

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES,"A" JAIPUR

डा० एस. सीतालक्ष्मी, न्यायिक सदस्य एवं श्री राठोड कमलेश जयन्तभाई, लेखा सदस्य के समक्ष
BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA Nos. 40 & 41/JP/2020
निर्धारण वर्ष / Assessment Year : 2012-13 & 2013-14

M/s Maverick Share Brokers Pvt. Ltd. 211, Laxmi Complex, M. I. Road, Jaipur	बनाम Vs.	DCIT, Central Circle-IV, Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAECM 8942 N		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

आयकर अपील सं./ITA Nos. 38 & 39/JP/2020
निर्धारण वर्ष / Assessment Year : 2010-11 & 2011-12

M/s Maverick Share Brokers Pvt. Ltd. 211, Laxmi Complex, M. I. Road, Jaipur	बनाम Vs.	DCIT, Central Circle-IV, Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAECM 8942 N		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Sh. Manish Agarwal, C.A
राजस्व की ओर से / Revenue by: Sh. P. R. Meena, PCIT

सुनवाई की तारीख / Date of Hearing : 24/08/2022
उदघोषणा की तारीख / Date of Pronouncement : 26/09/2022

आदेश / ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

These are four appeals filed by the assessee which are filed against the respective order of the Commissioner of Income Tax (Appeal)- 4, Jaipur

[Here in after referred as Ld. CIT(A)] passed on dates as mentioned here in below for the assessment year mentioned as tabulated here in below which in turn arises from the order passed by the DCIT, Central Circle-04, Jaipur dated and under the provision of Income tax Act, 1961 (in short 'the Act') as mentioned here in below:

Asstt. Year	Appeal No.	Reference to the date of order of the ld. CIT(A)	Reference to the order of the ld. AO date and section under which the order is passed	
2010-11	38/JP/2020	16.10.2019	27.12.2017	u/s. 143(3) r.w.s. 153A
2011-12	39/JP/2020	16.10.2019	28.12.2017	u/s. 143(3) r.w.s. 153A
2012-13	40/JP/2020	16.10.2019	28.12.2017	u/s. 143(3) r.w.s. 153A
2013-14	41/JP/2020	16.10.2019	27.12.2017	u/s. 143(3) r.w.s. 153A

2. As the issues involved in the present appeals are common and inextricably interlinked or in fact interwoven as it is evident from the following chart.

A.Y	Assessee's Appeal No	Issue	Amount Rs.	AGOA No.
2010-11	38/JPR/2020	Interest Payment From Undisclosed Sources	69,449.00	1 to 1.2
2011-12	39/JPR/2020	Interest Payment From Undisclosed Sources	85,361.00	1 to 1.2
2012-13	40/JPR/2020	Interest Payment From Undisclosed Sources	27,912.00	1 to 1.2
2013-14	41/JPR/2020	Interest Payment From Undisclosed Sources	37,32,344	1 to 1.2

Therefore, the parties argued them together and are disposed off by this common order.

3. As it is seen that for all these appeals grounds are similar, facts are similar and arguments were similar and were heard on the same day.

Therefore, we consider the facts and ground taken in ITA No. 41/JP/2020 for A. Y. 2013-14 as lead case.

4. The assessee has assailed the appeal in ITA No. 41/JP/2020, before us on the following grounds;

“1. On the facts and in the circumstances of the case the Ld. CIT(A) has grossly erred in upholding the addition of Rs. 37,32,344/- (on protective basis) made by alleging the same as interest payment out of undisclosed sources of income, on the basis of excel sheets in a pen drive which was found and seized from the possession of Shri Kailash Chand Khandelwal, who is one of the employee of the Maverick Group, without appreciating the true nature of entries, thus the addition so upheld deserve to be deleted.

1.1 That the Ld. CIT(A) has further erred in confirming the addition by ignoring the facts that assessee has not made any interest payment appearing column No. 2 of Excel Sheets in pen drive, thus consequent addition confirmed by Ld. CIT(A) deserves to be deleted.

1.2 That the Ld. CIT(A) has further erred in confirming the addition by wrongly observing that the factum of such additional interest being paid and TDS deducted on such payments have been accepted by the assessee, whereas the name of appellant has not appeared in any of the column of said excel sheets. Appellant prays that such observation being incorrectly made deserves to be ignored and excluded and the consequent addition so confirmed by Ld. CIT(A) by relying such observation, deserves to be deleted.

2. That the appellant craves the right to add, delete, amend or abandon any of the grounds of this appeal at the time or before the actual hearing of the case.”

