

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "H" MUMBAI**

**BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER) AND
SHRI SANDEEP SINGH KARHAIL (JUDICIAL MEMBER)**

**ITA No. 5466/MUM/2015
Assessment Year: 2012-13**

Mrs. Shweta Avarsekar,
1401, 14th floor, Pushpanjali
Apartment, Old Prabhadevi,
Mumbai-400025.

**PAN No. AAEP A 2258 E
Appellant**

Asst. Commissioner of Income Tax,
Central Circle-8(2), Mumbai
Vs. (Erstwhile, the Asst. Commissioner
of Income Tax, Central Circle-45)

Respondent

**ITA No. 5467/MUM/2015
Assessment Year: 2012-13**

Mrs. Pushpa Avarsekar,
13th floor, Pushpanjali Apartment,
Old Prabadavi Road, Prabadavi,
Mumbai-400025.

**PAN No. AACPA 1273 F
Appellant**

Asst. Commissioner of Income Tax,
Central Circle-8(2), Mumbai
Vs. (Erstwhile, the Asst. Commissioner
of Income Tax, Central Circle-45)

Respondent

**ITA No. 5468/MUM/2015
Assessment Year: 2012-13**

Mr. Ashish Avarsekar,
13th floor, 1252, Pushpanjali
Apartment, Old Prabhadevi,
Prabhadevi,
Mumbai-400025.

**PAN No. AAAPA 6084 A
Appellant**

Asst. Commissioner of Income Tax,
Central Circle-8(2), Mumbai
Vs. (Erstwhile, the Asst. Commissioner
of Income Tax, Central Circle-45)

Respondent

**ITA No. 5469/MUM/2015
Assessment Year: 2012-13**

Mr. Kishore Avarsekar,
1252, Pushpanjali Apartment, Old
Prabhadevi Road, Prabhadevi
Mumbai-400025.

PAN No. AACPA 6883 F

Appellant

Asst. Commissioner of Income Tax,
Central Circle-8(2), Mumbai
Vs. (Erstwhile, the Asst. Commissioner
of Income Tax, Central Circle-45)

Respondent

ITA No. 720/MUM/2017
Assessment Year: 2012-13

Mrs. Apurva Avarsekar,
1252, 12th floor, Pushpanjali
Apartment, Appasaheb Marathe
Marg, Old Prabhadevi Road,
Mumbai-400025.

PAN No. ADIPA 4854 B

Appellant

Asst. Commissioner of Income Tax,
Central Circle-8(2), Mumbai
Vs. (Erstwhile, the Asst. Commissioner
of Income Tax, Central Circle-45)

Respondent

Assessee by : Mr. Apurv Gandhi, AR
Revenue by : Mr. Kishan Vyas, CIT-DR

Date of Hearing : 11/04/2022
Date of pronouncement : 29/04/2022

ORDER

PER OM PRAKASH KANT, AM

These five appeals, preferred by the respective assessee(s), are directed against the respective order of the Ld. First Appellate Authority ('FAA') i.e CIT(A). In the case of Sh Kishore Avarsekar, Smt Pushpa Avarsekar, and Smt Sweta Avarsekar, the appeals are directed against separate orders, each dated 09/09/2015 passed by

the Ld. CIT(Appeals)-48, Mumbai for assessment year 2012-13. In the case of Sh Ashish Aversekar, the appeal has been preferred against the order dated 22/09/2015 passed by the Ld. CIT(Appeals)-48, Mumbai for assessment year 2012-13. In the case of Smt Apurva Aversekar, appeal has been preferred against the order dated 15/11/2016 passed by the Ld. CIT(Appeals)-52, Mumbai for assessment year 2012-13. In all these appeals, a common issue of telescoping benefit has been raised, therefore these appeals were heard together and disposed off by way of a consolidated order for convenience.

2. The grounds raised in respective appeals are reproduced as under:

ITA No. 5469/Mum/2015 (AY 2012-13)

On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in not granting telescoping benefit in respect of disclosure of cash paid of Rs.95,71,400/- on account of land purchased, against on money received of Rs.2,65,00,000/- offered for taxation by family members. The appellant prays that the A.O. may please be directed to either tax the source or utilization of the cash.

