IN THE INCOME TAX APPELLATE TRIBUNAL
RAJKOT BENCH, RAJKOT
(Conducted Through Virtual Court)
Before: Shri Waseem Ahmed, Accountant Member
And Shri T.R. Senthil Kumar, Judicial Member

ITA Nos. 25 & 26/Rjt/2021 &
C.O. Nos. 1 & 2/Rjt/2021
Assessment Years: 2006-07 & 2007-08

Assistant Commissioner of Income Tax, Central Circle-1, Rajkot	Vs	Shri Rajeshkumar Govindlal Patel 4th Floor, Sita Apartment, Nr. Pradyuman Police Station Sadar Bazar, Rajkot PAN: ABPPB7559M
Shri Rajeshkumar Govindlal Patel 4th Floor, Sita Apartment Nr. Pradyuman Police Station Sadar Bazar, Rajkot PAN: ABPPB7559M **(Appellant)**	Vs	Assistant Commissioner of Income Tax, Central Circle-1, Rajkot **(Respondent)**

Assessee Represented: Shri S. N. Soparkar, Sr. Adv
with Shri Mehul Ranpura A.R.
Revenue Represented: Shri Shramdeep Sinha,CIT DR

Date of hearing : 02-02-2023
Date of pronouncement : 12-04-2023

आदेश/ORDER

PER : T.R. SENTHIL KUMAR, JUDICIAL MEMBER:-

These two appeals are filed by the Revenue against the Common Appellate order dated 04.01.2021 passed by the Commissioner of Income Tax (Appeals)-11, Ahmedabad arising out of the Assessment orders passed under section 153A r.w.s. 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') relating to the Assessment Years (A.Ys) 2006-07 & 2007-08. These two Cross Objections are filed by the assessee as against the above Revenue appeals. Since common issues are involved in both the appeals, the above Revenue appeals and Cross Objections are disposed of by this common order. ITA No. 25/RJT/2021 relating to the asst year 2006-07 is taken as the lead case.

2. Brief facts of the case is that the assessee is an individual and Partner in 14 Partnership Firms which are engaged in Construc tion, Trading of Commodities, Film Industry and deriving income from Business, Capital Gains and also Income from Other Sources. For the asst year 2006-07 the assessee filed his Return of Income on 31-07-2006 admitting total income of Rs.4,17,050/=. The return was processed under section 143[1] dated 06-12-2006 and refund was issued to the assessee. Thus there was no regular assessment u/s.143[3] of the Act.

2.1. There was Search action u/s.132 of the Act at the residential premises was commenced on 08.09.2011 and concluded on 09.09.2011 at 4.00 a.m. and no incriminating materials was found. Therefore Prohibitory order was passed on 09.09.2011 for the cupboard in the bedroom of Mr. Jay R. Patel [son of the assessee]. The said Prohibitory order was revoked on 15.09.2011 and continued with Search action, again nothing incriminatory documents were found to give rise to

disclosure of undisclosed income. However, the Investigation Officer on 15.09.2011 showing the unauthenticated paper in his possession i.e. the code profile client from foreign bank (Which was not even found from assesse's possession) vide Qn. 4 & 5 as follows:

Q.No.4: I am showing you code profile client 5095020378, which contains three different pages. Please explain what you want to say on this.

Ans : At this moment this thing is not in my memory and we shall inquire about this. However, keeping in mind whatever is unrecorded transactions or investments, of our family members, groups and business concerns, companies etc., or if there is any errors and omissions of the accounts, or if any information of unrecorded investments is gathered or may be gathered, from any other agency or medium, we have made total voluntary disclosure of Rs 39.60 crores on adhoc basis on behalf of family members, group concerns and companies, vide our letter dated 12.9.2011 to the Addl. Director of Income tax (Inv) Rajkot.

Q.No.5: I had shown you code profile client 5095020378, as per which as on February 2007, the balance when converted into Indian Rupees, works out to Rs 30.00 crores. Please explain.

Ans: As mentioned by me earlier, I am not able to remember anything about such investment. In any case, in order to buy peace of mind, I have admitted on behalf of the entire group, a disclosure more than this amount (that is investment in foreign bank accounts) of Rs 39.60 crores has been declared

2.2. The assessee was issued with notices under section 153A dated 12-06-2012 calling upon the assessee to file his Return of Income within 30 days of receipt of the notice. The assessee filed his Return of Income showing total income of Rs.4,17,050/= on 18-10-2013. Further notice under section 142[1] dated 14-11-2014 was served on 15-11-2014 fixing the case for hearing on 19-11-2014. The assessee vide its letter dated 16-11-2014 submitted that the search u/s.132 was carried out on 08-09-2011 and concluded on 15-09-2011, therefore the assessments have become barred by limitation on 31-03-2014. In view of the same the notices issued

after 31-03-2014 are treated as not valid in law and therefore the assessee was not required any compliance to the above notices. The Assessing Officer replied that the time limit to complete the assessments as per provisions of section 153B[1] expires on 31-03-2014, however in the case of the assessee, reference to the Competent Authority was made by the Commissioner of Income tax [Central-II], Ahmedabad vide letter dated 01-01-2013 with a request to get details of foreign bank accounts held by the assessee with HSBC Geneva. In reply the Under Secretary [FT&TR-III][2] vide his letter bearing no. 504/0300/2012–FTD–1 dated 22-01-2013 stated in paragraph 2 that a reference for Administrative Assistance has been made to the Competent Authority under the provisions of "Exchange of information" under Indo-Switzerland Double Taxation Avoidance Agreement [DTAA]. Since the reference was made to the Competent Authority and the information was not received till 31-03-2014, the limitation period to pass the assessment orders for the assessment years 2006-07 to 2012-13 gets extended by one year as per explanation [viii] to section 153B[1] of the Act. Therefore the one year from the end of 31-03-2014 shall get extended upto 31-03-2015 and therefore the notices issued are valid in law.

2.3. During the assessment proceedings again a statement u/s.131[1A] was recorded on 22-11-2013 from the assessee as follows:

> *11. Have you opened' any bank account with HSBC Geneva, either directly or through any of your agents or relatives?*
>
> *Ans:- No Sir, to the best of my knowledge and belief and based on my memory, 1 state that, we do not have account with HSBC Geneva.*

12. As per information available with the department, you are having bank account jointly with Rashmikant Bhalodia and Rajnikant Bhalodia (your cousin brothers) with HSBC Geneva. Please affirm whether you are having any such foreign account(s) or not.

Ans:- No Sir, as far as I remember and to the best of my knowledge and belief, I have not opened such bank account.

13. I am showing you certain information available with the department, as per which you are having foreign bank account jointly with your above mentioned cousin brothers, the details of which are as under:-

User customer code:-	*5095020378*
Identification details:-	*5090154184/ 5090181764/ 5090181766*
List of IBAN	*CH22 0868 9050 9110 0491 1*
	CH44 0868 9050 9110 0490 3
	CH68 0868 9050 9124 8333 3
Creation date	*31.01.2000*

Please affirm whether you are/were having the above mentioned bank account.

Ans:- Regarding this, I state that, we have repeatedly submitted in the post search inquiries as also before your Honour that, we do not have any knowledge or we do not remember having any such account abroad.

14. So you mean to say that you are not having any details of the above mentioned bank accounts. But that does not mean that the above mentioned bank accounts does not exist, especially in light of the fact that your name as well as the names of your cousin brothers (Shri Rashmikant & Shri Rajnikant) have been mentioned as account holders and your residential address at Rajkot, date of opening of account, etc have been mentioned in the above information. If that is the case, then why do you decline to sign the 'consent waiver form', which shall facilitate the department to gather details on your behalf, which, as admitted by you, is otherwise difficult for you to obtain.

Ans:- Sir, I state that, the so called data is not authenticated or certified by any bank or institution and I do not remember about any such accounts. It is also fact that, I have repeatedly requested to provide with the certified and authenticated data in this regard. In the absence of any such information and knowledge about such account, any consent waiver form could not be signed. I may clarify that we tried to find out such details. However nothing is found.

15. Are you aware that this statement is being recorded on oath and subsequently if it is found that you had made false affirmation, then you shall be subject to prosecution? You are therefore again asked to specify whether you are / were having the above mentioned bank account.

Ans:- Sir, my replies to the questions are not false to the best of my knowledge, belief and my memory and I know that my replies should not be false in the statement recorded under oath.

2.4. Thus the assessing officer held that there was receipt of specific information that the assessee was holding and maintaining foreign bank account with client profile was created on 15-02-2005 along with the two persons namely Rashmikant V Bhalodia and Rajnikant M Bhalodia. Further based on the admission of Rs.39.6 crores by the assessee during the recording of statement under section 132[4] of the Act and the news report appearing in Indian express dated 09th February 2015 wherein details of independent investigation carried out by Washington-based International Consortium of Investigative Journalist [ICIJ] and the Paris based Le Monde News paper. The name of the assessee, as per the said report, is appearing at SR number 19 with balance of USD 69,08,661/= as the balance as on 11/2006. Though the assessee filed the retraction statement by sworn affidavit dated 21-03-2014 which is 29 months after making the first admission of unaccounted income, the same was rejected following various judicial decisions. Since the maximum amount invested is US 59, 56,197.30, wherein the exchange rate as on March 2006 was Rs.44.21 for one US Dollar. Therefore the investment in Indian rupees works out to Rs.26,33,23,482/= which is treated as unexplained investment and treated as the total income of the assessee. Thus the Ld AO demanded a tax of Rs.19,77,19,860/= for the assessment year 2006-07. Similarly for the assessment year 2007-08 on the same set of facts the Ld AO demanded a tax of Rs.7,96,52,820/=.

3. Aggrieved against the assessment orders the assessee filed appeals before the Commissioner of Income Tax [Appeals]-11, Ahmedabad. The assessee raised Additional Grounds of Appeal on two counts namely **[a] legality of addition of Rs.26,33,23,482/- to the returned income despite the fact that the original assessment made was not pending at the time of the search and [b] that no addition of Rs.26,33,23,482/- could have been made in absence of any incriminating material found in the course of search**. The Ld CIT[A] called for a remand report from the AO and rejoinder from the assessee and after considering various judicial precedents decided the issue in favour of the assessee observing [since detailed analysis is made by the CIT[A] both on facts and law, major portion of the order is reproduced for better understanding the issues] as follows:

> "…. 5.11 I have perused the assessment order, considered the written submission filed by the appellant, also the arguments of the AR and decisions/judgment of various honourable courts. In the present case, the search action has been carried out on 08.09.2011. On the date of search no assessment proceedings for the year under consideration was pending. If some incriminating material had been found in search, income resulting there from could have been assessed and in such an event, section 153A would come into play and assessment would have been made accordingly. Therefore, what is important is to see whether any incriminating material had been found during the search or not
>
> 5.12 From the copies of material on record and on perusal of the assessment order, it is seen that, first and foremost, there is no mention of any incriminating material in the statement recorded during the course of search on 08.09.2011 or subsequently in assessment order, which led to the addition of unexplained investment in bank account. Further, from the perusal of the assessment order, it is clear that during the course of search neither any material indicating the holding of any foreign bank account was found nor details / link of investment in HSBC Geneva. The AO has not made any reference in the assessment order in respect of any seized

material. Had there been any material of incriminating nature, AO would have referred to it in the assessment order. Thus, it is abundantly clear that nothing was found in respect of HSBC Bank account during search and addition has been made without the backing of any incriminating material in connection with such alleged unexplained investments.

5.13 The second limb to this argument is that, whether voluntary disclosure of income made during search at the time of recording statement u/s 132(4) on revocation of PO in search constitute incriminating material?

5.14 In this regard, the AR of the assessee vehemently argued that since during the search, no incriminating material was found, AO could not have deviated from already assessed income u/s 143(1) on 05.12.2006 in view of the fact that such assessment had attained finality. Therefore, he has no jurisdiction to make any addition without establishing link with incriminating material found in search, if any. Since this is missing in this case, the AO could not have made any variation in the income already assessed u/s. 143(1).

5.15 It is worth to mention in the case that no incriminating document/paper/statement/evidence which suggests that the appellant had a bank account with HSBC Bank in Geneva was found during the search operation undertaken at the residence and business premises of the appellant. This is proved from the fact that the appellant was not shown any evidence /document/statement during the course of his examination and recording of various statements during the course of search proceedings which would suggest that he was the owner of the purported bank account with HSBC Geneva. No questions regarding any purported Paper/Document/Statement purportedly found or shown to him were put to him during the course of his examination and recording of various statements during the period from 08.09.2011 and subsequently.

5.16 During the course of the assessment proceedings which commenced on 12.06.2012 with the issue of notice U/s 153A asking the appellant to furnish return of income for six assessment years. From this date till the issue of show-cause notice the AO has not furnished any Paper/ Document/Statement/Evidence to the appellant despite the fact that the appellant had repeatedly asked for the same.

5.17 Except for the narrative in the AO's show-cause notice as stated above, the AO has not shared the purported data which according to the

AO was received under Double Taxation Avoidance Conveyance (DTAC) between India and France till this date. It has been submitted that the AO has not shared the purported information in his possession which is heavily relied by him in coming to the conclusion that the appellant had an offshore bank account.

It is interesting to note here that the above extract does not state as to what it means, what it pertains to, how it reveals that it pertains to a Bank Account and to which bank, location of the bank, financial information in form statement which shows the debits and credits etc.

5.18 It will be appreciated that no incriminating document was found during the course of search proceedings. It appears that the AO was also not sure of its own source of information and the veracity of the information on which heavy reliance is placed.

5.19 The AO till date has not been able to find/unearth any information regarding the purported offshore account of the appellant. It appears that upto the date, (FT&TR-1) Division has not been in a position to supply any positive information to the CIT(Central) in regard to the purported account. This is so even after the passage of more than eight years since the date of reference made by the Commissioner of Income tax (Central)-II Ahmedabad on 01.01.2013 to the JS(FT&TR-1) Division of the CBDT under DTAA

5.20, The AO has heavily relied on the so called "base document" in coming to the conclusion that the appellant has a Off Shore Account with HSBC Bank Geneva and that the amount of Rs.39.60 Crores was invested by the appellant in the said purported bank account with HSBC Bank Geneva. The so called "base document does not contain anything which says that the same indicated the ownership of the appellant in the HSBC Bank, Geneva. It is important that the "base document" is the photocopy of pieces of paper which, though according the AO is a Base document which suggests that the appellant is the owner of a Off Shore Account with HSBC Bank Geneva, is nothing except pieces of paper which mentions the name and certain personal details of the appellant. The papers relied by the AO do not contain any reference to the source from which it is found/received, it is unauthenticated and unverifiable and it is needless to add that it does not mention that it pertains to a Bank Account even.

5.21 As regards the voluntary ad-hoc disclosure made in statement recorded u/s 132(4), he submitted that such surrender of income was subject to finding out of any incriminating materials during the search. However, it was missing in this case and therefore he had retracted before the AO due to non- finding of any undisclosed income or investment to the extent of voluntary disclosure made.

5.22 From the perusal of assessment order and the written submission filed, it reveals that the issue on hand is basically two-fold. First is the nature of addition per se based on the information, and second the voluntary admission of unaccounted income made by the appellant during the course of search. The AO treated both as interconnected and intermingled the issues while making the addition.

5.23 In order to dwell into the issue, it is important to first consider the very nature of information based on which the AO has made the addition on account of unexplained investment. In order to be an unexplained investment, there should first be explicit and unambiguous evidence of Investment. Its existence should not be doubted or questioned and after first identifying the evidence of Investment, question comes whether it is explained or not and thereafter, satisfaction of the authority follows as per his wisdom looking to the facts, materials and evidence available on records. Hon'ble High Court of Rajasthan in the case of CIT v. Vinayak Plasto Chem (P) Ltd. 42 taxmann.com 43 held that the onus is on the assessing officer to prima facie prove that investment was made by the assessee.