5. The brief facts of the case as culled out from the records is that a search and seizure actions u/s. 132 of the Act and/or survey action u/s. 133A of the Act was carried out by the Income Tax Department on the members of the Marverick Group, Jaipur on 22.07.2015 of which the assessee is one of the members. During the course of the above referred actions, cash jewellery, valuables, stock in trade, documents, books of

account and / or loose papers found and or seized from the premises of the Maverick Group Jaipur of which one such member happens to be the assessee. In this case original return of income was filed on 29.09.2013 declaring total income at Rs. 98,59,810/-. On account of search jurisdiction over the cases was assigned to Central Circle -4, Jaipur vide order u/s. 127 of the Act. In compliance to the notice u/s. 153A of the Act, return of income e-filed on 28.11.2015 declaring total income at Rs. 98,59,810/-. After filling return u/s. 153A, the notices u/s. 143(2) along with the questionnaire were issued. The assessee filed the details and same was kept on record. The assessee engaged in the business of Share trading and earned income from business or profession and other sources during the year under consideration.

6. In the assessment order the Id. AO observed as under while making the addition which is disputed by the assessee:

“During the course of search operation in the Maverick Group, Jaipur a pen drive was found and seized from the possession of Shri Kailash Chand Khandelwal, who is one of the employee of the Maverick Group. The pen drive so seized contained some files in excel software. The excel sheets contents adjustment entries in the last column with remarks of 2.4%. From the details, it is seen that out of the total interest after considering the duplicate / repeated entries noted in adjustment account, total of such entries comes to Rs. 75,27,847/-out of which it has been claimed that an amount of Rs. 35,15,548/- pertained to various individual / concerns related to Maverick group and balance Rs. 40,12,299/- related to other persons. Necessary actions have been taken in the case of persons/ concerns related to the Maverick group where the addition on substantive basis has already been proposed in their respective assessments.

However, the assessee has failed to establish that the amount appearing under adjustment account in the name of other persons was not paid by assessee or assessee's group concerns persons. The total amount pertains to others persons is Rs. 40,12,299/-, out of which an amount of Rs. 37,32,344/- pertains for the year under consideration. Since the pen drive was found from the possession of the assessee's trusted employee, hence the provisions of section 132(4A) are invoked. Accordingly show cause notice dated 05.12.2017 was issued to the assessee, which is reproduced as under:

"It is with reference to the pending scrutiny assessment for the AY. 2013-14 in your case. During the course of search, a pen drive was found from the possession of one of your trusted employee Shri Kailash Khandelwal in whose case the action u/s 132 was carried out, containing excel files of interest paid by various persons of your group and by other persons also. In these files the payment of interest over and above the amount recorded in the books of accounts was also found noted as adjustment entries. During the course of assessment proceedings it was explained by your authorised representative that the said amount was asked in addition to the interest already paid however, the same was never paid. In this connection it is seen that nowhere in the proceedings the fact that no such amount was paid to these companies was established by you with credible evidences. On the other hand it has been clearly written in the seized documents i.e files available in pen drive that interest @2.4% was paid as adjustment entry over and above the interest payment recorded in the books of accounts on which TDS was also deducted.

From the details, it is seen that out of the total interest after considering the duplicate/ repeated entries noted in adjustment account, total of such entries comes to Rs 75,27,847/- out of which it has been claimed that an amount of Rs 35,15,548/- pertained to various individual concerns related to Maverick group and balance Rs. 40,12,299/- related to other persons. Necessary actions have been taken in the case of persons concerns related to the Maverick group where the addition on substantive basis has already been proposed in their respective pending assessments however, you have failed to establish that the amount appearing under adjustment account in the name of other persons was not paid by you or your group concerns/ persons. Since the pen drive was found from the possession of your one of the treated employer. you are show caused as to why not the provisions of section 132(4A) are not invoked and by treating the payment of Rs. 40,12,199/- being made by you out of the undisclosed income and therefore it is proposed to make an addition of R 37,32,344/- in your case on protective

Your reply on these issues should reach to this office by 08.12.2017 on which date your case is fixed for hearing Please note that no further opportunity will be provided to you and the case will be decided on merits as per the material available on record. Statutory Notice U/s 142(1) of the IT. Act, 1961 is enclosed for necessary compliance.

The assessee vide his reply dated 08.12.2017 submitted that the amount represents the additional interest asked by the finance broker which was not paid by the assessee the relevant portion of the same is reproduced as under:

“With regard to your proposal for making protective addition in the hands of the assessee company on account of the amount appearing under the title adjustment it is submitted that as stated above and also in our earlier submission non of the party is related to the assessee company in any manner nor assessee is aware about the transactions entered into by them nor such entry is appearing in the books of accounts of the assessee company therefore, your presumption that the amount appearing under the title adjustment in the said excel sheets is farfetched, without any direct or remote connection with the assessee company and purely a guess work.”

The reply filed by the assessee has been considered and found untenable. The assessee's plea that non of the party is related to the assessee company in any manner nor assessee is aware about the transactions entered into by them nor such entry is appearing in the books of accounts of the assessee company is not correct. Since the pen drive was found and seized from the possession of Shri Kailash Chand Khandelwal, who is one of the trusted employee of the assessee. It is very much mandatory for the assessee to explain the contents of the details/account found from the pen drive, which was in the possession of the assessee. The assessee was given ample opportunities during post search enquiries and assessment proceedings to produce any Corroborative evidences in support of his version. In view of these fact the assessee's reply is not accepted and therefore, the adjustment entries amount pertains to the other than assessee's group persons amounting to Rs. 37,32,344/- is added back to the total income of the assessee on protective basis after invoking provisions of section 132(4A) of the Income Tax Act, 1961 for the year under consideration.”

7. The assessee aggrieved from the said order of the assessment preferred an appeal before the Id. CIT(A). The Id. CIT(A) has not granted any relief on this issue and thus, the assessee has raised this appeal before us. Thus, the present appeals preferred on the issues raised in the grounds of appeal on which the Id. CIT(A) has not granted any relief to the assessee. The relevant findings of the Id. CIT(A) reiterated here in below:

“Ground no.2- Protective addition on pen drive Rs. 37,32,344/-

7. I have perused the written submissions submitted by the Ld. A/R and the order of AO. I have also gone through various judgments cited by the Ld. A/R. I have already held that the addition on the basis of entries in the Pen Drive found from the premises of the key employees are sustainable. On the facts and in the

circumstances of the case, since the such addition are held to be sustainable the protective addition of Rs. 37,32,344/- is also confirmed. The ground raised is dismissed.”

8. The Id. AR of the assessee in this appeal against the grounds raised has relied on the following written submission :

The ground wise submission is as under:

Ground of Appeal Nos. 1 to 1.2:

In these grounds of appeal, assessee has challenged the action of Id.CIT(A) in confirming the addition made on “protective basis” of account of entries stated to have been found in excel sheets available in pen drive found from the possession of Shri Kailash Khandelwal, an employee of assessee company, by grossly ignoring the fact that none of the entry contained the name of assessee company which is an undisputed fact. The addition made in various assessment years is tabulated as under:

Asstt. Year	Amount
2010-11	69,449.00
2011-12	85,361.00
2012-13	27,912.00
2013-14	37,32,344.00

At the outset kind attention of the hon'ble bench is invited to the fact that while making protective addition in case of assessee, Id. AO has not recorded his finding as to about the name of specific case / person in whose case the same is added on Substantive basis.

In this regard, it is submitted that under Income-tax Act, 1961, there is no provision to pass protective assessments and it is only through certain judgments of the Courts of Law that protective assessments are permitted. The courts while holding that the AO is entitled to make protective assessment, had laid down certain guidelines which have to be followed. In the instant case, Id. AO does not have unfettered powers to do protective assessments and the conditions laid down by the Court have to be fulfilled before making a protective assessment. The pre-requisites for making a protective assessment are as follows:

- a) The reasons for making a protective assessment should be mentioned in the order.
- b) The entity and the assessment year in which the substantive addition has been made, has to be mentioned in the protective assessment order.
- c) There should be a declaration in the assessment order, as well as in the demand notice, that this is a protective assessment and it should also be stated that, the demand arising out of the protective assessment, will not be recovered.
- d) A substantive assessment must necessarily precede the protective assessment.
- e) In case of a protective assessment there should not be any penalty proceedings, unless a protective assessment is converted into a substantive assessment.

In support of such proposition, reliance is placed on the following:

- i) Lalji Haridas vs. ITO and another 43 ITR 387 (SC).

- ii) Dilip Kumar Jain vs. ITO 5 ITD 552 (ITAT, Indore).
- iii) ITO vs. Miss Vasudha Bajoria 40 ITD 414 (Cal.)
- iv) M.P. Ramchandran vs. DCIT 129 TTJ 190 at page 195 (ITAT Mumbai).

Hon'ble Delhi ITAT in the case of G.K. Consultants Limited, vs Income Tax Officer, in ITA No. 1502/Del/2013 (Case Law PB-II APB 255-263) has held as under: (APB 262)

"19. On careful consideration of above contention, we are of the view that there may be a substantive assessment without any protective assessment but there cannot be any protective assessment/addition without a substantive assessment/addition, meaning thereby there has to be some substantive assessment/addition first which enables the AO to make a protective assessment/addition. In the present case, the AO proceeded to make protective assessment by way of reopening of assessment of the assessee appellant company without being a substantive assessment on the date of assumption of jurisdiction u/s 147 of the Act which is not permissible as per decision of ITAT, Mumbai in the case of M.P. Ramachandran vs DCIT (supra) and Suresh K Jajo vs ACIT (supra)."

