

**Surendra M. Khandhar Vs. Assistant Commissioner of Income Tax**

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**Court :** Mumbai

**Decided On :** Dec-03-1999

**Reported in :** [2001]76ITD121(Mum)

**Appeal No. :** IT Appeal Nos. 5531 & 6181 (Bom) of 1995 3 December 1999 A.Y. 1991-92

**Appellant :** Surendra M. Khandhar

**Respondent :** Assistant Commissioner of Income Tax

**Advocate for Pet/Ap. :** D. Bhaskara Rao, *for the Appellant* S. Ramu, *for the Respondent*

**Judgement :**

ORDER

M.V.R. Prasad, A.M.

These are cross appeals by the assessee and the department against the order of the Commissioner (Appeals), dated 30-3-1995 for the assessment year 1991-92. These were heard together and are disposed of by this common order.

2. Various grounds are taken by the assessee in ITA No. 5531 /Bom/95. Excluding the ancillary grounds, the main grounds are as follows :

'0.1

(a)

The Commissioner (Appeals) was not justified in sustaining the addition of Rs. 62,500 made by the Assistant Commissioner by estimating the professional receipts of the appellant at Rs. 5,00,000 as against the admitted receipts of Rs. 4,37,500.

02.

(a)

The first appellate authority was not correct in confirming the estimated disallowance of Rs. 20,000 made by the Assistant Commissioner out of expenses incurred by the appellant on salary and bonus of his employees.

03.

(a)

The Commissioner (Appeals) was not justified in sustaining disallowance of Rs. 1,19,952 out of interest claimed by the appellant on the ground that the relevant borrowals were made from concerns whose name appear in Annexure A 3 seized from the office premises of Eshita Dye Chem Pvt. Ltd. in December 1991, in the course of search under section 132 of the Income Tax Act.

04.

(j)

The first appellate authority was not justified in upholding in principle the assessing officers decision to bring to tax in the hands of appellant, the 'Peak' of the credits appearing in the bank accounts of the 110 bank accounts whose names appear in Annexure A 3.

(The addition sustained by the Commissioner (Appeals) in this regard is Rs. 2,62,01,981 out of the addition made by the assessing officer of Rs. 12,86,70,053.)

3. The assessee has also raised subsequently the following additional grounds

'(A) Without prejudice to the grounds mentioned at 4(a) to 4(k) (only 4(j) reproduced above), the first appellate authority should have directed the assessing officer to deduct the 'Peak' worked out and included in the income-tax assessment for the assessment year 1990-91, from the 'Peak' arrived at for the assessment year 1991-92 and include only the balance.

(B) The assessing officer erred in charging interest under section 234A of the Income Tax Act, though the appellant voluntarily filed his return of income and no notice under section 142(1) of the appellant.

(C) The Assistant Commissioner ought to have charged under section 234B of the Income Tax Act, as the appellant paid advance tax on the basis of the income shown by him in the return of income filed by him.'

4. In the appeal filed by the department in ITA No. 6181/Bom/95, following grounds are taken

'On the facts and in the circumstances of the case and in law, the learned Commissioner (Appeals) has erred in

(i) allowing relief of Rs. 1,70,000 and Rs. 4,00,000 on erroneous assumptions without verifying the facts;

(ii) deleting the addition of Rs. 20 lakhs without appreciating the fact that it was for the assessee to prove that the contents of seized paper were not authentic as per the provisions of section 132(4A) of the Income Tax Act;

(iii) ignoring the facts that the assessee neither proved the authenticity of the seized paper nor the address, etc., of the parties involved in the transaction;

(iv) setting aside the addition of Rs. 12,86,70,053 on account of unexplained cash credits to work out the peak on the basis of maximum balance outstanding without appreciating the fact that the peak could be worked out, only if, the assessee could establish that withdrawals were entered back into the bank account.'

5. Both the learned counsel for the assessee and the department have filed voluminous paper-books in this case and have cited a large number of cases in support of their propositions.

