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

BEFORE SHRI. SUNIL KUMAR YADAV, JUDICIAL MEMBER
AND SHRI. JASON P. BOAZ, ACCOUNTANT MEMBER

ITA No.355/Bang/2017
Assessment year 2009-10

Shri Ratan Babulal Lath, P-22, Pearl Block, Golden Enclave, Old Airport Road, Bengaluru – 560 017. PAN : AABPL 0986 F	Vs.	The Deputy Commissioner of Income-Tax, Central Circle – 1(1), Bengaluru.
APPELLANT		RESPONDENT

Assessee by	:	Shri. V. Srinivasan, Advocate
Revenue by	:	Shri. Muzaffar Hussain, CIT

Date of hearing	:	06.04.2018
Date of Pronouncement	:	15.06.2018

O R D E R

Per Sunil Kumar Yadav, Judicial Member

This appeal is preferred by the assessee against the order of the CIT(A), inter alia, on the following grounds:

1. The orders of the authorities below in so far as they are against the appellant, are opposed to law, equity, weight of evidence, probabilities, facts old circumstances of the case.

2.1 The appellant denies himself liable to be assessed by invoking the jurisdiction u/s.147 of the Act, as the mandatory requirement to invoke jurisdiction u/s.147 of the Act, do not exist and have not been complied with and consequently, the notice issued u/s.148 of the Act, to assume jurisdiction is bad in law and hence, the resultant assessment order passed deserves to be cancelled.

2.2 Without prejudice to the above, the learned CIT[A] has erred in law in upholding the "draft order" passed for disposal of the objections of the appellant on re-opening of the assessment instead of unconditional "final order" required to

be passed and thus, failed to notice that the draft order passed by the learned A.O. is not in conformity of the directions of the Hon'ble Supreme Court in the case of GKN DRIVESHAFT reported in 259 ITR 19 and consequently, there is no valid disposal of the objections of the appellant and hence, the impugned assessment order passed requires to be cancelled.

2.3 Without prejudice to the above, the learned CIT[A] failed to appreciate that, under the scheme of the Income-tax Act, the A.O. who recorded the reasons and issued the notice u/s. 148 of the Act, alone would be competent to uphold the validity of action, as it is essentially a case where the subjective satisfaction of the income escaping assessment derived by the A.O. who recorded the reasons and issued the notice is to be objectively demonstrated and defended with reference to the material that was available with him at the time the reasons were recorded, and since the A.O., who disposed off th objections was not the same person who recorded such reasons, the findings about the objectification of the subjective belief stands vitiated, erroneous and thus, there is no valid disposal of the objections and hence, the impugned assessment order passed requires to be cancelled.

1.4 Without prejudice to the above, the learned CIT[A] has seriously erred in upholding the reassessment without noticing the objections of the appellant against the assumption of jurisdiction u/s.147 of the Act, on the basis of the reasons as recorded by the learned ACIT, Central Circle-1[1], Bangalore, under the facts and in the circumstances of the appellant's case.

2.5 Without prejudice to the above, the learned CIT[A] ought to have appreciated that the materials available with the learned A.O. on the date of recording the reasons could not reasonably induce the belief that income has escaped assessment, especially when the A.O. who recorded the reasons has lot even cared to verify the correctness of the information shared by another authority prior to recording the reason and also the Joint Commissioner has also not applied his mind to proximate and pertinent matters relevant for the formation of the belief by the A.O. and relied upon farfetched and remote considerations and both of them have thus abdicated the duties cast on them as a matter of safeguard provided by the statute against abuse of the process of the extraordinary power of reopening to make an assessment under the facts and in the circumstances of the appellant's case.

3.1 Without prejudice to the above, the learned CIT[A] is not justified in sustaining the addition of Rs.60,00,00,000/- in the hands of the appellant as unexplained income in respect of the alleged investment made by the appellant in M/s. Jagati Publications Ltd., under the facts and in the circumstances of the appellant's case.

3.2 The learned CIT[A] failed to appreciate that the appellant has not made any investment at all in M/s. Jagati Publications Ltd., as informed by the investigation of CBI and therefore, there is no question of the appellant having any undisclosed income and funds to make such imaginary investment factually to warrant any addition in the hands of the appellant.

3.3 The learned CIT[A] ought to have appreciated that the appellant had pleaded and proved that the investment in M/s. Jagati Publications Ltd., was made by M/s. AVANT GARDE FASHION WEAR PRIVATE LIMITED [PAN : AAGCA 0657A],

which is an Income-tax assessee and the same was reflected in the Balance Sheet, which is also filed, and therefore, holding that the appellant -Las made the investment and not explained the source thereof is arbitrary, based only on suspicion, surmise, assumptions, presumptions, without any an iota of evidence and infact, contrary to evidence and hence perverse and therefore, requires to be deleted.

