IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH : BANGALORE

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND SMT. BEENA PILLAI, JUDICIAL MEMBER

ITA Nos. 1945 & 1946/Bang/2016
Assessment years : 2010-11 & 2011-12

Mr. B. Nagendra, 1st Cross, Nehru Colony, Near Railway Track, Bellary. **PAN: ADKPN 9671M**	Vs.	The Deputy Commissioner of Income Tax, Circle 2(3), Bellary.
APPELLANT		RESPONDENT

Appellant by	:	Shri G.S. Prashant, CA
Respondent by	:	Dr. Manjunath Karkihalli, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	10.03.2022
Date of Pronouncement	:	17.03.2022

O R D E R

Per Chandra Poojari, Accountant Member

These two appeals by the assessee are directed against different orders of the CIT(Appeals) dated 10.8.2016 for the AYs 2010-11 & 2011-12.

ITA No.1945/Bang/2016

2. The assessee has raised the following grounds:-

"1. The order of the authorities below in so far as these are against the Appellant is opposed to law, weight of evidence, natural justice, probabilities, facts and circumstances of the Appellant's case.

2. The appellant denies himself liable to be assessed on a total income of Rs.4,42,96,740/- as against Rs.12,96,740/- returned by the appellant under the facts and circumstances of the case.

3. The learned CIT(A) erred in confirming the addition of Rs. 4,00,00,000/- as unexplained cash payments under the facts and circumstances of the case.

4. The authorities below failed to appreciate the fact that the memorandum of understanding with M/s. Shubham Ispat Pvt. Ltd. did not materialise and consequently erred in treating the sum Rs.4,00,00,000/- as unexplained cash payments under the facts and circumstances of the case.

5. The learned CIT(A) erred in confirming the addition of Rs.30,00,000/- as unexplained cash credits under the facts and circumstances of the case.

6. Without prejudice the addition made is wrong and requires to be made as Nil on the facts of the case.

7. Without prejudice, the authorities below ought to have worked out the peak credit before quantifying the unexplained credits under the facts and circumstances of the case.

8. The orders of the authorities below are bad in. law as the mandatory conditions to invoke the jurisdiction did not exist, or having not been complied with an consequently the orders of the authorities below are bad in law for want of requisite jurisdiction.

9. The appellant denies himself liable to be assessed under section 143(3) r.w.s 153/ of the Act on the ground that: -

   i. The search initiated in the case of the appellant is illegal and ultra vires the provisions of section 132(1)(a), (b) & (c) of the Act;

   ii. The search is conducted not on the basis of any prior information or material inducing any belief but purely on the suspicion and therefore, the action under section 132 of the Act is bad in law and consequent assessment under section 153A of the Act is null and void-ab-initio on the parity of the ratio of the decision

of the Hon'ble Apex Court in the case of UOI vs. Ajith Jain, reported in 260 ITR 80.

iii. The learned authorities below have not discharged the burden of proving that there is a valid initiation of search under section 132(1)(a), (b) & (c) of the Act, its execution and its completion in accordance with law to render the proceedings valid and to assume jurisdiction to make an assessment under section 153A of the Act. Reliance is placed on the decision of the Hon'ble Karnataka High Court in the case of C. Ramaiah Reddy vs. ACIT, reported in 339 ITR 210.

iv. The authorities below failed to appreciate that a valid search is a sine qua non for making a valid assessment under section 153A of the Act on the parity of the ratio of the decision of the Hon'ble Apex Court in the case of UOI vs. Ajit Jain, reported in 260 ITR 80.

10. The learned CIT(A) failed to appreciate the fact that the learned assessing officer had not obtained the approval of the Additional Commissioner or having obtained the copy of the same is not provided to the appellant which is in violation of the settled principles of natural justice and thus the order of assessment needs to be set aside.

11. The order of assessment suffers from the want of application of mind by superior authorities before granting approval under the facts and circumstances of the case.

12. The appellant denies himself liable to be levied to interest-under sections 234A, 234B and 234C of the Act and further the computation of interest was not provided to the appellant as regard to the rate, period and method of calculation of interest under the facts and circumstances of the case. The appellant expressly urges that the period of levy of interest is not in accordance with sections 234A, 234B and 234C of the Act.

13. Without prejudice, the interest levied under sections 234A, 234B and 234C of the Act requires to be waived off under the facts and circumstances of the case.

14. The appellant craves leave to add, alter, delete or substitute any of the grounds urged above.

15. In view of the above and other grounds that may be urged at the time of the hearing of the appeal, the appellant prays that the appeal may be allowed in the interest of justice and equity."

3. Further, the assessee has raised the following additional grounds:-

" 1. The authorities below are not justified in not affording an opportunity to cross examine the third parties whose statements were used against the appellant, which is against the principles of natural justice and thus the orders of the authorities below are liable to be quashed in the interest of equity & justice.

2.a) The authorities below failed to appreciate that the appellant is merely one of the parties to the agreement with M/s. Shree Shubham Ispat Pvt. Ltd. and thus the entire addition of Rs.4,00,00,000/- as unexplained cash payment in the hands of the appellant is unjustified under the facts & circumstances of the case.

b) Without prejudice, out of the transaction amount of Rs.5,00,00,000/-, the appellant's share of Rs.1,00,00,000/- was paid through account payee cheque and thus the addition of Rs.4,00,00,000/- in the hands of the appellant as unexplained cash payment is bad in law and thus the same needs to be deleted under the facts and circumstances of the case."

4. The assessee has filed petition for admission of additional grounds stating that these grounds were not urged in the original grounds and they do not involve investigation of any fact otherwise on record and are pure questions of law. Relying on *Supreme Court judgment in the case of M/s National Thermal Power Co. Ltd. Vs. CIT, 229 ITR 383 (SC)* it was prayed that the additional grounds may be admitted for adjudication. In our opinion, these additional grounds are pure questions of law not involving fresh investigation into facts, a*ccordingly, following the Hon'ble Supreme Court judgment in the case of M/s National Thermal Power Co. Ltd. (supra)*, the additional grounds are admitted for adjudication.