ITA No. 5467/Mum/2015 (AY 2012-13)

Ground No.1:

On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in not granting telescoping benefit in respect of disclosure made on account of jewellery of Rs.20,24,879/-, against on money received of Rs.2,65,00,000/- offered for taxation by family members. The appellant prays that the A.O, may please be directed to either tax the source or utilization of the cash.

Ground No.2:

On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in not granting telescoping benefit in respect of disclosure made on account of jewellery of Rs.27,20,225/-, against on money received of Rs.2,65,00,000/- offered for taxation by family members. The appellant prays that the A.O. may please be directed to either tax the source or utilization of the cash.

ITA No. 5466/Mum/2015 (AY 2012-13)

Ground No.1:

On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in not granting telescoping benefit in respect of disclosure made on account of jewellery of Rs. 48,99,912/-, against on money received of Rs.2,65,00,000/- offered for taxation by the appellant. The appellant prays that the A.O. may please be directed to either tax the source or utilization of the cash.

Ground No.2:

On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in making an addition of Rs.1,99,000 as unaccounted cash in the hands of the appellant. The appellant prays that the said addition may please be deleted.

Ground No.3:

On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in not granting telescoping benefit in respect of disclosure made on account of jewellery of 27,70,925/- against on money received of Rs.2,65,00,000/- offered for taxation by the appellant. The appellant prays that the AO may please be directed to either tax the source or utilization of the case.

ITA No. 5468/Mum/2015 (AY 2012-13)

Ground No.1:

On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in not granting telescoping benefit in respect of disclosure of cash paid of Rs. 62,00,000/- on account of land purchased, against on money received of Rs. 2,65,00,000 offered for taxation by family members. The appellant prays that the A.O. may please be directed to either tax the source or utilization of the cash.

Ground No.2:

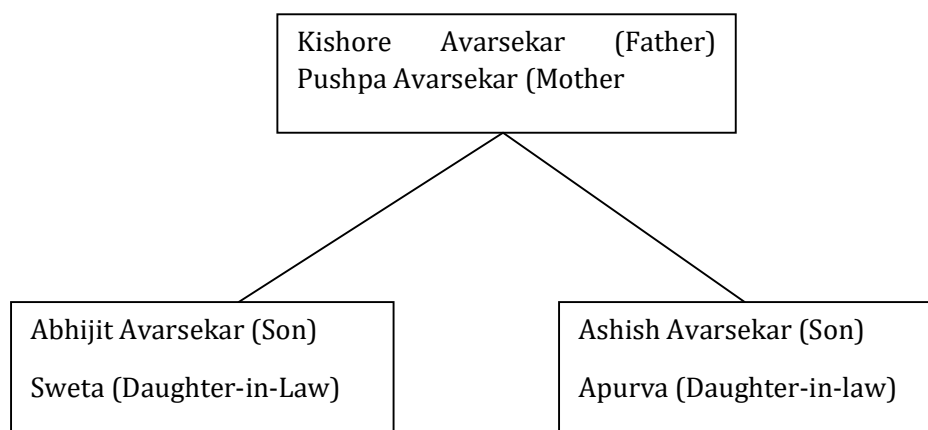
On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in not granting telescoping benefit in respect of disclosure made on account of jewellery of Rs.3,30,000/-, against on money received of Rs.2,65,00,000/- offered for taxation by family members. The appellant prays that the A.O. may please be directed to either tax the source or utilization of the cash.

ITA No. 720/Mum/2017 (AY 2012-13)

Ground No.1:

On the facts and in the circumstances of the case and in law, the La. CIT(A) erred In not granting telescoping benefit in respect of disclosure made on account of jewellery of Rs. 4,06,710/-, against on money received of Rs:2,65,00,000/- on sale of Matunga property offered for taxation by family members. The appellant prays that the A.O, may please be directed to either tax the source or utilization of the cash.

2. Briefly stated facts of the case are that all the above assessee(s) are part of a family, whose family tree is reproduced as under:



3. A search and seizure action under section 132 of The Income-tax Act, 1961 (in short 'the Act') was carried out on 10/02/2012 at the premises of M/s Unity infra projects Ltd and the residence of the directors of the company and their family members, which included above five assesseees.