3.4 The learned CIT[A] ought to have noticed that there is no material to show that the appellant has made investment in M/s. JAGATI PUBLICATIONS LIMITED, except the statement of the appellant before the CBI or Police authorities which is inadmissible and hence, the addition made is purely on hearsay without examining M/s. Jagati Publications Ltd., prima facie, to consider whether any addition has to be made on the belief and footing that the appellant has made the investment.

4. Without prejudice to the right to seek waiver with the Hon'ble CCIT/DG, the appellant denies himself liable to be charged to interest u/s.234-A, 234-B and 234-C of the Act, which under the facts and in the circumstances of the appellant's case and the levy deserves to be cancelled.

5. For the above and other grounds that may be urged at the time of hearing of the appeal, your appellant humbly prays that the appeal may be allowed and Justice rendered and the appellant may be awarded costs in prosecuting the appeal and also order for the refund of the institution fees as part of the costs.

2. During the course of hearing, the learned Counsel for the assesse has moved an application for the admission of the additional grounds. The additional grounds raised in the application are as under:

"The appellant begs to submit the under mentioned additional grounds of appeal which were not urged specifically in the original grounds of appeal filed at the time of institution of appeal. These grounds do not involve any investigation of any facts otherwise on the record of the department and are also pure questions of law, which goes into the very root of the matter of jurisdiction and validity of assessment and therefore, it is prayed that the additional grounds may kindly be admitted and disposed off on merits for the advancement of substantial cause of justice. Reliance is placed on the decision of the Hon"ble Apex Court in the case of National Thermal Power Co. Ltd. vs. CIT, reported in 229 ITR 383 and on the decision of the Karnataka High Court in the case of Gundathur Thimmappa & Sons vs. CIT, reported in 70 ITR 70.

1 The order of assessment is bad in law as the mandatary conditions for assumption of jurisdiction under section 148 of the Income Tax Act, 1961 (the Act) have not been complied with on the ground that:

a. The action of initiating the proceedings under section 147 of the Act by the predecessor assessing officer based on the information received from the Central Bureau of Investigation (CBI)/ Police authorities does not constitute reason to believe for reopening the assessment and does not stand the test of law.
b. The assessing officer has not independently applied his mind to the facts of the case and has merely relied upon the information received from the CBI/ Police authorities

amounting to borrowed satisfaction which is untenable and unsustainable in the eyes of law.

c. The sanction as required under section 151 of the Act has not been obtained from the Commissioner of Income Tax before issuance of notice under section 148 of the Act or having been obtained, the copy of the same has not been provided to the appellant on the facts of the case.

d. The action of the assessing officer in bringing to tax an amount of Rs. 60 crores merely on the basis of the oral statement of the appellant before the CBI/ Police authorities without any substantial evidence is impermissible and unsustainable in the eyes of law and thus the order of assessment needs to be quashed under the facts and circumstances of the case.

2. The order of assessment is bad in law as the statements made by Mr. Navneet Singhania were used against the appellant without providing an opportunity to the appellant to rebut the claims/ statements made against him.

3. The authorities below are not justified in law in not affording an opportunity to the appellant to cross-examine Mr. Navneet Singhania which is against the principles of natural justice.

4. The authorities below failed to appreciate that the investment in M/s. Jagati Publications Pvt Ltd was not made by the appellant but was in fact made by M/s. Sugam Commodeal Pvt Ltd and M/s. Chandelier Tracon Pvt Ltd under the facts of the case.

5. Without prejudice, the authorities below failed to appreciate the fact that the appellant was neither a shareholder nor a director o M/s. Sugam Commodeal Pvt Ltd and, M/s. Chandelier Tracon Pvt Ltd during the impugned assessment year and thus even in an extreme case, the appellant would not have acted to divert monies to those companies under the facts of the case.

6. Without further prejudice, the addition of Rs.60 crores is bad in law as neither the CBI / Police authorities nor the Income Tax authorities established that the appellant was in possession of money of Rs.60 crores under the facts and circumstances of the case.

7. The learned assessing officer erred in making an addition of Rs.60 crores in the hands of the appellant after having stated in the assessment order that the appellant was not capable of paying even Rs.20 crores as his personal money and the CIT(A) erred in confirming the addition made of Rs.60 crores under the facts and circumstances of the case."

3. Though the grounds raised in the form of additional grounds are already there in the original grounds of appeal, but in order to avoid any controversy, we prefer to adjudicate the additional grounds along with the original grounds.

4. Though various grounds are raised in the form of original grounds and additional grounds, but they all relate to only on 2 issues, one is the validity of the reopening of the assessment under section 147 of the Act and the second, addition of Rs.60 crores sustained by the CIT(A) in the hands of the assessee. The other ground raised in this appeal is with regard to interest chargeable under section 234B and

234C and since this ground is consequential in nature it does not require independent adjudication.