5. Ground Nos.1 & 2 are general in nature and do not require any adjudication.

6. First we take up grounds 8 to 11 with regard to validity of search proceedings by issue of notice u/s. 153A of the Act and consequent assessment. The ld. AR submitted that the mandatory requirements for the assumption of jurisdiction under section 153A were not complied with and that the reasons for conducting the search were not recorded. Assuming but not admitting that the reasons were recorded, the reasons so recorded must have been provided to the appellant for objections and rebuttal which has not been done by the authority. The AO ought to have provided the reasons if at all recorded to the appellant for objections and rebuttal and since the same has not been provided the order passed by the assessing officer needs to be quashed for violation of principles of natural justice.

7. It is submitted that the conditions under section 132(1) (a), (b), (c) did not exist and the reasons had to be given and thus the validity of search can be questioned. Reliance is placed on the decision of the Jurisdictional High Court in the case of *C Ramaiah Reddy vs ACIT reported in 339 ITR 210 / 61 DTR 82* wherein the Hon'ble Court has held that it is obligatory on the part of the Tribunal first to go into the jurisdictional aspect and satisfy itself that the said search was valid and legal. It is further held by the Hon'ble Court that valid search is sine qua non initiating proceedings under special chapters of assessment. It is further submitted that the learned assessing officer erred in not following the decision of the Jurisdictional High Court and hence the order passed by the assessing officer needs to be quashed on this ground alone in the interest of equity and justice.

8. The ld. AR further submitted that the AO has mentioned at page 8 of the order that the prior approval of the Additional Commissioner of Income Tax, Central Range-2, Bangalore was obtained vide letter F.

No.51(3)/Addl.CIT-CR-2/12-13 dated 30.03.2013 before passing the assessment order. The AO pointed out that the assessment order has been passed on 19.03.2013 and thus no approval could have been obtained on 30.03.2013 before passing the assessment order which is factually incorrect. The ld. AR submitted that the copy of the approval obtained from the Additional Commissioner has not been provided to the appellant which is against the settled principles of natural justice and thus the order needs to be cancelled on this count alone.

9. Without prejudice, it is submitted that if the Additional Commissioner had given prior approval, then the assessee has to be heard before giving the approval. The granting of an approval is not an empty formality and in the instant case the appellant has not been heard and hence the order is liable to cancelled even on this count as the principle of *audi alteram partem* has been violated. Further the copy of the approval has not been given to the appellant. It is of importance to submit that the relevant records may be looked into so as to find out as to when the AO sent the draft of his order and when the approval was given, what are the suggestions of the additional commissioner, is it a mere idle formality of putting a seal of authority on the order of the AO or has there been application of mind by the Additional Commissioner. This fact has to be looked into. It is submitted that the approval cannot be *ipse dixit*.

10. The ld. AR stated that it is of importance to submit that obtaining of approval is not a mere idle formality of putting a seal of authority on the proposal of the AO but there should have been application of mind by the Additional Commissioner. It is clear from the turn of events in this case that the approval of the additional commissioner has not been obtained and assuming that it has been obtained, the fact of application of mind by the Additional Commissioner needs to be looked into. Reliance is placed on the

decision of the Supreme Court in the case of *Union of India vs M L Capoor reported in AIR 1974 SC 87* and the decision of the Delhi High Court in the case of *Central India Electric Supply Co. Ltd vs ITO reported in 333 ITR 237*.

11. He further submitted that the AO acted in an arbitrary manner while completing the assessment proceedings. This statement can be proved by the fact the appellant had filed all the details sought for vide letters filed on 18.03.2013, 26.03.2013 and host of other dates whereas the officer mentions that the appellant did not comply with the notices issued. It is pertinent to mention that the appellant had filed the replies in a very short time on receipt of the notices or letters from the assessing officer i.e. for the letter received on 16.03.2013, reply was filed on 18.03.2013 and for the notice received on 23.03.2013, reply was filed on 26.03.2013. This proves the bona fide of the appellant in co-operating with the department whereas the AO states that the appellant was non-cooperative. This clearly establishes that the assessment was not completed in a fair manner and the AO acted in an arbitrary manner and completed the assessment merely on suspicion and surmises rather than relying on facts and evidence and thus it is prayed that the order of assessment be set aside on the grounds of non-application of mind and also for being against principles of natural justice, reasonableness, fair-play and equity.

12. He mentioned that the Officer issued another Notice under section 142(1) of the Act on 15.03.2013 as per which the appellant had to furnish certain details by 21.03.2013. The notice was served on the appellant only on 23.03.2013 and the appellant filed the reply on 26.03.2013 i.e. within a short span of two days. It is clear from the notice dated 15.03.2013 that details had to be filed by 21.03.2013 whereas the AO passed order on 19.03.2013 which is against the settled principles of natural justice. This

indicates and proves beyond doubt that the assessment was conducted in an arbitrary manner, without regard to the facts of the case, basic principles of natural justice and it may also be inferred that the officer had made up her mind to make additions in the case of the appellant irrespective of the fact whether the replies are furnished or not. Thus it is prayed that the order of assessment be cancelled on the ground of non-application of mind; being patently opposed to principles of natural justice; highhandedness in the approach to the assessment proceedings and lastly for being against the principles of reasonableness, fair-play and equity.

13. It is further submitted that the action of the AO in completing the assessment proceedings without even waiting for the time given by her own self to comply with the notice issued establishes that the officer has no regard to the manner in which assessment proceedings must be conducted and it may also be inferred that it is nothing but the gross abuse of the official position of the AO only with an intention to cause hardship to the assessee.

14. The ld. AR pointed out that the AO wrongly mentions on page 3 of the order that the appellant has not complied to the Notice under section 142(1) of the Act issued on 14.02.2013. It is to be noted that Notice under section 142(1) was dated 04.02.2013 and not 14.02.2013 as mentioned by the officer. The notice dated 04.02.2013 was received by the appellant only on 09.03.2013 and the appellant has replied to the same vide letter filed on 18.03.2013.

15. Without prejudice, it is contention of the appellant that the assessment order was not passed on 19.03.2013. Further, it is of relevance to ascertain the date of dispatch of the assessment order from the department for the reason that the posts would be delivered generally within 7-10 days and in the case instant the order was received only on

03.04.2013 which is about 15 days after passing the order. It is to be seen from the records of the department as to time frame between the passing of the order and the date of dispatch and whether there is a delay in all cases or not. Without prejudice, it is the contention of the appellant that the order has been passed much later than 19.03.2013 but it has been dated as 19.03.2013.