6. The learned counsel for the assessee filed the following paper-books

(1) Volume I (Pages 1 to 125)

(2) Volume II (Pages 1 to 225)

(3) Volume III (Pages 1 to 204)

(4) Volume IV, being written submissions (Pages 1 to 99).

7. The learned Departmental Representative filed a bulky Rayka Deluxe file which is serially numbered from page 1 to page 295 and other papers on admission of additional evidence, starting with a letter addressed by the Deputy Commissioner, Central Circle, dated 11-6-1999 to the Registrar, Income Tax Appellate Tribunal. In this volume, some papers are not serially numbered. Then, there are papers numbered from page 1 to page 88. Thereafter, there are other papers in this book which are not serially numbered.

8. The assessee is an individual. He is third in order of the following five brothers

(1) Shri Jagdish M. Khandhar

(2) Shri Praful M. Khandhar

(3) Shri Surendra M. Khandhar

(4) Shri Rajesh. M. Khandhar

(5) Shri Bipin M. Khandhar

Shri Praful M. Khandhar is the director of a concern called Eshita Dye Chem Pvt. Ltd., which is one of the concerns which has been searched along with the residential premises of the assessee. The assessee obtained Bachelors Degree in Commerce and also appeared for the Chartered Accountants Examination but he

did not obtain the degree. He started practice as an income-tax practitioner in October 1980. It is stated by the learned counsel for the assessee that he discontinued his profession in 1983. The learned counsel for the assessee also explained in a Note which may be seen at page 2 of Volume III of the Assessee's Paper-Book (hereinafter referred to as the APB) that the assessee started with two other businessmen, Shri S.M. Hussain and Shri Sudershan Kumar, in 1984, a limited company 'Suman Motels Pvt. Ltd.'. After obtaining the permission of the Controller of Capital Issues in 1989, this company is stated to have gone public and the shares were issued to the public in April/May 1990. This company, of which the assessee is a director, has its registered office at 42, Ambedkar Marg, Wadala, Mumbai-31 and its corporate office is at 208-210, Parshva Chambers, Essaji Street, Vadgadi, Mumbai-3. The assessee has his residence at Telang Road, Matunga, Mumbai, and he has also an office at 208-210, Parshva Chambers, Vadgadi, Mumbai, where the abovementioned Eshita Dye Chem Pvt. Ltd. and Suman Motels Ltd. also have their offices. This Parshva Chambers will figure very prominently in this order as the search was conducted in this premises. The assessee has also a cabin in 208-210, Parshva Chambers, where M/s. Eshita Dye Chem Pvt. Ltd. is located. Search operations were conducted on 18-12-1991 at the residential premises of the assessee and also that of his three brothers. Simultaneously, searches were also conducted at the office premises of M/s. Suman Motels Ltd. and M/s. Eshita Dye Chem Pvt. Ltd. at 208-210, Parshva Chambers. The search proceedings initiated on 18-12-1991 were temporarily concluded at 8 a.m. on 19-12-1991. They were resumed on 20-12-1991 to search a computer room and a cabin occupied by the assessee in 208-210, Parshva Chambers. During the search on 20-12-1991 of 208-210, Parshva Chambers, a crucial document, described as Annexure A 3, in the Panchnama relating to the search of the premises and containing a list of 110 bank accounts and the names of the banks and the branches in which they are held was found. There is some dispute as to the exact location in which this statement, termed as Annexure A 3, has been located during the search. The contention of the department is that it was located in the cabin occupied by the assessee, whereas the stand of the assessee is that it was located in the table of the typist in the computer room. There is, however, no dispute that it was located in the premises 208-210,

Parshva Chambers, during the search on 20-12-1991. The banks and their branches involved are the following

- (1) Indian Bank, Mandvi Branch.
- (2) Co-operative Bank at Ahmedabad, Narshi Natha Street, Bombay.
- (3) State Bank of Saurashtra.
- (4) Bank of India, Khand Bazar.
- (5) UCO Bank, Mandvi Branch.
- (6) Punjab National Bank, Bhatt Bazar.
- (7) United Western Bank, Vadgadi.
- (8) Satara Sahakari Bank Ltd.
- (9) Allahabad Bank, Sion.
- (10) The Madhavapura Merchant Co-operative Bank Ltd., Mandvi Branch.
- (11) New Bank of India, Khand Bazar.
- (12) Union Bank of India, Kakad Bazar.
- (13) Bank of Baroda, Khand Bazar.
- (14) Canara Bank, Sion.