Hon'ble Delhi ITAT in the case of Income tax officer, vs. M/s Fussy Financial Services Pvt. Ltd in I.T.A. No. 4227/DEL/2014 (Case law PB II APB 264-268) has decided the issue of Protective Assessment as follows (APB 267 backside and 268):

"7.1 We further note that the analysis of the investment account reveal that the company has made investment of Rs. 5,04,01,000/-. The statement given by Sh. PN Jha assumes importance wherein he categorically admitted that the company was doing the business of investment and finance and during the year the bank accounts of the company have been used to provide the accommodation entries. The addition of Rs. 3,17,67,951/- made by the Assessing Officer on protective basis, which is not sustainable in the eyes of law, because in this case the AO himself stated in the assessment order that the Department is looking after the cases of beneficiaries and the amounts channelized through this group would be taxed in the hands of the beneficiaries, the amount of total credits of Rs. 3,17,67,951/- made in its bank account with Kotak Mahindra Bank, KG Marg, New Delhi, during the year is added to the income of the assessee on protective basis. In this case we find that AO has not made any substantive assessment. There may be substantive assessment without any protective assessment, but there cannot be any protective assessment without there being a substantive assessment."

The addition so made on protective basis, without giving finding as to whether the substantive addition in proposed cases has already been made, is totally unjust and bad in law. Ld. CIT(A) has failed to appreciate these facts and upheld the addition without making any observations as to why the addition on protective basis is sustainable when no addition on substantive basis was completed in the case of any of the persons in whose name such entries were found noted while protective addition was made in the hands of the assessee company.

As submitted above, in the present case of the appellant even there is no finding recorded as to in which specific case or cases the substantive addition is being proposed what to talk of passing of assessment order having / making substantive addition in same specific case / cases. Hence protective addition so made is bad in law and deserves to be deleted.

Without prejudice to our submission on the legal issue of protective addition, the submission on merits of the addition made is as under:

Brief facts related to these grounds of appeal are that during the course of search, one pen drive was found from the possession of Sh. Kailash Khandelwal, one of the employee of Maverick Group, which contained excel sheets containing certain entries of loans taken and interest payment by various individuals/ firms/ companies. The printout

of the said sheets is available at page 1 to 89 of the paper book. Last column in such excel sheets was "Adjustment entries" and sum total of such so called adjustment entries appearing in excel sheets was arrived at Rs.75,27,847/-. Ld. AO himself at page 3 of Assessment order has mentioned that out of Rs.75,27,847/-, an amount of Rs.35,15,548/- pertains to various individuals/ concerns related to Maverick group and balance Rs.40,12,299/- was related to other persons not related to Maverick group. It is stated that amount of Rs. 35,15,548/- is claimed to be pertaining to various individuals / concerns of the Maverick Group as their names were appearing in the excel sheet. However, it is pertinent to note that in those excel sheets, nowhere the name of assessee company was appearing still the remaining amount of Rs.40,12,299/- undisputedly pertaining to persons other than related to Maverick Group has been added in the hands of assessee on protective basis in four assessment year starting from AY 201-11 to AY 2013-13 i.e. the assessment year to which the entry pertained, solely for the reason that such pen drive was found from the possession of employee of Maverick Group though none of the entries belonged to assessee nor its name was appearing in any of such sheet and the pen drive was also not found and seized from the business premises of assessee company nor found from the residences of any of the Directors / partners of the company / firms of the group but was seized from the residence of Shri Kailash Khandelwal. It is also matter of fact that statements of Shri Kailash Khandelwal were also recorded u/s 132 and nowhere in the statements he was confronted with the entries/contents of the Pen Drive. Further, he was never examined by Id. AO during the course of assessment proceedings nor he was ever confronted with these papers at any stage. Initially it was alleged that the said amount was the income of the assessee company but when the true nature of the entries were explained, the addition was made as unexplained expenditure towards interest payment. At this juncture, kind attention of the hon'ble bench is invited to provisions of section 132(4A) of the Act, which reads as under:

Section 132 Search & Seizure

(4A) Where any books of account, other documents, money, bullion, jewellery or other valuable article or thing are or is found in the possession or control of any person in the course of a search, it may be presumed—

- (i) that such books of account, other documents, money, bullion, jewellery or other valuable article or thing belong or belongs to such person;
- (ii) that the contents of such books of account 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.]

As stated above, that though such pen drive was found from the possession of employee of Maverick Group, at the same time the Id.AO himself has admitted that sum of Rs.37,32,344/- was not appearing in the name of assessee nor in the name of any members of Maverick Group and was in the name of parties totally unrelated to the assessee. However, he proceeded to make the addition in the hands of assessee company "on protective basis" without there being any addition in the hand of any persons on substantive basis to whom such entry are considered by Id. AO to be belonging to.