16. It is further submitted that the AO completed the assessment in a hurried manner for the reasons best known to her on 19.03.2013 itself whereas the time limit for passing the assessment order is 31.03.2013 This is against settled principles of natural justice and thus the order needs to be set aside on this count alone.

17. On the other hand, the ld. DR submitted that the assessee cannot question the validity of search by issue of notice u/s. 153A and consequent framing of assessment. He relied on the decision of Delhi High Court in the case of *M B Lal v. CIT, 279 ITR 298* (Del) wherein it was held that the validity of search proceedings cannot be examined in appeal filed before the Tribunal against the block assessment and the remedy lies under article 226 of the Constitution. In Paras Rice [2009] 313 ITR 182, the Punjab and Haryana High Court following the decision of the Delhi High Court in M.B. Lal's case [2005] 279 ITR 298, held that while hearing an appeal against the order of assessment, the Tribunal cannot go into the question of validity or otherwise of any administrative decision for conducting search and seizure. In the matter of Gaya Prasad [20071 290 ITR 128 (MP), it has been held that the jurisdiction exercised by the statutory authority while hearing an appeal cannot enter into the justifiability of an action under section 132A. Whether the order passed by the Commissioner of Income-tax is without jurisdiction or not cannot be the subject-matter of assessment as the same does not arise in the course of

assessment. Therefore, neither the Assessing Officer nor the appellate authority can dwell upon the said facet. One may note with profit, it would not be a jurisdictional fact within the parameters of assessment preceding or an appeal arising there from. It can only partake of the nature and character of adjudicatory fact to the limited extent whether such search and seizure had taken place and what has been found during the search and seizure. The validity of search and seizure is neither jurisdictional fact nor adjudicatory fact and, therefore, the same cannot be dwelled upon or delved into in an appeal. The submission that the Tribunal having been constituted under article 323 of the Constitution can delve into it, is an unacceptable proposition in law, especially in the teeth of the provision contained under section 253. It is relevant to mention that in a recent case, the Hon'ble Chattisgarh High Court in the case of *Trilok Singh Dhillon vs CIT (2011)41(I) ITCL 2010 (Chattisgarh-HC)* has held that it was not open to the appellant to question the legality and validity of search & seizure proceedings during assessment proceedings before the Assessing Officer or in appeal before the Commissioner of Income Tax or the Tribunal. Further, the SLP filed by the appellant has been dismissed by the Hon'ble Supreme Court vide order dated 16.07.2012-SLP (C) No.6717 of 2012 (2012) 210 Taxman, 95 (SC) (MAG) and 20 Taxmann.com 806. Moreover, in the decision of Karnataka High Court in the case of C Ramaiah Reddy in 339 ITR 210 with regard to giving a finding on the legality of search also, does not help the appellant as the Hon'ble High Court in the said case [though pending in appeal by Revenue before Supreme Court] referred the matter of validity of search to the ITAT. Therefore he submitted the assessee cannot question the orders sanctioning search u/s.132 of Income Tax Act.

18. We have heard both the parties and perused the material on record. In the present case, the assessee is questioning the validity of search by issue of notice u/s. 153A of the Act. In our opinion, this issue has been settled by the decision of the Special Bench in the case of *Proman Ltd. v. DCIT, 95 ITD 489 (Del) (SB)* wherein it was held that Tribunal cannot adjudicate upon issue relating to validity of search conducted under section 132 while disposing of appeal against block assessment.

18.1 Further the Hon'ble Supreme Court in the case of *N.K. Jewellers Vs. CIT, New Delhi (2017) 85 taxmann.com 361(SC)* held that in view of the amendment made in section 132A by Finance Act, 2017, the reason to believe or reason to suspect as the case may be, shall not be disclosed to any person or any Authority or Appellate Tribunal as recorded by income Tax Authority u/s.132 or section 132A. We, therefore, cannot go into that question at all.

18.2 The Hon'ble Jurisdictional High Court in the case of *Prathibha Jewellery House Vs. CIT (2017) 88 taxmann.com 94 (Karnataka)* dismissed the writ petitions and held that even the law has been amended by insertion of the aforesaid Explanation by Parliament in Section 132 of the Act by the Finance Act, 2017 with retrospective effect from 1.4.1962. The Court held that the Explanation also prohibits the Appellate Authorities to go into the reasons recorded by the concerned Income Tax Authority for directing Search against the assessee or tax payer. The relevant portion of order is reproduced below:-

> "Having heard the counsels for the parties, this court is satisfied that the present writ petitions deserve to be dismissed for the following reasons:
>
> (i) That even the law has been amended by insertion of the aforesaid Explanation by Parliament in Section 132 of the Act by the Finance Act, 2017 with retrospective effect from 1.4.1962. That Explanation also prohibits

the Appellate Authorities to go into the reasons recorded by the concerned Income Tax Authority for directing Search against the assessee or tax payer.

(ii) That this Amendment came after both, ITAT passed the order in the present case on 21.11.2014 as also the learned CIT(A) passed the impugned order on 11.2.2015. Nonetheless, retrospective effect of the said Amendment, will have its effect on the present case as well so long that the said Amendment holds the field. Therefore, the Appellate Authorities of the Department cannot be expected to go into the said question. It is only for the Constitutional Courts to examine the vires and validity of such Amendment and for that, a separate writ petition is already said to be pending. However, no such challenge to the Amendment has been made in the present case."

In view of the above legal position laid down by the Hon'ble Supreme Court and the jurisdictional High Court, the assessee's ground on questioning the validity of search is rejected."

18.3. Being so, the assessee cannot question the validity of search before this Tribunal. Accordingly these grounds are dismissed.