5.24 Therefore, here it is imperative to ascertain whether the information lying with the AO is said to be authentic and constitute a valid evidence. It is seen from the assessment order that the AO has specifically mentioned that there was receipt of information which,

(i) shows the assessee is holding foreign bank account.
(ii) shows the assessee's date of birth and legal residential address,
(iii) it clearly speaks of specific instructions given by the assessee to the bank,
(iv) the assessee was in touch with the bank, wherein he was having active telephonic communication in respect of the investments, movement of funds etc. and
(v) date and time of conversation with the bank officials are shown clearly.

Thus, on these observations, the AO alleged that the assessee is having foreign bank account. However, on confrontation of the above information to assessee on different occasions, he denied having any such foreign bank account and reiterated the absence of any authentic information

5.25 Before me the AR of the assessee submitted that the document relied upon by the AO is not an evidence much less admissible evidence in view of the fact that data shown is not in original but photocopies, which were not authenticated and did not have any signature of the banking authority nor is it on letter-head He also emphasized that appearance of some personal details of the appellant on the photostat copy does not validate the information. The personal details are easily available from known sources and therefore, such details do not better the case of the AO in any manner. He also submitted that had the information been authentic and concrete, no necessity would have arisen to collect the same again from FT&TR Division. The burden of proof for proving the connection of the alleged foreign bank account with the assessee was upon the AO and not on the appellant. Therefore, where the AO attempts to draw an inference that the assessee owns and maintains foreign bank account, based on some unverified sheet of paper which is indicative of---a bank statement, it is upon the AO to prove the truthfulness of the same. Thus, he submitted that the alleged unauthenticated and uncorroborated sheets of papers should not be considered as evidence, whether primary or secondary, and therefore no addition could have been made merely on fiction.

5.26 The AR heavily relied upon the finding given in following cases by the Hon'ble ITAT where identical issues were involved.

(1) Parag Dalmia Vs DCIT supra
"Since verificatory report in respect of above is yet to be received, and since in absence of such verificatory letter, it cannot be conclusively proved that the accounts in fact do belong to the assessee, therefore, considering the totality of the facts and in the interest of justice, we restore this issue to the file of the Assessing Officer and

(ii) Shyam Sunder Jindal vs DCIT supra
From the aforesaid notings, it is clear that the Assessing Officer informed the assessee about the copy of bank account obtained under DTAA, However, a contradictory observation has been made in the assessment order that the requisite information from Swiss Banking Authority had not been received. Therefore, considering the totality of the facts the impugned order is set aside

and the matter is restored back to the file of the Assessing Officer to be adjudicated afresh in accordance with law. [Para 23]

Now, I deal with the surmise of the AO that assessee's admission of Rs.39.60 crores was on account of concealed foreign bank account. The inference drawn by her is that, there was existence of information in possession of the AO, as per which the assessee owned foreign bank account and based on such assertion, search was carried out and thereafter, post search, the assessee had admitted unaccounted income to the tune of Rs 39.60 crores, although he denied knowledge of having any foreign bank account. The statement recorded u/s. 132(4) of the Act, reproduced in the assessment order at Page 11, also clearly spells out that, the appellant had vehemently denied having knowledge of any foreign bank account, though however, in order to buy peace of mind and to cover up any incriminating material which is/may be found during search, in respect of his individual capacity or family members or group concerns, he is making admission of unaccounted income to the tune of Rs 39.60 crores.

5.27 It has been noticed that the appellant in the statement u/s 132(4) recorded on 15.09.2011 vide answer to Q.No.4 has surrendered the undisclosed income at Rs.39.60 Crores in the hands of family members, group concerns and companies etc. for the omissions, errors or any other unrecorded transactions. In the said surrender he has not specified the assessment year to which the said surrender pertained and the name of assessees in whose hands the said surrender pertained. Even the authorised officer while recording the statement of appellant has not asked for the specific details of the assessment year and the persons in whose hands the aforesaid surrender of undisclosed income has been made. In view of the above facts, the surrender of undisclosed income could not be said to be pertaining in relation to A.Y 2006-07 & 2007-08. Thus, the AO cannot take cognizance of such surrender of undisclosed income for making the addition in A.Y.2006-07 & 2007-08.

5.28 The assessee on the other hand contends that, the said disclosure of income was not linked with or based on any specific discrepancy or omission or error but ad-hoc and on random basis. Plain reading of statement clearly proves that, assessee had denied having any knowledge of any foreign bank account. He has repeatedly requested to avail the authenticated and certified data as to so-called account/investments, which the AO failed to produce, and thereby the appellant was deprived of the fundamental right to have relevant information which is totally

unlawful. Further, opportunity of cross-examining the person/source from where the half-hearted data was obtained, was not given to the assessee. Such a conduct on the part of the AO is violative of the principles of natural justice. It was contended that the disclosure of Rs.39.60 crores was to cover up any errors or omissions which may be unearthed in the search which was carried out at several places. When the disclosure is made as a precautionary measure, the same is obviously conditional and the addition thereof can be made only if some corroborating material is found in the search. Hence, such an addition is uncalled for.

5.29 It has also been emphasized that on revocation of PO, the ADIT had confronted the assessee with the material in his possession. Despite this, the assessee did not make any disclosure on account of the material so confronted and he categorically denied having any foreign bank account. Thus, the disclosure was ad hoc and contingent upon finding of any incriminating material in the course of search He also stated that this is apparent from the statement recorded and reproduced by the AO in the assessment order itself. To reiterate, the disclosure was not specific, but was ad hoc. The AO's observation that the name, address and other details of the assessee are tallying with the impugned data, is not a new fact it was there on the date of revocation and despite these details, the assessee had denied the existence of any foreign bank account. Further, the disclosure was voluntary on behalf of entire group and subject to finding out any undisclosed income or investment etc. As regards the retraction after more than two years, the AR stated that incriminating material only to the tune of Rs.2.05 crores was found and hence there was no justification to stick to the earlier admission of Rs.39.60 crores.

5.30 However, as discussed supra, the very material relied upon by the AO cannot be termed as evidence, therefore, the subsequent stand of the appellant of having retracted the admission, stands vindicated. I find substantial force in the argument of the assessee that there cannot be any admission of unaccounted income, in the absence of any incriminating material. The decisions relied upon by the AO are on different facts and are distinguishable.

5.31 In light of the above, in my opinion it is clear that

(a) the appellant had made admission of unaccounted income with a rider that this is subject to any incriminating material being found from him or his family or group concerns;

(b) that the appellant had vehemently denied having any knowledge of alleged foreign bank account;

(c) that the parallel drawn by the AO that the disclosure of unaccounted income and the value of investment as per the information available with her being almost same, it is clear that the appellant had admitted out of such unaccounted bank account only, is only a surmise, which is not backed by any legal document,

(d) the retraction seems to be justified in the absence of any incriminating material and

(e) nowhere the appellant had stated that the disclosure is in respect of the alleged foreign bank account.

Hence, in light of the above facts together with the legal propositions discussed, it appears that the admission was in respect of incriminating material, if found during search, and in the absence of such material and also as the AO failed to unearth any unaccounted transaction post search and during assessment proceedings, and also in light of the various judicial pronouncements supra of the Hon'ble Supreme Court and Hon'ble Gujarat High Court in the case of Kailashben Manharlal Chokshi supra, it can be safely concluded that retraction in the absence of any incriminating material, cannot be said to be unjustified

5.32 Assessee also relied upon the decision of Hon'ble Delhi High Court in the case of PCIT vs. Best Infrastructure (India) Pvt. Ltd. 397 ITR 082, wherein it has been held that "Statement recorded u/s.132(4) by themselves does not constitute incriminating material and assumption of jurisdiction by the Assessing Officer u/s. 153A solely based on statement is unsustainable when there is no incriminating material found during the course of search.

5.33 Further, from the CBDT Circular in F.No.286/98/2013-IT (Inv.II) dated 18.12.2014, it is amply clear that the CBDT has emphasized to focus on gathering evidences during search/survey and strictly directed to avoid obtaining admission of undisclosed income under coercion/under influence. Keeping in view the guidelines issued by the CBDT from time to time regarding statements obtained during search and survey operations, it is undisputedly clear that the ADIT/AO have not collected any other evidence to prove that the impugned income (Rs. 39.60 Crores) was earned by the assessee. It is a proven fact that, once a statement is

retracted, the contents stated in the retracted affidavit/statement must be substantially corroborated by other independent and cogent evidence and such onus is upon the assessee. However, since there is no evidence of any real income earned/any incriminating material found/any concealment of income, etc, it can be construed that such onus is discharged by the assessee. It has been consistently held by various courts that a sworn statement cannot be relied upon for making any addition and must be corroborated by independent evidence for the purposes of making assessments. The statement recorded under section 132(4) cannot be independently used for making any addition in the hands of the assessee and the said statement cannot be the sole basis for making any addition and must be independently corroborated by evidence.

5.34 The reliance have also been placed on various decision/judgment whereby the Hon'ble Courts have upheld the similar ratio. Some of them are as under. Jurisdictional High Court in the case of Pr. CIT vs. Saumya Construction Pvt. Ltd. in 387 ITR 529 (Guj), has held that no addition can be made unless the incriminating material is found during the course of search when the assessment is not abated. The gist of the judgment is reproduced hereunder-

Under section 153A of the Act, an assessment has to be made in relation to the search or requisition, namely, in relation to material disclosed during the search or requisition. If in relation to any assessment year, no incriminating material is found, no addition or disallowance can be made in relation to that assessment year in exercise of powers under section 1534 of the Act and the earlier assessment shall have to be reiterated. In this regard, this court is in complete agreement with the view adopted by the Rajasthan High Court in the case of Jai Steel (India), Jodhpur v. Assistant Commissioner of Income Tax (supra). Besides, as rightly pointed out by the learned counsel for the respondent, the controversy involved in the present case stands concluded by the decision of this court in the case of Commissioner of income- tax-1 v. Jayaben Ratilal Sorathia (supra) wherein it has been held that while it cannot be disputed that considering section 153A of the Act, the Assessing Officer can reopen and/or assess the return with respect to six preceding years; however, there must be some incriminating material available with the Assessing Officer with respect to the sale transactions in the particular assessment year.

Gujarat High Court in the case of Chetnaben J Shah V/s The ITO, Ward 10(3) has made the following observations:

"We have heard learned Counsel for the respective parties and perused the records of the case. We are of the view that the CIT (Appeals) has rightly appreciated the case based on the sound principles of law and has also considered the statement made by the assessee at the relevant point of time. We are of the view that in light of the observations made by this Court in the case of Kailashben Manharlal Chokshi v. Commissioner of Income-tax (supra), mere speculation cannot be a ground for addition of income. There must be some material substance either in the form of documents or the like to arrive at a ground for addition of income. Considering the ratio laid down in the above decision and in the facts of the present case, we are of the view that the issue raised in this Appeal is required to be answered in favour of the assessee and against the Department"

The Gujarat High Court in the case of Chandrakumar Jethmal Kochar (55 taxmann.com 292) dated 12 November 2014 is also relied upon by the Appellant. In that case the assessee retracted from said admission contending that it was made at mid night under pressure and coercion. Assessing officer, however, made addition on basis of disclosure made by assessee in statement recorded under section 132(4). The question before the court was whether merely on basis of admission that few benami concerns were being run by assessee, whether the addition could be justified when despite retraction revenue could not furnish any corroborative evidence in support of such admission. The Court has ruled in favour of assessee following Kailashben Manharlal Chokshi v. CIT [2010] 328 ITR 411/[2008] 174 Taxman 466 (Guj.) (Para6).

5.47 I have considered the material on record and various case Laws relied upon by the appellant and legal precedents laid down by the jurisdictional High Court and other High Courts as also by several Benches of the Hon'ble ITAT. The crux of the finding is that, Clause (a) of sub-section (1) of section 153A mandates the AO to issue notice in respect of the preceding six assessment years. Clause (b) mandates the AO to assess or reassess the income in respect of these years. A combined reading of both the provisions indicates that where a pending assessment has abated, the total income will comprise of the normal income on the basis of returned income plus the income escaping assessment on the basis of seized material found in the course of search. Where the assessment has reached finality and hence not abated, the income under section 153A shall be determined on the basis of the material found in search. In any case, the income to be determined u/s. 153A has to be on the basis of material found in the course of search. If no incriminating material is found in the course of search, then no adverse inference can be drawn. Thus, incriminating material is sine qua non for making assessment u/s 153A. It cannot be on the basis of any material or information which is dehors the search. This established matrix has been held by various decisions/judgments discussed in

preceding paras besides in the following judicial precedents of jurisdictional High Court as also other Courts.

(I) Dr. CIT v. Devangi alias Rupa 394 ITR 184 (Guj.)
(II) PCIT vs Meeta Gutgutia 96 taxmann.com 468 (SC)
(III) CIT Cen-III vs. Kabul Chawla [2015] 61 taxmann.com 412 (Del]
(IV) CIT v. IBC Knowledge Park (P) Ltd. 385 ITR 346 (Kar)
(V) Pr. CIT-2 v. Salasar Stock Broking Ltd. [ITA No. 264/2016
(VI) CIT v. Gurinder Singh Bawa (2017) 386 ITR 483 (Bom.).
(VII) Pr. CIT v. Mahesh Kumar Gupta [ITANO. 810/2016
(VIII) Pr. CIT v. Ram Avtar Verma [2017] 395 ITR 252
(IX) Pr.CIT v. Sunrise Finlease (P) Ltd. [2018] 89 taxmann.com

5.48 Now, coming to the facts and circumstances of the present case, the search revealed nothing incriminating. Further, the post search proceedings also revealed nothing incriminating. The AO failed to retrieve any authentic data from the custodians of the information / data. Thus, it can be inferred that, the assessment is finalized, and addition has been made on the presumption that the appellant is holding a foreign bank account. It is also seen that, even if the material in possession of Investigation Wing prior to search, is treated as incriminating, still there is substantial force in the argument of the AR that, the very fact that the Assessing Officer sought clarification of such information from the foreign agencies, in order to authenticate the said information, she failed to retrieve such clarification from the custodians of such information. This proves that the assessing officer herself was not sure about the authenticity of the said information. Under, the circumstances it is difficult to term the information in possession of the AO as evidence, much less incriminating. This proposition finds ample support from the various rulings referred supra, more particularly that of the jurisdictional High Court in the case of Saumya Construction Pvt. Ltd. supra.

5.49 In this case no such information was found during the search and hence in view of the principle laid down by the jurisdictional High Court in the case of Pr. CIT vs. Saumya Construction Pvt. Ltd. 387 ITR 529 and other decisions/judgments cited above, addition cannot be roped in the assessment u/s 153A particularly when it has not abated. This decision of jurisdictional High Court is binding and one acting under the same jurisdiction as a subordinate authority, is bound to follow the decision rendered by highest Court of the state.

5.50 Further my above view on legal aspect is also in consonance with the principle laid down by Hon'ble Gujarat High Court and various courts. Under the circumstances, the addition based on the alleged incriminating document, cannot be made in the assessment order passed u/s 153A if such document was not found in the possession of the assessee during the course of search operation. In view of the above discussion, as also after considering the relevant judicial pronouncements, the addition of unexplained deposits/investment in foreign bank account made by the AO

cannot survive and hence deleted. Thus, this additional ground of appeal is allowed.

Decision on Additional Ground of appeal in A.Y.2007-08

Since the above additional ground of appeal is also involved in the appeal for A.Y.2007-08, and the facts are similar in this year, hence following the decision taken in A.Y.2006-07 as per the preceding paras. The addition made on account of undisclosed investment in foreign bank account is deleted. Thus, this additional ground of appeal in A.Y.2007-08 is allowed accordingly.

3.1. Thereafter the Ld CIT[A] dealt with the **legal ground namely completion of assessment proceedings after the expiry of time-limit prescribed under section 153B[1] of the Act**. After detailed discussion of the provisions of law and various case laws the Ld CIT[A], decided the issue in favour of the assessee as follows:

"…. 6.4 This ground of appeal raised against the finalization of assessment proceedings after the expiry of the time limit prescribed u/s. 153B(1)(viii) of the 1.T.Act, 1961.