Regarding the nature of entries contained therein it was explained to Id.AO that as per the Pen Drive (copy of which was supplied by the Id.AO during the course of assessment proceedings) is having total five files prepared under Excel format which are as under:

File No.	Name of the File	APB
A.	Copy of MMM2013.xls	1-42
B.	MMM2013 new 29.05.2013.xlsx	43-54
C.	MMM2013.xls	55-70
D.	New Microsoft Excel Worksheet.xls	71-81
E.	MMM.pdf	82-89

Each file contained various excel sheets and the one sheet contained the total transactions whereas the remaining sheets contained the person-wise / company-wise break-up of the transactions appearing in the first sheet. The details available in the sheets of one file are also appearing in the sheets containing in other files, therefore, there are duplications / repetitions of the entries not only within a file but also in other sheets available in other files. Accordingly the reconciliation was filed for such duplicate/repeated entries and after reducing the same the total of all the entries was reduced from Rs. 2,51,22,735/- to Rs. 75,27,847/-.

Regarding the entries appearing under the title "as per books", it was explained that they appear to be the loans taken by the respective individuals / company / firm whose name is appearing under the title "your com name" from the respective company whose name is appearing under the title "our com name" and based on the entries pertaining to various members of the Maverick group it was submitted that all such transactions are duly recorded in the respective book of accounts coupled with the entries pertaining to the interest and TDS thereon which fact is verifiable from the books of accounts of the respective persons of Maverick group which were produced for examination of Id.AO who found no error in the submission of the assessee. The amounts appearing in the last column titled as "Adjustment" for which it was explained that the said amount represents the additional interest asked for by Finance broker, which was not actually paid by the respective individuals/company/ firms. In fact, it is admitted that such sheets contained details prepared by finance broker, who had kept the details of different loans advanced to various persons including certain individuals/entities of Maverick Group and while possibly sending the details pertaining to persons related to Maverick group however, since the same is in Excel format, the other sheets were kept hidden by the broker, which were construed as unhide by the department. However it is incorrectly alleged by the Id. AO that as the pen drive was found from the possession of the employee of assessee company, all entries would pertain to the group; whereas same is actually not correct.

As submitted above, parties other than of Maverick group are concerned (in whose name entries were found in excel sheets), it is once again submitted that none of the parties are related to the assessee company in any manner nor the assessee is aware about the transactions entered into by them.

It is, therefore, submitted that as name of assessee is not mentioned in any of the sheets in pen drive, by no stretch of imagination presumption can be drawn u/s 132(4A) that pen drive constitutes undisclosed transaction related to assessee. In this scenario, it is submitted that no incriminating document whatsoever was found in the case of assessee for the year under appeal, thus it is requested that addition made in all the four assessment years under appeal by Id.AO on "protective basis" deserves to be deleted.

It is further clarified that excel sheet was received from some finance broker who had been working for many persons apart from Maverick Group. Same was received by

employee of the group namely Kailash Khandelwal with the understanding that he would refer the details as belonging to various individuals / companies of the group out of total list and do the needful. This explanation of assessee was partly accepted by Ld. AO who has not made any addition of the entries pertaining to individuals / companies of group but made addition out of remaining entries. Now coming to the list in the excel sheet, it is submitted that there are few names / concerns of Maverick Group against whom amount in last column had been mentioned and Ld. AO in his wisdom has added these amounts in those cases. Accordingly excel sheet may be an incriminating document in the case of persons / concerns of the Maverick group whose names are appearing therein. However as the name of assessee company is not at all appearing in this excel sheet, this sheet cannot be considered as incriminating document in the hands of assessee company. Ld. AO has categorically observed that name of assessee company is not appearing in the excel sheet and therefore has not rightly added directly any amount. Since there is no incriminating document relating to assessee company, additions so made u/s 153A are bad in law and deserves to be deleted. Ld. CIT(A) though accepted this plea of the assessee company that no incriminating paper was seized during the search pertaining to the assessee company however, he further went on to uphold the addition based on the excel sheet which do not contain any reference of the assessee company without fully appreciating his own findings.

In view of above, it is humbly submitted that the impugned orders of lower authorities suffers from serious error in as much as the additions made are not based on any incriminating loose paper/material found / seized as the result of search from the possession of the assessee, which could not have been made under section 153A particularly when on the date of search no proceedings were pending for impugned assessment years and thus no proceedings stood abate due to the search and therefore, there being no pending assessment proceedings which could have been considered as merged into the assessment u/s 153A and such findings of the Id. CIT(A) in favour of assessee are not challenged by the department in appeal before this hon'ble bench.

In the circumstances, it is humbly prayed that the addition made in various assessment years presumed as unexplained payment of interest based on the entries found noted in the computer Pen drive, which was found and seized from possession of an employee of the assessee company and do not contain the name of the assessee as the payer in any of such entry, deserves to be deleted more particularly when the Id. CIT(A) has accepted the contention that when no incriminating paper was found and seized as a result of search pertaining to any of these assessment years thus no addition could be made in the assessment completed u/s 153A and such findings are not challenged by the department before the hon'ble bench."

9. The Id. AR of the assessee also filed a case law paper book relying on the various judicial pronouncement in respect of the contentions raised by him in the proceeding before us.