19. Grounds No.2 to 4 is regarding unexplained cash payments of Rs.4,00,00,000. The facts are that during the course of search, a MoU signed between the appellant and promoters of M/s. Sreesha Enterprises Pvt. Ltd. was found. For the purchase of mining lease Rs.4 crores was paid in cash by the appellant to Kamal Kumar Jain & Mahendra Kumar Jain who were the Directors of Sri Shubham Ispat Pvt. Ltd. [SSIPL] which is having ownership of Sreesha Enterprises Pvt. Ltd. [SEPL]. The receipt of cash was confirmed by Kamal Kumar Jain. The other partners of the venture being Mr. Shaju Nair, Nagendra, H M Guruprakash also confirmed the above payment to Rs. 4 Crores to SSIPL by the appellant. When the appellant was questioned, he stated that out of the total amount of Rs. 5,00,00,000/- paid to SSIPL, Rs. 1,00,00,000/- has been paid through account payee cheque by M/s. Eagle Traders. He further stated that since

reliance is being placed on the third party statement, he must be given opportunity to cross examine them. The AO didn't agree with the arguments of the appellant for the following reasons:-

(1) The reiteration of the fact that Rs. 1,00,00,000/- has been paid by cheque by M/s Eagle Traders and Logistic [ETL] does not prove the source of cash payment of Rs. 4,00,00,000/-.

(2) The assessee's contention that Rs. 4,00,00,000/- did not yield any income owing to the cancellation of the said MOU does not hold waters because the question here is not income arising out of the said MOU, but the source of cash of Rs. 4,00,00,000/-, considering the fact that the said Rs. 4,00,00,000/- is not reflected in the books of accounts of the assessee. However, by the above submission of the assessee, it is principally agreed by the assessee that Rs. 4,00,00,000/- has been paid in cash.

(3) The request for opportunity to cross examine the third parties also does not hold water because the primary evidence in respect of cash payment of Rs. 4,00,00,000/- is the MOU dated 17.08.2009 which is duly signed by the assessee himself, thus confirming that the assessee has paid Rs. 4,00,00,000,/- in cash.

20. The AO, therefore, added Rs 4 crore as assessee's undisclosed income. The appellant in the course of appellate proceedings reiterated the same and stated that the MOU was cancelled subsequently. According to the CIT(Appeals), the arguments of the appellant is totally misplaced. The moot question is that whether payment in cash was made? The same is evident as the MOU has been seized during the course of search and the same is signed by the appellant himself. This is not the case where reliance has been placed on some third party. Here the primary evidence is the MOU seized and the same was just corroborated by various persons such as Kamal kumar Jain, Mr. Shaju Nair, Nagendra and H M Guruprakash.

The CIT(A) observed that the appellant instead of giving the source is trying to twist the facts. He, therefore, held that the appellant doesn't have the source to explain the investment of Rs.4 crores and upheld the addition.

21. The ld. AR submitted before us that the appellant along with three others i.e. J N Ganesh, Shaju Nair and H M Guruprakash had entered into a Memorandum of Understanding (MOU) dated 17.08.2009 with SSIPL for purchase of mining lease ML No. 2062 in respect of 16.19 hectares situated in Sy. No. 69 of Sadarahalli and Sy. No. 11 of Keshavapura Village for Rs.9.50 crores. It was agreed between the parties that SSIPL to provide the clearance certificate from the Deputy Collector for operating the mine and the draft of the terms have been kept ready as on 17.08.2009 pending clearance certificate from the Deputy Collector. However, SSIPL could not obtain the clearance certificate from the Deputy Collector and thus the MOU was cancelled on 10.11.2009.

22. It is submitted that as per the MOU dated 17.08.2009 each of the second party i.e. the appellant and three others were to pay 25% of the contracted amount to SSIPL. It is submitted that the appellant did not make any payment in cash and the appellant's share of Rs.1,00,00,000/- was paid through the account payee cheque No. 375624 dated 14.08.2009 drawn on Axis Bank Account of ETL which was presented to bank on 20.08.2009 and thus the addition made by the AO in the hands of the appellant as unexplained cash payment is unwarranted and liable to be deleted under the facts & circumstances of the case.

23. The ld. AR submitted that the authorities below failed to appreciate that the appellant did not make any payment in cash and added entire amount of Rs.4 crores by holding that the appellant had confirmed the payment of Rs.4 crores by signing the said MOU. This finding of the

authorities is contrary to the facts & circumstances of the case. It is submitted that the appellant had contended before the learned CIT(A) that only a sum of Rs. 1 crore was paid through cheques and no payment in cash was ever made by the appellant to SSIPL. The CIT(A) did not take cognizance of the submissions made by the appellant. Therefore, the addition made by the AO of Rs. 4 crores as unexplained cash payment needs to be deleted under the facts & circumstances of the case.

24. Without prejudice, it is submitted that as per the MOU each of the second parties i.e. the appellant, J N Ganesh, Shaju Nair and H M Guruprakash were required to contribute 25% of the contracted amount for making payment to M/s. Shree Shubham Ispat Pvt. Ltd. and therefore the addition of entire amount of Rs.4 crores in the hands of the appellant is unwarranted under the facts and circumstances of the case.

25. Without prejudice, it is further submitted that the agreement with SSIPL was entered into by a group of individuals consisting of the appellant, Mr. J N Ganesh, Mr. Shaju Nair and Mr. H M Guruprakash which constitute an association of persons (AOP). It is submitted that the common intention of the parties to the agreement was to do the business of mining jointly. Therefore, this arrangement between the parties comes within the purview of unincorporated AOP.

26. It is submitted that section 4 of the Act creates a charge in respect of total income of every person and the term "person" has been defined under section 2(31) of the Act, which includes an "Association of Persons" or "Body of Individuals", whether incorporated or not. However, there is no definition of AOP as such in the Act. The Apex Court decision in the case of *CIT vs. Indira Balakrishnan, reported in 39 ITR 546* is an authority in so far as concept of AOP is concerned.

27. He submitted that the essentials of an AOP as per the ratio of the Apex Court decision are as follows:-

a) Two or more persons joining in a common purpose.
b) The purpose of such joining is to produce income profits or gains.
c) The combination or joining is voluntary.

28. He further submitted that in the instant case, the appellant and 3 other parties have come together to acquire the mining lease from SSIPL with an intention to carry out mining business and earn profit and thereby fulfilled all the essentials of an AOP as laid down by the Apex Court. Thus the appellant contends that, income if any arising out of the transaction ought to have been taxed in the hands of the Association of Persons and not in the hands of the appellant under the facts and circumstances of the case. Reliance is placed on the decision of the Jurisdictional Tribunal in the case of *Indsing Developers Pvt. Ltd. vs. ACIT in ITA No. 629/B/2009* which has been upheld by the Jurisdictional High Court reported in *239 Taxman 350*.