5. Now with regard to validity of reopening of assessment, we have examined the orders of the lower authorities and we find that the appellant is an individual and has filed his return of income for assessment year 2009-10 at total income of Rs.13,44,160/-. Appellant was interrogated by CBI in connection with providing accommodation entries to the companies of Shri. Y S Jagan Mohan Reddy and the CBI has noticed that the appellant has provided a sum of Rs.60 crores to Shri. Navneet Kumar Singhania which was deposited in the accounts of 2 companies viz., M/s. Sugam Commodeal Pvt. Ltd., and M/s. Chandelier Tracon Pvt. Ltd., and ultimately invested as share capital into M/s. Jagati Publications Pvt. Ltd. The CBI has recorded the statement of the appellant as well as of Mr. Navneet Kumar Singhania, a local cash carrier, in which it was deposed by the appellant that he has supplied cash of Rs.60 crores through local cash carrier Shri. Navneet Kumar Singhania. The information collected by the CBI was forwarded to the AO. On the basis of the said information, the AO has reopened the assessment under section 147 of the Act, in the hands of the appellant by issuing notice under section 148 of the Act dated 26.03.2015. In response to notice, assessee has filed a letter date 09.04.2015 stating that the original return filed on 22.08.2009 be treated as return in response to notice under section 148 of the Act. The appellant also requested for copies of reasons recorded which was supplied to the assesse and on receipt of reasons, appellant filed objection before AO through letter dated 08.05.2015. The objection of the appellant was disposed off by the AO by draft order dated 01.12.2015 and thereafter the AO passed an assessment order dated 28.01.2016. In the final assessment order the AO has added a sum of Rs.60 crore as income of the appellant.

6. The appellant challenged the order before the CIT(A) mainly on two grounds, one is with regard to validity of reopening of assessment and the other on merit. On

the point of validity of reopening of the assessment it was contended before the CIT(A) that assessment was reopened on the basis of the statement recorded by the CBI and under the CRPC and the evidence Act the statement recorded by the police authorities are not admissible as evidence. Therefore, the statement recorded by the CBI cannot be the basis for the reopening of the assessment. The CIT(A) examined the explanation of the assessee but was not convinced with it and he accordingly confirmed the reopening of the assessment. The relevant observation of the CIT(A) is extracted hereunder for the sake of reference:

> 7.8 I have considered the submissions made. For purpose of re-opening the assessment the requirement is that the A.O. must have a reason to believe that income has escaped assessment. The reasons recorded by the A.O. shows that based on information received from CBI in connection with providing accommodation entries to Y. S. Jagan Mohan Reddy Group of Companies, the appellant had provided Rs.60 Crores to one Mr. Navneeth Kumar Singhania, which was routed as share capital in Jagati Publications through two companies. In the statement of the appellant before the CBI, the appellant had deposed that he had supplied Rs.60 Crores in cash, which was also corroborated by Mr. Navneeth Kumar Singhania, in a statement recorded before the DCIT, Circle-2[3], Hyderabad. After considering the said information, the AO has examined the return of income filed by the appellant and noticed that the appellant's income consists of only salary and interest income. It is also noticed that from the details available on record that the appellant is not capable of paying Rs.20 Crores as stated before the CBI, as his personal money. The AO has recorded that the appellant has not satisfactorily explained the source for the remaining cash payment of Rs.40 Crores and on account of this there was reason to believe that the income of the appellant had escaped assessment.

"7.9 I find that the recording of the reasons by the A.O. clearly brings out the belief that income of the appellant has escaped assessment by virtue of the information received from CBI, which in turn was based upon the statement of the appellant before CBI itself. Thus, there are sufficient materials before the AO to arrive at a prima facie belief that the income of the appellant has escaped assessment. It is also seen in the appellant's case that there is no scrutiny assessment under section 143[3] of the Act in the past. The Hon'ble Supreme Court in the case of Rajesh Jhaveri Stock Brokers P. Ltd., reported in 291 ITR 500 [SC] has held as follows:

> "The expression "reason to believe" in section 147 would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped

> assessment, he can be said to have reason to believe that income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. What is required is reason to believe" but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether Mere was relevant material on which a reasonable person could have formed the requisite belief. Whether material would conclusively prove escapement of income is not the concern at that stage. This is so because the formation of the belief is within the realm of the subjective satisfaction of the Assessing Officer."

7.10 Thus, the action of the A.O. in re-opening the assessment cannot be faulted as A.O. based on material in his possession has arrived at a prima-facie conclusion am income of the appellant has escaped assessment. There need not be any final determination at this stage and it is enough if the A.O. points out the material based err 'which he has arrived at the belief that income has escaped assessment. It is also that the A.O. has followed the provisions of the Act in obtaining sanction for misuse of notice and he has communicated the reasons to the appellant and disposed of the objections raised by the appellant by passing a speaking order. Hence, the AO has complied with the judgement of the Hon'ble Supreme Court in the case of GE% Driveshafts reported in 259 ITR 19 [SC] also. The contentions and grounds raised by the appellant on this issue are therefore without merit and the same have to be rejected. These grounds are DISMISSED."