4. As a result of undisclosed income offered during the course of the search proceedings, in their respective return of incomes the above assessee has declared investment in assessment year 2012-13 against unexplained investment in jewelry, unaccounted cash, cash paid for purchase of immovable property etc. The income declared in respect of said unexplained investment has been duly accepted and assessed by the Assessing Officer. However, before the Ld. FFA, above assessee claimed that those unexplained investments were out of money received (Rs. 2,65,00,000/0) on sale of "Matunga Flat" and declared by the other family members namely Sh Abhijit Avarsekar(Rs.1,42,06,679/-) and Smt Sweta Avarsekar(Rs.1,22,93,321/-) as undisclosed income in the return of income filed for assessment year 2009-10.

5. A summary of chart of cash money generated from sale of sale of Matunga Flat and telescoping benefit sought by the above assessee is reproduced as under:

Details of Telescoping Benefit Claimed

Sr. No	Assessee	ITA No	A.Y.	Particulars	Amount of addition	Telescoping Benefit Restriction
1	Ashish Avarsekar	5468/M/2015	2012-13	Cash paid for purchase of Nagpur Land - Offered in ITR	36,00,000	36,00,000
				Cash paid for purchase of Nagpur Land - Offered in ITR	26,00,000	26,00,000
				Discrepancy in jewellery - Offered in ITR	3,30,000	3,30,000
2	Shweta Avarsekar	5466/M/2015	2012-13	Discrepancy in jewellery - Offered in ITR	27,70,925	27,70,925
				Discrepancy in jewellery - Addition made by AO	48,99,912	48,99,912
				Unaccounted cash found in locker - Addition made by AO	1,99,000	1,99,000
3	Kishore Avarsekar	5469/M/2015	2012-13	Cash paid in purchase of land at Chomu Mhala site - Offered in ITR	95,71,400	95,71,400
4	Pushpa Avarsekar	5467/M/2015	2012-13	Disclosure on jewellery - Offered in ITR	27,20,225	-
				Discrepancy in jewellery - Addition made by AO	20,24,879	20,24,879
5	Apurva Avarsekar	720/M/2017	2012-13	Discrepancy in jewellery - Offered in ITR	4,06,710	4,06,710
Total					2,91,23,051	2,64,02,826

6. Before us the Ld. counsel of the assessee submitted to argue the case of Smt. Pushpa Avarsekar as lead case, result of which to be followed in other cases. The Ld. DR did not object to this proposal of the Ld. Counsel. Accordingly, we proceeded to hear the appeal of

Smt. Pushpa Aversekar as lead case, result of which to be followed in of other cases.

ITA No. 5467/Mum/2015 for AY 2012-13 (Smt. Pushpa Aversekar)

7. During the course of the search proceedings, jewelry was found from the residential premise/locker of the assessee, Smt. Pushpa Aversekar, who made disclosure of unaccounted jewelry of ₹27,20,225/-and declared the same in return of income filed on 02/07/2012 for assessment year 2012-13. During the course of the assessment proceedings, the Assessing Officer asked to explain the source of investment in total jewelry found from her premises and lockers in her name. The assessee filed detailed reply pointing out the discrepancies in respect of investment of gold and diamond jewelry and her inability to reconcile. She further declared an amount of Rs.20,24,879/- before the Assessing Officer, during the course of assessment proceedings as unexplained investment in jewellery, which was over and above the amount of unexplained

jewelry of ₹27,20,225/- shown in her the return of income. The Assessing Officer added the said some as undisclosed income under section 69A of Act.

8. Before the Ld. CIT(A) the assessee has not disputed the unexplained investment in jewelry declared in the return of income as well as offered as addition during assessment proceedings, however sought telescoping benefit of the undisclosed income of ₹2.65 crores declared by the other family members i.e. Sh Abhijit Aversekar and Smt. Sweta Aversekar, which was declared in assessment year 2009-10 and was based on incriminating document related to transactions of receipt of on money on sale Of Matunga Plot of Land found during the course of the search. The assessee contended that any undisclosed income should takes place either at the point of source (cash generation) or at the time of utilization of cash (purchsae of jewellery, land etc.) and taxing the same at

different utilization would lead to double taxation, which is against the principles of fair tax regime.

9. The Ld. CIT(A) after a detailed finding rejected the above contention of the assessee for considering unexplained investment of the assessee for assessment year 2012-13, out of the unaccounted cash received by other assessees, which was declared by them in assessment year 2009-10.

10. Aggrieved, with the finding of the Ld. CIT(A), the assessee is appeal before the Tribunal raising the grounds as reproduced above.