29. It is submitted that the AO relied on the statements of Mr. Kamal Kumar Jain to make an addition of Rs. 4 crores as unexplained cash payment. However, he did not provide an opportunity to cross examine Mr. Kamal Kumar Jain whose statements have been used against the appellant and thus the order of the assessment needs to be set aside as it suffers from want of application of principles of natural justice. Reliance is placed on the decision of the Supreme Court in the case of *Andaman Timber Industries vs. CCE, reported in 127 DTR 241*.

30. It is further submitted that, the AO has relied on the statements recorded from Mr. Kamal Kumar Jain. However, he officer did not provide the said statement to the appellant to rebut the evidence used against him.

This action of the AO is opposed to all known canons of the settled principles of natural justice and thus it is prayed that the orders of the authorities below needs to be quashed on this count alone in the interest of equity and justice. Reliance is placed on the decision of the Hon'ble Supreme Court in the case of *Kishinchand Chellaram vs. CIT reported in 125 ITR 713*.

31. On the other hand, the ld. DR relied on the orders of lower authorities.

32. We have heard both the parties and perused the material on record. In this case, there was a search action on 2.10.2010 u/s. 132 of the Act at the assessee's premises and certain incriminating documents were found. Originally notice u/s. 153A dated 14.11.2011 was served on the assessee, however, assessee did not comply with the notice. Subsequently another notice u/s 153A r.w.s. 29 dated 27.9.2012 owing to change in incumbency was served on the assessee. In reply, the assessee vide letter dated 4.10.2012 acknowledged the notice dated [27.9.2012] requesting for time till 10.11.2012 to file return of income as required by said notice. AO has given another opportunity vide letter dated 9.10.2012 to file return of income in compliance of notice u/s. 153A of the Act. The assessee vide letter dated 21.11.2012 requested further time till 15.12.2012 to file the return. Final show cause notice dated 17.12.2012 was issue to assessee for due compliance of notice u/s. 153A of the Act. Consequently, the assessee vide letter dated 24.12.2012 stated that return u/s. 139 filed on 4.10.2010 be treated as return filed in response to notice u/s. 153A. In the said return assessee has shown income of Rs.1296740. Later notice u/s. 143(2) was issued to assessee to appear before AO and produce necessary books of account. Further notice u/s. 142(1) dated 14.2.2012 was issued to which there was no response from assessee. Finally notice

u/s. 144 was issued proposing completion of assessment to the best of judgment based on material on record. In response, the assessee submitted reply dated 4.3.2013, but not produced necessary evidence to support assessee's claim.

33. In the course of search it was found that MoU signed between the assessee and promoter, SSIPL for the purchase of mining lease and amount of Rs.4 crores was paid by cash to Kamal Kumar Jain and Mahendra Kumar Jain who were directors of SEPL. The receipt of cash was also confirmed by Kamal Kumar Jain in his statement recorded. The other two persons to the MoU, Mr. Shaju Nair, Nagendra, H M Guruprakash also confirmed payment of Rs.4 crores to SSIPL by Nagaraj and said Rs.4 crores was not reflected in books of account of present assessee. However payment of Rs.1 crore by cheque was admitted by assessee paid by ETL. The contention of the assessee before the lower authorities was that the transaction did not materialize and the said sum of Rs.4 crores did not yield any income and therefore no addition is warranted on account of the above. However, Mr. N has not denied the payment of 4 crores to SEPL. The said 4 crores has been reflected in the MoU dated 10.11.2009 and this MoU was found during the course of search action in the premises of assessee.

34. Now the contention of the ld. AR is that the statement recorded from other parties were not confronted to assessee inspite of specific requests by assessee and also no cross-examination was provided to the assessee. As such the addition is bad in law.

35. In our opinion, there is no question of providing cross-examination of third parties because the primary evidence for addition of 4 crores is MoU dated 17.8.2009 which is duly signed by assessee himself and confirmed that assessee has paid 4 crores in cash. More so, the presumption u/s.

292C is that where any books of accounts, other documents, money, bullion, jewellery or other valuable article or thing is found in the possession or control of any person in the course of search, it may be presumed that :-

i) they belong to such person;

ii) the contents of such books of accounts and other documents are true; and

iii) that the signature and every other part of such books of account and other documents which purport to be in the handwriting of any particular person or which may reasonably be assumed to have been signed by, or to be in the handwriting of, any particular person, are in that person's handwriting, and in the case of a document stamped, executed or attested, that it was duly stamped and executed or attested by the person by whom it purports to have been so executed or attested.

36. It may be noted that the authorities are permitted to draw inference on the basis of books of accounts, documents found in the course of search as it belongs to assessee and the contents therein are true and correct and circumstances justify drawing of inference against the assessee. The burden was on the assessee and in absence of any reason, same to be acted upon.

37. In the present case, there is a valid MoU wherein payment of 5 crores are shown; 4 crores was in cash and 1 crore by way of cheque. The amount of payment of 1 crore by cheque was recorded in books of account and the other part of payment of 4 crores by cash was not recorded in the books of account. When 1 crore cheque payment has been accepted by assessee, why not the other 4 crores of cash payment is not true. The inference by the lower authorities was that both cash and cheque payments were true and on that basis the source of 4 crores has not been explained by assessee and it is unrecorded payment in the books of account and

payment of cheque of 1 crore has been paid by assessee and fully recorded, but payment of another 4 crores has not been denied by assessee and also not shown to be source of payment of 4 crores. As such, it is justified to draw inference that assessee made payment of 4 crores to the concerned parties as mentioned in the MoU. The inference drawn by the lower authorities to this extent is justified. Section 292C grants permission to lower authorities to draw such inference. We do not find any infirmity in that inference drawn by the lower authorities.