7. Now the assessee is before us and reiterated his contentions. We have carefully examined the order of the lower authority in this regard and we find that AO got the information from the CBI, the other investigating agency that certain investment was made by the appellant through Shri Navneet Kumar Singhania in Jagati Publications and the same was not disclosed by the assessee in his return of income. While forming a belief that income has escaped assessment, the AO is required to have some cogent information on the basis of which a belief can be formed. At the time of forming a belief, AO is not required to make any enquiry or investigations. On the basis of information received, he has to apply his mind with the material available before him and then form a belief that income has escaped assessment. In the case Rajesh Jhaveri Stock Brokers Pvt. Ltd., reported in 291 ITR 500 (SC), the Hon'ble Apex Court has observed that the "expression "reason to believe" in section 147 would mean cause or justification. If the Assessing Officer

has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. What is required is “reason to believe" but not the established fact of escapement of income. At that stage, final outcome of proceedings is not relevant. The only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether material would conclusively prove escapement of income is not the concern at that stage. This is so because the formation of the belief is within the realm of the subjective satisfaction of the Assessing Officer.”

8. In the light of these observations of the Apex Court, we are of the view, that for reopening assessment, AO is required to form a prima facie belief that income chargeable to tax has escaped assessment. In the instant case, the AO has got the information from the CBI, the other investigating agency, that certain investment was made by the assesse through Shri Navneet Kumar Singhania, local cash carrier in the Jagati Publications and this investment was not declared by the assessee in the returned income. Therefore, the information received by the AO is sufficient to form a belief that income chargeable to tax has escaped assessment. Thus, we confirm the order of the CIT(A) upholding the validity of the reopening of the assessment.

9. On merit, the facts in brief borne out from the record are that on the basis of the information received, AO has made an addition of Rs.60 crores in the hands of the assesse which was challenged before the CIT(A) with the submission that assesse has not given the aforesaid amount to Shri Navneet Kumar Singhania for its investment in Jagati Publications. It was further contended before CIT(A) that the copies of the statements recorded by the CBI was never confronted to the assessee nor the AO collected any other evidence in support of his claim that assessee has given the aforesaid amount to Shri Navneet Kumar Singhania for its onward

investment in Jagati Publications. It was also contended before the CIT(A) that assessee was neither a shareholder nor a director in the companies viz., M/s. Sugam Commodeal Pvt. Ltd., and M/s. Chandelier Tracon Pvt. Ltd., who ultimately invested the aforesaid alleged amount in share capital in Jagati Publications Ltd. The contention of the assessee were examined by the CIT(A) but he was not convinced with it and he confirmed the additions.

10. Now the assessee is before us. Besides reiterating its contentions, the learned Counsel for the assessee has contended that for making the addition, AO has simply relied upon the statement recorded by the CBI whereas the statement recorded by the police authorities is not a good piece of evidence and is not admissible under the law. Besides, AO has not made any effort to collect any information either from the aforesaid 2 companies i.e., M/s. Sugam Commodeal Pvt. Ltd., and M/s. Chandelier Tracon Pvt. Ltd., with regard to the investment of Rs.60 crores in these companies and further investment by these companies of the said amount in Jagati Publications Ltd. The AO has rather not made any enquiry from M/s. Avanth Garde Fashion Wear Pvt. Ltd., who, according to the AO, has acquired the shares of Jagati Publications Ltd., from M/s. Sugam Commodeal Pvt. Ltd., and M/s. Chandelier Tracon Pvt. Ltd., subsequently. If the information received from CBI is so reliable, the AO could have made investigation/enquiry from the companies involved in these transactions. It was further contended that acquisition of share of Jagati Publications Ltd., by M/s. Avant Garde Fashion Wear Pvt. Ltd., has not been doubted by the AO as no addition was made in the hands of M/s. Avant Garde Fashion Wear Pvt. Ltd., as admitted by the AO in response to query of the Tribunal raised during the course of hearing. Therefore, the impugned addition cannot be made in the hands of the assessee without any basis.

11. The learned DR placed reliance upon the order of the CIT(A). Besides it was also contended that the AO has got the information from the CBI and that information

was confronted to the assessee and since he could not furnish the proper explanation, the AO has made the additions.

12. Having carefully examined the orders of authorities below in the light of rival submissions, we find that the sole basis for making an addition in the hands of the assessee is a statement of the assessee as well as Shri Navneet Kumar Singhania recorded by the CBI. It is a settled position of law that the statement recorded by the CBI or police authorities/investigating authorities cannot be made a sole basis for making additions. Moreover, the statement recorded by the police authorities are not admissible under evidence as per provisions of Section 25 of Indian Evidence Act, 1982 and also in the light of judgment of the Apex Court in the case of Zwinglee Ariel Vs. State of MP (supra). The information or the evidence collected from the CBI can be used by the AO for forming a belief that income chargeable to tax has escaped assessment in the hands of the assessee. But for making addition, some more efforts are to be required on the part of the AO. The stand of Revenue is that the assessee has given 60 crores to Shri Navneet Kumar Singhania for the investment in 2 companies, i.e., M/s. Sugam Commodeal Pvt. Ltd., and M/s. Chandelier Tracon Pvt. Ltd., for acquiring the shares in Jagati Publications Ltd. On the basis of this information, the AO could have re-opened the assessment or make an enquiry in the affairs of both the companies to find out as to whether such amount of Rs.60 crores was ever invested or brought in the books of accounts of this company. If it was brought in those companies, source of the funds could have been examined by the AO but he did not do so. Before us, the copy of balance sheet of the companies of M/s. Sugam Commodeal Pvt. Ltd., and M/s. Chandelier Tracon Pvt. Ltd., were filed and as per the schedule B, it is evident that M/s. Chandelier Tracon Pvt. Ltd., had acquired shares of Rs.31,12,00,000/- of Jagati Publications Ltd., and M/s. Sugam Commodeal Pvt. Ltd., had also acquired 28,58,00,000/- shares at the face value of Rs.10/-. Therefore, the total investment in shares by these companies in Jagati Publications Ltd., comes to Rs.52 crores but not 60 crores as alleged by the Revenue.

It is the responsibility of the AO to dig out the truth about the source of investment in Jagati Publications Ltd., by M/s. Chandelier Tracon Pvt. Ltd., and M/s. Sugam Commodeal Pvt. Ltd. It is also an undisputed fact that during assessment year 2009-10 relevant to financial year 2008-09 the assessee was neither a shareholder nor connected in any manner with these companies and to controvert the stand of the assessee nothing has been brought by the Revenue on record. They were simply harping upon the statement recorded by the CBI without bringing any evidence from any corner. The Revenue has also taken a stand that shares of Jagati Publications Ltd., were finally acquired by the M/s. Avant Garde Fashion Wear Pvt. Ltd., from these two companies. But from perusal of the balance sheets of M/s. Avant Garde Fashion Wear Pvt. Ltd., it is noticed that this company has acquired 16,58,322 shares of Jagati Publications Ltd., @ 360/- per each share for a sum of Rs.59,84,92,020/- meaning thereby the entire shareholding of Jagati Publications Ltd., held by the M/s. Sugam Commodeal Pvt. Ltd., and M/s. Chandelier Tracon Pvt. Ltd., were not acquired by M/s. Avant Garde Fashion Wear Pvt. Ltd., in which the assessee happened to be a Director. Therefore, AO has not brought any material on record to demonstrate that assessee has made the investment in Jagati Publications Ltd., by acquiring its shares during the impugned assessment year. The addition made by the Revenue authorities is only on the basis of the statement recorded by the CBI. It is also evident from the assessment order that the statement was not even confronted to the assessee during the course of assessment proceedings and assessee was also no even allowed to cross-examine Shri Navneet Kumar Singhania. From the careful examination of the assessment order we find that AO has made half-heartedly investigation on receipt of the information from the CBI. Once he got such a sensitive information from the CBI the onus of the AO is more and he should have examined the affair of all the three companies and if he finds anywhere that the substantial cash was introduced, that company should have been put on notice to explain the source of fund. If they failed to explain, the addition could have been made in their hands. But the AO did not make any efforts to investigate all these facts. By simply placing

reliance upon the statement recorded by the CBI, he made an addition in the hands of the assessee knowing fully well that the statement recorded by the CBI cannot be held to be a good piece of evidence in the court of law unless and until some corroborative independent evidence is collected by making necessary enquiry.

13. We have also carefully perused the various judicial pronouncements referred to by the assessee wherein it has been held that on the basis of the confessional statement during the course of search/survey, the addition cannot be sustained unless and until there is some corroborative evidence, if the assessee has retracted from the statements. In the case of Manoj Prabhakar Vs. Asst. CIT reported in 84 TTJ 625, the Tribunal has held that "whether addition, made only on basis of figures noted on slip of paper found from possession of assessee and statement of 'P', could not be sustained because no direct evidence was available on record to corroborate fact regarding passing of consideration beyond and above consideration mentioned in sale deeds". Similarly in the case of Ajay Sharma Vs. ACIT 101 TTJ 1065 (Delhi), the Tribunal has also held that where no cogent evidence was collected during the search to show that the assessee was taking money for fixing cricket matches, the reports of the CBI and Madhavan Commission on match fixing could not be relied upon for making additions as they were not evidence found during the search.

14. In the case of ITO Vs. Balram Jakhar, 8 SOT 1 (Amritsar), the reopening of the assessment on the basis of the CBI report was examined and the Tribunal has held that merely on the basis of the CBI report, the reopening is not possible, as in the criminal proceedings, the assessee was acquitted by the court. The facts of that case was that assessee filed his return upon which assessment was made and subsequently as a result of the search conducted by the CBI at the premises of one 'J' in which certain diaries were found which contained entries of payment made by 'J' to various persons, which were recorded in abbreviated forms. It revelas that assessee had received Rs.17 lakhs from 'J' and CBI launched criminal prosecution against

assessee. Based on said materials, the AO initiated reassessment proceedings against the assessee on the ground that said amount had not been shown in the returns. The assessee explained on the basis of which proceedings were initiated. The AO however rejected the said explanations and held that income tax proceedings are independent proceedings and had nothing to do with the decision of the special bench. The assessee in reply requested the AO to produce 'J' before him for cross-examination. The AO, however rejected the said request and based on the material available on record he made an addition of Rs.17 lakh in the hands of the assessee by treating the same as undisclosed income. On appeal, the CIT(A) set aside the findings of the AO and deleted the additions of Rs.17 lakhs. The matter went to the Tribunal. The Tribunal re-examined the entire issue and relying upon the various judicial pronouncements in which it has been held that evidence is to be judged by considering the surrounding circumstances and applying the test of human probabilities. The Tribunal finally concluded that Revenue has no sufficient material available on record to support the finding of the AO. The relevant observation of the Tribunal is extracted hereunder for the sake of reference:

> "Though the assessee was charge-sheeted on allegation of receipt of Rs. 17 lakhs but prosecution resulted into futility as the assessee was discharged of the offences by the Special Judge and the said decision was later on affirmed by the High Court and the Supreme Court on the ground that there was no evidence against the assessee except diary, note book and loose sheet with regard to payment and it was held that evidence of such a nature could not be converted into legal evidence against the assessee. Therefore, the very foundation of initiation of reassessment proceedings disappeared in the instant case and, accordingly, the addition would also not survive. There was no recovery made at the instance or persistence of the assessee. The revenue relied only upon diary and charge-sheet framed by the CBI. The whole case of the revenue would collapse the moment assessee was discharged of the sole allegation of receipt of Rs. 17 lakhs.
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> The abbreviated form allegedly recorded in diaries was not explained by any material. It could resemble to name of other person also who was having similarity in name. Unless it was proved through corroborative evidence that entries were having any nexus with the assessee, addition could not be made in the hands of the assessee. Material on record was not enough to conclude findings against the assessee. It, therefore, appeared that findings of the Assessing Officer were, based on suspicion which could not take place of legal proof.

The Assessing Officer admitted before the Commissioner (Appeals) that the Department had no other evidence except those diaries. Therefore, it was a case of no evidence against the assessee as whatever evidence was available was not considered by the High Court and the Supreme Court to have any evidentiary value. No corresponding entries in the books of account or in the form of accretion in assets were found or proved by the Assessing Officer.

The Assessing Officer never produced 'J' before the assessee for cross examination. The assessee in his reply to the show cause notice before the Assessing Officer specifically requested to produce the persons who had made the statement against the assessee for cross-examination but no person was produced for cross-examination. Therefore, whatever material was collected at the back of the assessee could not be read in evidence against the assessee. It is settled law that if any material is collected by the income-tax authorities at the back of the assessee then opportunity to controvert the same should have been given to the assessee. Therefore, in the instant case, whatever material was collected by the Assessing Officer could not be read in evidence against the assessee. The fact was conceded by the Assessing Officer before the Commissioner (Appeals) that except the copies of the documents recovered by the CBI there was no other material found against the assessee.

The Supreme Court in its various decisions has held that the evidence is to be judged by considering the surrounding circumstances and by applying the test of human probabilities.

However, in the facts of the instant case, only diaries were recovered which were having only abbreviated forms without further explaining or mentioning anything and, therefore, it was not considered as evidence by the High Court and the Supreme Court. If the test of human probabilities was applied in favour of the assessee, then it could be inferred that 'X might have recorded the entries in abbreviated forms in diary without the knowledge of the assessee. Therefore, under such circumstances, the revenue would not be justified in making any addition against the assessee.

Therefore, the revenue had no cogent or sufficient material evidence on record to support the findings of the Assessing Officer and, thus, there was no reason for interfering with order of the Commissioner (Appeals). It was to be accordingly, confirmed."

15. In the case of ITO Vs. Pukhraj N Jain reported at 95 ITD 281 (Mumbai), the Tribunal has held that AO being a quasi-judicial authority cannot base his conclusion/decision on the finding of any authority under any other Act/law and, thus, adopt the finding/conclusion of that authority; the decision to withdraw by the AO has to be his own and independent one. In that case, while on his way, the assessee's brother KNJ was intercepted by DRI officials and contraband gold bars were found in this possession, the Customs Collector confiscated gold as being improperly imported into India from abroad and imposed penalties under Customs Act, 1962 and

Gold Act, 1968 on assessee and his brother KNJ. Based on the order of the Customs Collector as well as the statement of KNJ and the assessee recorded by DRI officials, the AO made addition under section 69A on account of value of unexplained valuable article being gold, not recorded in books of account of assessee. On appeal, the Commissioner deleted the addition finding that the AO merely relied on the orders of the Customs Collector having had conducted the inquiry and having ascertained the facts and having passed his order under the Customs Act, the AO for framing assessment under the Act and for that purpose for making addition under section 69A in the hands of the assessee in respect of value of gold seized by officials was not required to make any inquiry. The Tribunal had held that though the AO while making as assessment does not strictly act as a court of law but he acts in quasi judicial capacity and the proceedings before the AO are in general in the nature of quasi-judicial though for specific purpose, the same are deemed judicial proceedings under section 136 of the Act. Thus the AO cannot base his conclusion/decision on the finding of any authority under any other Act/law and thus adopt the finding/conclusion of that authority. The relevant observation of the Tribunal is extracted hereunder for the sake of reference:

> "Section 112 of the Customs Act provides for the liability of penalty on any person who does not omit to do any act which would render such goods liable to confiscation under section 111, or who acquires possession of such goods or is in anyway concerned in the carrying, removing, deposing, keeping, concealing, selling or purchasing, etc., of such goods. As such, the person, liable for imposition of penalty under section 112, may be the person being in any way concerned with the goods which are improperly imported into India from outside. The above provision, in no way; requires the concerned person to be the owner of the goods. Under section 138A of the Customs Act, there is a provision for presuming in any prosecution for an offence under the Customs Act, requiring the culpable mental state on the part of the accused, that such accused had the required culpable mental state though the accused could furnish defence to rebut the said presumption. [Para 18]
>
> The contention of the revenue that the Customs Collector having had conducted the inquiry and having marshaled/ascertained the facts and then having passed his order under the Customs Act, the Assessing Officer; for framing assessment under the Act and for that purpose for making an addition under section 69A in the hands of the assessee in respect of the value of gold seized from KNJ by Customs officials, was not required to make any inquiry, seemed to be misplaced/fallacious, reflective of a non-understanding or misunderstanding of the very basic concept of judicial/quasi-judicial adjudication by a judicial or quasi-judicial authority. Although an Assessing Officer; while making an assessment, does not strictly act as a Court of law, but he acts in a quasi-judicial capacity

and the proceedings before the Assessing Officer are, in general, in the nature of quasi-judicial, though for specific purpose, the same are 'deemed judicial proceedings' as provided in section 136. An Assessing Officer; being a quasi-judicial authority has to, while framing assessment, discharge his duty/function judicially and in that process, has to apply his own mind independently to the facts of the case, ascertained by him and then draw his own conclusion/ decision by appreciating the evidence/material brought/available on record before him; the Assessing Officer cannot base his conclusion/decision on the finding of any authority under any other Act/law and, thus, adopt the finding/conclusion of that authority. The decision to be drawn by the Assessing Officer has to be his own and independent one. It is clear from the provision of section 143(3) that the Assessing Officer could not base his decision on the findings/conclusions of Customs Collector drawn in his order under the Customs Act. [Para 21]

As regards the statement of KNJ: the same too was not recorded by the Assessing Officer during assessment proceedings but was recorded by the Customs officials. The said statement was recorded at the back of the assessee and the assessee had not been allowed an opportunity to cross-examine 'KNJ' as regards the said statement. Besides, whatever be contained in the said statement of KNJ: the same had been retracted by KNJ' as was evident from his letters alleging that the same was recorded forcibly and under threat and under influence and that the same was not voluntary. Moreover; 'KNJ; being himself involved in the unlawful transaction of carrying contraband gold, was a tainted witness whose testimony, even otherwise, might not be worth reposing credence therein or placing reliance thereon. As against the said statement of KNJ, there was also the statement of the assessee denying totally his involvement in connection with the said gold transaction. [Para 22]

'KNJ' having been found in possession of gold, prima facie,it was he who was to be treated as owner of the possession (gold) unless this presumptive inference was rebutted by proper/convincing evidence. There being no 'evidence' worth the name, the 'other material' being the said statement of 'KNJ' and the order of Customs Collector, remained too feeble to entangle assessee as the owner of the said contraband gold, seized by the Customs officials from the possession of 'KNJ: [Para 23]

For making an addition under section 69A, apart from ownership of the asset/valuable article, which is deemed to be the income of the assessee for that financial year; it is also a pre-requisite that such asset/valuable article 'is not recorded in the books of accounts' maintained by the assessee (if any). In the instant case, even if the department's factual allegations were assumed to be correct, the stage of recording the said seized gold in the books of account of the assessee could not be said to have arrived yet as the gold was stated to have been seized on the way when KNJ' as bringing the same and, thus, the valuable article had not yet been brought to the assessee. [Para 24]"