11. Before us, the Ld. counsel of the assessee mainly relied on the submission made before the Ld. CIT(A). The Ld. counsel submitted that telescoping is permitted in law. In support of the claim, he relied on the decision of the Hon'ble Supreme Court in the case of **Manik Sons reported in 74 ITR 001**. The Ld. counsel submitted that on money from sale of 'Matunga Land' has already been offered to tax and taxes have been paid. Now if utilization of that money in

purchase of the jewelry, is also taxed, it would lead to double taxation. The Ld. counsel submitted that all the assessees are part of a single-family and they used to live jointly and for all practical purposes everything belongs to everyone. The Ld. counsel submitted that the residential apartments, where search was conducted, there is, commonality of residing by family members in those premises. The Ld. counsel also submitted that in the case of **Sh. Pawan Lashkary v. DCIT (ITA No. 452/JP/2012) dt. 16.01.2014**, Jaipur Bench of the Tribunal has allowed the benefit of the telescoping of the income declared in the hand of the partnership firm against jewelry acquired by the partners. In view of the above, the Ld. counsel submitted that unexplained investment in jewelry declared by the assessee shall be treated as acquired out of the cash declared by the other family members.

12. The Ld. DR on the other hand relied on the order of the lower authorities and submitted that assessee has not made any such

claim either during the search proceedings or post search proceedings or even in the assessment proceedings and this is only a afterthought advised while filing appeals of the family members. This fact of cash declared on sale of Matunga Land and not entered into their capital account, must have been noticed at the time of filing appeals and an adventure has been made to explore the possibility of the benefit, but the same is not permitted in law.

13. We have heard rival submission of the party on the issue in dispute and perused the relevant material on record. The assessee not only during the course of the search proceeding admitted the unexplained investment in jewelry worth Rs.27,20,225/-but declared the same in the return of income as undisclosed income and paid taxes in the return of income. During the course of assessment proceeding , the assessee further declared undisclosed income due to failure on the part of the assessee to explain the source of investment of the jewelry worth ₹20,24,879/-. Neither

before the Authorized Officer in search proceeding nor in post search proceeding, the assessee at any point of time explained that those investments were out of the cash received as on money on sale of 'Matunga Land' by other family members. Even, no such submissions were made in assessment proceedings before the Assessing Officer. The Ld. CIT(A) has rejected the contention of the assessee observing as under:

4.3 It may be mentioned that in the case of M/s Goetze (India)Ltd. Vs. CIT (2006) 157 Taxman-1 the Hon'ble Supreme Court has held that fresh claim can be made before AO by filing revised return of income only and no fresh claim can be made by way of filing a letter during assessment proceedings. In present case admittedly such claim was never made before AO. In this regard it would be relevant to see whether such claim can be made during appellate proceedings. There are number of decisions in which it has been held that fresh legal claim can be made before appellate authority provided all material is available on record and no further investigation or verification of facts is needed for such claim. Reliance is placed on the decision of Jute Corporation of India Ltd. vs CIT 187 IT 688(SC). The appellant relies on the decision in case of Pruthvi Brokers & Shareholder IT No 3908 of 2010 but the same is distinguishable on facts. In the said case assessee had made a claim before AO and same was rejected by AO. In present case under consideration no such claim is made before A during assessment proceedings

4.4 Appellant has also claimed that a fresh claim can be made first time before CIT(A) in light of decision of CIT Vs Pioneer Press 120 Taxman 887. However, in the said case, in the absence of sufficient profit, assessee had not made the claim of deduction W/s 80HH of I.T. Act before AO, but after disallowances made by AO, there was sufficient profit and accordingly, because of change in circumstances, assessee made a fresh claim of deduction us 80HH before the CIT(A) for the first time and the same was allowed. Thus, facts of case relied upon by appellant are distinguishable.

4.5 In the present case under consideration Mr Abhijit Avarsekar and Mrs Shweta Avarsekar had sold plot of land in AY 2009-10 and received a sum of Rs. 2.65 Crore in cash outside -poks of account and appellant made no claim of telescopic benefit before AO. In the circumstances, AO had no occasion to examine whether such sale proceeds were available for purchase of unexplained jewellery in AY 2012-13. with the appellant who was remotely connected with the transaction of such receipt of cash. This requires verification of facts and investigation as appellant claims that such fund goes into common hotchpots of Avarsekar Family. There is no cash flow statement pertaining to unaccounted cash received by appellant, on record of AO. Thus, fresh claim of appellant needs investigation and verification of facts.