38. Now the ld. AR made another plea before us that even presuming that there was payment of 4 crores, it is to be considered that payment has been made by AOP, not by present assessee himself. However, we find that MoU was formed with the assessee and burden is cast upon assessee to show that amount of 4 crores has been paid by AOP who joined together vide MoU to make payment of 4 crores. But there is no iota of evidence brought on record by assessee to show that AOP existed by producing relevant records, PAN, bank account or any other material to suggest that there is existence of AOP. In such circumstances, the lower authorities are justified to infer that payment was made exclusively by the assessee itself.

39. The next argument of the ld. AR is that the lower authorities have not granted opportunity to cross-examine various parties involved in this transaction. In this case, lower authorities have not placed any reliance on the statement recorded from various persons to sustain the addition of 4 crores. The addition was solely based on MoU found during the course of search action and it is not based on statement from various persons. Being so, there is no question of providing any cross-examination to the assessee in this case.

40. The assessee relied on various case laws. These decisions do not have any relevance at this stage since AO had not solely relied on the

statement of parties to make such addition of 4 crores in the case of assessee. Accordingly, these case laws are not considered.

41. Finally considering the totality of facts and circumstances of the case, we are of the opinion that lower authorities are justified in bringing to tax an amount of 4 crores paid by assessee to Kiran Kumar Jain and Mahendra Kumar Jain. This ground of the assessee is dismissed.

42. The next ground is with regard to addition of Rs.30 lakhs as unexplained cash credit. The facts are that the bank account (Axis Bank) of the appellant reflected a cash deposit of Rs. 30,00,000/- into the bank. The appellant was given an opportunity to explain the source of the above deposit but he failed to explain the same. Therefore, the AO added Rs. 30,00,000/- back to the total income of the appellant as unexplained cash credits.

43. Before the CIT(A), the assessee argued that he has not deposited the alleged sum of Rs. 30 lakhs in his bank account. The copy of the bank statement for the period 01.04.20109 to 31.03.2010 was submitted before the AO along with the reply dated 26.03.2013. It was reiterated that there are no cash deposits at all in the bank account of the appellant for the impugned assessment year which is clearly discernible from the bank statement. It was further submitted that the AIR information sheet provided along with the notice does not depict in any manner whatsoever that there was a deposit of Rs. 30 lakhs in the appellant's bank account during the year under consideration and thus the addition of Rs. 30 lakhs is bad in law and needs to be deleted.

44. A remand report was called for and the remand report dated 28.4.2015 from the AO was as under:-

> "From the Axis Bank account extract (No. 267010100005906) available in the case record of Sri. B Nagendra period starting from the 01. 04.2009 to 31.03.2010 cash deposit amounting to Rs. 30,00,000/- is not found. The copy of the bank account statement for the relevant period has been attached as Annexure-A. As per the ITS Details (Annexure-B) the transaction of Rs. 30 lakhs has been reflected in the Axis bank ltd, Bellary but it is not clear as to which a/c no, this deposit is related to. If A/c no. 267010100005906 is the only account held by the assessee in Axis Bank, Bellary and supposedly the assessee has an account in only one branch of the Axis Bank in Bellary then there appears to be a mistake at the end of the bank while filing AIR Information. However, if the assessee files a break up of bank account balance (Rs. 11,44,112) as per balance sheet attached Annexure - C), then there would be clarity. The assessee needs to give bank wise breakup of bank account balance and the Axis bank year year-end balance should match with year —end balance as per account extract enclosed (Annexure - A). The assessee has not furnished such reconciliation."

45. In view of the above and the fact that AIS details clearly shows that the appellant has made a deposit of Rs 30 lakhs in cash, the CIT(Appeals) that the appellant has not given the correct bank details or the break up of bank account balance and upheld the addition made by the AO.

46. The ld. DR supported the orders of lower authorities.

47. We have heard both the parties and perused the material on record. The contention of the ld. AR is that the alleged cash deposits were not made in the account assessee, as such it cannot be taxed in the hands of assessee. More so, the remand report by AO dated 28.4.2015 is not furnished to assessee for his comments wherein the AO himself confirmed that cash deposit of Rs.30 lakhs was found in the Axis Bank account No.267010100005906, therefore addition of 30 lakhs merely on the basis of assumption and surmises deserves to be deleted. The AO in his remand report stated that assessee has not furnished all his bank accounts tallying

with closing balance as on 31.3.2010 at Rs.11,44,112. However, the details of various bank accounts were not furnished to AO, as such it is not possible to verify the balance account wise. It is also true that copy of the remand report is not furnished to the assessee. In view of this, we are of the opinion that it is appropriate to remit the entire issue in dispute to the file of AO with a direction to AO to furnish copy of remand report to the assessee and direct the assessee to reconcile the closing balance and furnish details of various accounts with bank. Ordered accordingly.

48. The grounds regarding levy of interest u/s. 234A, 234B & 234C are consequential and mandatory in nature.

49. This appeal by assessee is partly allowed.

ITA No.1946/Bang/2016

50. In this appeal, assessee has raised the following grounds:-

> "1. The order of the authorities below in so far as these are against the Appellant is opposed to law, weight of evidence, natural justice, probabilities, facts and circumstances of the Appellant's case.
>
> 2. The appellant denies himself liable to be assessed on a total income of Rs.55,77,428/- as against Rs.3,15,240/- returned by the appellant under the facts and circumstances of the case.
>
> 3. The learned CIT(A) erred in confirming the addition of Rs.16,58,250/- as unexplained cash under the facts and circumstances of the case.
>
> 4. Without prejudice, the authorities below ought to have considered the fact cash found of Rs. 16,58,250/- was out of drawings made from M/s. Eagle Traders & Logistics under the facts and circumstances of the case.

5. The learned CIT(A) erred in confirming the addition of Rs.36,03,938/- as unexplained jewellery under the facts and circumstances of the case.

6. Without prejudice, the authorities below ought to have considered the fact that the value of jewellery as per cost incurred to purchase has been entered in books of account and thus no portion of it can be treated as unexplained jewellery on the facts of the case.

7. The orders of the authorities below are bad in law as the mandatory conditions to invoke the jurisdiction did not exist, or having not been complied with and

   consequently the orders of the authorities below are bad in law for want ,of requisite jurisdiction.

8. The learned CIT(A) failed to appreciate the fact that the learned assessing officer had not obtained the approval of the Additional Commissioner or having obtained, the copy of the same is not provided to the appellant which is in violation of the settled principles of natural justice and thus the order of assessment needs to be set aside.