It has been noticed that a reference to the competent authority was made by CIT(Central)-II, Ahmedabad vide letter dated 01.01.2013 for seeking information under exchange of information article in the DTAA with Swiss Federation Subsequently, the FT & TR Division of CBDT vide letter dated 21 02.2013 informed that a formal request has been placed with the Swiss Authorities for furnishing of required details. As per the said letter a reference for administrative exchange has been made to the competent authority under the provisions of Exchange of Information Article-2 India Switzerland Double Taxation Avoidance Agreement However, since the information was not received till 31.03.2014 and is yet to be received, therefore, limitation date for passing assessment order gets extended as per explanation (viii) to section 153B

As per AO the time limit for completion of assessment gets extended as per provisions of explanation (viii) to Section 153B of the IT Act for a further period of one year. As per AO, by virtue of referred extension the time barring date was extended to 31.03.2015. As per AO the relevant assessment order passed on 17.02.2015 was well within the limit envisaged as per the provisions of IT Act but the appellant objected the same. The appellant submitted that as per the prevalent provisions of law u/s. 153B(1)(viii) the time limit for completion of assessment to be

excluded was from date of reference and upto the date of receipt of the information or six months whichever is less.

Appellant further submitted that the amendment in the provisions was made effective from 01.07.2012 and according to the amended provisions the time limit for completion of assessment was extended by excluding the period upto the date of receipt of such information or one year whichever is less. So appellant has submitted that the amended provisions which were effective from 01.07.2012 were not applicable on the facts of the case as search action in its case was taken place on 08.09.2011 and even notice for filing of return of income u/s 153A was issued on 12.06.2012. In other words, the amended provisions were applicable to such cases where search action has been initiated on or after 01.07.2012 which is not the case of the assessee. Thus according to the appellant the extended time limit for completion of assessment was 31.03.2014 while the assessment has been completed on 17.02.2015. Thus as per appellant the assessment completed was time barred.

I have considered the submissions filed by the assessee as also the arguments of the AR in respect of time limit to pass such order contained in section 153B of the Act. The assessee relies on the fact that the information in possession of the department is not certified or authenticated and the source thereof is also not disclosed to the assessee. It is further claimed that the fate of queries raised before competent authority is also not known. The assessee further presumes that response to queries raised by FT&TR may have been denied as reported in press reports. Under the circumstances, such reference without any authentic information or evidence does not allow the AO to extend the time limit to frame the assessment u/s 153A as per Explanation (viii) to section 153B of the Act.

6.5 Section 153B prescribes the time limit for assessment in search cases and Explanation thereto specifies the exclusion periods in this time limit. The time limit to pass assessment order in a search case is two years from the end of financial year in which the last of the authorizations for search u/s 132 was executed. Accordingly, the regular time limit in this case was 31.03.2014.

6.6 Ongoing through the facts, submissions and the relevant provisions of law in respect of issue of time limit for completion of the assessment two important questions emerge, which are noted as under:

1. In view of the provisions of section 153B Explanation (viii), the exclusion of the time for completion of assessment has to be worked out.

Whether this period of exclusion available would be of six months or one year at that time as per the prevalent provisions of the law.

2. The exclusion period of six months or one year would be started/counted from the date of reference for exchange of information i.e. from 21.02.2013 or would be counted from the limitation date for completing the assessment i.e. from 31.03.2014.

6.15 As per the information available during the appeal Proceedings, a reference to competent authority was made for exchange of information on 02.01.2013 as confirmed by FT & TR division vide their letter to Pr. CIT (Central) Accordingly, as per Explanation (viii) to the Section 153B the limitation for completion of the assessment shall be deemed to be excluded for a period of Six Months i.e. Period commencing from the date on which a reference for exchange of information is made ending with the date on which the information so requested is received by the Commissioner or a period of six months, whichever is less, shall be excluded. Since no information in this case has been received by the Pr. CIT, the upper limit of six months exclusion would be available to the AO for completion of assessment

6.16 The above situation is once again reiterated as under

- Financial Year		2005-06
-Assessment Year		2006-07
-Return of income under section 153 A:		18.10.2013
-Date of Reference to Competent Authority:		21.02.2013
-Period of extension from the date of reference (Six Months) to end on		20.08.2013
- Due Date of completion of assessment:		31 March 2014.
- Time available after the date of extension from 21.08.2013 to 31.03.2014	=	212 days

In such a case the assessment order was to be passed by 31 March 2014 as the period available after the period of extension from the date of reference to competent authority is 212 days in view of proviso to Explanation of Section of 153 B of IT Act. However, in the instant case the assessment was completed on 17th February, 2015 which was beyond the statuary time limit as noted above.

6.17 Further Provided in Section 153B that where immediately after the exclusion of the aforesaid period, the period of limitation referred to in clause (a) or clause (b) of this sub-section available to the Assessing Officer for making an order of assessment of reassessment, as the case may be, is less than sixty days, such remaining period shall be extended to sixty days

and the aforesaid period of limitation shall be deemed to be extended accordingly. Now in the case six months period to be excluded begins on 21.02.2013 and ends on 20.08.2013 This period falls well before the period of limitation which ends on 31.03 2014. Therefore the Period of Limitation would be 31.03.2014

The last date for completion of the assessment as per the provisions of section 1538 was 31.03.2014. The period of six months for which the extension would have been available to the AO expired before this date and therefore there is no question of automatic extension of time.

In view of the above, the assessment completed by the AO on 17th February 2015 was way beyond due date i.e. 31.03.2014 for completion of assessment proceedings for AY 2007-08.

6.18 WITHOUT PREJUDICE TO THE ABOVE even assuming without granting that the period to be excluded while calculating the period of limitation available to the AO is a period of One Year (Not as per the amendment made by Finance ACT 2011 but held by AO), the following picture emerges:

-Financial Year:	2006-07
-Assessment Year:	2007-08
-Return of income under section 153 A:	27.07.2012
- Date of Reference to Competent Authority:	21.02.2013
- Period of extension from the date of reference (One Year) to end on	20.02.2014
- Normal Due Date of completion of assessment	31 March 2014
-Time available after the date of extension from 21.02.2014 to 31.03.2014 =	38 days

In such a case the assessment order would have been to be passed by 22nd April, 2014 as the period available after the period of extension from the date of reference to competent authority was less than 60 days and hence in view of proviso to Explanation 153 B of IT Act the AO would have the 60 days' time to complete the assessment which expired on 22.04.2014. In this case also the assessment completed on 15.02.2015 is far later than the limitation date of 22.04.2014.

6.19 To summarise the issue, it is noticed that as per Explanation (viii) to section 153B, the period to be excluded begins from the date of reference made, till the date of Six Months (or one year as per AO) or the receipt of the information whichever is earlier. Since, in the instant case on reference no information has been received from foreign authorities even till date,

therefore the maximum available time would be six months (or one year as per AO). Accordingly if the above period of reference is excluded, then the following picture emerges:

1. If period of six months is considered then the period to be excluded would be from 21.02.2013 and till 20.08.2013. Thus period of 212 days were available (from 21.08.2013 to 31.03.2014). As per the proviso to the explanation (viii) to section 153 B which states that if the period available to the AO is less than 60 days for the purpose of limitation then the period available would get extended to 60 days or deemed to be extended accordingly. Thus no benefit of 60 days period as per the said proviso would be available to the AO for completion of the assessment as it was already having 212 days left with him for completion of assessment till 31.03.2014.

2. If period of One Year is considered then the period to be excluded would be from 21.02.2013 till 20.02.2014. Thus period of 38 days were available (from 21.02.2014 to 31.03.2014).As per the proviso to the explanation (viii) which states that if the period available to the AO is less than 60 days for the purpose of limitation then the period available would get extended to 60 days or deemed to be extended accordingly. In this case, the time available with the AO was 38 days and hence taking the benefit of 60 days period as per the said proviso further time of 22 days would be available to the AO to completion of the assessment and the date of limitation would be 22.04.2014

In the first situation, the limitation expired on 31 March 2014. According the benefit of the said proviso was not available to the assessing officer and assessment order passed after the statutory time line ice. 31.03.2014 is barred by limitation and thus making assessment void ab-initio

In second situation as per the proviso to explanation of Section 1538(1) the limitation expires on 21.04.2014. Even in this situation also assessment completed on 17.02.2015 is much beyond the aforesaid date.

6.20 Now with regard to question no. 2, whether the exclusion time of six months (or one year as per AO) for completion of the assessment would start from the date of reference for exchange of information i.e. 21.02.2013 or from time barring date of assessment i.e. 31.03.2014.

It may be pointed out that the interpretation of the AO regarding the extension of the period beyond the date of limitation i.e 31 March 2014 by

adding a period of one more year and extending the limitation up to 31 March 2015 is not in line with the harmonious interpretation of the provisions of section 153B. If the same is considered, then it would lead to the Proviso appended to the Explanation of Section 153 B redundant and infructuous as under no circumstances the period of sixty days mentioned in the said proviso would become applicable due to availability of extended period of one year from the normal time barring date as per Section 153 B(a) or (b) of IT Act.

Similarly, if the exclusion period of six months is counted from the date of limitation of assessment i.e. 31.03.2014 then also the limitation expires on 30.09.2014 while the assessment in the case has been completed on 17.02.2015 which is much beyond the limitation date hence, assessment became barred by limitation Moreover, the proviso to explanation of Section 153 B for availability of 60 more days' time for completing the assessment would become infructuous and redundant as under no circumstances the period of sixty days mentioned in the said proviso would become applicable due to availability of extended period of six months from the normal time barring date as per Section 153 B(a) or (b) of IT Act.

Thus, the working/counting of the limitation date for exclusion period (six months or one year) in view of Explanation (vii) of Section 153 B from the time barring date i.e. 31.03.2014 is not in consonance with the provisions of law as in that case the proviso to Explanation would become redundant / non workable and thus the same would not be in accordance with the provisions of law as intended by the legislature. The relevancy/applicability of the said proviso to explanation has been emphasized by the Hon'ble Delhi High Court in the case of CIT Vs. U Like Promoters Pvt. Ltd. in ITA No.1528/2010, 1529/2010, 1530/2010 and 1532/2010 dated 24.01.2005. For ready reference the observations of the Hon'ble Court are reproduced as under:

> "16. It is not possible to agree with the contention of the respondent assessee. The following dates, which have been stated above, may again be noted:-
>
> (1) Date of limitation for completing assessment under Section 153A in normal course was 31st March, 2006.
>
> (ii) On 22nd March, 2006 an order under Section 142(2A) was passed.
>
> (iii) On 31st March, 2006, the assessment proceedings were stayed by an interim order in W.P. (C) No. 4954/2006.

(iv) On 18th December, 2006, the stay order was vacated with liberty to the Revenue to issue a fresh notice and after considering the reply, pass an order under Section 142(2A).

(v) On 19th January, 2007, an order under Section 142(2A) was passed (the special audit was to be completed within 105 days, i.e., by 4th May, 2007).

(vi) On 29th June, 2007, the assessment order was passed.

17. From the aforesaid dates, it is clear that as per the proviso to Explanation to Section 1538, the assessment order could have been passed on or before 3rd July, 2007, ie., period of 60 days after the special audit report was to be submitted to the Assessing Officer.

18. The proviso quoted above has an object and purpose. It stipulates that the Assessing Officer should have a minimum period of 60 days to complete the assessment, in case after exclusion of period under the Explanation, the period for completing the assessment is less than 60 days. Every time this situation occurs, the proviso comes into play and has to be applied. The proviso can come into operation on one, two or more occasions in the same assessment/reassessment proceedings. In the present case, the respondent assessee had filed a writ petition. Because of the stay order passed, the period during which the stay order was in operation in the High Court has to be excluded. Thereafter, the Assessing Officer passed an order under Section 142(2A) of the Act and the period for conducting special audit has to be excluded. The proviso to Explanation stipulates that the Assessing Officer can pass the assessment order within 60 days, if after excluding the time mentioned in the Explanation, the time for completing the assessment is less than 60 days. In terms of the said proviso, the Assessing Officer had the extended period to complete the assessment proceedings. The Assessing Officer had to complete the assessment within 60 days from the date on which the special audit report was to be submitted to him."

In view of the above discussion, there had been the breach of the period of limitation while passing the assessment order as the assessment has not been completed within the statutory time limit i.e. upto 31.03.2014 but completed on 17.02.2015 which was much later to the statutory time limits u/s. 153 of IT Act. Thus, the assessment is quashed."

4. Aggrieved against the common Appellate orders, the Revenue are in Appeal before us raising the following Grounds of Appeals:

1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in holding that any addition during the assessment u/s.153A has to be confined to the incriminating

material found during the course of search u/s. 132(1) of the Act, even though, there is no such stipulation in sec.153A of the Act.

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating that sec.153A requires a notice to be issued requiring the assessee to furnish his return of income in respect of each assessment year falling within six assessment years and to assess or reassess the total income of those six assessment years, and that the scheme of assessment or re-assessment of the total income of a person searched will be brought to naught if no addition is allowed to be made for those six assessment years in the absence of any seized incriminating material.

3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating that while computation of undisclosed income of the block period u/s.158BB was to be made on the basis of evidence found as a result of search or requisition of books of accounts, there is no such stipulation in sec.153A and sec.153BC specifically states that the provisions of Chapter-XIV-B, under which sec.158BB falls, would not be applied where a search was initiated u/s. 132 after 31/5/2003.

4. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating that assessment in relation to certain issues not related to the search and seizure may arise in any of the said six assessment years after the search u/s. 132 is conducted in the case of the assessee, and that if the interpretation of the Id. CIT(A) were to hold it will not be possible to assess such income in the 153A proceedings, while no other parallel proceedings to assess such other income can be initiated, leading to no possibility of assessing such other income, which could not have been the intention of the legislature. Further, the AO is duty bound to assess correct income of assessee as held in various judgments.

5. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs.26,33,23,482/- made on account of the deposit/investment in HSBC Geneva Bank Account held by the assessee & his cousin brothers jointly.

6. On the facts and in the circumstances of the case and in law the impugned order passed by the Ld. CIT(A) is contrary to law in as much as the addition made on account of undisclosed foreign

bank account has been made on the basis of incriminating documents duly confronted to the assessee during the course of search.

7. On the facts and in the circumstances of the case and in law, the ld. CIT(A) has not following the proposition of law laid down in the Finance Act, 2012.

8. On the facts and in the circumstances of the case and in law, the ld. CIT(A) ought to have upheld the order of the A.O.

9. It is, therefore, prayed that the order of the ld. CIT(A) be set aside and that of the A.O. be restored to the above extent.

5. Assessee has filed Cross Objections as against the Revenue Appeals before us raising the following Grounds of Appeals:

1. The grounds of appeal mentioned hereunder are without prejudice to one another.

2. The Id. Commissioner of Income Tax (Appeals)-11, Ahmedabad [hereinafter referred to as the "CIT(A)"] erred on facts as also in law in not deciding the ground of appeal related to initiation of the proceedings and validity of notice issued u/s.153A of the Income-tax, 1961 [hereinafter referred as to the "Act"]. The notice issued u/s 153A of the Act is bad in law and without jurisdiction and therefore the same may kindly be quashed.

3. The Ld. CIT(A) erred on facts as also in law in not deciding on merit, the ground of appeal related to addition made of Rs.26,33,23,482/- on account of peak balance of impugned foreign bank account. The Action of ld. CIT(A) in not deciding the ground of appeal on merit is unjustified. The AO may kindly be directed to delete the addition.

4. The Ld. CIT(A) erred on facts as also in law in not deciding on merit, the ground of appeal related to rejection of claim of set off of brought forward loss of Rs.55,629/-. The Action of ld. CIT(A) in not deciding ground of appeal on merit is unjustified. The AO may kindly be directed to allow the claim of set off of brought forward loss.

5. Your Honour's appellant craves leave to add, to amend, alter, or withdraw any or more grounds of appeal on or before the hearing of appeal.

