceful and convincing. However when looked into the provisions of Section 245I, we are of the opinion that it gives the protection to the applicants before the settlement commission only that such matter cannot once again be taxed in the hands of only those four applicants in different proceedings for the same assessment year or in different assessment years. According to us, the provisions of Section 245I does not give protection to the whole world with respect to the 'matter' as decided by the settlement commission, it only protects those applicants who are before the settlement commission. Therefore, this proposition raised by the learned authorised representative stands rejected.

72. Issue number [7] that arises before us is Whether the assessment order passed in the case of the assessee on 'protective basis' is sustainable because identical 'substantive and protective additions' were made on the basis of the same material i.e. pen drive in case of group companies, which have been deleted by the learned CIT – A, 29 on the ground that entries in the cash book and 125 pages found in the seized pen drive belongs to the promoters and not to these companies. The revenue has accepted such orders of the learned CIT – A, 29 in the case of the group companies and those orders have not been challenged therefore on the identical facts the orders passed by the learned assessing officer are not sustainable. Issue number [8] is When the additions made in the hands of the other entity on 'substantive basis' is deleted by the learned CIT – A, can the protective addition in the hands of the assessee is sustainable
73. The facts clearly shows that on the same material contained in the pen drive the additions have been made by the revenue on 'substantive basis' in the hands of Dalmia cement Bharat Limited and on 'protective basis' in case of (1) Dalmia Bharat Enterprises Ltd, (2) Joydeep Basu and (3) Dalmia Bharat Sugar and industries Ltd.
74. on the facts on record placed before us it is apparent that the substantive addition has been made in the case of Dalmia cement Bharat Limited and the addition on protective basis is been made in the hands of the assessee. The fact shows that the substantive addition made in the case of Dalmia cement Bharat Limited are deleted by the learned CIT – A – 29, New Delhi with a categorical finding that the undisclosed income arising from the impugned cash book in the seized pen drive pertain to the applicants before Income Tax Settlement Commission and not to any of the companies of the Dalmia group including the assessee in whose hands the protective addition has been made. Such orders are placed before us in appeal number 136/2014 – 15/CIT (A) – 29 for assessment year 2006 – 07. The learned CIT – A has deleted the above addition in the assessment year 2006 – 07 wherein on identical basis the additions have been deleted for all other assessment years. The observation of the learned CIT – A areas Under:-

*""6.1 I have also perused the order of Settlement Commission dated 03.03.2015, issued under section 245D(4) in respect of settlement application filed by S/Sh. Yadu Hari Dalmia, Gautam Dalmia, Puneet Dalmia, Jai Hari Dalmia (Directors in Dalmia group). And I have also gone through the CIT-III (Central) report dated 16.05.2014, 07.07.2014 and 12.09.2014 wherein CIT-III (Central)*

*on the basis of evidence and statement recorded during search of key employees etc. have time and again emphasized that:-*

- (a) the entries in cash book and 125 pages found in pen drive which was seized from the residence of Mr. Joydeep Basu, belonged to the appellant only.*
- (b) the cash of Rs. 13,75,88,000 seized from various lockers belongs to the appellant and not to S/Sh Yadu Hari Dalmia and Gautam Dalmia and*
- (c) therefore the disclosure of RS. 90 cr. (made by the 2 applicants namely S/Sh Yadu Hari Dalmia and Gautam Dalmia, on the basis of entries recorded in the cash book and 125 pages found in the seized pen drive and the cash found in the lockers of employees, should not be accepted.*

*6.2 It is noted that the Hon'ble Settlement Commission, after considering the CIT, Central (III) various reports dated 16.05.2014, 07.07.2014, 12.09.2014 and 17.09.2014 and also after giving the department the opportunity of verifying the entries recorded in cash book and 125 pages found in the pen drive with the cash book (on the basis of which Rs. 90 cr. was surrendered by the 2 applicants) held that both*

- (i) the entries in the cash book and other documents (125 pages) found in the pen drive seized from the residence of Mr. Joydeep Basu and*
- (ii) the cash found in the lockers held in the name of employees, belonged to S/Sh Yadu Hari Dalmia and Gautam Dalmia.*

*The relevant gist of para 9 of settlement order dated 03.03.2015 on both the above issue reads as under:-*

*.....*  
*6.3 From the perusal of the order of Settlement Commission since categorical findings have been given by the Hon'ble Settlement Commission (which is a body superior to the undersigned) that the entries in the cash book and 125 pages which is found in the pen drive on the basis of which addition of Rs. 3,67,96,02,924 is made in the hands of the appellant in Assessment Years 2006-07 to 2012-13 and also cash in the lockers are held to be belonging to S/Sh Yadu Hari Dalmia and Gautam Dalmia and not to the appellant, hence the A.O's action in adding Rs. 22,80,39,000 made on the basis of pen drive (cash book and 125 pages) does not appear to be on sound footing.*