9. The order of assessment suffers from the want of application of mind by superior authorities before granting approval under the facts and circumstances of the case.

10. The appellant denies himself liable to be levied to interest under sections 234A, 234B and 234C of the Act and further the computation of interest was not provided to the appellant as regard to the rate, period and method of calculation of interest under the facts and circumstances of the case. The appellant expressly urges that the period of levy of interest is not in accordance with sections 234A, 234B and 234C of the Act.

11. Without prejudice, the interest levied under sections 234A, 234B and 234C of the Act requires to be waived off under the facts and circumstances of the case.

12. The appellant craves leave to add, alter, delete or substitute any of the grounds urged above.

13. In view of the above and other grounds that may be urged at the time of the hearing of the appeal, the appellant prays that the appeal may be allowed in the interest of justice and equity."

51. Ground No. 1 is general in nature and requires no adjudication.

52. Ground Nos. 7 to 9 are with regard to validity of assumption of jurisdiction u/s. 132 of the Act. It is submitted that the search u/s. 132 of the Act is conducted not on the basis of any prior information or material inducing any belief but purely on the suspicion and therefore, the action u/s. 132 of the Act is bad in law and consequent assessment order passed under section 143(3) r.w.s. 153A of the Act is null and void-ab-initio on the parity of the ratio of the decision of the Hon'ble Apex Court in the case of *Ajith Jain, reported in 260 ITR 80*.

53. It is further contended that the AO and the CIT(A) have not discharged the burden of proving that there is a valid search, including, its execution and its completion in accordance with law to render the proceedings valid and to assume jurisdiction to make an assessment under section 153A of the Act. The appellant is entitled to ask for the copy of the Warrant of Authorisation, copy of the satisfaction note and copy of the material including belief for issuance of the warrant of authorisation to contend before this Tribunal that the search conducted was illegal and consequently notice issued under section 153A of the Act are not valid in law.

54. It was further submitted that the AO has mentioned at page 8 of the order that the prior approval of the Additional Commissioner of Income Tax, Central Range-2, Bengaluru was obtained vide letter F. No.51(3)/Addl.CIT-CR-2/12-13 dated 30.03.2013 before passing the assessment order. It is

relevant to point out that the assessment order has been passed on 19.03.2013 and thus no approval could have been obtained on 30.03.2013 before passing the assessment order which is factually incorrect. It is submitted that the copy of the approval obtained from the Additional Commissioner has not been provided to the appellant which is against the principles of natural justice and thus the order needs to be cancelled on this count alone.

55. The ld. DR relied on the orders of lower authorities.

56. We have heard both the parties and perused the material on record. It is noted that the CIT(Appeals) has called for remand report from the AO who has given the report as under:-

> "In this regard, it is brought before your kindself that as per assessment order's last page, it is explicitly mentioned that the order has been passed after taking prior approval of Addl. CIT, Central Range-2, Bangalore vide letter dt. 30.3.2013. Hence the assessment order has been passed after the approval of Addl. CIT, Central Range-2, Bangalore. The D&CR entry for the demand was made on 30.3.2013 which is also after the receipt of approval by the Addl. CIT, Central Range-2, Bangalore. Hence the date of assessment order may be read as 30.3.2013, since the same is only a typographical mistake.
>
> The very mention of fact of approval of Addl. CIT, Central Range-2, Bangalore dt.30.3.2013 and the date of booking of demand in D&CR on 30.3.2013 clearly proves that the order has been passed only after prior approval of the Add!. CIT, Central Range-2, Bangalore on 30.3.2013. Hence it is _'inadvertent typographical mistake."

57. In view of the above, it is to be noted that the mistake pointed out by the assessee is a typographical error and prior permission has been taken from the Addl. Commissioner. Hence there is no merit in the grounds of the assessee and accordingly dismissed.

58. Regarding validity of search also, the assessee cannot question before this Tribunal as observed in earlier in AY 2010-11 hereinabove. This ground is rejected.

59. The next ground is with regard to addition of Rs.16,58,250 on account of unexplained cash. During the course of search, cash of Rs. 15,76,250/- was found from the residential premises of the appellant and Rs 82,000/- was found from the office of M/s. Suresh Constructions, Vyalikaval, Bangalore, which happens to be his office. Initially the appellant stated that the money found at the residential premise belongs to his father-in-law Mr Ramaiah vide his statement u/s. 132(4) dated 25.10.2010 and for the cash found at the office, it was stated that the money is for day to day expenditure given to his staff. Subsequently, the appellant stated that the cash found at both the premises were his drawings made from M/s. Eagle Traders and Logistics [ETL] in which the assessee claims to be a partner. However, the appellant didn't bring any supporting evidence before the AO like the ledger account of his drawings from the firm, cash book and cash flow statement reflecting the cash withdrawal from the said firm, cash book and cash flow statement in the hands of ETL evidencing the availability of such cash in hands of the firm, bank statements corroborating the above withdrawals and hence, the same was added by the AO.

60. The appellant submitted before the CIT(Appeals) that the AO added a sum of Rs. 16,58,250/- as unexplained cash found during the search. The appellant contended then and it is reiterated that the cash found of Rs. 16,58,250/- during the search was out of the drawings made from ETL, a firm wherein the appellant is a partner. Therefore the addition made is not warranted and thus needs to deleted under the facts and circumstances of the case. It was submitted that the appellant had erroneously mentioned

during recording of statement on 25.10.2010 that he cash found in his premises belonged to Mr. Ramaiah. The cash found was out of drawings made from ETL, the details of which are already on the records of the department. The appellant in the letter dated 18.03.2013 had provided by the assessing officer is patently opposed to law and not warranted on the facts of the case. It was submitted that any statements made by the appellant the search and post-search proceedings will not have any evidentiary value unless they are backed by tangible evidence admissible in the court of law. Thus, when the appellant has clearly stated that the statement made on 25.10.2010 was on a wrong appreciation of facts and moreover when the sources of cash found during search is explained trough documentary evidence, the addition made is not warranted and thus needs to be deleted on the facts of the case.