6. During the course of hearing of the above Revenue Appeals Ld. CIT DR Shri. Shramdeep Sinha requested for 60 days time to get the details of chain of custody of information regarding foreign investment holding in HSBC, Geneva by the assessee and he is trying to obtain a confirmation in this regard from CBDT/Investigation Wing. This request of the Ld DR was stoutly opposed by the Ld Senior Counsel Shri S.N. Sorparkar on the ground that the Administrative Commissioner, CIT [Central II] vide his letter dated 01-01-2013 requested to get details of foreign bank accounts alleged to be held by the assessee with HSBC Geneva, from Under Secretary, [FT&TR-III][2]. Thereafter the Ld.CIT, Central-II has forwarded a copy of letter bearing no. 504/0300/2012–FTD–1 dated 22-01-2013 received from the Under Secretary [FT&TR-III][2]. As per paragraph 2 of the said letter, a reference for Administrative Assistance has been made to the Competent Authority under the provisions of "Exchange of information" under Indo-Switzerland Double Taxation Avoidance Agreement [DTAA]. However no information was received from the Competent Authority before completion of the assessment orders by the A.O. as well as during the pendency of the above appeals by Ld CIT[Appeals] in January 2021, that is almost nine years after the so called reference made by the Department. Again two years after filing of the above appeals by the Revenue, in the above circumstances the Ld DR is seeking further time to get the details is highly unjustifiable and against the Principle of Natural Justice and therefore requested not to grant further time of 60 days.

6.1. We have carefully considered the submissions of the rival parties and granted time to the Ld DR to submit his written arguments within 15 days of the conclusion of the hearings of the appeals. Since the question of getting the details of foreign bank account from CBDT/Investigation Wing after a period of 10 years is not justifiable. Further the Administrative Commissioner namely PCIT, Central has filed the present appeals for the Revenue, it is the very same office who had sought for information from the Under Secretary [FT& TR-III][2] and no information received before completion of assessment by the assessing officer. It is further stated in the Written/Reply Arguments that the assessee gathered information after inspecting the departmental records that the Ld CIT[A], Ahmedabad before finalizing the appellate orders, had once again called for a report from the AO, as to whether any information was received from the CBDT [FT&TR], post assessment order. Since the reply of the AO was not in affirmative, the Ld CIT[A] proceeded to finalize the appeals. Therefore the Ld CIT DR's request is reject and however directed to submit his Written Arguments within 15 days of completion of the hearings.

6.2. Thus the Ld CIT DR submitted his Notes on Arguments by email on 14-02-2023 the same is reproduced as follows:

"Note on arguments by CIT DR in the case of Shri Rajeshkumar G. Patel, ITA Number 25/RJT/2021- AY 2006-07; ITA Number 25/RJT/2021

Brief facts of the case:

1. Information was available with the Income tax department about foreign bank account held by Shri Rajeshkumar G. Patel in HSBC,

Geneva when an action of Search and Seizure u/s 132 of the IT Act was conducted in the premises of the assessee on 08.09.2011.

2. During the course of S&S proceedings, information available with the department (Page 18,19 of assessment order for AY 2006-07) including other documents were confronted to the assessee and he was required under oath u/s 132(4) of the IT Act, to give statement.

3. In the course of statement, when confronted with the documents detailing Bank account in HSBC wherein details of Rajeshkumar G Patel, address, etc. were mentioned, the assessee while stating that he was not able to recall the specifics, also made a voluntary disclosure of an amount of Rs. 39.60 Crores and informed that he has informed accordingly by a letter to the Addl. Director (Investigation). Thereafter, in the subsequent question he was informed about the value of holding in bank account whereupon Shri Patel stated that his disclosure covers the amount of investment in foreign bank account.

4. Thereafter, after 29 months of such admission, Shri Rajeshkumar G Patel filed a statement of retraction of his disclosure to Department. The amount was also not shown in his return of income filed in response to Sec. 153A notice.

5. Ld. AO in her assessment order has corroborated the 'admission' of Shri Rajeshkumar G Ptel with independent corroborative evidences. The assessment order also discusses the reasons advanced by the assessee regarding his retraction. It mentions that the assessee has been demanding certified copies of documents from authorities/banks from the department.

6. During the course of assessment, after retraction, the assessee was required to provide a 'consent waiver', as per procedure, to enable the department to proceed ahead with independent enquires. It mentions that the assessee has refused to provide even the consent waiver.

7. Thereafter, on the strength of the findings in the Search, especially the 'admission' by the assessee when confronted with the details of Bank-deposit in HSBC, Geneva and other corroborating and circumstances indicating that the amount 'held' by assessee has not been disclosed in the Return of Income for AY 2006-07 and AY 2007-08, added the amount of deposits (converted into Indian rupees), the ld. AO added the undisclosed amount to taxable income of the assessee, in respective years.

8. Ld. CIT (A) deleted the addition on technical/legal grounds without going into the merits of the case, quashing the assessment order for breach of time limits, and also, holding that no incriminating documents were found/seized during the course of Search and seizure action.

9. The Department is in appeal before Hon'ble ITAT on multiple grounds of appeal.

Hearing on 02.02.2023:

10. The CIT-DR invited the attention of Hon. ITAT on the applicability of the provisions of Evidence Act on the 'admission' by the assessee, in response to the specific querry confronting documents pertaining to the investment in the Foreign HSBC-Geneva bank accounts held by the assessee.

a. **Applicability of provisions of evidence Act proceedings under the I.T.Act:**

In the case of Chuharmal vs. CIT (1988) 70 CTR(SC) 88/172 ITR 250(SC), hon'ble Apex court has held that "salutory principle of common law embedded in section 110 of the Evidence Act could be applied to the taxation provisions." Following is an extract from the order of :-

"para.2……..there the contention was raised that the provisions in sec.110 of the Evidence Act where a person was found in possession of anything, the onus of proving that he was not the owner was on the person who affirmed that he was not the owner, was incorrect and inapplicable to taxation proceedings. This contention was rejected. The High Court of Bombay held that what was meant by saying that the Evidence Act did not apply to the proceedings under the Act was that the rigour of the rules of evidence contained in the Evidence Act was not applicable but that did not mean that when the taxing authorities were desirous of invoking the principles of the Act in proceedings before them, they were prevented from doing so. Secondly, all that s. 110 of the Evidence Act does is that it embodies a salutary principle of common law jurisprudence which could be attracted to a set of circumstances that satisfy its conditions.

3. We are of the opinion that this is a correct approach……..."

b. Importance of "Admission" in Evidence Act- **The admission by the assessee made further enquiries to estop. Also, the assessment order has discussed corroborative evidences and circumstances linked with the admission of the assessee.**

Section 17:-Admission defined: 'An admission is a statement, oral or documentary or contained in electronic form which suggests any inference as to any fact, any issue or relevant fact, and which is made by any of the person, and not the circumstances herein after mentioned. One such persons mentioned in **Section 18(1)** is " by party interested in subject matter"-which is defined as- Persons who have any property or pecuniary interest in the subject matter of the proceeding, and who make the statement in their character of persons so interested.

Sec.31 admission not conclusive prove but may estop:- Admissions are not conclusively proof of the matter admitted but they may operate as a stoppage under the provisions hereinafter contained.

11. Thereafter kind attention of Hon'ble ITAT was brought towards the fact that despite being on 'oath', the assessee has given affidavit wherein he has retracted his disclosure. (**the affidavit is not on record and is Hon. ITAT may require the assessee to provide a copy of Affidavit filed before AO**). Thereafter arguments were made on "perjury" and that perjury, even by filing an affidavit has

been held as contempt of court in various decision of Hon'ble Supreme Court:

a. **Perjury**:

The simple definition of 'perjury' is giving/ furnishing/ submitting intentionally false evidence by the person when he is bound by law to state the truth or give/submit/furnish true evidence in the Court of Law. In addition to the offense of perjury, when if false evidence or oral testimony is submitted in the Court proceedings under oath, the contempt of Court is also committed.

The definition of 'Criminal contempt of Contempt' within the meaning of section 2 of the Contempt of the Court Act 1971, includes "*the doing of any act which interferes with obstructs or tends to obstruct the administration of justice in any manner*". Making of false statement of oath may interfere with the admission of justice and may thus amount to contempt of Court.

The offence of perjury, done by stating false testimony or furnishing false evidence by a person or oath, can be done by stating wrong or incorrect or suppressed information in the affidavit submitted in the Court proceedings. The main ingredient of the offence is 'intentional or voluntary' act of falsely testifying, submitting or furnishing fake evidence or suppressing information in the Court proceedings.

In the case of Re-Suo-motto proceedings (2001) **AIR 2001 SC 2204, 2001 CriLJ 2611, 2001 (4) SCALE 199, (2001) 5 SCC 289, 2001 3 SCR 750**, the Apex Court has made following observations on perjury:

1. Justice dispensation system would be wrecked if statutory restrictions are not imposed upon the litigants, who attempt to mislead the court by filing and relying upon the false evidence particularly in cases, the adjudication of which is depended upon the statement of facts.if the result of the proceedings are to be respected, these issues before the courts must be resolved to the extent possible in accordance with the truth. The purity of proceedings of the court cannot be permitted to be sullied by a party on frivolous, vexatious or insufficient grounds or relying upon false evidence inspired by extraneous considerations.

2. Sanctity of the affidavits has to be preserved and protected discouraging the filing of irresponsible statements, without any regard to accuracy.
3. In India, law relating to the offence of perjury is given a statutory definition under Section 191 and Chapter XI of the Indian Penal Code, incorporated to deal with the offences relating to giving false evidence against public justice. The offences incorporated under this Chapter are based upon recognition of the decline of moral values and erosion of sanctity of oath. Unscrupulous litigants are found daily resorting to utter blatant falsehood in the courts which has, to some extent, resulted in polluting the judicial system.

Hon. Karnataka High Court, in a writ petition, WRIT PETITION NO.19448 OF 2015 (GM-FC), in the matter of Dr.Pravin R and Dr.Arpitha, has held that consideration of complaints regarding perjury should not be deferred or delayed by the Courts. In this case proceedings, the respondent wife had submitted an affidavit which was found to be false on fact. In this case the High Court of Karnataka remanded the matter back to Lower Court for initiating perjury proceedings. Hon. Court has held as follows:

> The tone for this judgment may be set by what Shakespeare said in Richard III about perjury; the relevant stanza runs as under: *"My conscience hath a thousand several tongues, And every tongue brings in a several tale, and ever tale condemns me for a villain. Perjury, Perjury in the highest degree; Murther, in the direst degree; All several sins, all us'd in each degree. throng to the bar, crying all "Guilty, guilty!."*

The following anguish expressed by the Hon'ble Supreme Court in Swarna Singh vs. State of Punjab (2000) 5 SCC 668 about rampant perjury in courts merit a mention:

"*Perjury has also become a way of life in the Law Courts. A trial Judge knows that the witness is telling a lie and is going back on his previous statement, yet he does not wish to punish him or even file a complaint against him...*"

"….act of perjury is treated as a heinous offence in all civilized societies; consideration of complaints with regard to the same cannot be deferred or delayed; otherwise there is all possibility of the fountain of justice being polluted."

In the case of Sejalben Tejasbhai Chovatia vs. State of Gujarat (Special Criminal Application) (Quashing) 7666 of 2016 the Hon'ble High court has Gujarat has ruled similarly.

b. **Perjury is also a criminal contempt of Court**

(i) In the case of Murray & Company Vs Ashok Kumar Nevatia, (2000) SCC 367, AIR 2000 SC 833, the Hon'ble Supreme Court has held that a false statement deliberately made in an affidavit before the Court amounted to contempt of Court.

(ii) Hon'ble Supreme Court has held in the matter of MC Mehta Vs Union of India (2003) 5 SCC 376, AIR 2003 SC 3469, that filing a false statement or false affidavit is contempt of Court.

(iii) Similarly, in the case of UP Residents Employees Cooperative House Buildings Society Vs Noida (2004) 9 SCC 670/ AIR 2003 SC 2723 it was held that filing of false affidavit amounts to contempt of Court.

c. In the case of Perumal Vs Janki on 20 January, 2014 by Hon'ble Supreme Court of India in criminal appeal number 169 of 2014, following has been observed:

16. The offence under section 193[1] IPC is an act of giving false evidence or fabricating false evidence in a judicial proceeding. The act of giving false evidence is defined under section 191 IPC as follows:

> "191. Giving false evidence.— Whoever, being legally bound by an oath or by an express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, is said to give false evidence.
>
> Explanation 1.—A statement is within the meaning of this section, whether it is made verbally or otherwise.
>
> Explanation 2.—A false statement as to the belief of the person attesting is within the meaning of this section, and a person may be guilty of giving false evidence by stating that he believes a thing which he does not believe, as well as by stating that he knows a thing which he does not know." It can be seen from the

> definition that to constitute an act of giving false evidence, a person must make a statement which is either false to the knowledge or belief of the maker or which the maker does not believe to be true. Further, it requires that such a statement is made by a person (1) who is legally bound by an oath; (2) by an express provision of law to state the truth; or (3) being bound by law to make a declaration upon any subject.

"……..there is no rule of law that common sense should be put in cold storage'

12. It was argued as to how the case in hand is different from case like Saumya Construction (Gujarat HC); Kabul Chawla (Delhi HC) by pointing out that that the assessment order has a direct connection with the findings of Search and seizure action. The view taken by ld. CIT (A) is a very narrow view, wherein he has harped on the requirement of document found or seized during the Search and Seizure proceedings. However, the intent of judicial interpretation has been to see a perceptible link between the Search and Seizure proceedings and the additions in assessment order. In this case the link is established by the 'admission' in the statement, the confrontation of the information available with the department to the assessee leading to voluntary disclosure by the assessee of Rs. 39.60 Crores. It was further argued that the disclosure is not 1 Crores or 100 Crores, or even a round figure. A disclosure like 39.60 is a well thought of figure. The disclosure vide letter to Additional Director; and in response to the confrontation of an information about the foreign bank deposit of the assessee, is a material fact and is directly borne out of 'search and seizure proceedings', unlike the cited cases by ld. AR and the cases relied upon by Ld. CIT (A) while deciding the legal-issue. It is requested that further time may be given for arguments.

13. **Due to paucity of time, rebuttal arguments have not been completely made**. Ld. AR has pointed out several cases, repeatedly stating that the facts of its case are similar to the cited case. **However, time is required to rebut the case laws relied upon by the Ld. AR**. **This was requested to Hon. Tribunal during the course of hearing also.**

14. Further, during the hearing a case decided by Hon. ITAT Mumbai was mentioned by Honourable Member wherein there has been a ruling on refusal by the assessee to sign consent-waiver. This case was momentarily displayed on screen in between the arguments. **Revenue has had no occasion to study and advance arguments based on this case**.

15. Kind attention of Hon. ITAT is invited to the ratio of decision by Hon. Delhi High Court in the case of Jansampark Advertising (56 taxmann.com 286) wherein the following has been held: "Assessment proceedings under the Income Tax Act are not a game of hide and seek. The inquiry in the wake of a notice under Section 148 is not an empty formality. It must be effective and with a sense of purpose. There is an elaborate procedure set out which requires scrupulous adherence and followed up on. In the hierarchy of the authorities, the AO is placed at the bottom rung. The two layers of appeals, before the matter engages the appellate jurisdiction of this court, are authorities vested with the jurisdiction, power and obligation to reach appropriate findings on facts. Noticeably, it is only the appeal to the High Court, under Section 260-A, which is restricted to consideration of "substantial question of law", if any arising. **As would be seen from the discussion that follows, the obligation to make proper inquiry and reach finding on facts does not end with the AO. This obligation moves upwards to CIT (Appeals), and also ITAT, should it come to their notice that there has been default in such respect on the part of the AO. In such event, it is they who are duty bound to either themselves properly inquire or cause such inquiry to be completed**."

16. The assessee has not refuted that the investment in Bank account belongs to him. Only the authenticity of the document is being doubted. I have requested for a time of 30 days for me to collect details from investigation wing and CBDT. Hon'ble ITAT has been pleased to provide only 15 days. It is humbly submitted that this is a case filed in the year 2021 and there appears no basis to hurry up the proceedings in department's appeal and brush aside the request by the CIT DR that time is needed to collect information and also to rebut the arguments by the Ld. AR.

In the meantime, I have discussed these matters with officers in CBDT and have reliably learnt that the information regarding holding of investment by the assessee in the foreign banks (which were found to be not disclosed) were received through Government channels. Thus there remains no doubt on the authenticity of the documents based on which Search and Seizure actions were carried out and the assessee was confronted.