Accordingly appellant's ground of appeal relating to claim of telescopic benefit cannot be entertained

4.6 On merit, the claim is untenable. The sale proceeds of Rs. 2.65 Crore on sale of plot of land was received in assessment year 2009-10 by Mr. Abhijit Avarsekar and Mrs Shweta Avarsekar whereas the appellant claims telescopic benefit against payment of on money for purchase of his own plot of land at Jaipur in assessment year 2012-13. This shows that there is no proximity of transactions and persons who have received on money and

offered for taxation and person who claims telescopic benefit are different persons. Further the, appellant stays at Flat no. 1252 Pushpanjali Apt., Old Prabhadevi Road, Mumbai whereas Mr Abhijit Avarsekar and Mrs Shweta Avarsekar stay at Flat no. 1401 Shruti Apt, Old Prabhadevi Road, Mumbai. Thus Mr and Mrs. Abhijit Avarsekar and the appellant Mrs Pushpa Avarsekar reside in different buildings. At the time of search or during post search enquiry or during assessment proceedings no such claim of telescopic benefit was made. Thus claim of appellant of telescopic benefit is clearly an afterthought.

4.7 in the following cases it is held that omission to claim set off of past intangible additions against cash credit would give rise to a presumption that former amounts were not available for set off.

(1) R. Dalmia vs CIT (2002) 255 ITR 401 (Del)

(2) CIT vs G. M. Chennabasappa (1959) 35 ITR 261 (A.P.)

In view of above case laws it can be said that as appellant has not made claim of telescopic benefit during assessment proceedings before AO or during search or post search enquiry it can be presumed that unaccounted sale proceeds received on sale of Matunga property were never available for purchases of jewellery in AY 2012-13.

There is no evidence on record to show that Mr Abhiit Avarsekar and Mrs Shweta Avarsekar have filed their wealth tax return showing cash on hand of Rs.1,42,06,679/- and Rs.,,22,93,321/- respectively in AY 2009-10 to AY 2011-12 . It is also not known whether amount given in cash to appellant is by way of gift or by way of loan. This does not support appellant's

4.8 It is the claim of appellant that family members keep sale proceeds in common pool. Avarsekar family whose members draw the fund for

purposes of expenditure, investments, etc. but there are no books of account of such expenses, investments, etc. being maintained nor there is any cash flow statement filed by appellant. At the time of search no such a practice for keeping cash in common pool did surface or brought to the notice of search party. During appellate proceedings, the appellant was not in a position to explain the individual share and the persons interested in the so called common pool of Avarsekar family; how they acquired their rights in the hotchpot. There is no plausible explanation with the appellant as to why income from such 'common pool' was offered in individual names. The appellant is silent on the issue as to where the cash was kept and why it was not shown in the Wealth tax. No cash flow statement is filed which has to consider all household expenses of all Avarsekar family members, other expenses and extensive travelling expenses outside India which is apparent from passports of family members and investments, etc and therefore appellant's claim of telescopic benefit deserves to be rejected.

(n) Further case laws cited by appellant ie M.M. Sulaiman vs ACIT 51 taxmann.com 310 (Cochin) is distinguishable on facts in as much as in that case both undisclosed income were declared-in same year and there was subsequent investment again in same year so there is proximity of transactions. Similar were facts in case of Arun Kala vs ACIT 17 SOT 15(JP)

5. Admission made in statement under section 132(4) has great evidentiary value. The appellant surrendered income before the AO for which A did not proceed for any further enquiry and completed assessment by treating the amount offered in the return as unexplained investment under section 69B of the Act. The undisclosed income in the return was on specific item, burden of proving the interconnection for availing the benefit is on the appellant, for which no sufficient case has been made out. The appellant has not maintained any books of account. The appellant has not demonstrated as to how he claims telescoping in this case. It is not the case