61. The CIT(Appeals) observed that the appellant has no evidence to support his claim and the onus is on him to prove with tangible evidence. It is also important to note that initially he had stated that the money belongs to his father in law in a statement recorded u/s 132(4) and only subsequently, he changed his statement to suit his convenience. Statement recorded u/s 132(4) is recorded under oath. It has far more evidentiary value than a letter written by the appellant. The statement recorded under oath u/s 132(4) cannot be retracted ordinarily unless the appellant conclusively proves that it was a wrong statement on wrong understanding of facts or law or it has been recorded under threat, force or coercion. In the case of *B. Kishore Kumar 62 taxmann.com 215 (SC)*, the SLP was dismissed against High Court's order where it was held that since assessee himself had stated in sworn statement during search and seizure about his undisclosed income, tax was to be levied on basis of admission without scrutinizing documents. This judgement makes it clear that statement u/s

132(4) is a good piece of evidence to be used against the appellant. The addition made by the AO was, therefore, upheld by the CIT(Appeals).

62. The ld. AR submitted that the cash found during the search is out of the drawings made from ETL, a firm, wherein Assessee is a partner and it was erroneously stated on 25.10.2010 that the cash found belonged to Mr. Ramaiah.

63. The ld. DR relied on the orders of lower authorities.

64. We have heard the both the parties and perused the material on record. The main contention of the assessee is that physical cash amounting to Rs. 16,58,250 found during the course of search action was drawings From Eagle Traders & Logistics Ltd. [ETLL], a firm wherein assessee was a partner. The assessee submitted that he had erroneously during the statement recorded on 25.10.2010 stated that the cash found in his premises belonged to Mr. Ramaiah, assessee's father-in-law and he denied that statement. In the present case, the assessee is not able to show that earlier drawings made from ETLL was not utilized and kept idle and it was available to the assessee to explain the physical cash of Rs. 16,58,250 found during the course of search action. The assessee made one more plea that statement recorded on 25.10.2010 was not provided to him for his comments. This plea of the assessee is a new plea not borne out of records. The assessee has not taken this plea any time before the AO or the CIT(Appeals) when the questioned this physical cash found during the search. Being so, this plea is only an after-thought which cannot be appreciated. In our opinion, the statement recorded u/s. 132(4) has great evidentiary value and cannot be disregarded in a summary manner by simply observing that assessee has retracted the same. Retraction is to be made within reasonable time and immediately after such statement has been recorded either by filing a complaint to superior authority or otherwise

brought to the notice of higher officials by duly sworn affidavit or statement supporting it. Nothing has been done by before the lower authorities. The ld. AR relied on various judgments to say that statement u/s. 132(4) has no evidentiary value. All the judgments relied by the assessee were delivered under different set of facts which cannot be applied to the present case. In the present case, the assessee other than taking a different plea at different stage, he has not brought any material on record to suggest otherwise that physical cash found during the course of search was not belonging to the assessee. There is also no evidence to suggest that cash withdrawn from ETLL was unused and kept with the assessee idle though repeatedly withdrawals were made one after the other. As per the provisions of section 292C, presumption is that cash found during the course of search belongs to assessee and burden is on the assessee to prove otherwise. Being so, we do not find any infirmity in the lower authorities bringing the cash found during the search to tax in the hands of assessee as unexplained cash. Therefore this ground of the assessee is rejected.

65. The next ground is regarding unexplained jewellery of Rs.36,03,938. Jewellery weighing 1296.560gms was found in the residential premise of the appellant which was valued at Rs.36,03,938/- . Though the appellant was reflecting gold jewellery of Rs. 16,79,475/- in the statement of affairs, he failed to explain the source of such an investment, mode of payment, bifurcation of inherited, purchased and gifted jewellery, as called for. Hence, Rs. 36,03,938/- was treated as unexplained investment in the hands of the appellant. The appellant submitted that jewellery worth Rs. 36,03,938/- found during of search had been added as unexplained jewellery by the AO which is not proper. The appellant had replied to the queries raised by the department in this regard through letter filed on 18.03.2013. It is reiterated that the jewellery found forms part of the

Balance Sheet as at 31.03.2010, the copy of which is already on the records of the department. It is further submitted that the value of the jewellery as per the Balance sheet is Rs. 16,79,475/- and the AO made addition of Rs. 36,03,938/- on account of unexplained jewellery. The basis of arriving at the value of jewellery at Rs. 36,03,938/- is not discernible from the order. The appellant had also requested for basis of valuation of jewellery through the letter filed on 18.03.2013. Further, the value of jewellery as per cost incurred to purchase it has been entered in the books of accounts and thus no portion of it can be treated as unexplained jewellery on the facts of the case and thus the addition made needs to be deleted on the facts of the case.

66. The ld. DR submitted that assessee failed to explain the source of the said investments, mode of payment, bifurcation of inherited, purchased and gifted jewellery , as called for, by the AO. As far as the basis of valuation is concerned, the same has made by a registered valuer and hence, this objection cannot be entertained. As such, addition to be sustained.

67. We have heard both the parties and perused the material on record. The main contention of the ld. AR is that ss has disclosed jewellery at RS.69,79,475 in its balance sheet which is a historical cost of valuing with the average of 1441 gms. However, the lower authorities considering the jewellery found during the course of search action at 1296.560 gms. Valued at Rs.36,03,398 as on the date of search and the difference in value is only on account of inflation in the cost of jewellery and if the historical cost is applied, there is no undisclosed jewellery in the hands of asse and there cannot be any addition. We find force in the argument of the assessee. The assessee has already disclosed 1441 gms. in its balance sheet as on 31.3.2010 valuing at Rs.16,79,475, being so, jewellery cannot be treated

as unexplained in the hands of assessee. Accordingly, the addition on this count is deleted.

68. With regard to interest levied u/s. 234A, 234B & 234C, the same is consequential and mandatory in nature.

69. This appeal of the assessee for AY 2011-12 is partly allowed.

70. In the result, both the appeals by the assessee are partly allowed.

Pronounced in the open court on this 17th day of March, 2022.

Sd/-	Sd/-
(BEENA PILLAI)	(CHANDRA POOJARI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Bangalore,
Dated, the 17th March, 2022.

/*Desai S Murthy /*

Copy to:

1. Appellant 2. Respondent 3. CIT 4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.