*It is also pertinent to mention here that while giving the above finding the department was given due opportunity to verify the transactions recorded in the cash book and 125 pages in Pen drive [on the basis of which the AO has made the additions in the year under consideration] with the entries in the cash book which was filed by the 2 applicants (on the basis of which they surrendered*

*Rs. 90 crore) no adverse findings were brought to the notice of the Hon'ble Settlement Commission.*

*Hence, in view of the above findings of the Settlement Commission that the entries in the cash book and 125 pages found from the files stored in the pen drive, seized from the residence of Mr. Joydeep Basu, does not belong to the appellant, the addition of Rs. 22,80,39,000 made in the appellant's hand on the said "pen drive" deserves to be deleted."*

75. Based on the above finding of the learned CIT – A in the case of the assessee whereas substantive addition has been made, the learned CIT in the present appeals (CIT – A – 22) has held as Under:-

"7.5 On perusal of the above findings as well as the order passed by the Hon'ble Settlement Commission dated 03.03.2015, issued under section 245D(4), in respect of settlement application filed by Sh. Yadu Hari Dalmia, Gautam Dalmia, Puneet Dalmia, Jai Hari Dalmia (Directors in Dalmia group) and appellate orders passed by CIT(A)-29, Delhi in the other cases of Group Companies, I find that entries in the cash book found in the pen drive does not belong to the appellant. As in the appellant's hand only protective addition is made and substantive addition made in the case of Dalmia Cement (Bharat) Ltd. has already been deleted by CIT(A)-29, Delhi, therefore, following the order of Ld. CIT(A), the addition of Rs. 22,80,39,000/- is not sustainable. Therefore the addition made in the appellant's hand is deleted."

76. Further while allowing the appeal of the assessee the learned CIT – A in the case of the assessee also enquired from the revenue whether any appeal has been filed against the order of the learned CIT – A – 29 in appeal of the assessee in whose hands substantive additions are made. As per letter dated 31/1/2019 written by Asst Commissioner of income tax, Circle – 12 the learned CIT – A confirmed that no second appeal has been preferred by the revenue against the order of the learned CIT (A) – 29 in the case of Dalmia cement Bharat Limited. During the course of hearing before asked we have also asked the revenue is that whether any appeal has been preferred by the revenue against the above order of the learned CIT – A – 29 in case of Dalmia cement Bharat Limited, the assessee in whose hand substantive additions have been deleted, learned that departmental representative reiterated the letter of the Asst Commissioner dated 31/1/2019. From the above facts it is apparent that the substantive additions have been deleted by the learned CIT – A – 29 in case of Dalmia cement Bharat Limited and therefore now before us, there is no other option but to delete the protective addition as protective addition alone cannot have any

legs to stand on when substantive addition has been deleted holding that the pen drive neither belonged to the assessee in whose hands the substantive addition is made.

77. Our attention has also been drawn towards instruction number 1842 dated 28<sup>th</sup> of March 1990 issued by the central board of direct action with respect to the appeals before the CIT appeals in case of protective assessments where it has been stated that the protective assessments and be kept in abeyance before the appellate authorities till the proceedings in the main cases are finalized. In the present case, the main case has concluded, as the revenue has not agitated the order of the learned CIT – A further.
78. It is also a settled precedent that when the substantive additions are deleted, the protective additions also cannot survive. It can survive in one of the situation where there is a finding in the case of the person in whose hands 'substantive addition' is made that the income belongs to the person in whose hands 'protective additions' are made. We could not find such finding by any authority in the case of assessee in whose hands 'substantive additions' are deleted. Thus, we are of the view that when the 'substantive additions' is deleted in the hands of another assessee without holding that income does not belong to that assessee but to this assessee, 'protective additions' cannot be sustained in the hands of this assessee. Further, when on the identical facts and circumstances, identical additions even on 'protective basis' are deleted in the hands of the other assessees by Id CIT (A) and such orders are remained unchallenged, we do not find any reason that such protective additions should be sustained in the hands of the assessee. Thus, we decide issue no [7] and [8] in favour of the assessee and uphold order of Id CIT [A] deleting additions.
79. The last question no [9] in this set of appeals and CO is that Even otherwise, it is presumed that pen drive belongs to the assessee, manner of protective addition in the hands of assessee is correct, jurisdiction u/s 153C is correctly assumed in the case of assessee, despite deletion of substantive addition, still whether the disclosure made before ITSC covers the amount of data involved in the pen drive. For this, we have perused the various replies and counter replies made before the ITSC by the parties and findings of ITSC on that.
80. On perusal of order of ITSC, we find following observations :-