of the appellant that all money goes to common pool and all property is held jointly. The appellant's plea of telescoping is cleverly taken in the garb of common pool while conveniently forgetting that Avarsekar family does not include a common domicile, a common kitchen, a common pool of funds or treasury, a common ownership of property and common worship. It is a matter for consideration by the taxing authorities in each case to ascertain whether the g wwnpalained cash deficits or cash credits can be reasonably attributed to a pre-existing fund of ed profits during the previous year and was utilized for acquisition of assets in that year only, whereas in the case on hand firstly it is not the unaccounted profit of the appellant and secondly, it is spread over more than three years. In any event, the facts and circumstances do not point to a reasonable conclusion that telescoping could be allowed as claimed by the appellant. The very fact of voluntary disclosure of on-money payment during search and subsequent offer of it in the return of income and the lack of evidence to support the contention of the appellant must result in dismissing the claim of telescoping. Admission made in statement under section 132(4) has great evidentiary value. Members of Avarsekar family have at no point of time brought to the notice of the Department the existence of common pool as advanced before me in appellate proceedings. In fact when specifically asked during the course of search regarding the locker numbers, movable and immovable properties held by her son Shri Abhijit Avarsekar and his family members, the appellant herself in reply to question nos. 11 & 12 u/s. 132(4) recorded on 10.02.2012 categorically stated that she had no idea of any locker, movable and immovable properties held by her son Shri Abhijit and his family members, which clearly proves the fact of non-existence of such common pool as well as this theory of common pool is nothing but an after thought,

6. *The onus is upon the appellant to establish the nexus between the unaccounted income disclosed by parties other than the appellant and the investment made by the appellant. In this regard support may be drawn from the Hon"ble Supreme Court's decision in the case of Kale Khan Mohammad Hanif Vs. CIT (50 IT 1). The facts in that case are that the AO did not give credit of the business income estimated against the unexplained cash credits assessed as income from undisclosed sources. On appeal before the Hon"ble Supreme Court, it was held that the amounts of cash credits could be assessed to tax as income from undisclosed sources in addition to the business income computed by estimate. The taxing authorities were not precluded from treating the amount of credit entries as income from undisclosed sources simply because the entries appeared in the books of certain business whose, income had previously been computed on percentage basis. In the instant case since the appellant has failed to establish the nexus of earlier transactions with that of the current year's transactions, no credit is to be given, It may be pertinent to mention here that in the case of Kale Khan the Supreme Court did not allow the benefit of telescoping even in that case where both the undisclosed income and investment belonged to the same assessee. Whereas in the instant case the appellant has sought to claim the benefit of telescoping of the undisclosed income of the third party with that of undisclosed income of the appellant without establishing the nexus thereof.*

In view of the above discussion, appellant's claim of telescopic benefit is rejected accordingly ground of appeal is hereby dismissed."

13.1 According to Ld. CIT(A), no cash flow statement pertaining to unaccounted cash received on sale of 'Matunga Land' and utilised

against unexplained investment of the assessee, was submitted before the AO and therefore fresh investigation was required and in such circumstances no fresh claim can be admitted by the appellate authorities.

13.2 The Ld. CIT(A) has also rejected the contention of the assessee on the ground that there was no proximity of period in transactions on money received from sale of 'Matunga Land' and unexplained investment in jewelry. The Ld. CIT(A) also rejected the telescoping benefit because telescoping benefit has been sought from undisclosed income of the other person and not from the same person. The Ld. CIT(A) also rejected the common pool theory due to lack of evidence as well as due to separate Income-tax return filed by the members of the family. He has also emphasized that no such statement were made during the course of section 132(4) of the Act, no books of accounts are maintained in respect of unexplained cash and there are no evidence as how the money was given from one

family member to other family members either by way gifts or loans etc. The Ld. CIT(A) relied on the decision of the Hon'ble Supreme Court in the case of **Kale Khan Mohamad Hanif Vs CIT (50 ITR 1)** and held that Hon'ble Supreme Court did not allow the benefit of the telescoping of undisclosed income from business against the cash credit due to lack of evidence that such business income was utilised in taking entry of the cash credit.