I am trying to obtain a confirmation in this regard from CBDT/Investigation Wing. Since the matter is quite old, I humbly request you to provide a time of atleast 60 days, and also consider extension if circumstances so require and permit revenue to submit the factual details of chain of custody of information regarding foreign investment holding of the assessee. It is also requested to not to treat this case as 'heard' and provide sufficient time to the department to rebut the arguments and case laws submitted by ld. AR.

It is further requested to make this submission a part of adjudication order."

6.3. The Ld AR submitted his Reply/Rejoinder Arguments on 01-03-2023 and the same is reproduced as follows:

"Para wise comments on the reply submitted by the ld. CIT(DR) dated 14.2.2023

1. Kind reference is invited to submission dated 14.2.2023, forwarded by the Ld. CIT(DR). Para wise comments on the averments raised by the Ld. DR is rebutted as under.

2. The points raised in the covering letter dated 14.2.2023 are also forming part of the notes appended thereto and hence, no separate discussion about the averments made in the covering letter is being made. However, it is prayed that, the plea of the Ld. CIT(DR) seeking further time / adjournment of 60 days on the pretext that he needs to obtain information from the FT&TR (CBDT) Delhi is unsavoury because, such an exercise has already been carried out by the Pr. CIT (Central) Ahmedabad on 1.1.2013. This was confirmed by the Pr CIT(Cent) Ahmedabad, who had forwarded letter No 504/0300/2012-

FTD-1 dated 21.2.2013 received from the Under Secretary (FT&TR-III)(2) CBDT. (Kind reference invited to para 4 of the assessment order). **As a matter of fact, Your Honours are humbly appraised that, it is for this reason only the assessment proceedings were extended.**

3. It is further submitted that, as a matter of caution, the ld. CIT(A) Ahmedabad, before finalizing the appellate order, had once again called for a report from the AO, as to whether any information was received from the CBDT (FT&TR), post assessment order. Since the reply of the AO was not in affirmative, the ld. CIT(A) proceeded to finalize the appeal. The Respondent gathered this information from the departmental records for which inspection was sought.

4. Now that when the Ld. CIT(DR) chose to revisit this statutory exercise once again, the Respondent feels that this is nothing but dragging the matter to endless litigation, which is against the spirit of the decision of the Hon. Supreme Court in the case of Sun Engineering Works. Hence kind objection is raised to the adjournment sought of 60 days, just for the sake of revisiting the old exercise, and hence, may kindly be detested.

5. The Respondent is also of a strong belief that, it is beyond the jurisdiction of the Ld. CIT(DR) to revisit the work done by a senior officer of the same rank.

6. In light of the above, the Respondent proceeds to furnish para wise comments on the report / finding of the Ld. CIT(DR), as under.

Para 1 (under the heading Brief facts of the case)

1. As per this para, the ld. CIT(DR) has held that, *information was available with the income tax department about foreign bank account held by Shri Rajeshkumar G Patel in HSBC Geneva when an action of search and seizure u/s. 132 of the I T Act was conducted in the premises of the assessee on 8.9.2011.*

Reply 1.1 No comments. However, the Respondent desires the Hon. Members to take note of the fact that, only *information* was available with the department and not any *evidence,* much less incriminating evidence.

Para 2 (under the heading Brief facts of the case)
Reply 2. No comments.

Para 3 (under the heading Brief facts of the case) As per this para, the ld. CIT(DR) has held that, in the statement recorded u/s. 132(4), when the Respondent was asked about the foreign bank account, the Respondent stated that he is unable to recall the specifics and he also made a voluntary disclosure of an amount of Rs 39.60 crores. Thereafter he was asked about the value of holding in bank account, whereupon the Respondent stated that his disclosure covers the amount of investment in foreign bank account.

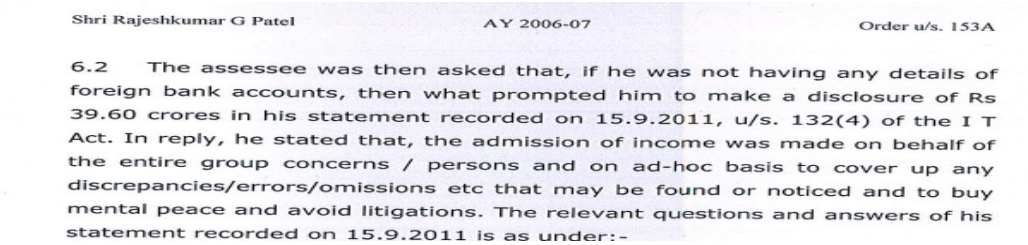
Reply 3.1 The above finding of the Ld. CIT(DR) is taken out of context. Here the most sacrosanct version is the assessment order. Kind attention is drawn to para 6 to 6.2 of the assessment order, which is an event that occurred right in front of the assessing officer. The AO, during the course of assessment proceedings had summoned the Respondent and recorded his statement. The relevant paras of the assessment order is reproduced hereunder.

6. Therefore, with a view to ascertain and reaffirm the facts, the assessee was summoned to this office and his statement was recorded on oath on 22.11.2013. In the said statement, the assessee was specifically asked to furnish details about foreign bank accounts. In reply to question No. 10, he deposed that, *as far as I remember and to the best of my knowledge and belief, I do not have such foreign bank accounts.* [verbatim]

6.1 The next question was more direct, viz., whether he has opened any bank account with HSBC Geneva, either directly or through any of your agents or relatives? In reply to this question, he denied having opened any such bank account. Again, in the next question he was informed that the Department is in possession of information that he along with his brothers have foreign bank accounts, and what he wants to say on this aspect. In reply to this question, he again denied having any foreign bank accounts. Thereafter, he was shown information available with the department, as per which he was having foreign bank account jointly with cousin brothers wherein their names, residential address at Rajkot, date of opening of account, etc have been mentioned. He was further asked as to why he was not signing the 'consent waiver form'. In reply, he submitted as under:-

Ans:- Sir, I state that, the so called data is not authenticated or certified by any bank or institution and I do not remember about any such accounts. It is also fact that, I have repeatedly requested to provide with the certified and authenticated data in this regard. In the absence of any such information and knowledge about such account, any consent waiver form could not be signed. I may clarify that we tried to find out such details. However nothing is found.

5

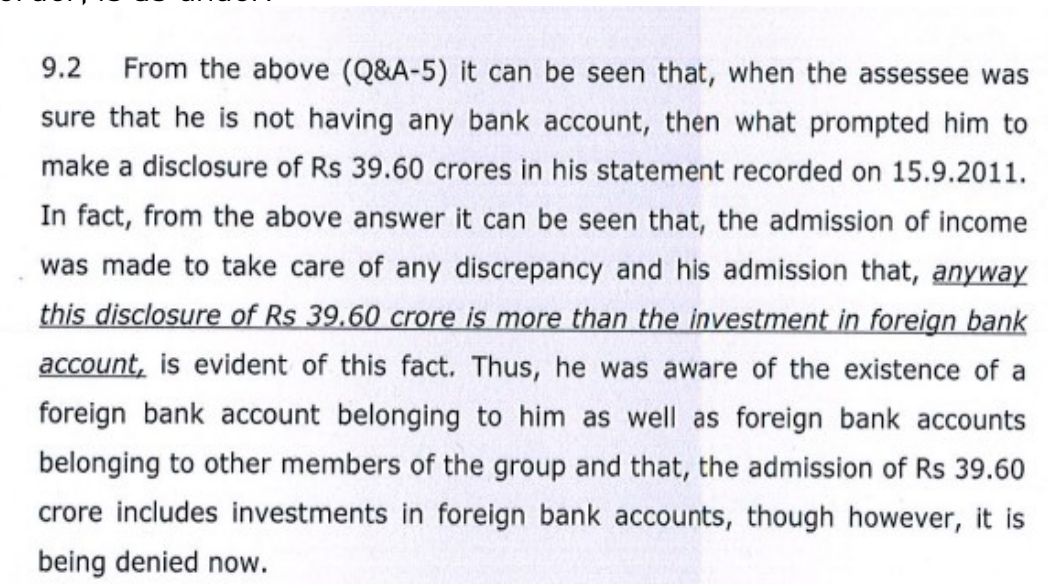


Shri Rajeshkumar G Patel AY 2006-07 Order u/s. 153A

6.2 The assessee was then asked that, if he was not having any details of foreign bank accounts, then what prompted him to make a disclosure of Rs 39.60 crores in his statement recorded on 15.9.2011, u/s. 132(4) of the I T Act. In reply, he stated that, the admission of income was made on behalf of the entire group concerns / persons and on ad-hoc basis to cover up any discrepancies/errors/omissions etc that may be found or noticed and to buy mental peace and avoid litigations. The relevant questions and answers of his statement recorded on 15.9.2011 is as under:-

From the above excerpts of the assessment order, it is clear that, the disclosure is totally unrelated to the alleged foreign bank account. Albeit, the purported disclosure was towards any errors and ommissions found from the Respondent, his family members and group concerns. Thus, the finding of the ld. CIT(DR) is taken out of context.

3.2 The Respondent further submits that, the AO, in the assesment order had also reproduced the statement of the Respondent recorded u/s. 132(4) by the Investigation Wing. While making this addition under compulsion, the AO had grossly played with the language used by the Respondent in his statement recorded u/s. 132(4). This is grossly unjust because, an income tax assessment order relies heavily on evidence (which is devoid here) and not on the construction of sentence in the stattement recorded u/s. 132(4). The jugglery of language manipulated in the assessment order, is as under.



9.2 From the above (Q&A-5) it can be seen that, when the assessee was sure that he is not having any bank account, then what prompted him to make a disclosure of Rs 39.60 crores in his statement recorded on 15.9.2011. In fact, from the above answer it can be seen that, the admission of income was made to take care of any discrepancy and his admission that, *anyway this disclosure of Rs 39.60 crore is more than the investment in foreign bank account,* is evident of this fact. Thus, he was aware of the existence of a foreign bank account belonging to him as well as foreign bank accounts belonging to other members of the group and that, the admission of Rs 39.60 crore includes investments in foreign bank accounts, though however, it is being denied now.

3.3 From the above it can be seen that, the finding recorded by the AO supra that "***what prompted him (Respondent)",*** is nothing but a surmise. Nowhere in the assessment order, the AO has cited a single evidence in support of the finding that the Respondent had any foreign bank account.

Para 4 (under the heading Brief facts of the case) As per this para, the ld. CIT(DR) has submitted that, ***after 29 months of such admission, Shri Rajesh Patel filed a statement of retraction of his disclosure to department.***

Reply 4.1 Unfortunately, here the Ld. CIT(DR) is totally silent about the numerous correspondences made by the Respondent to the Department, though however, he acceedes in para 5 that, the Respondent had vehemently pleaded the department to furnish copies of the corroborative materials, so as to enable him to proceed in the matter. No such materials were given to the Respondent. This is the reason why it took so long to file retraction affidavit. Interestingly, in para 5 of the letter of the ld. CIT(DR) affirms this fact. Further, Hon'ble Members may please appreciate that, this is not a retraction but rather a clarification.

5. As per this para, the ld. CIT(DR) has submitted that, ***the ld. AO in her assessment order has corroborated the 'admission' of Shri Rajeshkumar G Patel with independent corroborative evidences.***

Reply 5.1 This finding is grossly untrue. Nowhere in the assessment order the AO has corroborated the admission of the Respondent with independent corroborative evidences. This is because, no such corroborative evidences (about foreign bank account) was found during search. Rather, it never existed. If there is a single corroborative evidence in this regard, then the ld. CIT(DR) ought to have unfolded this fact by referring to specific instance (from the assessmdent order). Thus, this is just a passing remark without substance.

6. As per this para, the ld. CIT(DR) has held that, the Respondent refused to provide the consent waiver form.

Reply 6.1 In this connection the Respondent humbly submits that, the Investiation wing was carrying unauthenticate information about some foreign bank accounts, retrieved from some media reports. All throughout the proceedings, the Respondent sought authentic information/ data / documents from the Department. The very fact that the information available with the department was not authentic, is the reason why seach took place, as they wanted to confirm this unauthentic information with some corroborating material (to be hopefully found from the possession of the Respondent). The only requirement / plea of the Respondent was that, he may be given copy of any document to prove the allegation. This amply proves that the 'satisfaction note' of the Investigation Wing was also on a wrong footing as they came only for roving inquiry.

7. No comments.

8. As per this para, the ld. CIT(DR) has submitted that, the CIT(A) deleted the addition on technical and legal founds without going into the merits of the case.

Reply 8.1 This is taken contextually. The order of the ld. CIT(A) covers the entire facets of the case. He also called for remand report from the AO. **The allegation that the ld. CIT(A) did not go into the merits of the case, is perplexing because, in the absence of any material, there is no merits in the case.**

9. No comments

10. Under this para, the ld. DR has relied upon the Evidence Act.

Reply 10.1 The Respondent prays that, before citing the definition of evidence as per the Indian Evidence Act, it is prayed that the definition of 'evidence' should be read together with the definition of 'proved' and the merged result of these two definitions are to be considered for ascertaining a fact to be evident to the case. According to Section 3 of the Evidence Act 1872, evidence means and includes:

- *All such statements which the court allows or needs to be presented before it by the witnesses in connection to matters of*

fact under inquiry. These statements are termed as oral evidence.

- *All such documents including any electronics record, presented before the court for inspection. These documents are termed as documentary evidence.*

10.2 Documentary evidence is the evidence that mentions any issue described or expressed upon any material by way of letters, figures or marks or by more than one of the ways which can be used for recording the issue. Primary documentary evidence includes the evidence that shows the original documents as mentioned in Section 62 of the Indian Evidence Act, whereas secondary documentary evidence is the evidence that includes copies of documents that can be presented in the court under certain circumstances or as mentioned in Section 63 and Section 65 of the Indian Evidence Act. Direct Evidence is acknowledged as the most important evidence required for deciding the matter in issue. Direct evidence directly proves a fact or disapproves of the fact by its virtue. In the case of direct evidence, a particular fact is accepted directly without giving any reason to relate to the fact. One does not even need to point out the illustration provided as the evidence given by the witness in the court of law is the direct evidence which is sufficient enough to prove the matter as against the testimony to a fact proposing guilt. **Here in the case of the Respondent, there is no direct evidence (as otherwise, the AO would have made it a part of the assessment order). In order to establish admission of evidence, the following facts should be consistent with the theory.**

- The circumstances from which the inference for the theory was drawn, should be fully established.
- The circumstances should be of a decisive nature.
- The circumstances should serve to mean and prove only the theory proposed to be proved and should not entertain any other theory.

10.3. None of the above pre-requisites are fulfilled here. Hence, a mere unauthenticated document, can never constitute evidence.

11. Under this para, the ld. DR has relied upon the definition of the word *perjury*.

Reply 11.1 The Respondent prays that, *perjury* is only applicable where there are false statements/ evidences. The Hon Members are humbly appraised that, the Department has also initiated prosecution proceedings. The only charge made in the prosecution filed by the department is failure to file return of income in time. Had there been alleged perjury, then obviously this too would have been the charge raised by the Department. This amply proves that, there is no perjury, as alleged.

12. Under this para, the ld. DR has alleged that the ld. CIT(A) has taken a narrow view wherein he has harped on the requirement of document found or seized during search and seizure proceedings.

Reply 12.1 This allegation is grossly unacceptable because, the ld. CIT(A) has relied upon various judicial pronouncements passed by Hon. Judges of various High Courts. Not a single judgement has been passed by him. The ld. CIT(A) is duty bound to adhere to the decisions / precedents laid down by various Courts, especially the Hon. Gujarat High Court. The Respondent relies upon the following judgements in this regard.

G.M Mittal Stainless Steel (P), CIT vs. – (2003) 179 CTR 553 = 263 ITR 255 = 130 Taxman 67 (Guj.)

Binding nature – Jurisdictional High Court decision – Is binding on the Revenue authorities within the State. Revenue authorities within the State cannot refuse to follow the jurisdictional High Court's decision on the ground that the decision of some other High Court was pending disposal before the Supreme Court.