16. Similarly, in the case of First Global Stockbroking (P.) Ltd., Vs. ACIT 115 TTJ 173, the Tribunal has observed that simply on the basis of the statement of the third person to Enforcement Directorate that he had remitted funds to the assessee from abroad, it could not be held that amount had been remitted by assessee from undisclosed sources; more so, when an opportunity to cross-examine said person was not granted to assessee. In that case, the Enforcement Directorate has received the information that assessee had arranged 1,25,000 dollars, which was remitted to FGM Ltd., through hawala channel. In this connection, the Enforcement Directorate had

recorded statement of one AS who in his statement had pointed out that he made the payment on behalf of the assessee. Addition to the assessee's income had been made on the ground that AS had arranged the remittance of 1,25,000 dollars to FGM Ltd., on behalf of the assessee. Having examined the facts in the light of legal propositions, the Tribunal has held that if some amount is remitted to foreign company by any person how it can lead the authority to believe that amount was remitted only by the assessee. The Department could not find out who contacted AS and how that person was related to the assessee. There should be some more corroboration for putting the assessee under a burden of tax for the income of Rs.61,87,500/-. Simply on the basis of statement of a third person, it could not be held that the amount had been remitted by the assessee from undisclosed sources, more so when an opportunity to cross examine said person was not granted to the assessee.

17. In the case of K.T.M.S. Mohammed Vs. Union of India reported at 197 ITR 196 (SC), the Hon'ble Apex Court have examined the scope of section 193 r.w.s. 228 of the Indian Penal Code r.w.s. 39 of the Foreign Exchange Regulation Act, 1973 (FERA) with respect to the false evidence and the Apex Court has observed that the statement made under section 39 of the FERA cannot be treated as having been recorded in a 'judicial proceedings' so as to be used as basis for fastening makers of those statements with criminality of offences under section 193 and/or section 229 of the Indian Penal Code on the ground that deponents of those statements has retracted from their earlier statements in a subsequent proceeding which is deemed to be a 'judicial proceeding. Their Lordship has further observed while examining the scope of section 136 of the Income Tax Act, r.w.s. 39 of the FERA, 1973, that the income-tax proceedings are entirely different from and dissimilar to proceedings under FERA. Therefore, the ITO in exercise of his power under section 136 cannot make use of statements recorded by Enforcement Directorate for prosecuring deponents of those statements in a separate and independent proceeding under Income-Tax Act, on ground that deponents had retracted their statements given before Enforcement

Directorate. In the case of Andaman Timber Industries Vs. Commissioner of Central Excise, 281 CTR 0 241 (SC), the Hon'ble Apex Court has held that not allowing assessee to cross-examine witness by adjudicating authority though statements of those witnesses were made as basis of impugned order, amounted in serious flaw which make impugned order nullity as it amounted to violation of principles of natural justice. The relevant observation of the Hon'ble Apex Court is extracted hereunder for the sake of reference:

> "4. Challenging the aforesaid order, the present appeal is preferred by the appellant-assessee.
>
> 5. We have heard Mr. Kavin Gulati, learned senior counsel appearing for the assessee, and Mr. K. Radhakrishnan, learned senior counsel who appeared for the Revenue.
>
> 6. According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.
>
> 7. As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may

also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17.03.2005 was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.

8. In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the Show Cause Notice."

18. Turning to the facts of the case in hand we find that the entire addition is on the basis of the statements of the assessee and Shri. Navneet Kumar Singhania recorded by the CBI. Before the AO, assessee has specifically denied such statements recorded by the CBI and has sought cross-examination of Shri. Navneet Kumar Singhania which were not afforded to the assessee. It was also not made clear to us by the Revenue authorities as to whether on account of statements recorded by the CBI, any criminal proceedings were initiated against the assessee and Shri. Navneet Kumar Singhania under any other Act and what was the result thereof. Except such statements, the AO has not brought anything on record to establish that assessee had made such investment in Jagati Publications through Shri. Navneet Kumar Singhania and the same was not declared in its return of income. In the light of these facts, we are of the considered opinion that addition cannot be made in the hands of the assessee in the absence of the relevant evidence. We accordingly set aside the order of the CIT(A) and delete the additions.

19. In the result, appeal of the assessee is allowed.

Pronounced in the open court on 15th June, 2018.

Sd/-	Sd/-
(JASON P BOAZ) Accountant Member	(SUNIL KUMAR YADAV) Judicial Member

Bangalore.
Dated: 15th June, 2018.
/NS/*

Copy to:

1. Appellant
2. Respondent
3. CIT
4. Guard file

By order

Sr. Private Secretary,
ITAT, Bangalore.