13.3 Before us also the Ld. counsel of the assessee has repeated the arguments of common pool of financial affairs maintained by the family and therefore sought telescoping benefit of undisclosed cash received on sale of Land by other family members against the unexplained investment declared by the assessee. It is contention of the assessee that in view of the source of the unexplained investment explained by the assessee, income declared against said unexplained investment in the return of income should be reduced. In our opinion, the argument of the common pool of financial affairs

are not sustainable. Because, the Income-tax returns are filed by all the members in their individual capacity and not as a HUF. Therefore, all the financial affairs including maintenance of cash or their assets and liabilities is required to be recorded separately. The cash received on sale of 'Matunga Land' has been identified as belonging to Sh Abhijit Sversekar and Smt. Sweta Aversekar. The said plot of land was in the name of these two persons and whatever amount of money received also belongs to them and cannot be considered as a joint money of the other family members. In view of separate returns of income filed, if the money has to be transferred from one family member to the other, same has to be entered in their books of accounts either as loan or gift . Before the lower authorities, the assessee has not produced any evidence to show that on money received by Sh Abhijit Aversekar or Sweta Aversakar was received by way of the loan or gift by other family members or the assessee. In absence of any such documentary evidences, the contention of the common pool of financial affairs are rejected.

Further, the assessee has voluntarily declared the unexplained investment in jewelry during the course of the search assessment as well as filed the undisclosed income against the said investment in the return of income voluntarily. Further, neither the assessee made any statement during the course of search action in terms of section 132(4) that investment in jewelry was made out of on money received by other family members from sale of the property nor any document or paper has been found during the course of the search which could indicate that the on money received was utilised against the purchase of unexplained jewelry. Therefore this claim is in the nature of the afterthought only. The Hon'ble Supreme Court in the case of Manik Sons (supra) has allowed the benefit of the telescoping of business income of the early years to explain the source of the cash credit in the case of the same assessee and that too directed to give after explaining as why the credit should be given. The relevant finding of the Hon'ble Supreme Court is reproduced as under :

“The appeal before the Tribunal raised a simple question-- whether the cash credits aggregating to Rs. 46,620 or any part thereof were liable to be taxed as income of the respondents in the year 1953-54. For that purpose the, Tribunal had to consider whether the respondents furnished any explanation leading to a justifiable inference that the amount or a part thereof did not represent income of the respondents. In the view of the Tribunal the cash credits had remained unexplained. But the Tribunal still reduced the cash credits by Rs. 21,000, and then proceeded to amalgamate the income for the two years and to divide it equally. For reducing the cash credits by Rs. 21,000 no reasons have 'been given, and amalgamation of the income for the two years and apportionment is without authority of law.

An assessment which has become final may be reopened in appeal by the Appellate Assistant Commissioner or the Tribunal or in revision by the Commissioner, or under an order of rectification of mistake, or pursuant to a notice of reassessment. The Tribunal hearing an appeal may give directions for reopening assessment of the year to which the appeal relates : it cannot give any directions to reassess in case of a period not covered by that year.' There is no sanction in law to enforce the undertaking given by the respondent-when urging his appeal in respect of the year 1953-54, to make a voluntary return for the year 1952-53; and even if the respondents carried out that undertaking the assessment of 1952-53 could not be reopened otherwise than in the manner prescribed by law. The undertaking must therefore be ignored. Under S. 33(4) of the Income-tax Act, 1922, the Income-tax Appellate Tribunal may, after giving both parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power conferred by that sub-section is wide, but it is still a judicial power which must be exercised in respect of matters that arise in the appeal

and according to law. The Tribunal in deciding an appeal before it must deal with questions of law and fact which arise out of the order of assessment made by the Income-tax Officer and the order of the Appellate Assistant Commissioner. It cannot assume powers which are inconsistent with the express provisions of the Act or its scheme.

The Tribunal was entitled to enquire whether the source of the cash credits was explained: if it held that they represented capital or income of earlier years, it could exclude them from income liable to be taxed in the year to which the appeal related. But the Tribunal had no power to find on amalgamation of income an average of more years than one, or to give credit for what is called intangible additions, without explaining why credit was given”.