“6.3 Further hearings were held u/s 245D(4) in the above matter on various dates and the issues raised in Rule 9 report and Report(s) u/s 245D(3) by the CIT and the reply by the applicants thereon were discussed at length during the course of these hearings. The necessary verification on the issues mentioned in the Rule 9 and 245D (3) reports were carried out with reference to replies of the applicant, by the Commission and in respect of the unresolved issues, the Commission issued the following directions:

.....The Department to verify the cash book submitted by the applicants vide their submissions on 26.5.2014 with the parallel cash book data of pen drive which was seized by the Department during the course of search from the residence of Sh Joydeep Basu, one of the employees of Dalmia Group.....

7. In compliance to the above directions, the CIT furnished a report dated 7.7.2014 on the issue of verification of the cashbook submitted by the applicants with the cashbook available with the Department and other documents. The applicants filed detailed submissions dated 14.7.2014 on the report of the CIT in respect of each of the issues raised by the CIT in his report dated 7.7.2014.

7.1 All the issues raised in the CIT's report dated 7.7.2014 as summarized above were discussed at length during the course of hearing u/s 254D(4) and thereafter we asked the Department to report as to whether the Department can prove that the entire income as depicted in the 125 pages of the pen drive owned up by the Applicants and a copy of which was made available to the Applicants, belongs to the company and not to the individuals. The CIT furnished his report on 12.09.2014 and the applicants' replies dated 15/17.9.2014 thereto were filed before us on 17.9.2014. The Bench has gone through these replies and rejoinders accordingly....

8. Shri S.K Tulsian, the learned Counsel has also submitted before us that in the letter dated 12.12.2013, addressed to the Commission in respect of the cases of Shri Yadu Hari Dalmia and

Shri Gautam Dalmia, it has been explained in detail that the allegation made by the CIT in his report under Section 245D(2B) dated 02.12.2013 that the above applicants have not made true and full disclosure of their income is without any basis and application of mind and the same is not based on any post-search enquiry/investigation carried out by the department. It is stated that the above report suffers from the following shortcomings:-

1....

2.....

3....

4 .One side depictions of cash transactions has been indicated in the report. Only receipts appearing in some pen drive have been highlighted for the purpose of claiming unaccounted income and corresponding payments have been ignored for estimating the income. At page 22 of its report the department has stated gross receipts of Rs. 495.35 crores (A.Y. 2006-07 to 2012-13) but has not uttered a word about the corresponding payments. It is noteworthy that against receipts of Rs. 369,20,85,030 for the period 2009-10 to 1 July, 2011, there is corresponding payment of Rs. 369,20,36,883 (refer to page-12 of Rule-6 Report) thus reflecting a net surplus of Rs. 48,147/- only. If the department is considering these to be business transactions, the natural corollary is that the net surplus of Rs. 48,147/- can only be considered as income.....

9.....As mentioned in para 4.2 above the applicants have owned up the contents of the seized pen drive consisting of 125 pages and these pages were directed to be given to the applicants. It is also stated that the applicants are not aware in whose presence the pen drive was found at Sri Joydeep Basu's residence.....

....However, we cannot ignore or brush aside the explanations/clarifications furnished by the above applicants, particularly in

respect of 125 pages of the above seized pen drive, of which printouts were furnished to the applicant by the department, as the applicants have compared and correlated various transactions appearing in the cash book in the seized pen drive vis-à-vis the settlement applications filed in their cases, particularly with reference to the working and basis of the unaccounted income arising from the same, which mainly constitutes the additional income offered by the above applicants before the Commission.....It may not be out of place to mention here that on the basis of the said seized pen drive, the Dept. has made several additions on a protective basis in the hands of Shri Joydeep Basu also. To our specific query made during the course of the present proceedings, whether, the Commission should ignore the additional income offered by the applicants, having correlation with various transactions appearing in pages 1-125 which have been owned up as discussed earlier in the seized pen-drive, in view of the department's consistent stand that the seized pen drive belongs to Dalmia group of Companies only, there was no affirmative and categorical response from the side of the department. In view of the facts and circumstances of the case as discussed above, we accept the disclosures made in the SOF of the applicants Shri Yadu Hari Dalmia and Sri Gautam Dalmia including 125 pages of the pen drive."