The authorised officer took a statement of the assessee on 20-12-1991 and in the course of his statement, he was examined on the bank accounts figuring in the statement termed as Annexure A 3. In a deposition taken from him during the search of Parshva Chambers, the assessee agreed to offer the peak of these bank accounts as his undisclosed income and it is the basis of this admission that the assessing officer made an addition of Rs. 12,86,70,053. Before we proceed to detail, the deposition of the assessee on the bank accounts figuring in Annexure A 3. We may also mention that the statements have been taken from the assessee

on different occasions and as per the details given in the APB at page 1 of Volume III, the relevant details are as follows:

'18-12-1991

At the residence of Shri S.M. Khandhar in Matunga, Bombay, preliminary statement was recorded from him by Shri Atul Pranay, authorised officer.

18-12-1991

At the residence of Shri S.M. Khandhar in Matunga, Bombay, final statement under section 132(4) of the Income Tax Act was recorded from him by Shri Atul Pranay, authorised officer.

18-12-1991 & 19-12-1991

At Parshva Chambers, Vadgadi, Bombay statement under section 132(4) of the Income Tax Act was recorded from Shri S.M. Khandhar, Director of Suman Motels Ltd. by Shri D.C. Patwari, authorised officer.

20-12-1991

At Parshva Chambers, Vadgadi, Bombay, statement was recorded from Shri S.M. Khandhar, Director of Suman Motels Ltd. by Shri Arvind Kumar, authorised officer, during the course of search under section 132(1) of the Income Tax Act.

23-12-1991

At 278, Samuel Street, Vadgadi, Bombay, statement under section 132(4) of the Income Tax Act was recorded from Shri S.M. Khandhar, Director of Suman Motels Ltd. by Shri Arvind Kumar, authorised officer.

23-9-1993

In the Income Tax Officer (CGO Annexe), Bombay statement under section 131 of the Income Tax Act was recorded from Shri S.M. Khandhar, Director of Suman Motels Ltd. by Shri Govindlal, assessing officer.'

A copy of the statement of the assessee given before the assessing officer on 20-12-1991 may be seen at pages 30 to 33 of the APB (Volume-I). The relevant portion of the deposition reads as follows:

'Q.4.

I am showing you six pages containing the name of the bank, the branch thereof, the name of the holders of the accounts as reflected in the pages under reference. Kindly explain the status of these accounts and the accounting thereof from the income-tax point of view and the undisclosed income reflected in the transactions in the bank pass books under reference.

Ans.

That list contains bank accounts of Khandhar group and other partnership and prop. concerns. All partners and proprietors are physically available but their creditworthiness is not linked with the transactions in the concerns under reference and, therefore, I am offering the peak amount as appearing in this bank statement for taxation. I undertake to close down all bank accounts and concerns as referred in the pages under reference, i.e., Annexure A 3, except Khandhar group. In this connection any particular concern due to some reason is not closed I may be allowed one month more time within which I will be positively able to close down the same. The Khandhar as referred above include the following concerns

1. Suman Motels Ltd.
2. Highway Users (India) Ltd.
3. Naheshri Marketing Ltd.
4. Tej Gaurav Industries Ltd.
5. Eshita Dye Chem Pvt. Ltd.
6. Saffron Surgical Systems Pvt. Ltd.
7. Tej Gaurav Farms Co. Pvt. Ltd.

8. Khandhar Engineering Works
9. Raj Enterprises
10. Raj Electricals
11. Ray Engineering Co.
12. Shekakha & Co.
13. H.P.S. International
14. Prabhavee
15. S.M. Khandhar & