

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'E' : NEW DELHI)**

**BEFORE SHRI A.T. VARKEY, JUDICIAL MEMBER
and
SHRI O.P. KANT, ACCOUNTANT MEMBER**

**ITA No.1912/Del./2013
(ASSESSMENT YEAR : 2002-03)**

**ITA No.1905/Del./2013
(ASSESSMENT YEAR : 2003-04)**

**ITA No.1914/Del./2013
(ASSESSMENT YEAR : 2004-05)**

**ITA No.2573/Del./2013
(ASSESSMENT YEAR : 2005-06)**

**ITA No.2574/Del./2013
(ASSESSMENT YEAR : 2006-07)**

DCIT, Central Circle 13,
New Delhi.

vs. Late Dr. M.V. Rao,
through Wife & L/H Smt. Swaranlatha,
F – 58, First Floor,
Green Park Main,
New Delhi – 110 016.

**CO Nos.169, 170 & 171/Del/2013
(in ITA Nos.1912, 1905 & 1914/Del./2013)
(ASSESSMENT YEARS : 2002-03, 2003-04 & 2004-05)**

Late Dr. M.V. Rao,
through Wife & L/H Smt. Swaranlatha,
F – 58, First Floor,
Green Park Main,
New Delhi – 110 016.

vs. DCIT, Central Circle 13,
New Delhi.

(PAN : AAACS0318Q)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Dr. Rakesh Gupta, Advocate &
Shri Somil Aggarwal, Advocate
REVENUE BY : Shri Jayant Mishra, CIT DR

Date of Hearing : 03.09.2015
Date of Pronouncement : 30.11.2015

ORDER

PER BENCH :

These are five appeals filed by the revenue and three cross objections filed by the assessee relating to assessment years 2002-03 to 2006-07 which arise from the orders dated 28.01.2013 and 01.02.2013 passed by the CIT(A)-I, New Delhi.

2. Since the Facts and grounds of appeals in all the assessment years are common, we shall consider the facts and grounds of appeal for Assessment year 2002-03 and the decision arrived for the Assessment year 2002-03 would be equally applicable to other Assessment years from 2002-03 to 2006-07.

3. First, we take up appeal for Assessment year 2002-03 in ITA No.1912/Del./2013 (Department) and CO No.169/Del./2013 (Assessee).

4. The grounds raised in Revenue's Appeal in ITA No.1912/Del/2013 (A.Y. 2002-03) are as below :-

“1 The order of the ld. CIT(A) is not correct in law and on facts.

2 On the facts and in circumstances of the case the ld. CIT(A) has erred in restricting the addition of Rs.37,751/- and

allowed relief of Rs. 48,000/- out of addition of Rs.85,000/- on account of disallowance of consultancy expenses.

3 On the facts and circumstances of the case the ld. CIT(A) has erred in law in deleting the addition of Rs. 2,17,57,724/- made on account of commission income earned in defense deals without appreciating the fact that assessee did not furnish any explanation in r/o the documents seized from his premises which were duly confronted to him during assessment and remand proceedings.

4 The appellant craves leave to add, amend any/all the grounds of appeal before or during the course of hearing of the appeal.”

5. The grounds raised in Assessee’s cross objection No. 169/D/2013 (A.Y. 2002-03) are as under:-

“1 That the expenditure of Rs. 97,551/- claimed against the business income of Rs. 60,000/- was disallowed arbitrary without any specific finding and restricted to Rs. 60,000/- which may kindly be ordered to be allowed in full.

2 That ld. CIT(A) has erred in remand back the case to the AO for enquiry which is beyond his power beside discussing the matter on merit in details. The order of ld. CIT(A) may kindly be confirmed w.r.t. deletion of addition on merit and amend to that effect.

3 Any other relief which deem proper and fit and in favour of the assessee may kindly be allowed.”

6. The facts in brief are that the original return in this case was filed on 08.08.2002 declaring net taxable income Rs.5,06,830/-. Subsequently, a search action was carried out by Delhi Police at the residential premises of the assessee at F-58, Green Park, New Delhi on 22.02.2007. During the course of search cash of Rs.2,00,23,700/- was found at this premises. On receiving the

above information, the IT department conducted a search and warrant u/s 132 was executed on 22.02.2007. Search was also conducted on 27.02.2007 at locker no. 12, Bank of India, Safdarjung Enclave, New Delhi. After the search, notice under section 153A of the Act as issued and served on the assessee on 18.11.2008 requiring to file the return of income. In response thereto, the assessee has filed return declaring an income of Rs.5,21,005/- on 06.10.2009. Pursuant thereto, assessment was made at an income of Rs.2,23,91,727/- u/s 153A/143(3) of the Act vide an order dated 29.12.2009. Against the aforesaid order of the Assessing Officer, assessee appealed before the Ld. CIT(A), who vide his impugned order dated 28.01.2013 has partly allowed the appeal of the assessee. Aggrieved by the order of the Ld. CIT(A), now the revenue is in appeal and assessee has preferred a cross-objection before the Tribunal.

7. Ground Nos.1 and 4 of the appeal of the revenue and Ground No.3 of the cross objection filed by the assessee are general and therefore, need no adjudication.

8. Ground No.2 of the appeal filed by the revenue and Ground No.1 of the cross objection filed by the assessee relate to disallowance out of expenses claimed by the assessee from the income earned from consultancy.

9. During the year under consideration, the assessee has declared income of Rs.60,000/- from consultancy and claimed expenses of Rs.97,551/- resulting in net loss of Rs.37,551/-. The Assessing Officer held that in view of the nature of the business, it is highly improbable that the expenses claimed have been incurred wholly and exclusively for the purpose of business and therefore, claim of expenses was an attempt to reduce tax liability by booking personal expenses against the income from consultancy. In view of the above and the fact that no details were filed in support of the expenses, he made an estimate of the expenses at 20% of the gross receipts i.e. Rs.12,000/- and disallowed the remaining expenses of Rs.85,551/- (Rs.97,551-12,000). On further appeal, the CIT(A) held that it would serve the interest of justice if the expenses claimed are restricted to gross consultancy income declared under the head income from business or profession and as such, he restricted the expenditure claimed to Rs.60,000/- and therefore, sustained the disallowance at Rs.37,551/- and granted relief of Rs.48,000/- which has been challenged in the appeal.

10. Having considered the rival submissions, it is apparent that neither of the authorities has examined the issue in correct perspective. All what has happened is that both the authorities proceeded to allow the expenses in part on estimate basis without there being any basis of the said estimation. It is well settled that no estimate should be made on suppositions and it is

incumbent upon the authorities below before making a disallowance or sustaining a disallowance to provide a basis for an estimate. During the course of hearing, the counsel for the assessee has pointed out that for assessment year 2001-02, identical disallowance had been made by the Assessing Officer which was deleted on appeal by the CIT(A) in an order dated 23.2.2011 by holding that regardless of the details of evidences filed by the appellant, an assessment order which does not provide any basis cannot be approved. In the instant year too, the Assessing Officer has proceeded to restrict the claim of expenditure on presumptive basis which is not a valid ground but at the same time in absence of details having been furnished, it would be inappropriate to allow the claim of the assessee in toto. It is thus considered appropriate and in the interest of justice to restore the matter to the file of the Assessing Officer for fresh adjudication and as such, ground raised both by the assessee and revenue are allowed for statistical purpose.

11. Ground No. 3 of the appeal filed by the revenue and Ground No. 2 of the cross objection filed by the assessee pertains to an addition of Rs.2,17,57,725/- representing the commission income earned in defence deal. The fact as emerging on record are that the assessee is close associate of Shri Suresh Nanda and used to officiate from the office building of companies of Nanda Group at D-5, Defence Colony, New Delhi. He was also a director in M/s. C-1 India Pvt. Ltd. and M/s Transcom Services Pvt. Ltd., both

companies are controlled by Shri Suresh Nanda. It has been noted by the Assessing Officer that Shri Suresh Nanda was shareholder in C-1 India Pvt. Ltd. and holds stake through Mauritius based entity Y2K Systems International Ltd. It has been stated that the main investor in M/s. Transcom India Pvt. Ltd. is Inet Communications Pvt. Ltd., an entity controlled by Shri Bipin B. Shah, who is a close associate of Shri Suresh Nanda and was director in almost all the major companies of the group. The Assessing Officer has further stated that on 22.02.2007, Delhi Police informed the Directorate of Income Tax (Inv.) that during the course of search action on one Dr. M.V. Rao, they have found cash amounting to Rs. 2 crores lying at his Green Park House. In view thereof, DIT issued warrant of authorization under section 132 of the Act for search and seizure action at the premise of Dr. M.V. Rao. It has been noted that said search action continued till 23.2.2007 and Rs. 2 crores was seized from his premises. It has been noted that the background of the police action was that the Prime Minister's Office had held a Press Conference on 21.2.2007 informing that one person by name of Dr. M.V. Rao was impersonating as Scientific Advisor to the Prime Minister of India. The Spokesperson of PMO stated that "It has come to the attention of the Prime Minister's Office that one Dr. M.V. Rao has circulated visiting cards and greeting cards describing himself as Adviser to the Prime Minister of India. This is to state that there is no such Adviser to the Prime Minister. Relevant

Government agencies have been instructed to identify and take necessary action against this gentleman.” Subsequently, Delhi Police was requested to hand over photocopies of the documents seized by them as it was felt that these documents could be relevant for the income tax proceedings as well. It has been stated that on analysis of these documents, it was found that all these documents were related to defence procurement and some of them are even the confidential order sheet entries of the Ministry of Defence. It has been stated that some of these papers are related to M/s Tadiran Communication Israel and M/s Transcom Services Ltd. is representing Tadiran in India for the servicing of communication equipment used by Indian armed forces. It has been stated that among the paper received from the Delhi Police were page no. 58 and 59 of Annexure A-10 which details the calculation of commission on contracts and the corresponding payments. It has been stated that a foot note on page 59 states that page nos. 60 & 61 are also attachments to this statement and the contents of page 58 and 59, as have been reproduced in the order are as below:

“CONTRACTS

B	C	D	E
	Contract No.	Commission	Value
79182208*	78433/5W&10W/GS/WE-7/D	08%	63,34,576.64
118702718*	30(1)/2002/D(GS-IV)-I	10%	1,18,70,271.88
112566065*	30(1)/2002/D/(GS-IV)-2	08%	90,05,285.20
109153491*	BHARAT	05%	54,57,674.55
	Offset of installation/warranty		-9,28,758

419604482			3,17,39,050.27
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*Figs illegible hence worked out on the basis of figs. In co. E

PAYMENT LIST

	A	B	C
1			
2	PAYMENTS		
3		Date	\$Paid
4		30/5/01	10,973
5		1/6/01	2,60,280
6		19/10/01	1,9,310
7		18/2/02	1,55,292
8		7/4/02	1,90,489
9		9/4/02	12,56,915
10		27/5/02	1,66,823
11		5/6/02	3,25,516
12		8/7/02	38,952
13		5/8/02	1,30,785
14		13/9/02	23,47,054
15		13/10/02	1,43,238
16		19/11/02	2,46,112
17		25/12/02	81,359
18		29/3/03	4,15,180
19		29/3/03	2,18,178
20		29/3/03	3,00,000
21		3/4/02	5,04,625
22		19/5/03	4,42,335
23		8/7/03	11,39,007
24		21/8/03	7,90,056
25		16/11/03	15,68,630
26		28/1/04*	6,313,54*
27		30/3/04*	8,10,171*
28		4/5/04*	13,50,870*
29		19/5/04*	15,49,468*
30		20/7/048	11,33,416
31		7/9/04*	11,97,981
32		3/11/04*	7,80,327
33		20/12/04*	8,88,275
34		27/3/05	14,53,,496
35		27/3/05	12,47,784
36		4/5/05	12,88,720
37		7/27/05	8,33,056

38		7/27/05	11,00,000
39		9/18/05	10,68,934
40		10/27/05	15,00,000
41			
42	Total paid		2,76,02,960.24
43	Total commission		3,17,39,050.27
44	Balance		41,36,090.03

*Figures and dates illegible hence, taken from page no. 60 and 61/A-10
This recon does not show payments that we attributed to Tadiram from old BA statements that we had (See attached listing from our database”

It has been stated that the above mentioned document details the commission payments relating to contracts for Radio Sets of the Indian Defence establishment. It has been stated that Shri M.V. Rao has refused to furnish any explanation with regard to these documents and has taken the plea that Shri M.V. Rao is not in a position to comment upon the documents due to his critical health condition. The contents of page no. 1 of Annexure A-5, which was also seized by Delhi Police, has been reproduced, which is as below:

“a Contract 78433/5W&10W/GS/WE-7/D(Proc.) dated March, 2001

<i>Consignment number</i>	<i>Date of shipment</i>	<i>Contractual WB expiry date</i>	<i>Extended upon RBI demands</i>
1	27/3/07	27/6/05	+30 months (29/12/07)
2	29/5/03	29/5/03	+27 months (29/12/07)
3	4/8/03	4/12/05	+24 months (4/2/07)
4	11/10/03	9/2/06	+24 months (25/1/08)
5	30/11/03	1/4/06	+24 months (10/4/08)

b) Contract 30(1)2002/D(GS-IV) for 5 & 50 W ratio sets dated March, 2004.