Air Conditioning Specialists Pvt. Ltd. vs. Union of India & Ors. (1996)221 ITR 739 (Guj.)

The Commissioner of Income Tax is a "Tribunal" subject to the supervisory jurisdiction of the High Court under Article 227 of the Constitution. Hence, he is bound to obey the law declared by the High Court. It is not open to the Commissioner of Income Tax to

ignore the decision of the jurisdictional High Court or refuse to follow it on the ground that the verdict had not been accepted by the Department and that the matter was carried further and was pending before the Supreme Court. When a point is concluded by a decision of the Court, all subordinate courts and inferior Tribunals within the territory of the State and subject to the supervisory jurisdiction of the High Court are bound by it and must scrupulously follow the said decision in letter and spirit.

In CIT vs. G. Dalabhai & Co – 226 ITR 922, the Hon'ble Gujarat High Court has remarked –

"Before parting with the case, we notice with anguish the language used by the Income Tax Officer in his assessment order saying that "with due respect to the decision of the Gujarat High Court, I do not follow the same'. The Income Tax Officer in not following the decision of the Gujarat High Court within whose supervisory territory he was functioning, is far from satisfactory, that is the least we can say. The minimum decorum of the system of hierarchy that Tribunals in the administration of justice and their judicial subordination to the High Court of the territory in which they function requires that they restrain in the use of proper expression while following or not following the decision of the High Court.

Bishnu Ram Borah and Another vs. Parag Saikia & Ors. AIR 1984 SC 898

The board of Revenue any other subordinate tribunal is subject to the writ jurisdiction of the High Court under Article 226 of the Constitution. Just as the judgments and orders of the Supreme Court have to be faithfully obeyed and carried out throughout the territory of India under Article 142 of the Constitution, so should be the judgments and orders of the High Court by all inferior courts and Tribunals subject to their supervisory jurisdiction within the State under Arts. 226 and 227 of the Constitution. The Board of Revenue cannot refuse to carry out the directions of the High Court. (1961) 1 SCR 474, Foll. (Para 12)

Jain Exports vs. UOI (1988) 3 SCC 579 lays down the principle that in a tier system, decision of higher authorities are binding on lower

authorities and quasi- judicial Tribunals are also bound by this discipline.

It has been observed by the Supreme Court in the case of *Union of India vs. Kamalakshi Finance Corporation Ltd. AIR 1992 SC 711* that judicial discipline requires that decision of higher authority should to be followed in the case of quasi-judicial authority and, therefore, a lower officer is bound to follow the decision of the higher authority e.g. Assessing Officer is bound to follow the decision of the Tribunal particularly so in the case of the same assessee. This principle requires that decisions of higher authorities such as Tribunal should be followed by lower officers, viz., CIT(A) and Assessing Officer. Even decision of the Tribunal, not a jurisdictional Tribunal, is required to be followed by the lower authority. Sometimes, an argument is made and also put on record that the Department has not accepted the decision of the Tribunal and Appeal has been preferred to the High Court. However, courts have repeatedly held that phraseology of not accepting the decision is obnoxious and unparliamentary in respect of the order of the higher authority. Unless, in Appeal the order of the higher authority is stayed, it operates as a valid binding decision to the lower authority not only in the case of the same assessee but also in other cases where the same law point is involved. If the Statute is an All India Statute, decisions of benches of the Tribunal at various places are considered as binding on the law point decided on the principle of judicial discipline.

The following are the observations of the Supreme Court from the decision in *S l Rooplal & Another vs. L. G. of New Delhi (2000) SCC 644*.

(1) "At the outset, we must express our serious dissatisfaction in regard to the manner in which a co-ordinate Bench of the Tribunal has overruled in effect, an earlier judgment of the same Tribunal. This is opposed to all principles of judicial discipline..... Precedents which enunciate rules of law from the foundation of administration of justice under our system. This is a fundamental principle which every presiding officer of a judicial forum ought to know for consistency in interpretation of law alone can lead to public confidence in our judicial system.

(2) The decision of the special (large) Bench of the Tribunal must be held to be a binding precedent for division benches otherwise the very purpose of constituting them will get frustrated. This of course is subject to the exception that if there is a High Court decision on the same issue and not noticed by the Special Bench, then the High Court decision will receive preference as was done in Chandulal Venichand's case 38 ITD 138.

12.2 Hence, it would be unfair to hold that the ld. CIT(A) took a very narrow view, whereas the fact is that, the ld. CIT(A) only took a consistent stand as was taken by various High Courts.

13. Under this para, the ld. DR has sought time for rebutting case laws. This being the discretion of the Hon. Members, no opinion is formed.

14. Under this para, the ld. DR has sought time for rebutting case laws. This being the discretion of the Hon. Members, no opinion is formed.

15. Under this para, the ld. DR has submitted that the matter of assessment does not conclude with the AO, but it extends to the CIT(A) and ITAT. This being the discretion of the Hon. Members, no opinion is formed.

16. Under this paragraph, the ld. DR contends that he has clarified the matter with CBDT and gathered information that the information regarding holding of investment by the assessee in foreign bank were received through government channels. If that be the case, then why has the Board delayed the matter and why was no information shared so far. This being only hearsay, no credence may be attributed. Against, as discussed in the first part of this note, it is prayed that, the above pretext are only meant to drag litigation. It is thus prayed that, adjournment of 60 days is too much to collect authentic data from CBDT.

Conclusion

17. In light of the above it is prayed that, the matter may be proceeded on the information available on record and kind justice may be given to the Respondent."

7. We have carefully considered the notes of arguments filed by the Ld CIT DR and the reply arguments filed by the Ld AR. Before going into the same we find from the Grounds of Appeal filed by the Revenue namely Grounds 1 to 4 are inter connected namely "Whether any incriminating material should be found and seized during the course of search for making assessment under section 153A of the Act". Ground nos 5 and 6, are relating to deletion of addition made on account of deposit/investments in HSBC Geneva bank account. Ground no 7 is the Ld CIT[A] has not following the proposition of law laid down in the Finance act, 2012. Ground nos. 8 and 9 is to set aside the order of Ld CIT[A] and restore the order of the assessing officer.

7.1. We notice that there is no specific Grounds of Appeal raised by the Revenue on the findings of the Ld.CIT[A] that **the assessment orders are barred by limitation and therefore the entire assessment itself is quashed**. In our considered view, this is the primary LEGAL Ground which ought to have been challenged by the Revenue in the present appeals, however no such specific ground is raised and further Ld CIT DR has not addressed this issue in his 'Notes on Arguments'. Thus we presume that the Revenue is not challenging the findings of Ld CIT[A] quashing the assessment orders as time-barred. However Ground no.7 " the Ld CIT[A] has not following the proposition of law laid down in the Finance Act, 2012." Though this ground is not specific about the assessment order is barred by limitation, but considering

that the Ld CIT[A] has not following the proposition of law laid down in Finance Act, 2012", which means about the amendment made in Clause [viii] of the Explanation to section 158B[1] of the Finance Act 2012, thereby extending the period of limitations from "six months" to "12 months" with effect from 1st day of July 2012.

7.2. For better understanding the Memorandum explaining the changes in the Income Tax Act vide Finance Bill 2012, wherein clauses 63, 65 the changes relevant to extension of time limit for completion of assessment, where information is sought under DTAA is explained as follows:

> "… The time limit for completion of an assessment provided in section 153 and 153B of the Income Tax Act. These provisions were amended vide Finance Act 2011 to exclude the time taken in obtaining for information [from foreign tax authorities] from the time prescribed for completion of assessment or reassessment in the case of an assessee. This time period to be excluded would **start from the date on which the process of getting information is initiated by making an reference by the Competent Authority in India** to the foreign tax authorities and end with the date on which information is received by the Commissioner. Currently, this period of exclusion is limited to 6 months. Foreign inquiries generally by nature take longer time for obtaining information. It is, therefore, proposed that this time limit of six months be extended to one year. **These amendments will take effect from 1 July 2012**."

7.3. As it can be seen from paragraph 4 of the assessment order, the Competent Authority namely Under Secretary [FT&TR-III][2] vide its letter dated 21-02-2013 sought for information under the provisions of 'Exchange of information' article to Indo-Switzerland, DTAA. Since the

reference been made after 1st July 2012, the amended extention period of 12 months will be applicable in the present case. It is further clear from the Memorandum explaining the changes in the Income Tax Act vide Finance Bill 2012 that the time period to be excluded would **start from the date on which the process of getting information is initiated by making an reference by the Competent Authority in India** to the foreign tax authorities and end with the date on which information is received by the Commissioner. In the present case since the reference was made on 21-02-2013 by the Competent Authority, the extended 12 months period expires on 20-02-2014. But the normal time barring period for completion of assessment order is on 31-03-2014. Thus there is 38 days time available from 21-02-2013 to 31-03-2014.

7.4. As per the proviso to Explanation [viii] to section 153B[1], which states that if the period available to the AO is less than 60 days for the purpose of limitation, then the period available would get extended to 60 days or deemed to be extended accordingly. Since the regular time limit of 38 days available with the AO, as per the above proviso, 60 days namely further time of 22 days, that is upto 22-04-2014 is available to the AO for completion of the assessment order. However the Ld Assessing Officer completed the assessment order on 17-02-2015 which is clearly barred by limitation. Both the AO and Ld CIT DR

could not able to justify that the assessment order passed is well within the period of limitation. Whereas the Ld CIT[A] in his Appellate order at paragraph 6.19 has elaborately dealt this issue and held that the assessment order is barred by limitation, since the same is passed after 22-04-2014. Therefore we have no hesitation in holding that the assessment orders passed by the Ld Assessing Officer on 17-02-2015 are clearly barred by limitation and the assessment orders are non existing in the eye of law. **Thus the Ground no.7 raised by the Revenue is devoid of merits and the entire Revenue appeals fails and deserve to be dismissed**.

8. Though the entire assessment is quashed on the ground of time barred, however we are required to adjudicate the other grounds raised by the Revenue. As stated earlier, Grounds nos. 1 to 4 are inter connected namely "Whether any incriminating material should be seized during the course of search for making assessment under section 153A of the Act". We notice that these common Grounds are raised by the Revenue in every search cases in a routine and mechanical manner.

8.1. It is seen from the Panchnama recorded during the course of search on 09-09-2011, lose paper file containing 99 pages were being found and seized by the Investigation team [which is placed in pages 56 to 58 of the paper book]. The above seized materials are car insurance, quotation for car,

Form No.7, 12 & 8A of Agricultural land at Limbdi [only land inquiry but no transaction took place], list of name and address of relatives and friends, legal notice from Swastik Oil Mill, copies of ledger account, correspondence letter with Ishwar Jagani [regarding Gujarat Cine Enterprise], dates of arrival and departure as per passport of Jay Bhalodia [son of the assessee], rough working of routine car expenses, Networth certificate & acknowledgement of Return of Income of Jay Bhalodia [for Visa purpose], rough details of rent for premises Nirali, draft of flat agreement [belongs to Pushpa Ben] and passport copies of the assessee and his wife. The above seized materials of 99 pages were been clarified by the assessee with each seized material by way of a table [which is placed in pages 59 to 61 of the paper book]. These sized materials are NOT the basis of making addition by the assessing officer in the assessment order. But additions were made based on what was NOT found and seized from the premises of the assessee during the course of search, namely three pages entries of HSBC Bank.

8.2. As it can be seen from para 6.2 of the Assessment order, a THREE pages photocopy document of HSBC, Geneva bank account with code profile client 5095020378 was confronted to the assessee and statement u/s. 132[4] was recorded admitting Rs.39.6 crores as investment in Foreign Bank accounts by the assessee on behalf of the entire group. This is NOT A DOCUMENT SEIZED during the continuation of the Search on 15-09-2011 at the premises of the assessee, but

brought by the Investigation Team as 'an information' by the ADIT and confronted to the assessee.

8.3. We find that the document relied upon by the AO is not an evidence much less admissible evidence in view of the fact that data shown IS NOT IN ORIGINAL BUT PHOTO COPIES, which were not authenticated. It neither have any signature of the Banking Authority nor it has the Bank Logo/emblem in it. [for ready reference the same is enclosed as Annexure 1 of this order, this document is also not eligible being a Photo copy]. Further mere appearance of some personal details of the assessee on the three pages photostat copy does not validate the information as true and correct. Since personal details are easily available from known sources and therefore such details do not validate the case of the AO in any manner. Further more if the "information" in the possession of the Revenue been authentic and concrete, then what is the necessity to collect the same again from the Competent Authority namely FT&TR Division. Even after ten years after such reference the Competent Authority could not produce the same to the Department. Thus the burden of proof for proving the connection of the alleged foreign bank account was upon the Revenue and not on the assessee. Therefore, what the AO attempted to draw an inference that the assessee owns and maintains foreign bank account, **based on some unverified sheet of paper which is indicative of a bank statement, it is upon the AO to prove the truthfulness of the same**. But till the stage of second appellate proceedings

before this Tribunal, being the highest facts findings authority, the Revenue failed to prove the same with necessary materials and proper evidences. **Therefore the Ground Nos. 1 to 4 raised by the Revenue are devoid of merits and the same is liable to be dismissed.**

9.1. Regarding Ground Nos.5 & 6, it is appropriate to consider the written submissions of both the parties on evidentiary value of the documents and the same is reproduced again as follows:

" 10.Under this para, the ld. DR has relied upon the Evidence Act.

Reply 10.1. The Respondent prays that, before citing the definition of evidence as per the Indian Evidence Act, it is prayed that the definition of 'evidence' should be read together with the definition of 'proved' and the merged result of these two definitions are to be considered for ascertaining a fact to be evident to the case. According to Section 3 of the Evidence Act 1872, evidence means and includes:

- *All such statements which the court allows or needs to be presented before it by the witnesses in connection to matters of fact under inquiry. These statements are termed as oral evidence.*
- *All such documents including any electronics record, presented before the court for inspection. These documents are termed as documentary evidence.*

10.2. Documentary evidence is the evidence that mentions any issue described or expressed upon any material by way of letters, figures or marks or by more than one of the ways which can be used for recording the issue. Primary documentary evidence includes the evidence that shows the original documents as mentioned in Section 62 of the Indian Evidence Act, whereas secondary documentary evidence is the evidence that includes copies of documents that can be presented in the

court under certain circumstances or as mentioned in Section 63 and Section 65 of the Indian Evidence Act. Direct Evidence is acknowledged as the most important evidence required for deciding the matter in issue. Direct evidence directly proves a fact or disapproves of the fact by its virtue. In the case of direct evidence, a particular fact is accepted directly without giving any reason to relate to the fact. One does not even need to point out the illustration provided as the evidence given by the witness in the court of law is the direct evidence which is sufficient enough to prove the matter as against the testimony to a fact proposing guilt. **Here in the case of the Respondent, there is no direct evidence (as otherwise, the AO would have made it a part of the assessment order). In order to establish admission of evidence, the following facts should be consistent with the theory.**

- The circumstances from which the inference for the theory was drawn, should be fully established.
- The circumstances should be of a decisive nature.
- The circumstances should serve to mean and prove only the theory proposed to be proved and should not entertain any other theory.

10.3.None of the above pre-requisites are fulfilled here. Hence, a mere unauthenticated document, can never constitute evidence.

11. Under this para, the ld. DR has relied upon the definition of the word *perjury*.

Reply 11.1The Respondent prays that, *perjury* is only applicable where there are false statements/ evidences. The Hon Members are humbly appraised that, the Department has also initiated prosecution proceedings. The only charge made in the prosecution filed by the department is failure to file return of income in time. Had there been alleged perjury, then obviously this too would have been the charge raised by the Department. This amply proves that, there is no perjury, as alleged.

9.2. Further the it is Nowhere in the assessment order the AO has corroborated the admission of the assessee with independent corroborative evidences. This is because, no such corroborative evidences (about foreign bank account) was found during search. If there is a single corroborative evidence in this regard, then the ld. CIT(DR) ought to have unfolded this fact by referring to specific instance (from the assessmdent order). Thus, this is just a passing remark without substance. Further the very fact that the information available with the department was not authentic, is the reason why seach took place, as the Revenue wanted to confirm this unauthentic information with some corroborating material (to be hopefully found from the possession of the assessee). The only requirement/plea of the assessee was that, he may be given copy of any document to prove the allegation, which was NOT PROVIDED since it is non-existing document. This amply proves that the 'satisfaction note' of the Investigation Wing was also on a wrong footing as they came only for roving inquiry.

9.3. In this connection, Jurisdictional High Court of Gujarat in the case of Kailashben Manharlal Chokshi Vs. CIT reported in [2008] 174 taxmann.com 466 (Guj.) held that merely on the basis of admission of the assessee could not have been subjected to such additions unless and until, some corroborative evidence is found in support of such addition. When the statement recorded at such odd hours cannot be considered to be a voluntary statement, when the same is

retracted by the assessee. Therefore the addition made is liable to be deleted. Operative portion of the above judgement reads as follows:

> "…26. In view of what has been stated hereinabove we are of the view that this explanation seems to be more convincing, has not been considered by the authorities below and additions were made and/or confirmed merely on the basis of statement recorded under section 132(4) of the Act. Despite the fact that the said statement was later on retracted no evidence has been led by the Revenue authority. We are, therefore, of the view that merely on the basis of admission the assessee could not have been subjected to such additions unless and until, some corroborative evidence is found in support of such admission. We are also of the view that from the statement recorded at such odd hours cannot be considered to be a voluntary statement, if it is subsequently retracted and necessary evidence is led contrary to such admission. Hence there is no reason not to disbelieve the retraction made by the Assessing Officer and explanation duly supported by the evidence. We are, therefore, of the view that the Tribunal was not justified in making addition of Rs. 6 lakhs on the basis of statement recorded by the Assessing Officer under section 132(4) of the Act. The Tribunal has committed an error in ignoring the retraction made by the assessee.
>
> 27. In the above view of the matter, addition of Rs. 1 lakh made on account of unaccounted cash is confirmed and the addition of Rs. 6 lakhs is hereby deleted."

9.4. Thus, we are of the considered opinion that the alleged unauthenticated and uncorroborated sheets of papers should not be considered as evidence, whether primary or secondary and therefore addition made by the Ld AO on such document is liable to be deleted. **Therefore the Ground Nos. 5 to 6 raised by the Revenue namely deletion of addition made on account of deposit/ investments in HSBC Geneva bank account are devoid of merits and the same is liable to be dismissed.**

10. It is appropriate to consider the Co-ordinate Bench of Delhi Tribunal in the case of Bhushan Lal Sawhney Vs. DCIT, Central Circle-7, New Delhi reported in [2021] 127 taxmann.com 642 wherein it was considered the temporal scope of Article 26 of the Amended Double Taxation Avoidance Agreement between India and Switzerland, thereby, such information could be provided from 1-4-2011. As per Notification dated 27-12-2011 between India and Switzerland Confederation for avoidance of double taxation, which clearly show that these are applicable after assessment years under appeals and as per information provided vide letter Dated 26-6-2015 no such information could be provided prior to 1-4-2011. Therefore, Swiss Authorities have not provided any information to Revenue Authorities in India about assessee's bank account with HSBC, Geneva, Switzerland for assessment years under appeals i.e., A.Ys. 2006-2007 to 2011-2012. Thus, there is no incriminating material available on record to make any addition in any assessment years. It may also be noted here that assessee since the very beginning denied to have maintained any such bank accounts with HSBC, Geneva, Switzerland. There is no material available on record that the assessee made deposits in HSBC Bank A/c in A.Y. 2006-2007 or thereafter earned any interest in remaining assessment years under appeals. Operative portion of the decision reads as follows:

"… 6. Learned Counsel for the Assessee submitted that it is an undisputed fact that search was conducted on 28-7-2011 on the assessee. Learned Counsel for the Assessee referred to paper book filed by the Ld. D.R. containing letter Dated 22-8-2019 of ACIT, Central Circle-7 [A.O.] to the CIT-DR in which it was categorically stated that last panchanama was drawn on 26-9-2011. He has, therefore, submitted that in F.Y. 2011-2012 search is executed and last panchanama drawn. Learned Counsel for the Assessee, therefore, submitted that impugned assessment orders passed on 2-3-2015 are barred by limitation because of search took place on 28-7-2011 as mentioned in the assessment orders and thus the limitation to pass assessment orders expire on 31-3-2014 as per Section 153B(1)(a) of the I.T. Act, 1961. But, the impugned orders have been passed on 2-3-2015. The Ld. CIT(A) did not appreciate the above issue. He has submitted that reason of passing the assessment orders Dated 2-3-2015 advanced by the Ld. CIT-DR was that since a reference under section 90 of the I.T. Act, 1961 was made to Swiss Authority and no information was received till the time of passing of the assessment orders, hence, the time limit was extended by one year under Explanation-IX of Section 153B of the I.T. Act, 1961. He has submitted that the Ld. CIT-DR has furnished a letter Dated 26-6-2015 together with information asked for in relation to the assessee received from Swiss Authority. It may be seen that as per A.O's admitted case, reference was made under section 90 of the I.T. Act, 1961 under the provisions of "Exchange of Information", Article of Indo Switzerland Double Taxation Avoidance Agreement [DTAA] and such information was required for the period from 1-4-1995 to 31-3-2012 seeking information under the provisions of "Exchange of Information" Article 26 of Indo-Switzerland Double Taxation Avoidance Agreement [DTAA]. He has submitted that the above stated such reference made under section 90 is bad in Law and Revenue could not have made any such reference for seeking information for the period prior to 1-4-2011 and hence such illegal reference could not have been made in Law, could not have lead to extension of time limit for passing the assessment orders. Thus, the time limit in passing the impugned assessment orders in the case of the assessee expired on 31-3-2014 itself. He has further submitted that in fact the Revenue

could not have made reference for the period prior to 1-4-2011 which is evident from the following:-

6.1.1 Administrative assistance by Swiss Competent Authority in their letter dated 26th June, 2015 addressed to Government of India, MOF, FT & TR and filed by Ld. CIT(DR) on 11-1-2021 through email reads as under:

"In accordance with Article 26 DTA CH-IN, administrative assistance for questions concerning the application of domestic law can only be provided for information starting from the financial years 2011/2012 as the prior years are not covered by temporal scope of Article 26 of the amended Double Tax Agreement between India & Swtizerland.

Therefore we can only provide you with information from 1 April 2011 (see decision A-4232/2013 of 12 December 2013 of the Swiss Federal Administrative Court)".

6.1.1.2 The Learned Counsel for the Assessee submitted that the Agreement between The Republic of India and The Swiss Confederation for avoidance of double taxation with respect to taxes on income as modified by Notification No. S.O.2903(E) Dated 27-12-2011. **Copy of Notification No. S.O.2903(E) Dated 27-12-2011 together with amended protocol filed to show it apply to later period.** Therefore, reliance is placed on the following judicial decisions which hold that if the Reference based upon which the limitation is sought to be extended is held bad, limitation so extended would also be bad in law.

… … ….

8. We have considered the rival submissions and perused the material on record. It is not in dispute that search was conducted in the case of assessee on 28-7-2011. Both the parties have placed on record copies of the panchanama drawn in the case of assessee at the time of search and thereafter, but, the same did not disclose if any, incriminating material much less than the material was found during the course of search to connect the assessee with maintenance of any bank account with HSBC, Geneva, Switzerland. The Ld. D.R. also placed on record letter of the A.O. Dated 22-8-2019 in which it is clearly mentioned by the

A.O. that last panchanama was drawn on Dated 26-9-2011. Learned Counsel for the Assessee also placed on record letter Dated 26-6-2015 issued by Swiss Competent Authority addressed to the Government of India in which it is specifically mentioned that information as required could be provided from F.Y. 2011-2012 as the prior years are not covered by temporal scope of Article 26 of the Amended Double Taxation Avoidance Agreement between India and Switzerland. Therefore, such information could be provided from 1-4-2011. Learned Counsel for the Assessee also placed on record Notification Dated 27-12-2011 between India and Switzerland Confederation for avoidance of double taxation. These would clearly show that these are applicable after assessment years under appeals and as per information provided vide letter Dated 26-6-2015 no such information could be provided prior to 1-4-2011. **Therefore, Swiss Authorities have not provided any information to Revenue Authorities in India about assessee's bank account with HSBC, Geneva, Switzerland for assessment years under appeals i.e., A.Ys. 2006-2007 to 2011-2012. Thus, there is no incriminating material available on record to make any addition in any assessment years. It may also be noted here that assessee since the very beginning denied to have maintained any such bank accounts with HSBC, Geneva, Switzerland. There is no material available on record that assessee made deposits in HSBC Bank A/c in A.Y. 2006-2007 or thereafter earned any interest in remaining assessment years under appeals.**

8.1 Considering the totality of the facts and circumstances of the case above, it is also clear that during the course of search no incriminating material was found against the assessee for maintaining any such bank accounts with HSBC, Geneva, Switzerland. Whatever information was supplied by the Swiss Authorities subsequently to the Revenue Authorities in India, no such information was provided for the period prior to 1-4-2011. Therefore, it is clear that no information have been provided by the Swiss Authorities that assessee maintained any bank account with HSBC, Geneva, Switzerland in assessment years under appeals i.e., 2006-2007 to 2011-2012. Therefore, it is clear that no incriminating material was found against the assessee so as to

make any addition against the assessee. The Hon'ble Delhi High Court in the case of, Kabul Chawla (supra) held as under:

"vii. Completed assessments can be interfered with by the A.O. while making the assessment under section 153A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment"

8.2 The Hon'ble Delhi High Court in its recent decision in the case Meeta Gutgutia (supra) in paras 69 to 72 has held as under :

"69. What weighed with the Court in the above decision was the "habitual concealing of income and indulging in clandestine operations" and that a person indulging in such activities "can hardly be accepted to maintain meticulous books or records for long." These factors are absent in the present case. There was no justification at all for the AO to proceed on surmises and estimates without there being any incriminating material qua the AY for which he sought to make additions of franchisee commission.

70. The above distinguishing factors in Dayawanti Gupta (supra), therefore, do not detract from the settled legal position in Kabul Chawla (supra) which has been followed not only by this Court in its subsequent decisions but also by several other High Courts.

71. For all of the aforementioned reasons, the Court is of the view that the ITAT was justified in holding that the invocation of Section 153A by the Revenue for the AYs 2000-01 to 2003-04 was without any legal basis as there was no incriminating material qua each of those AYs.

Conclusion

72. To conclude:

(i) Question (i) is answered in the negative i.e., in favour of the Assessee and against the Revenue. It is held that in the facts and circumstances, the Revenue was not justified in invoking Section

153A of the Act against the Assessee in relation to AYs 2000-01 to AYs 2003-04."

8.1. **The above Judgment is confirmed by the Hon'ble Supreme Court by dismissing the SLP of the Department. Therefore, on this reason alone no addition could be made of any unexplained bank deposits or interest earned thereon in any of the assessment years. In view of the above, we set aside the Orders of the authorities below and delete the entire additions.** In view of the above, there is no need to decide the remaining grounds of appeals which are left with academic discussion only. Accordingly, all the appeals of the Assessee are allowed.

8.2. In the result, all the appeals of the Assessee are allowed."

11. Further the Co-ordinate Bench of the Delhi Tribunal in the case of ANURAG DALMIA vs. DCIT reported in [2018] 52 CCH 0106 [ITAT Del] has considered similar HSBC Bank foreign account and deleted the additions made by the AO as follows:

"… 13. Now keeping in view the binding judicial precedents of the Jurisdictional High Court, we shall proceed to examine the facts as are available on record. The Income Tax Department through its FT & TR Division of CBDT had received information pertaining to foreign bank accounts either held by certain Indians or were beneficiaries in these bank accounts under the exchange of information between India and France. The French Authorities on 28.06.2011 gave information in USB that certain persons in India held bank accounts in HSBC Pvt. Bank (SUISSE), Switzerland. In the said information, the name of the assessee had also figured and 11 pages document pertaining to the assessee was also received. The contents of the documents have been reproduced in the assessment order. These documents revealed that in the bank accounts of certain entities, the assessee was either beneficial owner in the account or had been shown as the person having right of inspection or as account holder. The name of the entities which held the bank accounts have already been discussed above. The total sums standing in the bank accounts for the relevant financial year, aggregated to Rs.27.92 crore in terms

of INR. The details of amount appearing in the account of various entities have already been incorporated above. After receiving the said information, the Investigation Wing of the department carried out search and seizure action in the case of the assessee and group cases on 20.01.2012, to find out the assessee's link with these bank accounts and to get some corroborative material or documents. During the course of search and seizure action, as culled out from the impugned orders as well as the material placed on record, it is an admitted fact that no documents or any incriminating material whatsoever was found or seized during the course of search and seizure action so as to remotely suggest that either the assessee was having any bank account in Switzerland with HSBC or assessee was any way linked to these bank accounts. In the statement recorded u/s. 132(4) the assessee had categorically denied having such bank accounts or having any link with the bank accounts of such entities. No material or evidence was found to rebut the denial statement of the assessee. Apart from that, even during the course of the assessment proceedings when statement was recorded by the AO, assessee continued to deny such kind of transaction and even at the stage of the assessment proceedings the Assessing Officer did not confront with any material which can be said to have been recovered from the possession of the assessee in the course of search with regard to the deposits or any kind of link in the foreign bank accounts. The ld. CIT (A) in the impugned order also (which has been incorporated above) has not held that any document or evidence *qua* any link with the foreign bank accounts has found during the course of search, *albeit* he has given a finding that to the effect that it was on the basis of the information received which was precursor to carry out search and seizure action at the premises of the assessee and such an information/material even though not found in the course of search can be utilized for the purpose of assessment. For which reference was to made judgment of Hon'ble Supreme Court in the case of Pooranmal vs. DIT, (1974) 93 ITR 505 (SC). In the said judgment, Hon'ble Supreme Court held that if any evidence or material which has been found during the course of search can still be used/utilised, even if search has been held to be invalid. Nowhere has it been laid down by the Hon'ble Supreme Court that any material or information gathered prior to the search has to be reckoned or is deemed to be found

during the course of search. It was never a case of the department either before us or before the first appellate stage that in the post search anything has been found, except that the information which though was incriminating against the assessee was already in the possession of the department. Ld. CIT (A) though has tried to rope in the element of incriminating material/evidence found during the course of search by holding that statement u/s. 132(4) it constitutes incriminating material within the meaning and scope of Section 153A. However, such an observation and the finding is *de hors* the fact as admittedly in the statement recorded on oath u/s 132(4) at the time of search, assessee has categorically denied having such transaction or any kind of link with the foreign bank accounts. Thus, the observation of the ld. CIT (A) to this extent is erroneous on facts and hence cannot be upheld. In the letter filed by the ld. CIT-DR written by the Assessing Officer before us, it is clearly established that the information was received by the French Authority on 28.06.2011 and based on this information the investigation wing had carried out search in the case of the assessee. This fact itself is a testament that the material information which has been referred to in the assessment order was prior to the date of search and not found in the course of search or even in the post search events.

14. The information which has been received from the foreign authorities wherein the name of the assessee is appearing at the outset appears to be incriminating which warrants not only inquiry but also can lead to *prima facie* belief that assessee may be somehow link to these bank accounts. However whatever may be the incriminating information which can implicate assessee but the said information has been received as a result of search carried out on 20.01.2012. Once any document which though is in the nature of incriminating material but if it has not been found in the course of search, then in view of the principle laid down by the Hon'ble Jurisdictional High Court in several cases, such an addition cannot be roped in the assessment u/s.153A especially in the assessments which are not abated. If the Revenue had any incriminating material antecedent to the search, that is, it was found during the course of search or as a result of search, then in that case Revenue had various other courses of action left under the provisions of Income Tax Act, but certainly not

within the ambit and scope of Section 153A read with *2nd proviso* thereto."

