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IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH 'B', NEW DELHI

BEFORE SHRI P.N. PARASHAR AND SHRI RAJENDRA SINGH

ITA No.250/Del/2005
Block Assessment Period : 1.4.1990 to 3.8.2000

M/s. SMC Share Brokers Limited,
17, Netaji Subhash Marg,
New Delhi.

vs. DCIT, Central Circle 3,
New Delhi.

(APPELLANT)

(RESPONDENT)

APPELLANT BY : Shri Ved Jain and Ms. Rano Jain
RESPONDENT BY : Smt. Sangeeta Gupta

ORDER

PER P.N. PARASHAR, JUDICIAL MEMBER :

This appeal has been filed by the assessee against the order of the Id.
CIT (Appeals) dated 31.3.2005.

2. Shri Ved Jain, Id. FCA and Ms. Rano Jain, C.A. appeared for the assessee whereas Smt. Sangeeta Gupta, Id. CIT DR represented the revenue.
3. The assessee has taken as many as seven grounds in this appeal to challenge the order of the Id. CIT (A) dated 31.3.2005 for the block period

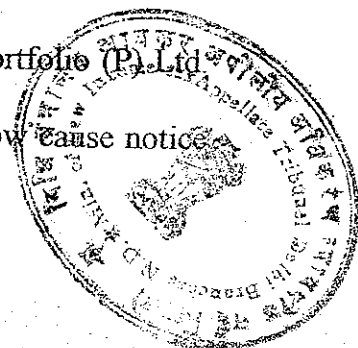
from 1.4.1990 to 3.8.2000. However, before taking up specific pleas raised by the assessee in various grounds of appeal, we consider it proper to narrate the background and facts relating to this matter which are as under :

4. The assessee company was a Member of the Delhi Stock exchange. It was carrying on the business of share broking and as such, it was engaged in the sale and purchase of shares on behalf of various clients. One such client on whose behalf shares were purchased and sold was M/s. Friends Portfolio Pvt. Limited.

4.1 On 3.8.2000, a search was carried out on one Mr. Manoj Aggarwal, Director of M/s. Friends Portfolio Pvt. Limited. During the course of search, inter alia, various documents and books of account etc. pertaining to M/s. Friends Portfolio Pvt. Limited were found. Consequent upon the search, block assessment of Mr. Manoj Aggarwal and that of M/s. Friends Portfolio Pvt. Limited were completed. These assessments were made under section 158BC on 29.8.2002.

4.2 On the basis of documents found during the course of search, statement of Mr. Manoj Aggarwal and other persons were recorded during the search and subsequent proceedings and on the basis of this evidence, the Assessing Officer of M/s. Friends Portfolio Pvt. Limited and Mr. Manoj

Aggarwal found that Mr. Manoj Aggarwal was doing the business of providing book entries to various parties and one of such beneficiary of accommodation of entries given by Mr. Manoj Aggarwal was the assessee, namely, M/s. SMC Share Brokers Limited. This conclusion was also based on the documents found and seized during the course of search under section 132 (1) of Income-tax Act from the premises of Mr. Manoj Aggarwal situated at 5A/12, Ansari Road, Darya Ganj, New Delhi. The pages 83 to 85 of Annexure A-3 contained details of accounts of M/s. Friends Portfolio Pvt. Limited with M/s. SMC Share Brokers Limited i.e. the assessee and as per these documents, profit of Rs.3,26,48,898.84 was shown to have been earned by M/s. Friends Portfolio Pvt. Limited on various transactions of shares. A brokerage incentive amounting to Rs.6,76,067/- was also found to have been credited to the account of M/s. Friends Portfolio Pvt. Limited. Besides, a diary was also seized which was marked as Annexure A-18 and as per this diary, two cheques were received by M/s. Friends Portfolio Pvt. Limited. In the diary, there was an entry regarding payment of cash of Rs.99 lacs in the name of M/s. SMC Share Brokers Limited. The Assessing Officer recorded statement of Mr. Manoj Aggarwal during the course of assessment proceedings in his case on various occasions. He also examined Mr. Neeraj Gupta who was said to be intermediary involved in the transactions. The assessment in the case of M/s. Friends Portfolio (P.) Ltd. was made on 29.8.2003. The Assessing Officer issued a show cause notice.



to the present assessee under section 158BD read with section 158 BC on 26.11.2002—and required the assessee to file return for the block period covering assessment years 1991-92 to 2001-2002. Return was required to be filed within 15 days from the service of notice. The assessee filed return in Form No.2B on 20.12.2002.

4.3 The Assessing Officer, during the course of assessment proceedings, further recorded statement of Mr. Manoj Aggarwal and issued a show cause notice on 17.11.2004. Against this notice, the assessee filed a detailed reply dated 25.11.2004. After considering the material collected by the Assessing Officer and the reply of the assessee, the Assessing Officer held as under :

“14. In the light of the above discussions, it is crystal clear that the transactions allegedly conducted by M/s. Friends Portfolio Pvt. Limited were actually the transactions conducted by the assessee company on its own trading account and the profit on this transactions had actually been earned by the assessee company. In order to reduce its profit on trading of shares, the assessee company claimed that these transactions were undertaken by it as a broker on behalf of M/s. Friends Portfolio Pvt. Limited. On account of these bogus accommodation book entries, the assessee has reduced its profit on trading in shares by Rs.3,26,48,898.84 in financial year 1999-2000 relevant for the A.Y. 2000-2001. Further, the assessee has transferred brokerage income of Rs.6,76,067/- by showing bogus accommodation entries of payment of Brokerage incentive to M/s. Friends Portfolio Pvt. Limited in the financial year 1999-2000 relevant for the A.Y. 2000-2001. Therefore, these amounts constitute the undisclosed income of the assessee during the Block Period.”

He thus completed the assessment on 29.11.2004 by working out the undisclosed income of Rs.3,33,24,965.84 as under :

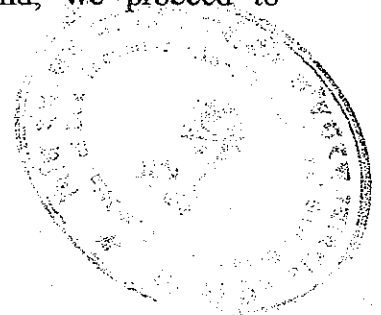
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|----|---|-------------------|
| 1. | Undisclosed income from suppression of Profit by accommodation entries of share Transactions (for the F.Y. 1999-2000) (as discussed in para 14) | Rs.3,26,48,898.84 |
| 2. | Undisclosed income from suppression of Profit by accommodation entries of Payment of Brokerage Incentive (for the F.Y. 1999-2000) (as discussed in para 14) | Rs. 6,76,067.00 |

Total undisclosed income for the block period	<u>Rs.3,33,24,965.84</u>
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4.4 The additions made in the assessment order were challenged before the Id. CIT (A) by the assessee. For doing so, various legal grounds were also taken. The Id. CIT (A) gave relief of Rs.6,76,067/- to the assessee by deleting the addition made on account of brokerage paid by the assessee to Mr. Manoj Aggarwal. However, he confirmed the addition of Rs.3,26,48,898.84.

4.5 The order of the Id. CIT (A) has been challenged in this appeal.

5. In the setting of the above factual background, we proceed to adjudicate various grounds taken in this appeal.



6. Ground No.1⁷ of appeal ^{are} is general in nature and ^{do} ~~does~~ not require any specific adjudication.

7. Ground Nos.2 (i), 2 (ii) and 2 (iv) challenge the validity of notice issued under section 158BC read with section 158BD.

8. Shri Ved Jain, Id. FCA while supporting the grounds took various pleas, which are as under :

8.1 That the Assessing Officer did not record any satisfaction as required under section 158BD during the course of assessment proceedings of M/s. Friends Portfolio Pvt. Limited or Mr. Manoj Aggarwal or before completion of these assessment orders.

8.2 That on the basis of contents of satisfaction note dated 26.11.2002, the Assessing Officer was not justified in issuing notice under section 158BC read with section 158BD.

8.3 That the assessment made on the basis of satisfaction note cannot be legally justified.

8.4 That the notice issued under section 158BC/158BD required the assessee to file return within 15 days, which is a period less than the period prescribed under the statute. Therefore, this notice is bad in the eyes of law and all the proceedings done in consequence thereof, are null and void.

8.5 That the notice issued under section 158BC/158BD is not legally maintainable as the same was issued much after the completion of the assessment order in the case of M/s. Friends Portfolio Pvt. Limited and Mr. Manoj Aggarwal.

9 In support of these pleas, the Id. counsel placed reliance on various decisions including the following:

- (i) CIT vs. Ekbal and Co. 13 ITR 154;
- (ii) Prabhat Sawmill Timber Merchant vs. ITO 51 ITD 549;
- (iii) Mahesh Kumar Batra vs. JCIT 95 TTJ 451;
- (iv) Chitra Devi vs. ACIT 77 TTJ 640;
- (v) Amity Hotels vs. CIT 272 ITR 75;
- (vi) Rushil vs. Harprakash 251 ITR 608;
- (vii) Adityanar Educational & Research Institute vs. State of Tamil Nadu 224 ITR 233; and
- (viii) Dayal Industries vs. CCT 100 STC 215.

10. Ld. CIT Departmental Representative, on the other hand, strongly opposed these arguments and placed reliance on the orders of the Assessing Officer and that of the ld. CIT (A).

11. We have carefully considered the facts and circumstances of this matter and the rival submissions. The legal issues relating to validity of notice issued under section 158BD and validity of the assessment proceedings were also raised before the ld. CIT (A). Before him, reliance was placed on behalf of the assessee on the decisions reported in 272 ITR 75, 170 ITR 592, 260 ITR 80, 121 Taxman 272, 97 ITR 696, 19 TTJ 546, 79 TTJ 1, (1998) 3 SCC 410, 141 Taxman 92, 79 TTJ 228 and 69 TTJ 66. Besides these decisions, reliance was also placed on the decision of Prarthana Construction (P) Ltd. vs. DCIT (2001) 70 TTJ (Ahd.) 122, Chiranji Lal Steel & Rolling Mills vs. CIT 81 ITR 222 (Punj.) and ACIT vs. Ms. Lata Mangeshkar 97 ITR 696 (Bom.). The ld. CIT (A) held that the satisfaction note contained valid reasons for the initiation of block assessment proceedings against the assessee and, therefore, it cannot be said that there was no proper satisfaction note. Regarding period of limitation, he was of the view that if the Assessing Officer is satisfied that there was undisclosed income, he can initiate proceedings under section 158BD at any stage and even after the completion of the block assessment in the case of persons searched. According to him, in the case of the assessee, proceedings

were initiated on 26.11.2002 after about three months from the completion of the assessment proceedings in the case of Mr. Manoj Aggarwal and limitation for completion of the assessment started from that date in the case of the assessee and thus the assessment order passed on 29.11.2004 was within the period of limitation prescribed.

11.1 So far as the plea relating to filing of return within 15 days from the date of notice is concerned, he held that the plea was only technical and cannot be accepted.

11.2 Before us, the ld. counsel has challenged these findings. According to him, during the course of search in the case of any person searched, if some undisclosed income or material disclosing undisclosed income is found and seized then the Assessing Officer, dealing with the case of such searched person, is required to record a satisfaction to initiate proceedings under section 158BD and to handover the incriminating material pertaining to such other person to the Assessing Officer of that person. He pointed out that in this case, no asset or document of the assessee relating to its undisclosed income was found during the course of search from the premises of Mr. Manoj Aggarwal. Regarding the alleged satisfaction note dated 26.11.2002, his contention was that this satisfaction note is mainly based on the statement of Mr. Manoj Aggarwal dated 19.6.2002 which cannot be treated

to be material disclosing undisclosed income of the assessee. It was also pointed out by him that although as per the assessment order, the books of account of the persons searched i.e. Mr. Manoj Aggarwal and M/s. Friends Portfolio Pvt. Limited and the alleged diary containing entries regarding cheques and cash have been made the basis for making the additions of undisclosed income in the case of the assessee in the assessment order passed under section 158BC/158BD but the satisfaction note does not make any reference to these documents. According to him, therefore, there is no nexus between the satisfaction note and the assessment made. The ld. Counsel also pointed out that even vide letter dated 5.11.2004, the Assessing Officer informed the assessee as under:

"Regarding the copy of seized material, the same shall be provided to you when it will be used against you in any proceedings of Income Tax Act."

On the basis of the above letter, his emphatic submission was that the seized material was not considered and used by the Assessing Officer for recording his satisfaction and for issuing notice under section 158BD against the assessee and, therefore, the assessment order passed against assessee under section 158BD, on the basis of such satisfaction note cannot be justified. In support of his contention on this issue, he placed reliance on the decision of Hon'ble Delhi High Court in the case of Amity Hotels 192 CTR 607 (supra).

12. Another contention strongly canvassed by the Id. counsel was that the satisfaction necessary for proceedings under section 158BD should be recorded as soon as the material pertaining to the person other than the person searched came to the notice of the Assessing Officer of the searched person or at the most during the course of assessment proceedings of that person and the relevant material relating to such 'other person' should be handed over to the Assessing Officer of that person. In support of this submission, he made reference to the provisions of section 132, 158BC and 158BD. In support of this submission, he placed reliance on the decision of Hon'ble Gujarat High Court in the case of Khandubhai Vasanji Desai & Ors. vs. DCIT 236 ITR 73 (Guj.)

13. Ld. Departmental Representative, on the other hand, submitted that there is no requirement under law for recording of satisfaction before the conclusion of the assessment proceedings in the case of persons searched under section 132 of Income-tax Act and satisfaction can be recorded even after passing of the assessment order under section 158BC in the case of person searched.

14. We have carefully considered the legal pleas raised in relation to the recording of satisfaction. The undisputed facts in this case are as follows :

14.1 The block assessment orders in the case of Shri Manoj Aggarwal and M/s. Friends Portfolio (P) Ltd. were completed on 29.8.2002.

14.2 The notice under section 158BD was issued to the assessee company on 26.11.2002.

14.3 As per the Departmental Representative, the satisfaction for initiating proceedings under section 158BD was recorded by the Assessing Officer making assessment in the case of Shri Manoj Aggarwal and M/s. Friends Portfolio (P) Ltd. on 29.8.2002 also i.e. on the date of passing assessment order dated 29.8.2002 itself. However, the ld. counsel for the assessee has seriously challenged the genuineness and the authenticity of this note. According to him, this note is antedated. He tried to substantiate his argument by demonstrating that if the satisfaction note was recorded on 29.8.2002 then there would have been no necessity to further record the satisfaction again on 26.11.2002. He also pointed out that from the contents and language of the alleged satisfaction note dated 29.8.2002, it is evident that this note is subsequently prepared. He submitted that if the satisfaction was recorded on 29.8.2002, the notice should also have been issued on that date itself or just thereafter.

14.4 The Id. Departmental Representative, on the other hand, maintained that the Assessing Officer had made this note on 29.8.2002.

15. We have carefully considered the entire material on record and the rival submissions. With this note, a list of beneficiaries has been appended.

The name of assessee appears at Item No.69, which is as under :

69	SMC Sharebrokers Ltd.	17, Netaji Subhash Marg, Daryaganj, New Delhi-02.	Friends Portfolio (P) Ltd.	30000000	The assessee has taken bogus accommodation entry through M/s. Friends Portfolio (P) Ltd. and hence satisfaction note in this regard has been recorded in the case of this company and proposal for centralization of this case in this circle has been approved for taking up proceedings u/s 158 BD.
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The last sentence in the above note indicates that the proposal for centralization of this case in this circle has been approved for taking up proceedings under section 158BD. The Id. counsel pointed out before us that no such approval was taken before 29.8.2002. According to him, the proposal is dated 19.9.2002 i.e. after the date of the office note. The office note cannot, therefore, mention any event, which has occurred later on i.e. after 29.8.2002. The fact that the proposal itself is dated 19.9.2002 could not be controverted by the Id. Departmental Representative.

16. On going through the alleged office note available on pages 202 to 226, it is found that the office note has been allegedly signed on 29.8.2002 that is the date on which the assessment order in the case of M/s. Friends Portfolio (P) Ltd. was completed. On closer scrutiny of the facts and circumstances mentioned above including the fact regarding the mention of satisfaction note in the case of "This Company" and proposal for centralization of the case in the circle in which the cases of searched persons fell, as referred to above, and also in view of the circumstances relating to this issue, we find force in the submissions of the Id. counsel for the assessee made before us and conclude that no satisfaction note was prepared on 29.8.2002 and this note has been prepared even after 26.11.2002. Our reasons for holding so are as under :

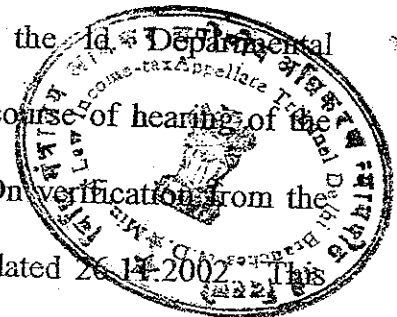
- (i) Had the satisfaction been recorded on 29.8.2002, there would have been no necessity to record another satisfaction on 26.11.2002. The note refers to the "satisfaction recorded in the case of this company" which reference is to the satisfaction dated 26.11.2002 and hence this note has been prepared subsequent to satisfaction note dated 26.11.2002.
- (ii) Had the satisfaction note been recorded on 29.8.2002 then the record pertaining to the other person not searched should have been transferred to the Assessing Officer of the present assessee

who was a different officer at that time then the officer of the searched person.

- (iii) The alleged satisfaction makes mention of the proposal and approval regarding centralization of the case. This proposal is dated 19.11.2002 and is subsequent to the alleged note which fact proves the contention of the Id. counsel for the assessee that the notice is antedated.
- (iv) There is a detailed note by the Assessing Officer, a copy of which has been filed at page 33 of the paper book. The concluding observations of the Assessing Officer in this note are as under :

“ In view of the facts mentioned above and the block assessments order of Sh. Manoj Aggarwal and M/s. Friends Portfolio P. Ltd., undisclosed income has arisen in the hands of M/s. SMC Share Brokers Ltd. which has been found during the course of search & seizure operations in the case of Sh. Manoj Aggarwal and his associate concerns. Thus, proceedings u/s 158BD are applicable in this case.”

The date below the signatures of the Assessing Officer is not legible in this copy. Therefore, the Id. Departmental Representative was asked during the course of hearing of the case to verify the date of this note. On verification from the record, she informed that the note is dated 26.11.2002. This fact has been recorded by the Bench on page 33 itself.



17. In view of the above, it is clear that on or before 29.8.2002, the Assessing Officer of M/s. Friends Portfolio (P.) Limited and that of Shri Manoj Aggarwal did not record any satisfaction. The note dated 29.8.2002 is, therefore, not to be taken for recording satisfaction required under section 158BC/158BD.

18. If we exclude the alleged note dated 29.8.2002 as recording the required satisfaction then there remains the satisfaction note dated 26.11.2002. The objection of the ld. counsel for the assessee for challenging the legal validity of this note is that the Assessing Officer making assessment in the case of the searched person had jurisdiction to record satisfaction only up to the date of passing assessment order in the case of searched person under section 158BC and after passing the assessment order, he became functus officio and did not retain any seizen or jurisdiction over the matter and thus he is not authorized or empowered to record satisfaction when he was not seized of the matter. The argument of the ld. counsel for the assessee was that for the purposes of Chapter XIV, the Assessing Officer is specially empowered under a special procedure for exercising the power of the assessment. This power being for specified purposes can be exercised only during the period till the assessment order is made. It was thus submitted by him that the satisfaction required for

proceeding under section 158BD cannot be recorded by the Assessing Officer after completing the assessment in the case of searched person and as in the instant case, the satisfaction note dated 26.11.2002 has been made after more than three months of the completion of the assessment under section 158BC of the Act, the proceeding initiated on the basis of this satisfaction note cannot be legally justified. In support of this submission, the Id. Counsel for the assessee placed heavy reliance on the decision of Hon'ble Gujarat High Court in the case of Rushil vs. Harprakash 251 ITR 608 (Guj.).

19. The Id. Departmental Representative, on the other hand, submitted that there is no limit prescribed for recording the satisfaction and the Assessing Officer is fully competent to record satisfaction even after completing the assessment in the case of searched person.

20. We have carefully considered the entire material and the rival submissions. The Assessing Officer of the searched person can record satisfaction regarding the undisclosed income of the other person at any stage during the assessment proceedings under section 158BC or even thereafter but such satisfaction has to be recorded in writing as held in the case of Amity Hotels vs. CIT 272 ITR 75 (Delhi). In the Act, there is no period of limitation provided for recording for satisfaction. The only period prescribed is for completing the assessment under section 158BD, which is



two years from the end of the month in which the notice under section 158BD has been issued in the cases where search is initiated after 1.1.1997.

20.1 The next plea of the assessee is that the satisfaction note makes no reference to the seized material and thus the proceedings under section 158BD judged from the satisfaction note cannot be justified. We do not find force in this submission also. The satisfaction note dated 26.11.2002, referred to above, is a detailed one. We have also reproduced the concluding observations of the Assessing Officer, which indicate that he applied his mind before recording the satisfaction. It may be pointed out that the satisfaction note is not required to contain each and every minute detail and to refer to each and every material relevant for making assessment under section 158BD. Thus, the argument that since, in the satisfaction note, there is no reference to seized material, the assessment made on the basis of such satisfaction note cannot be legally sustained, is not acceptable.

21. The next legal objection of the assessee against the validity of the assessment order is that the notice for filing return under section 158BD/158BC did not allow 15 clear days for filing the return and, therefore, on this ground, the notice is invalid. On going through the record, it is found that the notice was given on 26.11.2002 to the assessee for filing the return within 15 days of the service of the notice. The assessee raised



objections against this notice vide letter dated 10.12.2002. The return was filed in protest by the assessee on 20.12.2002. Thus, it is clear that assessee got more than 15 days time to file the return and as the assessee was allowed to file return even after the expiry of 15 days time, it cannot be said that the assessee did not, in fact, get a period of less than 15 days. As held in the case of Mahesh Kumar Batra vs. JCIT 95 TTJ 451 (Amritsar), even if there is technical defect or irregularity in the notice, the same is curable. Thus, this argument too is not tenable. The assessee has placed reliance on the decision of Delhi Bench of ITAT in the case of Neera Aggarwal vs. DCIT dated 9.2.2005 but in view of the decision of Special Bench in the case of Mahesh Kumar Batra vs. JCIT (*supra*), the decision of Delhi Bench of ITAT does not retain binding authority.

22. On the basis of our discussion and observations made above, we do not find any force in the legal pleas raised on behalf of the assessee to ground nos.2 (i), 2 (ii) and 2(iv).

23. Ground nos. 2(iii) and 2 (v) also challenge the validity of the assessment proceedings. In our considered opinion, the assessment proceedings in the case of the present assessee cannot be held to be invalid on the technical grounds raised by the assessee and the same are rejected accordingly.

24. Ground No.3 is as under :

"On the facts and circumstances of the case, the learned CIT (A) has erred, both on facts and in law, in rejecting the contention of the appellant that the assessment has been concluded in violation of the principles of natural justice and the material gathered at the back of the appellant has been used without giving opportunity to the appellant to rebut the same."

25. The contention of the ld. counsel for the assessee was that the main basis for making the addition in the case of the present assessee is the statement of Shri Manoj Aggarwal, which was recorded at the back of the assessee and despite repeated requests, the assessee was not allowed opportunity to cross examine him. In this regard, the ld. counsel made reference to the letter dated 19.11.2004 and 25.11.2004 which are available at page 36 and 72 of the paper book. According to him, this plea was taken even before the ld. CIT (A) but he did not consider it proper to offer any further opportunity of giving right to cross-examination of Shri Manoj Aggarwal to the assessee. In support of his submission, the ld. counsel placed reliance on the following decisions :

- (i) M.K. Thomas vs. State of Kerala 40 STC 278;
- (ii) State of Kerala vs. Shaduli 39 STC 478; and
- (iii) Vasanji Ghela and Co. vs. Commissioner of Sales tax (Bombay) 40 STC 544.

He also placed reliance on the following decisions :

- (i) CIT vs. Eastern Commercial Enterprises 210 ITR 103 (Cal.);
- (ii) Gargidin Jwalaprasad vs. CIT 96 ITR 97 (All.); and
- (iii) Paharchand and Sons vs. State of Punjab 30 STC 211

26. The Id. Departmental Representative, on the other hand, supported the observations of the Assessing Officer and that of the Id. CIT (A) and submitted that the assessment order cannot be vitiated only on account of this fact.

27. We have carefully considered the entire material and the rival submissions. The relevant facts relating to this aspect of the matter are as under :

27.1. The search in the case of Shri Manoj Aggarwal, Director of M/s. Friends Portfolio (P) Ltd. was conducted on 3.8.2000. Neither the assessee nor the Id. Departmental Representative has provided us with the copy of any statement of Shri Manoj Aggarwal recorded at the time of search. According to the Id. counsel for the assessee, the statement of Shri Manoj Aggarwal was not recorded on the date of search. The first version of Shri Manoj Aggarwal regarding the alleged bogus entries is in his letter dated 22.8.2000. A copy of this letter is available at page 101 of the paper book. We consider it proper to reproduce the contents of this letter which are as under :

"Sub : Proceedings under section 132 -

Dear Sir,

This has reference to the proceedings of Section 132 of I.T. Act, 1961, conducted at me and also to the discussion held with you which has inspired me to come clean before the Revenue Authorities. As you are aware, sir, all of my records have been seized during the search proceedings, the photocopies of which is yet to be obtained.

However, as informed earlier, it is not possible for me to adduce evidence in support of each transactions to your satisfaction. In view of this and to buy peace I have thoughtfully considered the transactions entered into by me and have come to the conclusion that out of the total transactions under investigation, the transactions amounting to Rs.100 crore approx. have been done by me on commission basis at various rates of commission ranging from 0.020% to 0.10% which means that I have given book entries against the cash/cheque receipt of approximately one hundred crores from various parties. Details/addresses of which I am ready to provide in case I receive photo copies of all the documents seized from various premises. I hope you will suitably deal with the above."

His statement was firstly recorded on 11.9.2000 thereafter, on 14.12.2000.

The statement of Shri Manoj Aggarwal was also recorded on 19.6.2002. A copy of this statement is available at pages 112 to 115. Thus, the statement of Shri Manoj Aggarwal was recorded on three different dates during the course of assessment proceedings in the case of M/s. Friends Portfolio (P) Limited. During the assessment proceedings of these persons, the present assessee was never examined nor summoned to confront or cross-examine Shri Manoj Aggarwal.

27.2 During assessment proceedings of the present assessee, the Assessing Officer issued notice dated 3.2.2003. The assessee filed detailed reply on 15.9.2004 and 29.9.2004. The statement of Shri Manoj Aggarwal was further recorded during the course of assessment proceedings of the present assessee on 9.11.2004 and thereafter a show cause notice dated 17.11.2004 was issued. The assessee filed reply to this show cause notice on 25.11.2004 and the assessment order was made just after four days i.e. on 29.11.2004. During the assessment proceedings of the present assessee also, the present assessee was never called to cross examine Shri Manoj Aggarwal.

27.3 Thus, on going through the copies of the statements of Shri Manoj Aggarwal, as referred to above, it is found that all the statements were recorded behind the back of the assessee and the assessee was not afforded any opportunity to cross examine him. In the letter dated 10.12.2002, the assessee made a request for providing him the photocopies of the material seized. Vide letter dated 20.12.2002 also, the assessee made a request to furnish copies of the seized material found during the course of search. Vide letter dated 10.11.2004, the assessee sought 10 days time to furnish the details required by the department. In the letter dated 19.11.2004 in para 5, it is mentioned by the assessee that copies of certain statements recorded by Shri Manoj Aggarwal were furnished by letter dated 17.11.2004. It was requested that the assessee should be given suitable time for submission of

reply against the letter dated 17.11.2004. In the letter dated 19.11.2004, following request was also made :

“We would also like to cross examine Mr. Manoj Aggarwal & Mr. Neeraj Gupta for the same. You are requested to please let us know the date and time when both the parties shall be available for cross examination.”

27.3 However, no opportunity to cross examine Shri Manoj Aggarwal and Shri Neeraj Gupta was afforded. The assessee addressed a letter dated 25.11.2004 in which also a reference was made to the letter dated 22.8.2202 of Shri Manoj Aggarwal written to the Director of Income-tax (Investigation), statement of Shri Manoj Aggarwal dated 11.9.2000, statement of Shri Manoj Aggarwal dated 14.12.2000 and that dated 9.1.2001 and 19.6.2002. The assessee also pointed out that even the signatures of Shri Manoj Aggarwal differ on various documents and papers and statements. The discrepancies pointed out by the assessee are as under :

6	Signatures of Mr. Manoj Aggarwal	Your kind attention is invited to following documents as supplied along with the notice dated 17.11.2004. from the perusal of such document it was seen that Mr. Manoj Aggarwal is in the habit of signing differently. Even two signatures as made on same document/paper do not tally/resemble each other. The one and only possibility to follow this non-genuine practice being a mala fide, deliberate attempt to deny signatures and responsibility of documents later on. In this connection attention is drawn towards followings :	
		Letter filed on 22.08.00 before DI (inv)	The name Manoj is followed Agg....
		Statement dated 11.09.2000	The name Manoj is followed Ag..... i.e. instead of "Agg...."

			The signatures show "Ag."
		Statement dated 14.12.2000	The signatures on page 4 - 7 do not tally with each other.
		Statement dated 19.06.2002	All the pages have been signed in Hindi except page no.2 which has been signed in English. Even the Hindi signatures appearing differently on different pages.
		Statement dated 09.11.2004	The signature on this statement do not tally or even resemble with any of the signatures in earlier statements. The signatures even tend to differ from page to page.
7.	Other errors in the statements of Mr. Manoj Aggarwal	<p>In this connection we respectfully invite your kind attention to declaration made by Mr. Manoj Aggarwal on last page of following statements:</p> <ul style="list-style-type: none"> • Statement dated 11.09.2000 • Statement dated 14.12.2000 <p>It has been categorically declared by Mr. Manoj Aggarwal that the contents of the statements written in English have been conveyed to him in Hindi.</p> <p>This declaration shows that Mr. Manoj Aggarwal either could not understand the contents as written in English so in order to understand the same they needed to be translated in Hindi and communicated to him.</p> <p>It may however be noted that such declarations are altogether missing in subsequent statements recorded on following dates:</p> <ul style="list-style-type: none"> • Statement dated 19.01.2001 (in this statement even the mandatory clause that the statement made without any pressure, coercion etc. is also missing) • Statement dated 19.06.2002 • Statement dated 09.11.2004 <p>From the above facts read with facts as stated</p>	

		vide pt. No.1-6 above, it is thus abundantly clear that the statements are unreliable and can not be used as an evidence to levy serious charges against the assessee and that too in absence of any corroborative cogent documents in support of such charges found during search.
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In the last, the assessee has further made the following submissions :

“In support of genuineness of transactions involved we take this opportunity to request you goodself to please examine yourself the persons as mentioned vide letter filed on earlier dates along with complete details with respect to name and address of such persons”

Further, in para (i) at page 93, the following pleas has been raised :

“(i) The proceedings are being concluded without giving proper and sufficient opportunity of being heard to the assessee and denying it its legitimate right to cross examine other parties (Mr. Manoj Aggarwal and Mr. Neeraj Gupta).

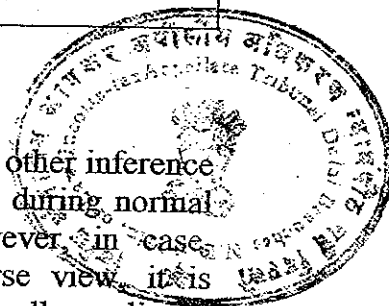
The assessee has also asserted legal right by raising following pleas in the said letter dated 25.11.2004 :

5.	It is the duty of the assessee to produce Mr. Manoj Aggarwal.	<ul style="list-style-type: none"> It may be noted that a number of statements were recorded by the revenue authorities from Mr. Manoj Aggarwal. It is also a matter as born out be the proceedings that such statements so 4recorded are proposed to be used against the assessee. At this stage we would like to draw your kind attention that last of such statement was recorded on 21.10.2004. Needlessly to state that the statements to be used against the assessee are recorded at the back of the assessee wherein serious
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		<p>allegation without any proof have been levied and upon presumption assumed by the Id. A.O. Thus in view of the gravity of seriousness of matter a cross examination being legitimate right of the assessee was demanded. It may be noted that under the circumstances the onus is the revenue to prove on the contrary as well as to provide the assessee an opportunity to cross examine witness, which is being denied.</p> <ul style="list-style-type: none"> • In this connection we respectfully place reliance on the following cases supporting legitimate right of the assessee to cross examine. • CIT v. Eastern Commercial Enterprises (1994) 210 ITR 103 (Cal.), Gargi Din Jawala Prasad vs. CIT (1974) 96 ITR 97 (All.), Pahar Chand & Sons v. State of Punjab (1972) 30 STC 211 (Pun), Banwarilal Sitaram v State of Orissa (1974) Tax LR 1960 (Ori.), State of Kerala v. K.T. Shaduli Yusuff (1977) 39 STC 478 (SC), Prarthna Construction (P) Ltd. v. Dy.CIT (2001) 118 Taxman 112 (Ahd)(Mag).
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In the last the assessee made following prayer :

"In view of the above, it is thus evident that any other inference other than genuineness of transactions incurred during normal course is incapable of being drawn. However, in case, however, your goodself still forms an adverse view it is requested that the factual and legal position as well as reliance on the cases as reported above may please be rebutted and an opportunity of being heard may kindly be provided to us."



27.4 It may be pointed out that the statement of Shri S.C. Aggarwal was recorded on 21.10.2004 and the last statement of Shri Manoj Aggarwal was recorded on 9.11.2004 i.e. after the statement of Shri Aggarwal and, therefore, it was necessary for the Assessing Officer to have allowed opportunity to the assessee to confront Shri Manoj Aggarwal.

28. In the assessment order, the Assessing Officer has made certain observations regarding the pleas taken by the assessee and concluded that in view of the decision of Hon'ble Kerala High Court in the case of M.K. Thomas vs. State of Kerala 40 STC 278 and in view of the decision of Hon'ble Supreme Court in the case of Shaduli 37 STC 478, the right of cross examination cannot be regarded as an invariable attribute of the requirements of reasonable opportunity.

29. The assessee has also challenged the assessment order before the Id. CIT (A) by taking a specific ground before the Id. CIT (A), which is as under :

"2. That on the fact and circumstances of the case and in law the Block assessment proceeding have been concluded without giving proper and sufficient opportunity of being heard to the appellant and thus failed to follow the principal of natural justice."

In support of this ground, the assessee also filed detailed written submission before the Id. CIT (A) and made detailed reference to the statements of Shri

Manoj Aggarwal. After making reference to the decisions of Hon'ble Supreme Court in the cases of R.S. Nayak vs. A.R. Antulay AIR 1986 SC 2045 and Morarka Properties (P) Ltd. vs. Biharilal Morarka & Ors. AIR 1978 SC 300, the assessee submitted that, **"documentary evidence of the assessee cannot be ignored merely on the basis of a verbatim statement made by a person and that too at the back of the assessee and without giving an opportunity to rebut the same."** In this regard, reference was also made to the decision of the ITAT, Delhi reported in the case of 139 Taxman 170.

30. The Id. CIT (A) obtained the remand report from the Assessing Officer in which it was stated that the contentions raised by the assessee are baseless and deserves to be rejected. Regarding right of cross-examination, reference was made to the assessment order again. The Id. CIT (A) obtained comments of the assessee on the remand report in which the assessee repeated his objections and placed reliance on the decision of Kishanchand Chellaram vs. CIT 125 ITR 713 (SC). The Id. CIT (A) has reproduced the reply of the assessee and also the decisions on which reliance has been placed by it. However, no finding on ground no.2, as taken before him by the assessee, was recorded. The Id. CIT (A) has simply rejected Ground Nos.1, 2 and 9. Thus, he too did not consider it proper to allow the opportunity to the assessee to cross examine Shri Manoj Aggarwal which

was the main basis for making addition against the assessee. In view of the above facts, it is clear that neither the Assessing Officer nor the Id. CIT (A) gave any opportunity to the assessee to cross examine Shri Manoj Aggarwal despite repeated requests made in this regard in writing before them.

31. On going through the assessment order and the order of the Id. CIT (A), it is found that the statement of Shri Manoj Aggarwal has been mainly used for making addition in the hands of the assessee. The Assessing Officer has repeatedly made use of the statement of Shri Manoj Aggarwal in the assessment order and, in fact, has based his conclusion on the basis of this statement for holding that the transactions carried out by the assessee were not genuine. In this regard, we may make reference to para 7.8 of the assessment order, which is as under :

“ In view of the statements of Sh. Manoj Aggarwal as specified in para 1 and the other points as specified in para 2, 3, 4 & 5 which clearly established that no genuine transactions have been conducted between you and M/s. Friends Portfolio Pvt. Ltd., you are required to show cause why the claimed transactions of Rs.3,33,24,965.84 (Rs.3,26,48,898.84 + Rs.6,76,067/-) entered in to by you with M/s. Friends Portfolio Pvt. Ltd., should not be treated as bogus accommodation book entries in the form of alleged share profits and brokerage incentives transferred to this concern which is non other than cheques issued by you and obtained the corresponding amount of cash as your undisclosed income.”

In para 13.2, he has concluded as under :

“ On the basis of documents found during the course of search of Sh. Manoj Aggarwal, his statements recorded during post search proceedings & assessment proceedings and other investigations carried out during assessment proceedings, it was established that Sh. Manoj Aggarwal was engaged in the business of providing bogus accommodation book entries. On the basis of these evidences which have been discussed at length in the assessment order of Sh. Manoj Aggarwal passed on 29.08.2002 it has been conclusively held that he was engaged in the business of providing bogus accommodation book entries on commission basis.”

32. The assessee has challenged truthfulness, correctness and creditworthiness of the statement of Shri Manoj Aggarwal and pointed out so many inconsistencies, inaccuracies and discrepancies, referred to above. On going through the material on record and in particular various observations of Assessing Officer in the assessment order, it is found that in compliance to the directions of the Assessing Officer, the assessee had furnished details on 29.11.2004. The Assessing Officer has made reference to these details in para 6 and 7 of the order. The statement of Shri Manoj Aggarwal was again recorded during the assessment proceedings on 9.11.2004 i.e. after the details and documents were furnished by the assessee. After recording this statement, the Assessing Officer issued a show cause notice on 17.11.2004. The Assessing Officer had made reference to this statement in the show cause notice as is obvious on perusal of para 7.7.2 of his order. The reply of the show cause notice was required by 19.11.2002. The assessee field letter dated 19.11.2004 and demanded

opportunity to cross-examine Shri Manoj Aggarwal. Further, vide letter dated 19.11.2004, the assessee again demanded this opportunity.

32.1 Vide another letter dated 25.11.2004 available on page 72, the assessee made reference to various statements of Shri Manoj Aggarwal and after pointing out discrepancies in para 6 of this letter, reproduced above, made a request to the Assessing Officer to examine him and other person. In para (i) on page 93, the following allegation was made by the assessee :

“(i) The proceedings are being concluded without giving proper and sufficient opportunity of being heard to the assessee and denying it its legitimate right to cross examine other parties (Mr. Manoj Aggarwal and Mr. Neeraj Gupta).”

33. The assessee also gave a petition to the Additional Commissioner of Income-tax for issuance of direction under section 144A of Income-tax Act. On this petition, the comments of the Assessing Officer/Deputy Commissioner of Income-tax were obtained. In these comments also, nothing is stated about the request of the assessee for cross-examination of Shri Manoj Aggarwal.

34. As pointed out above, the assessee took the specific ground before the Id. CIT (A) and in support of that ground also filed written submissions before the Id. CIT (A). The written submissions are available at pages 260 to 276 of the paper book. In para 10 of the written submissions, the assessee has made the following submissions :

"10. During the course of hearing before the A.O. the appellant company submitted all evidences in support of its contention that the transactions entered into with M/s. Friends Portfolio (P) Ltd., are that of the said company only and these are not accommodation entries. The A.O. was asked to give opportunity to cross examine Shri Manoj Aggarwal on whose statement allegation is being made. No such opportunity was given. Despite these facts, the A.O. has disbelieved the explanation given by the appellant and has made an addition of Rs.3,33,24,965/- as undisclosed income of the appellant. The appellant is challenging the issue of notice under section 158BD, framing of the block assessment as well as the above addition, hence this appeal before your honour."

The Id. CIT (A) called comments of the Assessing Officer on the written submissions of the assessee and the Assessing Officer submitted remand report dated 3.3.2005. Against this remand report also, the assessee made following submissions :

"2. Cross Examination of Mr. Manoj Aggarwal

The A.O. in the remand report has submitted that he has discussed the issue of cross examination in the assessment order. He has endorsed his decision that opportunity of cross examination need not be given in the present case. As a protective measure, he has asked that the opportunity of cross examination may be given at this stage by your honour. In this connection we are to submit that the A.O. is making a request against the provisions of the law. He cannot use the appellate proceedings to supplement the deficiencies in the assessment order. The assessment order has to stand on its own and in case the same has been passed by taking on record the evidences which legally cannot be considered, the only remedy shall be to ignore such evidences. As explained in our written submission that a specific request was made to the A.O. to provide an opportunity of cross examination of Mr. Manoj Aggarwal but the A.O. passed a speaking order rejecting the request. It is not the case where the A.O. wanted to allow

cross examination but could not do so by reason beyond his control. It is just like a case where the A.O. has not collected any evidence and finding himself cornered in the appellate proceedings, request the appellate authorities to assume the role of A.O. and carry out the investigation on his behalf. Thus, we strongly object to this request of the A.O. Acceding to such request shall also be against the law as a decision after cross examination shall be in appellate proceedings as against assessment proceedings. However, without prejudice to the above, we are ready to have the cross examination of Mr. Manoj Aggarwal as and when it is arranged."

However, even the Id. CIT (A) did not consider it proper to grant opportunity to cross-examination to the assessee. Thus, the departmental authorities, for reasons best known to them, avoided cross-examination of Shri Manoj Aggarwal though the assessee kept on demanding the right of cross examination to meet out the allegations levelled against him.

35. On closer scrutiny of various documents and on consideration of the entire relevant material, this case presents peculiar facts and circumstances. On one hand, the department was eliciting entire information from Shri Manoj Aggarwal by recording his statement again and again and on the other hand, it was denying the assessee to cross-examine him against such information. It is strange that the Assessing Officer called Shri Manoj Aggarwal during assessment proceedings and examined him under section 131, but even at this stage, the statement was recorded behind the back of the assessee although the assessee was participating in the assessment

proceedings. The Assessing Officer, instead of discharging the burden himself, directed the assessee to produce Shri Manoj Aggarwal when he was requested to provide opportunity of cross-examination. It is the settled rule of natural justice that evidence cannot be recorded behind the back of a party participating in the proceedings and if such evidence is to be used against such party then the party concerned shall be given full opportunity to meet such evidence and also to confront the same. The burden is definitely on the authority concerned. The Assessing Officer was discharging functions as a quasi-judicial authority and in compliance to the rules of natural justice, he was under a legal obligation to provide opportunity to the assessee to confront the witnesses examined by him during assessment proceedings even if such opportunity was not demanded. The instant case is a glaring example where the assessing authority has deliberately neglected this legal obligation.

35.1 To repeat, right from the very beginning, the assessee demanded the right to cross-examination but neither the Assessing Officer nor the Id. CIT (A) allowed this prayer. The cross examination of Shri Manoj Aggarwal was very much essential in the facts and circumstances of the present case. Shri Manoj Aggarwal gave several statements. In the earlier statements, there was no incriminating evidence against the assessee and in the subsequent statements, there were discrepancies and inconsistencies, which

were highlighted by the assessee including the variations in his signatures. The Assessing Officer had used this witness to meet out the version of the assessee. He has also tried to corroborate the other evidence by this witness. Thus, under these facts and circumstances and in view of the fact that the oral testimony of Shri Manoj Aggarwal who himself was engaged in the dubious dealings has been made anchor sheet for involving the assessee, the denial of right of cross-examination of this witness has seriously effected the basic right of the assessee and, in fact, such denial is to be viewed very seriously as it is fatal to the entire proceedings.

36. If we go to the background of the entire matter and in particular of various statements of Shri Manoj Aggarwal, then it becomes all the more clear that he was trying to exculpate himself by involving the assessee and others. Thus, he was not an independent witness but an interested witness and the testimony of such interested witness cannot be viewed without caution. As the Assessing Officer has violated the rules of natural justice in denying the opportunity of cross-examination to the assessee, the statements recorded behind the back of the assessee of such witness cannot be utilized against him.

37. The Assessing Officer has considered the submissions of the assessee on this issue and rejected the request for cross-examination by placing

reliance on the decision of Hon'ble Kerala High Court in the case of M.K. Thomas vs. State of Kerala 40 STC 278 (Full Bench), decision in the case of Manindra Nath Chatterjee vs. Collector of central Excise 1977 Tax LR 1754 and the decision of Madras High Court in the case of T. Devasahaya Nadar vs. CIT, Madras 51 ITR 20 and has held that it could not be stated as a general proposition of law that 'any evidence' upon which the department might rely should have been subjected to cross-examination. Thus, the Assessing Officer has rejected the objection of the assessee being without any basis.

38. We have gone through various authorities on the issue and are of the opinion that the Assessing Officer has not been able to properly appreciate the decision of Hon'ble Kerala High Court in the case of M.K. Thomas (supra)) and has wrongly applied the ratio of that decision to the facts of the present case. In that case, the case of the assessee was that the rice mill was idle during the first half of the assessment year 1965-66 and thereafter the control of the mill was given to one Pappachan as lessee and, therefore, the petitioner had no turnover from the mill for the year under question. The assessing authority estimated the turnover by two and half times of the bid amount. Meanwhile, the Intelligence Officer investigated the mill and seized some record and also recorded the statement of Pappachan who denied any lease and submitted that he was only working as an employee of

the petitioner. Thereafter, the Assessing Officer issued revised pre-assessment notices. The objections of the petitioner against the notices were rejected and the assessment was finalized. An appeal against the order of assessment was dismissed by AAC and further an appeal before the Tribunal remained unsuccessful. The assessee, in the Tax Revision before the Hon'ble High Court, asserted that he should have been afforded an opportunity to cross examine Pappachan before the latter's statement was used against him in completing the best of judgement assessment. In support of this argument, reliance was placed on the decision of K.T. Shaduli vs. State of Kerala 29 STC 44 and on other decisions. It was found in that case that no request for application to summon Pappachan was made by the assessee to the authorities. The Hon'ble High Court, after considering the provisions of section 17 and 53 of the General Sales Tax Act and the decision in the case of K.T. Shaduli vs. State of Kerala 29 STC 44 held that on the facts disclosed, the petitioner was not entitled to right the cross-examination. So far as the present case is concerned, the facts are totally different. In the present case, as opposed to the facts of the assessee had demanded right of cross-examination at the first opportunity before the Assessing Officer not only once but also repeatedly. As pointed out above, in the complexity of this matter and the importance attached to the statement of Shri Manoj Aggarwal and various discrepancies in his statement, the

requirement of opportunity of cross-examination was most essential and fundamental.

39. The other cases on which the Assessing Officer has placed reliance are also distinguishable on facts.

40. The issue has been considered by various authorities and the right of cross-examination has been considered an essential ingredient of reasonable opportunity to be afforded to an assessee. In the case of K.T. Shaduli vs. State of Kerala (supra), the view of the Hon'ble Kerala High Court was upheld by the Hon'ble Supreme Court. This decision is reported in 39 STC 478.

41. In the case of Vasanji Ghela & Co. vs. Commissioner of Sales Tax 40 STC 544, the Hon'ble Bombay High Court has considered various authorities and has held as under :

“ Held, that, on the facts and circumstances of the case, the order of the Deputy Commissioner was bad on the ground of non-compliance with the principles of natural justice and the order of the Tribunal which upheld the order of the Deputy Commissioner was also bad on the same ground.

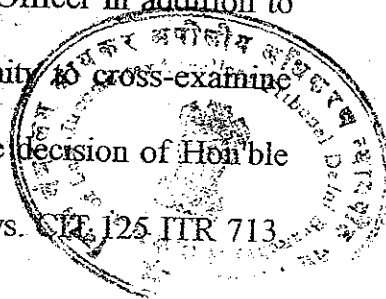
The rules of natural justice do require that normally speaking, if the statement of a person is intended to be used as evidence against a party, it must be made available to the party against whom it is intended to be used and such party must be given a fair opportunity to explain the same or comment on it. What would amount to fair opportunity would depend upon the

facts and circumstances of each case. If such a party makes a request to be allowed to cross-examine the person, who made the statement, for the purpose of meeting the statement or with a view to commenting thereon, such a request cannot, save in exceptional or special cases, be denied without violating the principles of natural justice."

In that case, the assessee was carrying on the business of grocery. They had shown sales to M/s. Keshavji Hirji. These sales were disallowed on the basis of written letter of M/s. Keshavji Hirji and his statement given to Collector of Sales-tax. The assessee requested that the original letter should be made available to him. The applicants were not permitted to read the original letter but the gist of information available with the department was communicated to them. The statement of Keshavji Hirji was that they did not affect the purchases from the assessee. However, after examining the books of account, the Deputy Commissioner upheld the disallowance. The applicants preferred revision against the order of Deputy Commissioner, which was dismissed by the Tribunal. It was contended before the Tribunal that the order of the Deputy Commissioner was bad on the ground that the rules of natural justice had not been complied with. The Tribunal observed that the necessary portion of the letter sent by Keshavji had been made available to the applicants and opportunities to cross examination was not necessary. Before the Hon'ble High Court, it was contended that it was obligatory on the part of the Deputy Commissioner to offer Keshavji Hirji for cross-examination although no specific request was made. The Hon'ble Court observed that the demand made by the applicants in reply to the

questionnaire submitted to the Additional Collector, requesting for an opportunity to read the letter of Keshavji in the original, also indicated that the applicants might desire to cross-examine Keshavji Hirji. It was also observed that the demand for cross-examination of Keshavji Hirji was not given up. Under these circumstances, after placing reliance on the decision of Division Bench of Punjab & Haryana High Court in the case of Pahar Chand & Sons vs. State of Punjab 30 STC 211 and after making reference to other decisions, the Hon'ble Court held that it was the duty of the Deputy Commissioner to have given an opportunity to the assessee to cross examine Keshavji Hirji and his failure amounts to violation of principles of natural justice. On this basis, the order of the Id. Commissioner was held bad in law and the order of the Tribunal was also held bad in law for the same reason.

42. The assessee has also placed reliance on the decision of Delhi Bench of ITAT in the case of Satish Gupta vs. ITO rendered by ITAT, Delhi Bench SMC-IV in ITA No.57 & 100/04 (assessment year 1995-96). In this case also, the issue involved was as to whether the Assessing Officer was required to afford an opportunity of cross examination of Shri Anand Prakash. This statement was made by the Assessing Officer in addition to other evidence. The assessee was not given opportunity to cross-examine despite having asked. The ITAT, after considering the decision of Hon'ble Supreme Court in the case of Kishanchand Chellaram vs. CIT 125 ITR 713.



deleted the addition by holding that the Assessing Officer's failure to allow cross-examination vitiates the entire addition. The observations of the Bench in the order dated July 2, 2004 are as under :

"The assessee further requested specifically to the Assessing Officer to allow him to cross-examine Anand Prakash. Despite these two requests, Anand Prakash was not allowed to be cross-examined by the assessee, a position which is not disputed before me by the department. The entire addition is based on the statement of Anand Prakash. As rightly pointed out on behalf of the assessee, if this statement is ignored, there is hardly any another direct evidence to justify the addition. Therefore, it was incumbent upon the Assessing Officer to afford an opportunity to the assessee to cross-examine Anand Prakash. He did not do so. The effect of the Assessing Officer's failure to do so is that the entire addition is bad. In the case of Kishan Chand Chelaram vs. CIT 125 ITR 713, THE Supreme Court held that if any evidence itself used against the assessee is not shown to him and an opportunity to controvert the same is not given to the assessee that evidence shall not be admissible in support of the addition. It was specifically held in that case that the Income-tax authorities are bound to accede to the request for cross-examination and if they do not do so, the addition cannot be sustained in the absence of any other evidence in support of the same. This position applies squarely to the present case. The addition suffers from a basic infirmity in the sense that it has been made without accepting the assessee's request made at least twice before the Assessing Officer, to cross-examine Anand Prakash. I, therefore, delete the addition."

43. It has to be pointed out that it is not the case of the department that Shri Manoj Aggarwal was not available or it was not within the control of the Assessing Officer to summon him. The powers of the Assessing Officer as are available under section 131 of Income-tax Act are very wide and such powers have to be utilized for meeting out the ends of justice. In fact, the

Assessing Officer has exercised this power frequently and its statutory power can be exercised against the assessee it has to be equally examined for the benefit of the assessee more particularly when he craves the concerned authorities for doing so. The denial of such power for the disadvantage of the assessee shows glaring conduct of bias and unfairness on the part of the authority and such a conduct is an attempt to cause injustice to him. It may be pointed out that the Assessing Officer has also utilized the statement of Shri Neeraj Gupta against the assessee although this witness has not made any statement against the assessee. Again, no opportunity was given to the assessee to cross-examination even this witness, which further strengthened the allegation of the assessee that the denial of cross-examination of this witness was also to the disadvantage of the assessee. On examination of the entire material, therefore, we are unable to appreciate the approach of the Assessing Officer who was expected to be fair to the assessee also in the quasi-judicial proceedings conducted by him. In the case of CIT vs. Simon Carves Ltd. 105 ITR 212, the Hon'ble Supreme Court of India has observed as under :

“The taxing authorities exercise quasi-judicial powers and in doing so they must ^{act} ~~and~~ in a fair and not a partisan manner. Although it is part of their duty to ensure that no tax which is legitimately due from an assessee should remain unrecovered, they must also at the same time not act in a manner as might indicate that scales are weighted against the assessee.”

44. At the time of hearing, Id. CIT DR submitted that if any prejudice has been caused to the assessee then the matter may be remanded and opportunity to cross-examination may be given by restoring the matter to the file of the Assessing Officer. Against this submission, the argument of the Id. counsel for the assessee was that the contents of the statement of Shri Manoj Aggarwal and Shri Neeraj Gupta cannot be utilized against it and the revenue cannot be given a second inning by restoring the matter to the file of the Assessing Officer.

45. In view of the background and facts narrated above, we find full force in the submissions of the Id. counsel for the assessee. A similar plea of the department was considered by Chandigarh Bench of I.T.A.T. in the case of Smt. Neena Syal vs. ACIT 70 ITD 62. In that case also, the seized documents were not confronted to the assessee before making the additions. The Department took the stand that the matter may be restored to the file of the Assessing Officer. It was also a search case. The Bench rejected the prayer of the revenue by observing as under :

"As regards Department's plea for restoring the matter to the file of the Assessing Officer, it may be mentioned that the provisions of Chapter XIVB are more stringent and have placed a greater burden on the departmental authorities to comply with the essential provisions of law and that these provisions have to be construed strictly. Thus, in a situation where the Assessing Officer had failed to comply with the basic provisions of section 69/69B, whereunder the impugned addition had overtly been made it was difficult to accept the plea that the matter may be restored to the file of the Assessing Officer, so that the

requisite material can be confronted to the assessee and then the addition made. It is not the function of the Tribunal to further allow opportunity to the Assessing Officer so as to cover up legal lapses made by him while making addition by restoring the matter back to his file. Further, the power of remand under section 254 is required to be exercised in a disciplined and responsible manner and that the same cannot be invoked in a case where the Assessing Officer has not cared to follow the provisions of section 69/69B, inasmuch as no explanation had been called for by the Assessing Officer in relation to the documents relied upon by him for making the impugned addition and further the said documents which were found with other persons, had not been specifically confronted to the assessee. Hence, the plea of revenue to restore the issue to the file of the Assessing Officer and to delete the impugned addition of Rs.4.83 lakhs could not be accepted."

Since, in the present case, the repeated requests of the assessee were turned down by the Assessing Officer as well as by the Id. CIT (A) for cross examining Shri Manoj Aggarwal and Shri Neeraj Gupta, it will not be proper to restore the matter back to the Assessing Officer for this purpose.

46. In view of the above, the statement of Shri Manoj Aggarwal, which has been used against the assessee, cannot be utilized against it because in denying the right of cross-examination, the Assessing Officer and the Id. CIT (A) have floated the settled canons of natural justice. On the basis of above observations, we allow Ground No.3 in favour of the assessee.

47. Ground Nos.4 & 5 challenge the sustenance of addition of Rs.3,26,48,898.84.

48. The Assessing Officer has made addition of Rs.3,33,24,965.84 on account of bogus accommodation book entries in the form of share profits. For this purpose, he has mainly placed reliance on the entries in the diaries seized (Annexure A-18) during the search under section 131 from the premises of Shri Manoj Aggarwal and Annexure A-13 copy of account of M/s. Friends Portfolio (P) Limited. It was observed by him that page 83 to 85 of Annexure A-13 contained details as per which profit of Rs.3,26,48,898.84 was shown to have been earned by M/s. Friends Portfolio (P) Limited on various transactions of shares and brokerage.

49. So far as the transactions entered in the Annexure A-13 seized during the search are concerned, the assessee has not disputed the fact and has rather admitted these transactions. However, the version of the assessee was that all these transactions were genuine and fully supported by the books of account maintained by it in the regular course of business. In order to substantiate his version, the assessee submitted all the details and furnished documentary evidence before the Assessing Officer including the following :

- (i) Copy of conduct note in the name of M/s. Friends Portfolio (P) Ltd. giving time and details of transactions;
- (ii) Copy of sale bill issued to M/s. Friends Portfolio (P) Ltd.;
- (iii) Copy of account of M/s. Friends Portfolio (P) Ltd.;
- (iv) Copy of bank statements evidencing payment before the close of the year;

- (v) Certificate regarding turnover; and
- (vi) Audited balance sheet and profit & loss account of the assessee company.

These documents are also available at pages 138 to 259 of the paper book. The Assessing Officer did not accept the version of the assessee and on the other hand held the transactions to be bogus by placing reliance on the statement of Shri Manoj Aggarwal, Shri Neeraj Gupta and entries on page nos.1 to 10 of Annexure A-18. He has also supported his conclusion by mentioning various other circumstances.

50. In appeal, the Id. CIT (A) has upheld the approach of the Assessing Officer. He has held that the transactions were not done by the assessee on behalf of M/s. Friends Portfolio (P) Ltd. but these were its own trading in shares which have been transferred to M/s. Friends Portfolio (P) Ltd. The assessee had challenged the findings of the Id. CIT (A) before us.

51. The Id. counsel for the assessee, Shri Ved Jain submitted before us that the Departmental authorities have failed to appreciate the facts properly. Firstly, he submitted that the statement of Shri Manoj Aggarwal cannot be used against the assessee because no opportunity was given to cross examine him. Secondly, on merits also, it was submitted by him that Shri Manoj Aggarwal had earlier submitted that the transactions amounting to 100

crores approximately were done by him on commission basis which shows that the remaining transactions done by him with the assessee and other companies were genuine. It was pointed out by him that in the statement recorded on 11.9.2000, Shri Manoj Aggarwal gave name of various persons with whom his transactions were not genuine but, in the last, the name of the assessee did not appear. It was further pointed out by him that even in the statement dated 19.6.2002, Shri Manoj Aggarwal confirmed his statement dated 11.2.2000 wherein name of the assessee did not appear. It was also submitted by the ld. counsel for the assessee that the statement of Shri Manoj Aggarwal has not been accepted by the Assessing Officer in its entirety and although the Assessing Officer has held the transactions carried out by him as bogus but no addition even on substantive or protective basis has been made in his case. The ld. counsel also placed reliance on following judgements :

- (i) CIT vs. Eastern Commercial Enterprises 210 ITR 102 (Cal.)
- (ii) Gargidin Jwalaprasad vs. CIT 96 ITR 97 (All.)
- (iii) Paharchand and Sons vs. State of Punjab 30 STC 211 (Punj.)

The submission of the assessee was that the assessee had carried out all the transactions through stock exchanges and made all the payments through account payee cheques. It was pointed out by him that the transactions have been duly recorded in the account of M/s. Friends Portfolio (P) Ltd. In this regard, reference was also made to various contract notes and other material.

The Id. counsel also assailed the findings of the Assessing Officer and the Id. CIT (A) regarding client agreement, note taking margin money, acceptance by some of the beneficiaries and entries in the diary. In support of his contention, he placed reliance on various authorities including the following :

- (i) ACIT vs. Miss Lata Mangeshkar 97 ITR 696;
- (ii) CIT vs. Shri Chamanlal Dhingra 171 Taxation 272;
- (iii) CIT vs. V.C. Shukla (1998) 3 S.C.C. 410;
- (iv) Chandradhar Goswami vs. Gauhati Bank Ltd. -
AIR 1967 S.C. 1058;
- (v) Hiralal Mahabir Prasad (ILR 1967) 1 P&H 435;
- (vi) Straptex India (P) Ltd. vs. DCIT 84 ITD 320; and
- (vii) Prarthana Construction (P) Ltd. vs. DCIT 70 TTJ 122.

The Id. Departmental Representative, on the other hand, supported the order of the Assessing Officer and that of the Id. CIT (A).

52. We have carefully considered the facts of this matter, entire material placed before us and the rival submissions of the Id. representatives of the parties. On the perusal of the show cause notice dated 17.11.2004 and the assessment order, it is found that the Assessing Officer has placed reliance on the documents found and seized during the course of search from the

premises of Shri Manoj Aggarwal, the statement of Shri Manoj Aggarwal and that of Shri Neeraj Gupta and certain other circumstances for making the addition of Rs.3,28,48,898.84. It has to be mentioned here that no search or survey was conducted upon the assessee. During the search in the premises of Shri Manoj Aggarwal and M/s. Friends Portfolio (P.) Ltd., no document or material of the assessee was found and seized to show undisclosed income of the assessee.

54. During the course of search, in the Annexure A-13 on pages 83 to 85, copy of account of M/s. Friends Portfolio (P.) Ltd. was found. As per these documents, profit of Rs.3,26,48,898.84 was found to have been earned by M/s. Friends Portfolio (P) Ltd. on various transactions of shares. The transactions of showing this profit of M/s. Friends Portfolio (P) Ltd. have not been denied by the assessee. The case of the assessee is that the transactions done by it with M/s. Friends Portfolio (P) Ltd. were on the basis of client agreement and all these transactions were carried out through banking channel. Thus, the contents of page 83 to 85 of Annexure A-13 showing the figures of profit of M/s. Friends Portfolio (P) Ltd. cannot be taken to be incriminating evidence against the assessee and on the basis of these contents, it cannot be said that the profit shown to have been earned by M/s. Friends Portfolio (P) Ltd. was the income of the assessee.

54.1 The other document found and seized during the course of search is Annexure A-18 on page 110 of this diary two cheques bearing No.005357 and 005356 of Rs.50 lacs each have been mentioned on 25.3.2000. These cheques have been received from M/s. SMC. Again, since the payments were made by M/s. SMC, i.e., the present assessee through cheques and further since the assessee has not denied the issuance of these cheques to M/s. Friends Portfolio (P) Ltd., the cheques cannot be treated to be a material relevant for making the addition of Rs.3,26,48,898.84.

55. The entry of cheques of Rs.50 ^{lacs} ~~000~~ each issued in the name of M/s. Friends Portfolio (P) Ltd. finds place in the books of account of the assessee. From the statement of account of the assessee of Canara Bank for the period 21.3.2000 to 31.3.2000 available at page 240 of the paper book, it is found that both of these cheques, which were issued on 25.3.2000, have been cleared on 27.3.2000. On page 232 of the paper book is the statement of account which also duly shows the entries of cheques of Rs.50,000/- each issued by the assessee on 24.3.2000.

56. In view of the above documentary evidence, the statement of the assessee that all the transactions have been done by him with M/s. Friends Portfolio (P) Ltd. in regular course of business and through banking channel is found substantiated. Thus, on the basis of documents found during the

course of search, namely, Annexure A-13 (pages 83 to 85 of the paper book), no adverse inference can be drawn against the assessee and on the basis of these documents, it cannot be said that the transactions carried out by him were bogus.

57. On page 1 of the above mentioned diary (Annexure A-18), there was an entry of cash of Rs.99 lacs. The Assessing Officer has correlated this payment with the cheques, referred to above. The contents of this diary have been reproduced on page 19 of assessment order. The Assessing Officer has inferred that it is a corresponding cash entry against the receipt of cheque on subsequent date. The entry mentions 'SMC'. No documentary or oral evidence has been adduced to corroborate this document with the assessee. It is not explained or proved that the amount of Rs.99 lacs was paid in cash to the assessee on 24.3.2000. It is further not proved that this amount was paid in lieu of cheques to be received on the next date. The mode of transfer of this money to the assessee has not been disclosed. Even Shri Manoj Aggarwal has not disclosed the manner and the mode through which the cash amount of Rs.99 lacs was delivered to the assessee. No other witness has been produced to prove this fact. Even Shri Neeraj Gupta has not admitted that he brought cheques from the assessee and took the cash in lieu thereof or took the amount of Rs.99 lacs from M/s. Friends Portfolio (P) Ltd. or Shri Manoj Aggarwal and paid that cash. In the accounts of the assessee

or at any other place, no evidence has been found or collected to show that the assessee had received cash of Rs.99 lacs from Shri Manoj Aggarwal. The author of the entries has also not been produced to prove that the entry was made on the basis of some actual transactions. Thus, the document i.e. page 1 of diary is only a dumb document and its contents cannot be proved against the assessee in absence of further material or evidence to corroborate this document and to connect the same with the assessee. The assessee, on the other hand, has denied the allegations levelled against it.

58. Shri S.C. Aggarwal, Director of the assessee company was examined by the Assessing Officer on 21.10.2004. Against the above entries, he has categorically submitted that the transactions undertaken by M/s. SMC with M/s. Friends Portfolio (P) Ltd. were genuine transactions. It has been specifically stated by him that Shri Manoj Aggarwal had taken the profit through account payee cheques. He has also categorically stated that he had never taken any cash from Shri Manoj Aggarwal. In support of this version, the assessee has filed the detailed accounts including the contract notes, bank accounts, sale bills, etc., copies of which have been filed in the paper book also. Thus, on one hand, there is documentary evidence fully corroborated by the oral evidence of the assessee to substantiate its version and on the other hand, there is only dumb document in the shape of unexplained entry of payment of cash to the assessee.

58.A The evidence in the shape of entry regarding payment of cash of Rs.99 lacs has not been considered against Shri Manoj Aggarwal or M/s. Friends Portfolio (P) Ltd. It is not explained by Shri Manoj Aggarwal as to from which source this amount came to him. In fact, the department has not made any enquiry from him about this undisclosed income. The payment of cash cannot be taken as out of the amount received through cheques against the cheques which were cleared on 27.3.2000 whereas the amount in cash has been paid on 24.3.2000, thus on the basis of such unproved ^{documents} ~~evidence~~, the addition made in the hands of the assessee cannot be justified at all.

59. Even assuming for a moment that cash of Rs.99 lacs was received by the assessee in lieu of cheque of Rs.1 crore, the addition of Rs.3,26,48,898.84 cannot be justified on the basis of the lone entry of payment of cash in the diary. The Assessing Officer has not been able to collect any other evidence to show that the assessee had received the entire profit shown to have been paid by it to M/s. Friends Portfolio (P) Ltd. It is to be noted that it is a case of block assessment under section 158BD and no addition in the block assessment can be legally justified unless the same is made on the basis of material or evidence found or seized during the course of search.

60. The matter has to be viewed from another angle. The diary does not pertain to the assessee nor was in the handwriting of any employee of the assessee. It was found with a third party. A presumption can be raised on the basis of possession of a document found during the course of search only against a searched person and thus no adverse inference can be drawn against the assessee on the basis of the possession of the diary with the third party. In this regard, reference may be made to the following cases :

(i) Addl.CIT vs. Miss Lata Mangeshkar 97 ITR 696

The assessee submitted her returns of income disclosing his professional receipts for assessment years 1962-63, 1963-64 and 1964-65. The returns were primarily based on the diaries, which were maintained by the assessee in respect of amounts received by her from producers etc. The ITO seized a ledger maintained by the firm known as Vasu Films of Madras. In this ledger, there were certain entries and on the basis of these entries, the Assessing Officer held that the assessee had concealed her real income by not showing certain payments for which no receipts were issued by her. In this regard, reliance was made on the entries, which were as under :

"20-9-1962	16/8	To Lata Mangeshkar	800 W plus	L.F.	Rs.
			700 B	102	1500
11-6-1963	16/5	To Lata		123	2000
				123	2000"

Shri N. Vasudev Menon, the managing partner of Vasu Films and one C.S. Kumar, the firm's Bombay manager also explained that the letter

'W' put against the figures mentioned in the entries represented payment in White while the letter 'B' to be against some items indicated payments in Black. The assessee was given an opportunity to cross-examination these persons. The Assessing Officer accepted the entries as showing payments made to the assessee and as the assessee had not shown these payments, these were treated to be the payments made outside the books of account. The AAC confirmed the additions. Before the Tribunal while challenging the addition, it was submitted that the lower authorities were not justified in drawing the presumptions or suspicions on the basis of entries in the diary. The Tribunal deleted the addition by accepting the plea of the assessee. The Hon'ble Bombay High Court upheld the view taken by the Tribunal. It was observed by the Hon'ble Court that the corresponding entries were not found in the day book and in absence of that, mere production of ledger entries would be of no avail, as there would be no guarantee about the truthfulness or genuineness of the entries in the ledger. It was further held that the entries are merely corroborative evidence and in absence of proper corroborative evidence, the primary direct evidence would alone be required to be examined and appreciated. In that case, such evidence consisted in the testimony of Shri C.S. Kumar. It was found to be unreliable by

the Hon'ble Court. The Hon'ble Court has also made the following observation :

"After all, the entries in the day-book or the ledger would be a corroborative piece of evidence and once the direct evidence of the person who is said to have made payments in "black" to the assessee is disbelieved, we do not think that any value could be attached to the entries in the ledger or to the entries in the day-book even if one had been produced. In the circumstances, we feel that the questions which are sought to be referred arise out of a finding of fact recorded by the Tribunal on pure appreciation of evidence."

(ii) CBI vs. V.C. Shukla and Others 1998 (3) SCC 410 SC

The Hon'ble Supreme Court has also considered the issue. According to the Hon'ble Court, the diaries are not books of account and no liability can be fasten on the person on the basis of a unilateral entry made by another person against such person. In para 34 of the judgment, the Hon'ble Court has observed as under :

"34. The rationale behind admissibility of parties' books of account as evidence is that the regularity of habit, the difficulty of falsification and the fair certainty of ultimate detention give them in a sufficient degree a probability of trustworthiness (Wigmore on Evidence, page 1546). Since, however, an element of self-interest and partisanship of the entrant to make a person – behind whose back and without whose knowledge the entry is made – liable cannot be ruled out the additional safeguard of insistence upon other independent evidence to fasten him with such liability, has been provided for in Section 34 by incorporating the words "such statements shall not alone be sufficient to charge any person with liability".

After considering various decisions, the Hon'ble Court has observed in para 39 that even correct and authentic entries in books of account cannot without independent evidence of their trustworthiness, fixed a liability on a person.

(iii) Hira Lal Mahabir Pershad [ILR (1967) 1 P&H 435]

The Hon'ble Punjab and Haryana High Court has observed that such entries though relevant were only a corroborative evidence and it is to be shown further by some independent evidence that the entries represent honest and real transactions and that monies were paid in accordance with those entries.

(iv) Prathana Construction (P) Ltd. vs. DCIT 70 TTJ (Ahd.) 122

Certain documents were found during the course of search operations at the residence of one Shri Sureshbhai Patel which contained details of payment made to one Shri Arunbhai. On these pages, there were number of entries with dates giving the name of the appellant and the purpose for which the same were given. The statement of Shri Sureshbhai Patel was also recorded whereby he explained that these payments were own money paid to the appellant. The appellant was confronted with the statement of Shri Sureshbhai Patel as well as the documents. The Assessing Officer rejected the explanation of the assessee/appellant on the ground that the statement of Shri Sureshbhai

Patel are to be relied upon as these amply confirm the seized documents. In the appellate proceedings, the assessee again denied alleged payment and contended that no conclusion can be drawn against him on the basis of these documents and the statement of Shri Sureshbhai Patel. The Ahmedabad Bench of ITAT accepted the plea of the assessee by observing as under :

"The first issue which calls for consideration is whether these documents and loose papers constitute admissible and relevant evidence in support of the Department's case or not. It is a settled proposition as held by various jurisdictional authorities that the rigour of the rules of evidence contained in the Evidence Act are not applicable to the income tax proceedings. However, the principles contained in the Evidence Act incorporated from the rules of natural justice forming part of the common law would naturally be applicable to the income tax proceedings. Now if we consider the evidentiary value of these documents it is amply clear that these loose papers and documents cannot possibly be construed as books of accounts regularly kept in the course of business. Such evidence would, therefore, be outside the purview of Section 34 of the Evidence Act, 1872. We are therefore of the considered opinion that the Revenue would not be justified in resting its case on the loose papers and documents found at the resident of the third party even if such documents contain narration of transactions with the assessee company. At this stage, we may also refer to the provisions of Section 132 (4A) which would, in any case, not be applicable to a third party from whose possession such papers and documents have not been found by the Revenue. We find merit in the contention of the learned Counsel that the statement of Shri Sureshbhai Patel and Shri Deepak Mehta recorded at the back of the assessee would not ipso facto conclude the case against the assessee particulars when the maker of the statement has not been allowed to be interrogated by the assessee company. Sureshbhai Patel and Deepak Mehta are the brokers and the transaction

involving the receipt of loan money have been, according to the Revenue, arranged through these persons. The mere testimony of these brokers tendered at the back of the assessee would not be sufficient to establish that the loan money has been received by the assessee."

61. The above judgement, which is on similar facts, fully supports the argument of the Id. counsel for the assessee that the addition cannot be sustained in the hands of the assessee on the basis of entry in the diary and the statement of Shri Manoj Aggarwal.

62. So far as the statement of Shri Manoj Aggarwal is concerned, it is not proved that the entire amount of profit paid to M/s. Friends Portfolio (P) Ltd. was the income of the assessee. Firstly, the earlier statements did not relate to the assessee and secondly the statements are general and vague in nature. The statement cannot be used against the assessee in absence of opportunity to confront that witness and in absence of his cross-examination as has been held by us while deciding ground no.3 of this appeal. Shri Manoj Aggarwal did not refer to any transaction relating to the assessee in his letter dated 22.8.2000 when he admitted that transactions amounting to Rs.100 crores approximately were done by him on commission basis. In his statement dated 11.9.2000 and 19.6.2002 also, no specific allegation was made against assessee. So far as the statement dated 19.6.2002 is concerned, the assessee has even challenged the genuineness and authenticity of this statement by

pointing out that the signatures of Shri Manoj Aggarwal on this statement did ^{not} tally with his signatures to his statement dated 14.12.2000.

63. So far as the last statement recorded by the Assessing Officer on 9.11.2004 is concerned, again the assessee has disputed the signatures of Shri Manoj Aggarwal on this statement also. In any case, since the witness was not cross-examined, his statement cannot be relied for sustaining the addition made against the assessee.

64. The statement of Shri Neeraj Gupta has been mis-quoted by the Assessing Officer. He has nowhere stated that he was acting as a mediator between the assessee and has participated in the bogus transactions involved in the present matter.

65. The Assessing Officer has also taken support from certain other circumstances for making the addition. These are as under :

(A) CLIENT AGREEMENT :

The Assessing Officer has observed that the client agreement has not been signed by M/s. Friends Portfolio (P) Ltd. This allegation is found to be incorrect. The client agreement has been duly obtained and signed by Director of M/s. Friends

Portfolio (P) Ltd. The assessee had categorically stated this fact even before the Id. CIT (A) and no effort has been made to disprove the contention of the assessee. The Assessing Officer did not refer the signatures of Shri Manoj Aggarwal to any handwriting expert to show that Shri Manoj Aggarwal did not make signatures but somebody else had forged the same. It was for the Assessing Officer to prove that if he wanted to disprove the document.

(B) MARGIN MONEY NOT OBTAINED :

The Assessing Officer was of the view that the assessee was doing his own business and had he been doing on behalf of M/s. Friends Portfolio (P) Ltd. then he would have definitely taken margin money. The contention of the assessee before the Id. CIT (A) was that there was credit in the account of M/s. Friends Portfolio (P) Ltd. at the time of transaction was carried out and that is why, there was no further requirement of margin money to safeguard any loss. Even if, any requirement of taking margin money under circular letter then also the transactions cannot be held to be bogus merely on the ground that no margin money was taken before doing business on behalf of the client.

(C) ACCEPTANCE BY SOME OF THE BENEFICIARIES :

The Assessing Officer has also observed that some of the beneficiaries who transacted with M/s. Friends Portfolio (P) Ltd. and Shri Manoj Aggarwal accepted the entries and accepted the transactions as bogus and also got their matter settled by the Settlement Commission. On this basis, the Assessing Officer has concluded that all the transactions entered into by Shri Manoj Aggarwal were bogus transactions. In fact, even Shri Manoj Aggarwal, in the first instant, did not accept that all the transactions entered into by him were bogus. Otherwise also, merely because some of the beneficiaries, for any reason, approached the Settlement Commission that by itself cannot be used against the assessee.

(D) ABNORMALITY OF TRANSACTIONS IN SHARES :

The Assessing Officer has also pointed out certain abnormalities in the transaction of shares carried out by assessee for M/s. Friends Portfolio (P) Ltd.. One of such abnormality as pointed out by him that the shares were not transferred in the D.Mat Account of M/s. Friends Portfolio (P) Ltd. The explanation of the assessee in this regard was that enough money was not provided by M/s. Friends Portfolio (P) Ltd. and if the transactions are on credit basis, the brokers are

not supposed to deliver in the account of their clients till they receive the payment from the account of M/s. Friends Portfolio (P) Ltd. It was pointed out by the Id. counsel for the assessee that they have not made full payments as such the delivery was delayed. The inference of the Assessing Officer that the transactions entered into by the assessee were bogus entries and that is the reason for the delay in delivery. Such inference also not found substantiated. The Assessing Officer has also made the allegation that the transactions entered by the assessee were bogus entries and the entries were made with the intention to transfer the profit to M/s. Friends Portfolio (P) Ltd. This allegation is also not correct. If the transactions are not genuine then the profit arising out of the same cannot be undisclosed income of the assessee. The assessee has shown that the transactions were genuine and were entered into normal course of business in its books of account. The details of each transactions are entered into contract notes.

65.1 On consideration of the entire material and relevant circumstances and on the basis of the authorities cited above, the entry regarding cash payment does not prove the case of the department. AS observed above, this evidence has not been properly corroborated. So far as the oral testimony of Shri Manoj Aggarwal is concerned, firstly, such evidence cannot be used

against the assessee for want of opportunity of cross-examination, as discussed above, and secondly, his testimony has to be discredited and disbelieved on merits also on account of his admitted conduct of carrying on illegal business of bogus transactions and dubious nature of activities. Neither the Assessing Officer nor the Id. CIT (A) were justified in giving credence to the evidence of a person who had dubious dealings, his credibility and integrity is also shattered in view of discrepancies, inconsistencies and infirmities found in his statements which have also been highlighted above. As his illegal transactions were discovered during the course of search, his only object might have been to defend himself by involving others. His statements are, therefore, self-serving. The department has also favoured him because even protective assessment has not been made in his hands regarding alleged bogus transactions found during the course of search. Neither the Assessing Officer nor the CIT (A) made any enquiry or carried out any investigation at the time of completion of assessment of Shri Manoj Aggarwal and M/s. Friends Portfolio (P) Ltd. by independently examining the genuineness and the correctness of his statements. His statement has been accepted on its face value without any verification and cross-verification from any other person with whom he carried out the transactions and received cheques etc. Since the cheques were deposited in his account and in the account of M/s. Friends Portfolio (P) Ltd., it was to be examined as to whether such transactions were benami

in nature. The Id. CIT (A) has supported the view taken by the Assessing Officer without going into the documentary evidence filed by the assessee on record and without assigning reasons for discarding the same. The evidentiary value of Shri Manoj Aggarwal was required to be have been examined in the context of the facts stated above but the Id. CIT (A) upheld the allegation made by the Assessing Officer regarding the addition of Rs.3,26,48,898.84 although no direct testimony was available to sustain this addition. There is not an iota of evidence to show that the whole amount transferred by the assessee to M/s. Friends Portfolio (P) Ltd. was refunded back to the assessee and was, in fact, its own income. In absence of documentary or circumstantial evidence, the addition cannot be justified in the block assessment done under section 158BD without there being material found in the course of search to substantiate the same. The addition is, therefore, based on assumption without there being any material or evidence to substantiate the same and, therefore, cannot be upheld.

65.2 On the other hand, the assessee has proved that transactions were carried by it through banking channel. The purchase and sale of shares by it is duly evidenced in the books of account. The assessee is a recognized share broker and no defect was found in the books of account maintained by him, which was also duly audited. The rate at which these transactions were carried out was also not disputed. The assessee had dealings with several parties and such dealings are also fully recorded in the books of account,

which is also evidenced by the documentary evidence on record and which were not found to be bogus or fake transactions. The oral testimony of Shri S.C. Aggarwal supports and corroborates the documentary evidence. Thus, the documentary evidence adduced by the assessee in which no discrepancy is found cannot be discredited only by statement of a person whose testimony is not free from doubt. In the case of Morarka Properties (P) Ltd. and Ors. vs. Biharilal Morarka & Ors. AIR 1978 SCC 300, it has been held that in the face of documentary evidence on record, the oral evidence is not entitled to any weight. In the case of R.S. Nayak vs. A.R. Antulay AIR 1986 SCC 2045, the Hon'ble Apex Court has held that documentary evidence is to be preferred over oral evidence in case conflict between the two.

66. In view of the above, the addition made by the Assessing Officer cannot be sustained and the same is directed to be deleted. ^{These} ~~This~~ ground of assessee, therefore, stands allowed.

67. Ground No.6 is as under :

"On the facts and circumstances of the case, the learned CIT (A) has erred both on facts and in law, in rejecting the contention of the appellant that no surcharge is leviable as the amendment to section 113 for levy of surcharge is effective only from 1st June, 20002 and as such the case of the appellant is not covered by the amendment."

68. The assessee took ground no.8 against imposition of surcharge. It was submitted before the Id. CIT (A) on behalf of the assessee that the

amendment to section 113 is effective from 1.6.2002 and the search in this case was carried on 8.1.2002 and accordingly the levy of surcharge was unauthorized and illegal. In this regard, reliance was also placed on the decision of Pune Bench of ITAT in the case of Aruna M. Katara vs. DCIT 82 TTJ 362. The Id. CIT (A) has considered the provisions of sections 158BH and 113 of Income-tax Act and upheld the order of the Assessing Officer. In this regard, he also made reference to the Circular No.7 dated 14.8.1995 of CBDT. The finding of the Id. CIT (A) was challenged by the assessee before us.

69. The Id. counsel for the assessee submitted before us that the issue has been decided by Amritsar Bench of the ITAT in the case of Manohar Lal Rattan Lal vs. DCIT 91 TTJ (Asr) 737 wherein it was held that proviso to section 113 shall be applicable in respect of search carried out on or after 1.6.2002. In view of the above decision, the levy of surcharge is not justified as search in this case had been carried out before 1.6.2002. This ground is, therefore, allowed accordingly.

70. In the result, the appeal is partly allowed as above.

(Order pronounced in the open court on the 27th January, 2006.)

sd
(RAJENDRA SINGH)
ACCOUNTANT MEMBER

sd
(P.N. PARASHAR)
JUDICIAL MEMBER

Dated the 27th January, 2006/TS

Copy forwarded to

1. Assessee
2. A.O.
3. CIT (A)
4. CIT
5. DR

By hand.


DEPUTY REGISTRAR,
ITAT, DELHI BENCHES