10. The Id. AR of the assessee relying on the written submission further submitted that the person from whom the pen drive is found is not at all relied upon at the time of search. It is also confirmed by both the parties at bar that the person Shri Kailash Chand Khandelwal under whose possession the pen drive found has not made any statement. The search party has not considered this PEN drive and that is why his statement is also not recorded during the search proceeding or at the time of assessment proceedings. The Id. AR of the assessee submitted that in this PEN drive details of the loan, TDS deducted and the name of the parties are written. There are duplication entries which were explained and reconciled with the books during the assessment proceedings. The Id. AR of the assessee in his Paper book at page 1 to 89 filed the print out of these excel sheets. The Id. AR of the assessee also filed the reconciliation of these entries with the books in his paper and the same was filed before the lower authorities. The excel sheet may be related to the finance broker and the same is not disputed. The only issue is for an amount claimed as additional interest demanded which has neither been paid nor in the seized material found to have been paid. Thus, the addition cannot be made without checking the veracity / reliability of the data recorded in the pen drive. Based on that confirmation the Id. AR of the assessee demonstrated that the assessee and its group concerned have recorded and accounted

the interest which is recorded in the Excel Sheet of the PEN Drive found. There are no further consideration flows in addition to what has been recorded in the books of accounts. The Id. AR of the assessee submitted that it is respective parties who were demanding, further interest @ 2.4% in addition to what has been recorded in the books. The additional interest which the assessee or its group concern never paid and there is no evidence of any such further sums paid and found as paid in the course of search. Since the issue is revolving about the PEN Drive found, the bench asked both the parties whether any finding of any person recorded and/or the statement of the person under whose possession this PEN drive found is recorded or not? In response it has been confirmed that there is no finding about the veracity of this PEN drive in the orders of the lower authorities. Therefore, working recorded in this PEN drive is merely an information recorded by that person and whatever financial transaction related to that information is recorded in the books and are already explained before the lower authorities and there is not dispute on this aspect. The revenue has made this addition in the hands of the assessee as protective addition only based on working made in this PEN drive. Therefore, the bench has directed revenue to call the factual information from the AO during the hearing of these appeals. The Id. AO categorically confirmed that the against that protective addition no substantive addition is

made. The relevant report of AO vide letter No. ITO/Wd-1(2)/JPR/2022-23/92 dated 02.05.2022, submitted his report and same is extracted here in below :

“Respected Sir,
Sub: Supplying of documents/information in the case of M/s Maverick Group Cases-reg.

Kindly refer to your letter No 50 dated 27.04.2022 on the abovementioned subject.

In this connection, the requisite information is reads as under:

i. No further appeals before Hon'ble ITAT were recommended in all the four assessment years.

ii. On perusal of the assessment records, it is noticed that the AO in assessment order has mentioned that a pen drive was found and seized from the possession of Shri Kailash Chand Khandelwal, one of trusted employee of the assessee. The pen drive so seized contained some files in excel software. The excel sheets contains adjustment entries in the last column with remarks of 2.4%. From the details, it was noted that out of the total interest after considering the duplicate/repeated entries noted in adjustment account, total of such entries comes to Rs. 75,27,847/- out of which it was claimed that an amount of Rs. 35,15,548 pertained to various individual /concerns related to Maverick group and balance Rs 40,12,299/- related to other persons. Necessary action has been taken in the case of Persons/concerns related to the Maverick group where the addition on substantive basis has already been proposed in their respective assessment. The total mount pertains to other persons is Rs. 40,12,299, out of which an amount of Rs 69,449/- pertains for A.Y. 2010-11, Rs. 85,361/- pertains to A.Y. 2011-12, Rs. 27,912/ pertains to A.Y. 2012-13 and Rs. 37,32,344/- pertains to A.Y. 2013-14. Since the pen drive was found and seized from the possession of Shri Kailash Chand Khandelwal one of trusted employee of the assessee. It was mandatory for the assessee to explain the contents of the details/account found from the pen drive which was in the possession of the assessee. During the post search enquiries and assessment proceedings, the assessee could not produce any corroborative evidences in sport of their support. Thus, adjustment entries to the other than assessee's group persons amounting to Rs. 69,499/- in the A.Y. 2010-11. Rs. 85,361/- in the A.Y. 2011-12 Re 27,912/- in the A.Y. 2012-13 and Rs. 37,32,344 in the A.Y. 2013-14 were added to the total income of the assessee on protective basis. **However, nothing on assessment record has been found which provide the details of the persons in which the substantive addition were made.**

iii. During the course of appellate proceedings, the assessee has contended that the pen drive found from the premises of one of the employee, Sh. Kailash Chand Khandelwal does not relates to the appellant in particular or the persons of the assessee group. However, the Ld. CIT(A) rejected the contention of the

assessee and stated that the pen drive found from the premises of Sh. Kailash Chand Khandelwal belongs to the assessee group and some of the appellant specifically mentioned in column No. 2 of spread sheet. The seized material is lying with the office of ACIT, Central Circle-4, Jaipur. If any further clarification is needed on this issue, the same may be obtained from that office.

Case records for A.Ys. 2010-11, 2011-12, 201-13 and 2013-14 (One volume each) are enclosed herewith.”

11. Based on the stated facts, the Id. AR of the assessee vehemently argued when in the report substantive addition is not made based on the findings of the Id. Assessing Officer how the protective addition can survive and therefore, he has submitted that the protective addition made in these cases are required to be deleted. To drive home to this contention the Id. AR of the assessee he has relied upon the findings of the SC in the case of Lalji Haridas Vs. ITO 43 ITR 387 where in the apex court observed that

We would, however, like to add one direction in fairness to the appellants. The proceedings taken against both the appellants should continue and should be dealt with expeditiously having regard to the fact that the matter is fairly old. In the proceedings taken against Lalji the Income-tax Officer should make an exhaustive enquiry and determine the question as to whether Lalji is liable to pay the tax on the income in question. All objections which Lalji may have to raise against his alleged liability would undoubtedly have to be considered in the said proceedings. Proceedings against Chhotalal may also be taken by the Income-tax Officer and continued and concluded, but until the proceedings against Lalji are finally determined no assessment order should be passed in the proceedings taken against Chhotalal. If in the proceedings taken against Lalji it is finally decided that it is Lalji who is responsible to pay tax for the income in question it may not become necessary to make any order against Chhotalal. If, however, in the said proceedings Lalji is not held to be liable to pay tax or it is found that Lalji is liable to pay tax along with Chhotalal it may become necessary to pass appropriate orders against Chhotalal. When we suggested to the learned counsel that we propose to make an order on these lines they all agreed that this would be a fair and reasonable order to make in the present proceedings.

12. He has further submitted that the coordinate bench of Indore ITAT has also taken a view following that judgement of the apex court in the case of Dilipkumar Jain Vs. ITO. The relied upon finding in that decision is reiterated here in below:

“8. I have considered the rival submissions and perused the entire evidence on record. There could be no dispute to the proposition that the ITO had jurisdiction to complete the assessments on protective basis. In cases where it appears to the income-tax authorities that certain income has been received during the relevant assessment year but it is not clear as to who has received that income, and, prima facie, it appears that the income may have been received either by A or by B or both together, it would be open to the appropriate authority to determine the said question by taking appropriate proceedings both against A and B. Reference may be made to the ratio of decision in the case of Lalji Haridas v. ITO [1961] 43 ITR 387 (SC). I may state at this stage that there is no specific provision in the Indian Income-tax Act, 1922 regarding making the assessments on protective basis. Such concept has been borrowed from law and practice as prevalent in England. The leading case on the subject is Attorney-General v. Aramayo [1925] 1 KB 86 (CA). Similar matter came before the Calcutta High Court in the case of B.V.Bagchi v. Ladhuram Taparia [Appeal from the original order No. 71 of 1951, dated 17.1.1952]. In the said decision, his Lordships Harries, C.J., while deciding the controversy observed as under:

The income-tax authorities also made an alternative assessment, assessing each of the firms separately and this was what is referred to as a protective assessment and is permissible in order to prevent assessment being barred by limitation.

Reference may be made to the ratio of decision in the case of Jagannath Hanumanbux. TTO [1957] 31 ITR 603 (Cal). The Hon'ble Calcutta High Court, while deciding the said case made observations as under:

...It is also true that there cannot be any assessment excepting of an assessee and there can be no doubt that the income-tax authorities must confine themselves within the four corners of the statute and not invent new procedures outside the limits of the Indian Income-tax Act (p. 609) If we read those decisions carefully, it would be clear that before completing the assessments on protective basis, the ITO is supposed to point out the name of the assessee who may be the owner of such income. It is common ground that in the present cases, till this date, the authorities below did not bring on record any material to show that the

declared income in question really belongs to some other assessee. The learned departmental representative frankly conceded that till this date no proceedings in respect of the disputed income have been started against any other assessee.

9. The learned counsel for the assessee contended that the income-tax authorities have no right to call the present assessments as protective because till this date they have not started any proceedings against the alleged real owner of such income. In my opinion, the contention of the assessee has substance. No doubt, the income-tax authorities has the right to make the assessments on protective but while doing so they are supposed to point out the name of the real owner of such income. At least some proceedings should be [commenced] against such assessee. Under the circumstances, in my opinion, the present assessment orders cannot be called the protective assessments. The learned AAC, without bringing on record any evidence, was of the view that the assessments were rightly made on protective basis. Even the learned AAC did not point out that who was the real owner of such income. When the matter came before the learned AAC, at least he should have come to a conclusion that really such income belonged to somebody else. Even if the ITO can blow hot and cold, it is certainly not open to the learned AAC or the Tribunal to blow hot and cold. Again it might be open to the ITO to make the protective assessments, but it is certainly not open to the AAC and the Tribunal to make a protective order. When the assessments are completed on protective basis and the appeals are pending before the Tribunal, in such situation the Tribunal ought to have decided both the appeals together and finally determined as to whether the said sum was, if at all, the income of the assessee or somebody else.”