81. From the above findings, it is clear that
- i. all 125 pages, which are referred in the case of the assessee and other companies, are considered for the purposes of making disclosure.
  - ii. Further, there was a clear finding of the ITSC that, Revenue has only considered one side of the cashbook found and ignored the other side of cashbook. Thus only receipt side of cash statements were considered by the revenue for taxing, ignoring all together payments side. This fact is evident in para no 8.4 of the order of ITSC.
  - iii. Further , ITSC at para 9 of the order has recorded finding that "the applicants have compared and correlated various transactions

appearing in the cash book in the seized pen drive vis-à-vis the settlement applications filed in their cases, particularly with reference to the working and basis of the unaccounted income arising from the same, which mainly constitutes the additional income offered by the above applicants before the Commission” and the disclosure made by the Applicants on the said basis was accepted by ITSC.

- iv. Further even before ITSC revenue raised similar objections relating to the adequacy of disclosure of additional income of Rs. 95 crores by the four applicants. ITSC considered the Departmental objection that the total cash receipts recorded in the parallel cashbook of Rs. 495 crores was much higher than the amounts disclosed by the four family members and hence the undisclosed income of the group should be Rs. 495 crores. ITSC Considered that revenue had estimated the undisclosed income of the group at Rs. 495.36 crores by considering only the receipt side in exclusion of the payment side of almost matching amount of the alleged parallel cashbook. If the receipts were considered as income, the payments were required to be considered as expenses on the same logic.
- v. Further actual receipts considered by the Applicants in their working of undisclosed income based on the details available with them was much higher i.e. Rs. 649.18 crores.
- vi. printout of the alleged parallel cashbook and other seized materials as given by the Department were analyzed by the Applicants with reference to their workings. Each entry mentioned in the alleged parallel cashbook & other seized material were correlated by the Applicants with their working of undisclosed income, which proved that the Applicant’s disclosure was full and true.
- vii. ITSC further after considering the various Reports of the CIT and the replies of the Applicants thereto, vide para 9 of the order u/s 245D(4) recorded a finding that the Applicants had compared and correlated all the transactions appearing in the parallel cash book vis-à-vis their working of undisclosed income and the same was found to be correct and as such, the disclosures made in the S.O.F was accepted. Thus , it is established that ITSC, after considering the arguments raised by both the sides concluded that the

Department's stance of considering only the receipts side of the parallel cash book (which as per the Department's calculation aggregated to Rs. 495 crores) was inappropriate and that the Applicant's working of undisclosed income of Rs. 90 crores (in the cases of Sri YH Dalmia and Sri Gautam Dalmia) after considering both the receipts and payments side was full and true and thus accepted.

viii. Further Id DR could not show us, that which entries are excluded or not taken in to consideration by ITSc while accepting the disclosure of Rs 90 Crores as full and true.

82. In view of this we find that ITSC has covered, the complete data of 125 pages found from the pen drive, deduced the income of Rs 95 crores, and held that such a disclosure is full and true. In absence of any infirmities pointed out by revenue about any leakage of income from the seized data, we find that revenue is not in a position to controvert findings of ITSC on adequacy of income offered for taxation. Thus, Issue no [9] is decided in favour of the assessee.

83. Thus, For AY 2006-07, Ground no 1 & 2 of the appeal of the Id AO are dismissed. Ground no 1 and additional ground raised by assessee in CO is allowed.

84. It is a statement by the parties that there is no change in the facts and circumstances of the cases for AY 2007-08 to 2012-13 , their arguments are same. We also found that grounds of both the parties for all these years are identically worded with same argument. Therefore as per our decision for Ay 2006-07 where in we have dealt with all the issues , accordingly we dispose of the matters for AY 2007-08 to 2011-12 for the same reasons as under :-

i. Thus, For AY 2007-08, Ground no 1 & 2 of the appeal of the Id AO are dismissed. Ground no 1 and additional ground raised by assessee in CO is allowed.

ii. Thus, For AY 2008-09, Ground no 1 & 2 of the appeal of the Id AO are dismissed. Ground no 1 raised by assessee in CO are allowed.

iii. Thus, For AY 2009-10, Ground no 1 & 2 of the appeal of the Id AO are dismissed. Ground no 1 raised by assessee in CO are allowed.

iv. Thus, For AY 2010-11, Ground no 1 & 2 of the appeal of the Id AO are dismissed. Ground no 1 raised by assessee in CO are allowed.

v. Thus, For AY 2011-12, Ground no 1 & 2 of the appeal of the Id AO are dismissed. Ground no 1 raised by assessee in CO are allowed.

85. Accordingly, all the six appeals of Id AO and all six CO of the assessee are disposed of.

Order pronounced in the open court on 13/09/2021.

Sd/-  
(SUDHANSHU SRIVASTAVA)  
JUDICIAL MEMBER

Sd/-  
(PRASHANT MAHARISHI)  
ACCOUNTANT MEMBER

Dated:13/09/2021  
A K Keot

Copy forwarded to

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

ASSISTANT REGISTRAR  
ITAT, New Delhi