12. Another Co-ordinate Bench of Kolkata Tribunal in the case of Bishwanath Garodia Vs. DCIT, Central Circle-3(3), Kolkata reported in [2016] 76 taxmann.com 81 has considered similar HSBC Bank foreign account and deleted the additions made by the AO as no seized materials was found during the search operation. Operative portion of the decision reads as follows:

> "….8. We have considered the rival submissions and also perused the relevant material available on record. It is observed that the returns of income originally filed by the assessee for both the years under consideration were duly processed by the Assessing Officer under section 143(1) well before the date of search conducted on 28.07.2011. The said search was conducted in the case of the assessee on the basis of information received by the Assessing Officer from CBDT relating to the undisclosed account maintained by the assessese with HSBC Bank, Geneva, Switzerland. During the course of search, no incriminating material, however, was found relating to the transactions reflected in the said Bank account of the assessee with HSBC Bank or any income relating thereto and this position was categorically admitted by the Assessing Officer during the course of appellate proceedings before the ld. CIT (Appeals) as is evident from the relevant order-sheet entry dated 21.12.2015 recorded by the ld. CIT (Appeals) (copy at page no. 22 of the paper book). The question that arises now is whether in the absence of such incriminating material, any addition to the total income of the assessee can be made on account of the transactions reflected in the Bank account of the assessee with HSBC Bank or any income relating thereto in assessments completed under section 153A of the Act for both the years under consideration.
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> 9. As per the provisions contained in Section 153A, if the search or requisition is initiated after 31.03.2003, the Assessing Officer is under an obligation to initiate proceedings under section 153A for

six years immediately preceding the year of search. The Assessing Officer is then required to assess or reassess the total income of the said six years and if any assessment or reassessment out of the said six years is pending on the date of initiation of the search, the same would abate, i.e. pending proceeding qua the said assessment year would not proceed thereafter and the assessment has to be made under section 153A(1)(b) of the Act read with the 1st Proviso thereunder. As regards the other years for which assessments have already been completed and the assessment orders determining the assessee's total income are subsisting at the time when the search or requisition is made, the scope of assessment under section 153A is limited to reassess the income of the assessee on the basis of incriminating material found during the course of search.

13. At the time of hearing before us, the ld. D.R. has contended that the processing of returns of income filed by the assessee as made by the Assessing Officer under section 143(1) could not be regarded as assessment and it is, therefore, not a case where the assessments for both the years under consideration could be said to have been completed. He has also contended that the conclusion of such alone is sufficient to give jurisdiction to the Assessing Officer to proceed against the assessee under section 153A of the Act. In support of this contention, he has relied on the unreported decision of the Hon'ble Delhi High Court in the case of Anil Kumar Bhatia (supra). In the said case, a question was posed by the Hon'ble Delhi High Court in paragraph no. 12 of its order as to whether the Assessing Officer was empowered to reopen the proceedings and reassess the total income taking note of the undisclosed income, if any, unearthed during the search where an assessment order had already been passed in respect of all or any of those six assessment years either under section 143(1) or section 143(3) of the Act and such order was already in existence having been passed prior to the initiation of search/requisition. Although this question was not finally answered by the Hon'ble Delhi High Court in the case of Anil Kumar Bhatia (supra), it is quite clear from the said question raised by the Hon'ble Delhi High Court that there was no distinction made by Their Lordships in the assessments

completed under section 143(1) and section 143(3) for determining the scope of the proceedings under section 153A. However, the said question arose specifically for the consideration of Mumbai Bench of this Tribunal in the case of Pratibha Industries Ltd. (supra) and after referring to the discussion made by the Hon'ble Delhi High Court in this context in the case of Anil Kumar Bhatia (supra), the Tribunal held that the only logical conclusion which could be traced out by harmonizing the legislative intendment and the judicial decision was that where the assessments had already become final prior to the date of search, the total income has to be determined under section 153A by clubbing together the income already determined in the original assessments and the income that is found to have escaped assessment on the basis of incriminating material found during the course of search. To arrive at this conclusion, reliance was placed by the Tribunal on the decision of Special Bench, Mumbai in the case of All Cargo Global Logistics Ltd. (supra), wherein it was held that even though all the six years shall become subject matter of assessment under section 153A as a result of search, the Assessing Officer shall get the free hand through abatement only on the proceedings that are pending. But in a case or in a circumstances where the proceedings have reached finality, assessment under section 143(3) read with section 153(3) has to be made as was originally made and in a case certain incriminating documents were found indicating undisclosed income, then addition shall only be restricted to those documents/incriminating material.

14. Keeping in view the discussion made above, we hold that the additions as finally made to the total income of the assessee on account of transactions reflected in the Bank account of the assessee with HSBC, Geneva, Switzerland and income relating thereto for both the years under consideration are beyond the scope of section 153A as the assessments for the said years had become final prior to the date of search and there was no incriminating material found during the course of search to support and substantiate the said addition. The said additions made for both the years under consideration are, therefore, deleted allowing the relevant grounds of the assessee's appeals.

15. Thus the Ground Nos.8 & 9 raised by the Revenue are general in nature and does not require separate adjudication. **In the result the appeal filed by the Revenue is devoid of merits and liable to be dismissed and we confirm the order of Ld CIT[A] who held that the assessment order is barred by limitation.**

16. C.O.No.1/RJT/2021 filed by the assessee and Grounds of Appeal raised therein are that the CIT[A] failed to decide the initiation of proceedings u/s.153A and failed to decide the additions made by the AO on merits of the case. We do not find merits in the grounds raised by the assessee, since the Ld CIT[A] who quashed the assessment order itself as time barred which is confirmed by us, therefore there is no separate adjudication is required on the merits of the case on the additions/disallowance made by the AO, since the assessment orders itself is invalid in law. **Therefore the Cross Objection filed by the assessee becomes infructuous and the same is dismissed.**

17. The facts in ITA No.26/RJT/2021 relating to the asst. year 2007-08 and the addition/disallowance is also identical except change in figures, therefore respectfully following the ratio of the decision in ITA No.25/RJT/2021 rendered herein above will be squarely applicable to the present asst. year 2007-08 also. **Thus the Revenue appeal is devoid of merits and liable to be dismissed. Similarly the Cross Objection No.2/RJT/2021 filed by the assessee becomes infructuous and dismissed.**

18. In the result both the appeals filed by the Revenue and the Cross Objections filed by the assessee are hereby dismissed.

Order pronounced in the open court on 12-04-2023

Sd/-	**Sd/-**
(WASEEM AHMED)	**(T.R. SENTHIL KUMAR)**
ACCOUNTANT MEMBER True Copy	**JUDICIAL MEMBER**

Ahmedabad :
Dated 12/04/2023

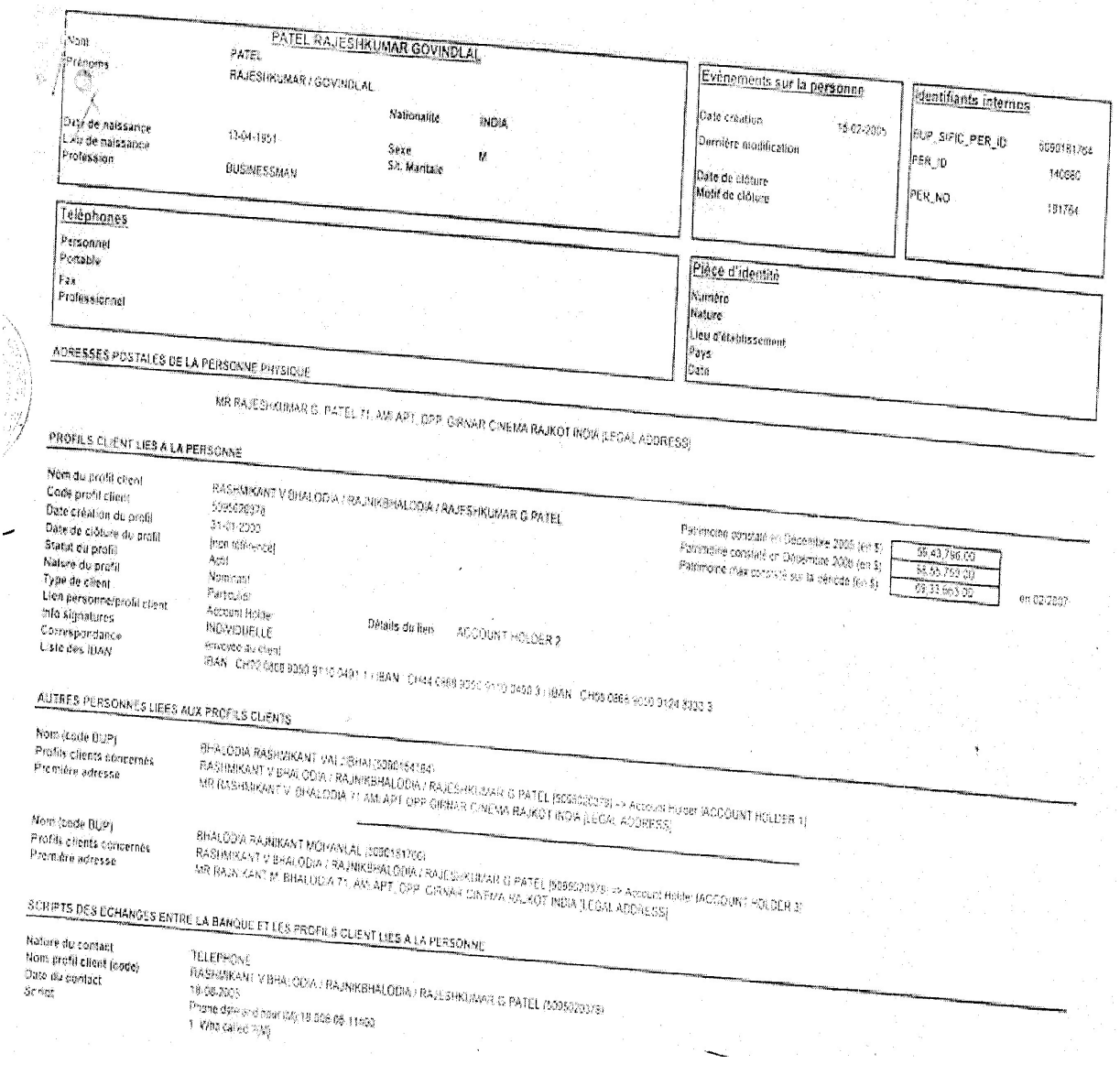
आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
राजकोट

Annexure-1



PATEL RAJESHKUMAR GOVINDLAL

Nom: PATEL
Prénoms: RAJESHKUMAR / GOVINDLAL
Date de naissance: 13-04-1951
Lieu de naissance:
Profession: BUSINESSMAN
Nationalité: INDIA
Sexe: M
Sit. Maritale:

Evénements sur la personne
Date création: 15-02-2005
Dernière modification:
Date de clôture:
Motif de clôture:

Identifiants internes
RUP_SIFIC_PER_ID: 5099181764
PER_ID: 140660
PER_NO: 181764

Téléphones
Personnel:
Portable:
Fax:
Professionnel:

Pièce d'identité
Numéro:
Nature:
Lieu d'établissement:
Pays:
Date:

ADRESSES POSTALES DE LA PERSONNE PHYSIQUE

MR RAJESHKUMAR G PATEL 71 AM APT OPP GIRNAR CINEMA RAJKOT INDIA (LEGAL ADDRESS)

PROFILS CLIENT LIES A LA PERSONNE

Nom du profil client: RASHMIKANT V BHALODIA / RAJNIKBHALODIA / RAJESHKUMAR G PATEL
Code profil client: 5099528978
Date création du profil: 31-01-2000
Date de clôture du profil: [non renseigné]
Statut du profil: Actif
Nature du profil: Nominatif
Type de client: Particulier
Lien personne/profil client: Account Holder
Info signatures: INDIVIDUELLE — Détails du lien: ACCOUNT HOLDER 2
Correspondance: Envoyée au client
Liste des IBAN: IBAN CH02 0488 9050 9110 2401 1 ; IBAN CH44 0488 9050 9110 2400 3 ; IBAN CH09 0868 9010 3104 8003 3

Patrimoine constaté en Décembre 2005 (en $): 99,43,796.00
Patrimoine constaté en Décembre 2006 (en $): 88,96,759.00
Patrimoine max constaté sur la période (en $): 09,33,963.00 en 02/2007

AUTRES PERSONNES LIEES AUX PROFILS CLIENTS

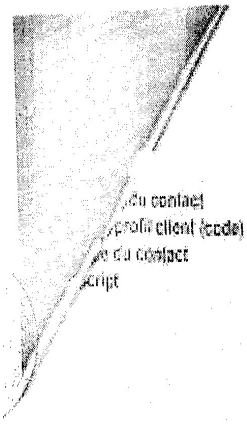
Nom (code BUP): BHALODIA RASHMIKANT VALJIBHAI (5099184784)
Profils clients concernés: RASHMIKANT V BHALODIA / RAJNIKBHALODIA / RAJESHKUMAR G PATEL (5099528978) -> Account Holder (ACCOUNT HOLDER 1)
Première adresse: MR RASHMIKANT V BHALODIA 71 AM APT OPP GIRNAR CINEMA RAJKOT INDIA (LEGAL ADDRESS)

Nom (code BUP): BHALODIA RAJNIKANT MOHANLAL (5099181764)
Profils clients concernés: RASHMIKANT V BHALODIA / RAJNIKBHALODIA / RAJESHKUMAR G PATEL (5099528978) -> Account Holder (ACCOUNT HOLDER 3)
Première adresse: MR RAJNIKANT M BHALODIA 71 AM APT OPP GIRNAR CINEMA RAJKOT INDIA (LEGAL ADDRESS)

SCRIPTS DES ECHANGES ENTRE LA BANQUE ET LES PROFILS CLIENT LIES A LA PERSONNE

Nature du contact: TELEPHONE
Nom profil client (code): RASHMIKANT V BHALODIA / RAJNIKBHALODIA / RAJESHKUMAR G PATEL (5099528978)
Date du contact: 18-06-2005
Script: Phone operator (18-06-05 11:00)
1 Who called ?(R)

Shri Rajeshkumar G Patel AY 2006-07 Order u/s. 153A



...du contact
...profil client (code)
...e du contact
...cript

2. How was the caller person identified ? (M)1. Attorney (on signature card)
Discussion was held with client on the following general subject(s)/product(s) Economy/Bonds
Comments on discussion held with client on subject(s)/product(s) Client gives following instruction. Not to renew Fid in USD of 980'000 maturing on 26.08.05. Invest the proceeds, USD 200'000 in Bond 11% Brazil 17.8.40 and
USD 480'000 in ABN AMRO Global Emerging Markets (USD)
Client's satisfaction Satisfied

TELEPHONE
RASHMIKANT V BHALODIA / RAJNIKBHALODIA / RAJESHKUMAR G PATEL (5065030078)
18-08-2005
Phone date and hour (M) 18.08.05, 11h50
1. Who called ?(M)
2. How was the caller person identified ? (M)1. Sole Account Holder (signatory)
Discussion was held with client on the following general subject(s)/product(s) Equities
Client order(s)/instruction(s) received related to investment
Description of the order(s)/instruction(s) if necessary client gives instruction to invest ABN AMRO Emerging Markets

Nature du contact
Nom profil client (code)
Date du contact
Script

TELEPHONE
RASHMIKANT V BHALODIA / RAJNIKBHALODIA / RAJESHKUMAR G PATEL (5065030078)
06-04-2005
Phone date and hour (M) 06.04.2005 10:10
1. Who called ?(M)
2. How was the caller person identified ? (M)1. General Attorney 2. Voice recognition
Discussion was held with client on the following general subject(s)/product(s) Bonds
Comments on discussion held with client on subject(s)/product(s) client wanted to buy 200'000 GM GBP bonds once he had an indicative price
Phone indemnity/discharge : Yes
Client order(s)/instruction(s) received related to investment
Description of the order(s)/instruction(s) if necessary he asked me to buy 200'000 GM 10.07.2005 8 875% GBP bond and sell 165'000 of the strips currently on the account, confirmed he was refering to nominals
Client's satisfaction Satisfied
Additional comments bought the same on the other account where he is POA