13.4 In the case of **Pawan Lashkary (supra)**, the Tribunal allowed adjustment of undisclosed income of partnership firm against the investment in jewelry by the partners observing as under:

“10. We have considered the submissions of both the parties and carefully gone through the material available on record. In the instant case, as regards to the benefit of jewellery to the extent of 111.83 gms purchased by Shri Shyam Sunder Lashkary is concerned, it is noticed that the said jewellery was purchased by Shri Shyam Sunder Lashkary from M/s JKJ and Sons jewelers through cheque No. 378627 dated 19/11/1999 of SBI and it was disclosed in the balance sheet dated 31/3/2000, therefore, the Ld. CIT(A) was justified in allowing the benefit for the said jewellery. Now the controversy remains on account of declaration of jewellery weighing 2518.20 gms of Rs. 21 lacs

declared in the hands of the firm M/s Pawan Enterprises. In the present case, it is noticed that the statement of the assessee was recorded during the course of search and the assessee stated that the firm is compendious name for partners and acts through the partners, therefore, the income may be utilized by the partners in the assets of the firm itself. The copy of the assessment order of the ITA 452 & 348/JP/2012 firm M/s Pawan Enterprises is placed at page Nos. 90 to 96 of the assessee's paper book wherein in para 5 it has been held that the undisclosed investment on account of jewellery was not to be taxed in the hands of the assessee firm but in whose hands, it was found and seized. It is not in dispute that the assessee surrendered the income of Rs. 21 lacs in the hands of the firm and claimed that the realization of the stock found short in the firm was utilized for purchasing the jewellery. In the instant case nothing is brought on record to substantiate that the amount disclosed by the partners of the firm was utilized elsewhere. Therefore, the benefit of the said surrender was to be given for acquiring the jewellery weighing 2518.20 gms, accordingly the addition to the extent of Rs. 21 lacs made in the hands of the assessee deserves to be deleted. We order accordingly”.

13.5 Before us, the case is not of a partnership firm and its partner, but the cases are of independent members of a family having their independent source of income. In the instant case before us, the assessee is seeking to explain the source of investment in jewelry from the unexplained cash lying with other persons. The ratios of the cases relied upon by the assessee are not applicable on the facts

of the case. It is for the assessee to demonstrate by way of documentary evidence as how the cash on money received on sale of the property was utilised for acquiring the jewelry, which has been held by the assessee as unexplained voluntarily.

13.6 In view of the above discussion, we reject the contention of the Ld. counsel of the assessee and uphold the finding the Ld. CIT(A) on the issue in dispute. The grounds raised by the assessee accordingly are dismissed.

13.7 The issue raised in the case of Kishore Aversekar (ITA No. 5469/Mum/2015) ; Ashish Aversekar (ITA No. 5468/Mum/2015) ; Apurva Aversekar (ITA No. 720/Mum/2017) being identical to the case of PushapaAversekar (ITA No. 5467/Mum/2015), which we have decided as lead case, therefore following our finding in said case, the other three appeals are decided *mutatsis mutandis*.

13.8 The appeals in above four cases are accordingly dismissed.

13.9 In the case of Sweta Averssekar (ITA No. 5466/Mum/2015), we find that She had disclosed undisclosed income of ₹1,22,93,321/- as on money received from sale of Matunga Property in assessment year 2009-10 and sought to adjust same against the unexplained jewelry of ₹48,99,912/- ; unaccounted cash of ₹1,99,000/- and disclosure of ₹27,70,925/- made against jewelry in assessment proceeding during AY 2012-13. In this case adjustment has been sought by the assessee against availability of undisclosed cash amount available in her own case. In view of the decisions of the Hon'ble Supreme Court in the case of **Manik Sons (supra)** Cited by the assessee, we feel it appropriate to restore this issue to the file of the Ld. Assessing Officer for considering in accordance with law subject to further verification whether the assessee has taken benefit of the undisclosed cash in the capital account or otherwise. Accordingly, we restore the appeal to the file of the Ld. Assessing Officer for deciding a fresh after providing adequate opportunity of being heard.

13.10 The appeal is accordingly allowed for statistical purposes.

14. In the result, the appeals by the four assesseees namely Mrs. Pushpa Avarsekar (ITA No. 5467/M/2015), Mr. Ashish Avarsekar (ITA No. 5468/M/2015), Mr. Kishore Avarsekar (ITA No. 5469/M/2015) & Mrs. Apurva Avarsekar (ITA No. 720/M/2017) are dismissed, whereas appealing the case of Smt. Sweta Avarsekar (ITA No. 5466/M/2015) is allowed for statistical purpose

Order pronounced in the open Court on 29/04/2022.

Sd/-

(SANDEEP SINGH KARHAIL)
JUDICIAL MEMBER

Sd/-

(OM PRAKASH KANT)
ACCOUNTANT MEMBER

Mumbai;

Dated: 29/04/2022

Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Sr. Private Secretary)
ITAT, Mumbai