13. Thus, without making known to whom substantive addition made no protective addition survive. Even though no payment is alleged to have been made and not relevant loose paper recording these averments is found and in light of that submission he has prayed to delete the protective additions.

14. Per contra, the Id. DR relied upon the order of the lower authorities and supported the arguments recorded in the orders of the lower authorities

and as regards the statement not recorded for the evidence of PEN drive he relied on the report of the AO.

15. We have heard the rival contentions, submission made and relied upon relevant judicial decisions by both the party. The bench has noted that when the PEN drive find during the search proceeding no questions are raised to the parties not only that the employee from this PEN drive found, his statement is not recorded. Thus, merely from that PEN when the veracity about that evidence is not recorded no addition either protective or substantive can be made. Not only that even on the merits the addition cannot be made on two counts, one is that there is no substantiative addition in those persons who claimed to have additional interest as duly confirmed before us by the AO and secondly when the substantive addition is not made protective addition cannot survive. The amount in dispute is nothing but the amount of the additional interest demanded and not paid by the assessee. Based on the decision relied upon by the Id. AR and on careful consideration of the facts in this case we hold that the Id. AO before completing the assessments on protective basis, the AO is supposed to point out the name of the assessee who may be the owner of such income. It is common ground that in the present case, till this date, the authorities below did not bring on record any material to show that the declared income

in question really belongs to some other assessee. The Id. DR honestly conceded that till this date no proceedings in respect of the disputed income have been made against any other assessee and the same is also confirmed by the AO in the report presented before us.

16. It is not disputed the findings of the Id. AO that there is no addition on substantive basis. Thus, the protective addition cannot be survived as AR of the assessee explicitly proved that whatever interest that they have paid in the group cases is duly recorded in the books of accounts and wherever applicable TDS is also deducted. As an additional interest as allegedly demanded by the parties is not paid by the assessee, even those parties are not questioned on that 2.4% found recorded in the Excel-Sheet and same were also not taxed on substantive basis. There cannot be any protective addition without making the substantive addition and Revenue did not controvert the argument of the AR of the assessee and has also not supported by any judicial decision so as to confirm the order of the lower authorities. Thus, the interest which is actually paid is duly recorded in the books of accounts and there is no other material which is found even the person under whom possession the PAN Drive is found his statement is not recorded. This action itself shows that department find this evidence as dump documents and is not evidence relied upon. The statement of the

person from whom the evidence his found is also not checked on its correctness and veracity. Therefore, based on the finding that the revenue has not made any substantive addition in the persons in whose name the interest as alleged addition income is not added and the Id. AR of the assessee categorically proved that there is no incriminating other document found recording the payment of the additional interest. Based on these observations we vacate the disallowance made for an amount of Rs. 37,32,344/- made on protective basis.

17. The fact of the case in ITA Nos. 38/JP/2020, 39/JP/2020 & 40/JP/2020 is similar to the case in ITA No. 41/JP/2020 and we have heard both the parties and persuaded the materials available on record. The bench noticed that the issues raised by the assessee in this appeal Nos. 38/JP/2020, 39/JP/2020 & 40/JP/2020 are equally similar on set of facts and grounds. Therefore, it is not imperative to repeat the facts and various grounds raised by both the parties. Hence, the bench feels that the decision taken by us in ITA No. 41/JP/2020 for the Assessment Year 2013-14 shall apply mutatis mutandis in ITA Nos. 38/JP/2020, 39/JP/2020 & 40/JP/2020 for the Assessment Year 2010-11, 2011-12 & 2012-13.

18. In terms of these observations all the four appeals in ITA NO. 38/JP/2020, 39/JP/2020, 40/JP/2020 and 41/JP/2020 are allowed.

Order pronounced in the open court on 26/09/2022.

Sd/-

(डा० एस. सीतालक्ष्मी)
(Dr. S. Seethalakshmi)
न्यायिक सदस्य / Judicial Member

Sd/-

(राठोड कमलेश जयन्तभाई)
(Rathod Kamlesh Jayantbhai)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 26/09/2022

*Ganesh Kr.

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. The Appellant- M/s Maverick Share Brokers Pvt. Ltd., Jaipur
2. प्रत्यर्थी / The Respondent- DCIT, Central Circle-IV, Jaipur
3. आयकर आयुक्त / The Id CIT
4. आयकर आयुक्त(अपील) / The Id CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA Nos. 40 41 38 & 39/JP/2020)

आदेशानुसार / By order,

सहायक पंजीकार / Asstt. Registrar