According to the contract (clauses.....) the Performance Bond (PB) and Advance Payment Bonds are being reduced with every shipment. According to our bank that was done only in the case of advance.

<i>Consignment number</i>	<i>Date of shipment</i>	<i>Contractual WB expiry date</i>	<i>Extended upon RBI demands</i>
<i>1</i>	<i>27/3/03</i>	<i>27/5/05</i>	<i>+12 months</i>
<i>2</i>	<i>29/4/03</i>	<i>29/6/05</i>	<i>+12 months</i>
<i>3</i>	<i>26/06/03</i>	<i>26/8/05</i>	<i>+12 months</i>
<i>4</i>	<i>2/09/2003</i>	<i>2/11/05</i>	<i>+9 months</i>
<i>5</i>	<i>2/11/03</i>	<i>2/1/06</i>	<i>+6 months</i>
<i>6</i>	<i>5/1/04</i>	<i>5/3/06</i>	<i>+3 months</i>

Note: The bold letters are today's news"

13. Further, it has been stated that printout of a letter from M/s. Tadiran Communication Ltd. found and seized as page no. 62, Annexure A-1 also indicates that the above contracts are related to the Indian Defence establishment and the legible portion of the letter, as reproduced is as below:

*“xxxxxxxA(L-16) Lt. Col. Vibhor Sharma DD(R)
WARRANTY BOND CONTRACT: 30(1)/2002/D(GS-IV)
DATED June 26th, 2002*

1 We acknowledge with thanks your letter dated August 2nd, 2006 related to contract 78433/5W&20W/WE-7/D (PROC) DATED MARCH 26TH 2002.

2 We appreciate very much the efforts exerted in the resolving of this long standing issue. However, kindly note that this solves only one issue. You may kindly refer to our letter to JS (Acquisition & Administration) Land Systems 1107-01/IND/VHF dated July 11th which highlighted, in addition to the case of the contract mentioned above, the same problems with unjustified warranty bonds extension demands in contract 30(1)/2002/D(GS-IV) dated June 26th 2002 (enclosed herewith please find the relevant Annex to the said letter)

3 We request you to kindly instruct the bank the cancel the said demands.

Sincerely yours

SIGNATURE

Pniel Fleishman

Dy VP Marketing

Tadiran Communications Ltd.

Marketing

94 Bm Hamoshavot Azprim Park Brosh Build

Petah Tikva Israel

NEW: Tel : (972-3)928021, Fax: (972-3) 9280822”

14. In view of the above, the Assessing Officer has concluded that the assessee is actively involved in facilitating defence deals for foreign companies in India including Tadiran Communication Ltd. It has been further held that the four contracts mentioned in the page nos. 58 and 59 of Annexure A-10 are contracts with Indian Defence establishment given to Tadiran of Israel and commission ranging from 5 to 10 percent of the total value of the contract has been paid. It has been held that if the foot note on page 59 mentions that page 58 and 59 are reconciliation statement and page 60 and 61 confirms the receipt of the amount mentioned at pages 58 and 59 and as such he concluded that commission income of USD 4,45,855 received during the financial year 2001-02 is added to the taxable income of the assessee.

15. On appeal, the CIT(A) has noted in the order that the Assessing Officer has made additions aggregating to Rs. 123,27,60,955/- for sale of Radio Wireless sets to the Indian Defence establishment for assessment years 2002-03 to 2006-07. He has further noted that the basic objection taken by the assessee was that assessee was not aware of the documents relied upon in the order and such document did not belong to him and he has nothing to do with those documents. It was further contended that the documents did not contain specific names much less names of the assessee and therefore, dumb document and should not be relied upon to reach the conclusion that any

amount of commission was taxable in the hands of the assessee. In a remand report, the Assessing Officer intimated the CIT(A) that copies of the documents were provided to the assessee and onus of proving that the documents did not belong to him was on the assessee and not on the revenue. Further on the directions of the CIT(A) under section 250 sub section (4), the assessee was also examined by the Assessing Officer on 5.4.2012 under section 131 of the Act and during that examination, the assessee deposed that the Israeli company M/s Tadiran Communication Ltd. was no longer in existence and the whereabouts of Mr. Pniel Fleshman, the then Dy. VP Marketing of the said company was not known and M/s Transcom Services India (P) Ltd. was not having any business dealings with M/s Tadiran Communication Ltd. Further, a report was also called from the Assessing Officer on 10.12.2012 with regard to the issue of requisition of documents seized by the Delhi Police as also whether any other relevant material to the case was available. The Assessing Officer in response to the said communication replied that the documents had been officially requisitioned by the Department from the Delhi Police and also referred to a subsequent search initiated by the Department on 24.2.2012 on the basis of information about the appellant maintaining a foreign account with HSBC, Switzerland which had not been disclosed to the Department. It has been stated that the in the subsequent search, cash amounting to Rs. 7.5 crore was

found from different bank lockers held in the name of wife/niece of the assessee and seized. A copy of the report was forwarded to the assessee and assessee in response to the said report inter-alia stated that the presumption under section 132(4A) of the Act does not apply to the documents seized by the Department and authenticity of the documents is itself questionable. It was further contended by the assessee that the subsequent search and seizure was not linked with the earlier search action. It was further stated that the said income was assessed substantively in the hands of the assessee and same income was also assessed substantively in the hands of Sh. Suresh Nanda also implying that the revenue was unsure in whose hands the income was to be taxed. It was stated that M/s. Tadiran Communication Ltd. has since merged with M/s Elbit Systems and necessary enquiries can be made with the new entity. It was stated that the case filed by the Delhi Police against the assessee abated by his death and till the closure of the case Delhi Police could not establish the allegation of impersonation or cheating against Dr. P.N. Rao. Having regard to the above proceedings, the CIT(A) in his order concluded as under:

“7.7 I have considered the facts and surrounding circumstances of the case as emerging from the assessment order and various reports of the AO, submissions and replies filed on behalf of the appellant, and the order of Hon’ble ITAT cited above. It is to be noted that strict rules of evidence are not applicable to tax proceedings {CIT v East Coast Commercial Co. Ltd. (1967) 63 ITR 449} and an income tax officer (ITO) can act on material which may not be accepted as evidence in a

court of law {Dhakeswari Cottron Mills Ltd. v. CIT [1954] 26 ITR 775; Dhakeswari Cotton Mills Ltd. v. CIT [1955] 27 ITR 126 (SC)}. The Hon'ble Supreme court held that the provisions of Evidence Act are not applicable to the income tax proceedings {Chuharmal VS. CIT (1988) 172 ITR 250}, meaning that the rules of evidence contained in India Evidence Act, 1872 are not rigorously applicable. It is open to the ITO to collect material to facilitate assessment even by private enquiry. But if the desires to use the material so collected, the assessee must be informed of the material and must be given an adequate opportunity of explaining it {C. Vasantlal & Co. v. CIT [1962] 45 ITR 206 (SC)}. As regards the issue raised by the appellant that the documents do not belong to him and cannot be held against him, as no legal presumption can be made u/s 132(4A)/292C, it is noted that the documents were seized from the possession of the appellant by the Income -tax Department or the Delhi Police, which fact has not been disputed. It is now undisputed that the appellant was given copy of the relevant documents on 01.12.2009. It is a matter of record that the appellant was also examined with regard to these documents during the appellate proceedings as per the direction of CIT(A) u/s 250(4) of the Act. the report of the AO containing communications with the Delhi Police relating to official requisition of the documents was also put to the ARs of the appellant and their replies thereto taken on record. Therefore, the objections of the appellant with regard to principles of natural justice not being followed, or the revenue not being entitled to raise the presumption u/s 132(4A), have been met to this extent.

7.8 So far as the claim that the said documents did not contain any specific names and dumb documents could not be relied upon to reach the conclusion of any such huge amounts of commission income is concerned, it is undisputed that M/s Transcom Services India (P) Ltd., in which the appellant was a shareholder director/ employee, did have business dealings with M/s Tadiran communication Ltd., the Israeli company. M/d Transcom Services India (P) Ltd. was the representative of M/s Tadiran Communication Ltd. in India for maintenance of the radio wireless sets supplied to the India defence establishment. The seized documents itself mention different contracts and official communications, amounts of contract and/ or

commission, relating to the contract of sale and maintenance of radio wireless sets to the India defence establishment. A communication to the Indian Ministry of Defence from Mr. Pniel Fleshman, the then Dy. VP Marketing of M/s Tadiran Communication Ltd. is part of seized documents and refers to the ongoing contracts.

7.9 It is further noted that an amount of Rs. 2 crore was found in cash from the residence of the appellant in the first search conducted on 22.02.2007. It is also relevant that in a subsequent search conducted by the Department on 24.02.2012, further cash of about Rs. 7.69 crore was found from four lockers held by the appellant's wife or his niece, jointly or severally, out of which cash of Rs. 7.60 crore was seized. The cash was stated to have been kept in these lockers by the appellant, his wife or his niece, at various points of time during the FYs 2006-07, 2007-08, 2009-10 and 2011-12. The appellant was also found to maintain a foreign bank account with HSBC, Geneva, not disclosed to the Department, during the period 2005-07. One of the entities linked to the bank account is M/s Clair consultants Ltd., a company incorporated in the British Virgin Islands, a known tax haven. There is a remittance of US \$30,000 at the instance of this company from Deutsche Bank, Singapore to the NRO/ NRE account of Sh. M Venu, son of the appellant, with Deutsche Bank, New Delhi. Thus, maintenance of an undisclosed foreign account and seizure of large amount of cash (Rs. 9.6 crore, i.e. Rs. 2 Crore in 2007 and Rs. 7.6 crores in 2012), lead to an inescapable conclusion that the appellant was beneficiary of some business activities transaction which he had not disclosed in the tax returns filed with the Department and was also avoiding paying due taxes thereon. The truth of the matter – (i-) whether these amounts represent any commission paid by M/s Tadiran Communication Ltd.; (ii) whether the total amount was indeed US \$ 27.603 million or Rs. 123.27 crore as held by the revenue on the basis of documents seized by Delhi Police; (iii) whether the appellant was indeed the beneficiary of the commissions; (iv) whether the appellant was the sole beneficiary or there were other beneficiaries; (v) whether Sh. Suresh Nanda or his companies were also beneficiaries and to what extent; cannot be ascertained on the basis of available documents and are, therefore, a matter of further investigation and verification.

7.10 The claim that M/s Tadiran Communication Ltd. was no longer in existence may not be correct, as in every country winding up of incorporated legal entities follows procedure as laid down by law. The documents and properties owned by the entity are also retained or disposed of as per the legal procedure. Therefore, it should be possible for the revenue to ascertain the truth of the matter by tracing and examining, through the Govt. of Israel, the documents/ transaction of M/s Tadiran Communication Ltd. Fairly, the L'd ARs of the appellant have confirmed in the final submissions filed on 23.01.2013 that M/s Tadiran Communication Ltd. stands merged with M/s Elbit system Ltd. of Israel. Similarly, it should be possible for the Govt. of Israel to trace out Mr. Pniel Fleshman, the then Dy. VP Marketing of the said company, if the gentleman is still alive, and examine him to ascertain the correct facts. If it is difficult for the appellant to trace the Israeli entity/ person, and if the appellant has appealed to the revenue accordingly, it is certainly possible for the revenue to do so under the DTAA between governments of India and Israel. The revenue cannot shirk its responsibility of ascertaining the truth. The Hon'ble ITAT, vide para 11 of its common order dated 24.07.2012 in the case of Sh. Suresh Nanda (ITA Nos. 1428, 1429 & 1430/ Del/ 2012 for AYs 2001-02, 2002-03 & 2003-04), regarding the same additions also made in the hands of Sh. Suresh Nahda, held that "interest of justice will be served if the issues about income from commission/ business of dealings in arms are decided afresh by AO". Since the directions of the Hon'ble ITAT in the case of Sh. Suresh Nanda relate to the same additions of income as in the case of appellant, the said direction will also be applicable in the case of this appellant. There is no need for this appeal also to travel to Hon'ble ITAT for same directions. In my considered view, the truth of the matter cannot be ascertained without making a reference to the Govt. of Israel through the Competent Authority, FT & TR Division of the CBDT, on the issues raised in Para 7.9 of this order, which are the same as, and in compliance to, the order of Hon'ble ITAT in the case of Sh. Suresh Nanda and complements the aforesaid orders by specifying the issues to be further enquired into. These issues will reach finality after reference to the Govt. of Israel under the DTAA and receipt of report there from. I direct the AO accordingly.

7.11 The Hon'ble ITAT, vide Para 11 of its common order dated 24.07.2012 in ITA Nos. 1428,1429 & 1430/Del/2012 for AYs 2001-02, 2002-03 & 2003-04, allowed the ground of appeal in the case of Sh. Suresh Nanda for statistical purpose. The ground of appeal has been allowed by the Hon'ble ITAT in that case on the same addition, in consonance with that order in this case also the ground of appeal has to be allowed for statistical purposes. Accordingly, this ground of appeal is allowed for statistical purpose.”

16. Before us, the learned DR contended that the conclusion of the CIT(A) to apply the order of the ITAT in the case of Suresh Nanda to the case of the appellant was not a correct conclusion. He submitted that the issue had to be examined independently in the case of assessee. Once the CIT(A) had found that the documents seized from the possession of the assessee had been confronted and the assessee has also been examined vis-à-vis the documents during the appellate proceedings, there was no justification to delete addition by following decision of ITAT, as assessee was a shareholder, director, employee in M/s. Transcom Services India Pvt. Ltd. which had business dealing with M/s. Tadiran Communication Ltd. He thus prayed that the addition made be sustained and relied upon the decision of the Delhi Bench of the Tribunal in the case of JCIT vs. Swarup Vegetable Products Industries Ltd. reported in 96 ITD 468. On the other hand, the learned counsel for the assessee supported the conclusion of the CIT(A) by relying upon the order of the Tribunal wherein the Hon'ble Tribunal by a common order dated 24.7.2012 in the case of Suresh Nanda had held that the interest of justice

would be served if the issue regarding commission of disallowance are decided afresh by the Assessing Officer.

17. We have considered rival submissions and perused the material on record. The short issue which requires consideration is in respect of the addition made on account of commission received by the assessee from M/s. Tadiran Communication Ltd., Israel. It is not in dispute that M/s. Transcom India Pvt. Ltd. was representing M/s. Tadiran Communication Ltd. in India for servicing of communication equipments used by Indian Armed forces. It is further not disputed that the assessee was a director of M/s. Transcom Services Pvt. Ltd. It is also apparent from the facts on record that the additions are based on documents/evidences seized as a result of search at the premises of the assessee. These documents have been confronted to the assessee and statements of the assessee have been recorded during the course of first appellate proceedings. From the perusal of the order of the CIT(A), it is noticed that the CIT(A) has also accepted the above factual position but yet deleted the addition for further investigation and verification. He has relied upon the order of the Tribunal in the case of Suresh Nanda. After having careful consideration in the matter, we feel that the CIT(A) has not concluded the issue in correct perspective vis-à-vis the position of law. The fundamental issue which requires consideration was that in view of the documents, an evidence found as a result of search at the residential premises of the assessee

and in light of the explanation tendered whether the addition is warranted or not. We find that CIT(A) has neither adverted to the documents and nor adverted to the explanation of the assessee vis-à-vis the said documents. It appears that the CIT(A) side tracked the issue by suggesting further investigation on the matter without having arrived at a conclusion based on the evidence already found as a result of search. This finding could have only been arrived only when CIT(A) had examined the evidences and explanation and thereafter could have suggested any further investigation, if he deems it so appropriate. However, this cannot be done at the threshold and that would tantamount to the effectively overlooking the evidences gathered as a result of search and suggesting that the addition would be based only on investigation carried out later. In other words, the evidences so gathered alone do not lead to a conclusion that the commission income was earned by the appellant. This is also contrary to his own finding that maintenance of undisclosed foreign account and seizure of large amounts of cash lead to an inescapable conclusion that the appellant was beneficiary of some business activities/transactions which he had not disclosed in the tax returns filed with the Department and was also avoiding paying due taxes thereon.

18. The following finding of the CIT (A) needs to be noted :-

“7.8 So far as the claim that the said documents did not contain any specific names and dumb documents could not be relied upon to reach the conclusion of any such huge amounts of commission income is concerned, it is undisputed that M/s

Transcom Services India (P) Ltd., in which the appellant was a shareholder director/ employee, did have business dealings with M/s Tadiran communication Ltd., the Israeli company. M/d Transcom Services India (P) Ltd. was the representative of M/s Tadiran Communication Ltd. in India for maintenance of the radio wireless sets supplied to the India defence establishment. The seized documents itself mention different contracts and official communications, amounts of contract and/ or commission, relating to the contract of sale and maintenance of radio wireless sets to the India defence establishment.

....

7.9 Thus, maintenance of an undisclosed foreign account and seizure of large amount of cash (Rs.i.e. Rs. 2 Crore in 2007 and.....), lead to an inescapable conclusion that the appellant was beneficiary of some business activities transaction which he had not disclosed in the tax returns filed with the Department and was also avoiding paying due taxes thereon.....”

19. It should be kept in mind that the onus was on the assessee to come clean on the seized cash and had to explain the documents found in his premises. The CIT (A) has co-terminus power akin to that of AO while adjudicating an issue before him; and in case the assessee fails to discharge the onus on the cash recovered and the documents seized from his premises, the CIT (A) has to decide whether AO is justified in drawing the inferences facilitating the addition impugned before him. It was the assessee who should have explained the cash amount to Rs.2 crores seized on 23.02.2007 vis-à-vis the documents revealing commission payment to certain transaction with MOD, and as to whether the entire amount is his cash or only a part belongs to him or it belongs to somebody else. The apparent is not real is upon the

person who claims it. What is his share of commission or the amount seized belongs to someone else or could have been only explained by the assessee and to substantiate the same he ought to have produced documents to reveal the arrangement between him and the companies concerned. There was nothing preventing the assessee from explaining the Rs.2 crores seized from his premises and the documents seized on 22.02.2007, because it was in the exclusive knowledge of the assessee and the companies associated with him. So based on the seizure of cash and documents and the failure of the assessee to discharge the onus cast on him, the question before the Ld. CIT(A) was as to whether the addition made by the AO is legally tenable, which has not been done by the CIT (A).

20. As aforesaid and having arrived at the aforesaid conclusion as pointed out, the CIT(A) ought to have independently examined the explanation vis-à-vis evidences gathered and thereafter only to conclude as to the validity of the addition. In such circumstances, it is considered expedient that the instant addition be restored to the CIT(A) for fresh adjudication in light of the facts and evidences on record after granting due opportunity of being heard to the assessee/legal heirs. We make it clear here that neither of the parties have placed on record any copy of the investigation either carried out by the AO or by the CIT(A) for our consideration and therefore, in such circumstances, the

only course available before us is to remit the matter back to the file of the CIT(A) for fresh adjudication.

21. The CIT(A) in his conclusion has referred to the order of ITAT in the case of Suresh Nanda where ITAT in respect of identical addition has held as under :-

“11. Apropos common ground raised in A.Ys. 2002-03 & 2003-04 in respect of alleged income from arms deals made on account of searches in the case of M.V. Rao and Mohan Sambha Ji Jagtap, the relevant statements have neither been provided nor these persons have been allowed to be cross examined by assessee. In the presence of these infirmities in the proceedings, these additions cannot be made. The AO may be directed to do the needful in this behalf; consider the outcome of assessment proceedings in their cases provide the opportunity for the cross examination and decide the issue afresh in accordance with law. We are of the view that the addition based on documents found from third parties cannot be made without confronting the material and allowing the opportunity of cross examination to the assessee. This proposition has been repeatedly laid down by all the Courts. Besides, there is a presumption in law that the person from whom the document is found is the owner of the document. The Department should discharge their burden before seeking to tax the assessee on the basis of documents found from Dr. M.V. Rao or Shri Mohan Sambhaji Jagtap. Since the assessee has not been provided necessary material including their statements, opportunity of cross examination and hearing based thereon, interest of justice will be served if the issues about income from commission/ business of dealings in arms are decided afresh by AO in the light of these observations. These grounds raised by the assessee in A.Yrs. 2002-03 & 2003-04 are allowed for statistical purposes.”

22. However, on careful consideration of the matter, we feel that the decision in the case of Suresh Nanda is certainly relevant but its reliance is to

be determined only after considering the documents and explanation of the assessee vis-à-vis instant addition and not in a summary manner more particularly when the ITAT itself has restored the matter back to AO was in view of lack of evidence on record in that case and for violation of principles of natural justice, which is definitely not so in the instant case, like Rs.2 crores seizure and documents seized from his premises whether justifies the AO's addition of Rs.2,17,57,724/- could have been independently arrived at by the CIT (A) for doing so, we restore this issue back to CIT (A) for adjudicating this issue afresh, needless to say that assessee/legal heirs to be given opportunity of being heard.

23. In the result, ground raised by the revenue is allowed for statistical purposes and cross objection by the assessee are dismissed.

24. Now, we take appeals in ITA Nos.1905/Del./2013, 1914/ Del./2013, 2573/Del./ 2013 & 2574/Del./2013 filed by the revenue and Cross Objection Nos.170/ Del./2013 and 171/ Del./2013 filed by the assessee for assessment years 2003-04 to 2006-07. The solitary issue involved relates to addition on account of commission income and since we have already held in respect of the above issue that matter requires fresh adjudication by the CIT(A) and therefore, following the above conclusion in all these appeals too, it is held that the issue is restored to the file of the CIT(A) for fresh consideration. As a

result, appeals of the revenue are allowed for statistical purposes and cross objection of the assessee are dismissed.

25. To sum up : in the result, the appeals filed by the revenue are allowed for statistical purposes and the cross objections filed by the assessee are dismissed.

Order pronounced in open court on this 30th day of November, 2015.

**Sd/-
(O.P. KANT)
ACCOUNTANT MEMBER**

**sd/-
(A.T. VARKEY)
JUDICIAL MEMBER**

**Dated the 30th day of November, 2015
TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A)-I, New Delhi.
- 5.CIT(ITAT), New Delhi.

**AR, ITAT
NEW DELHI.**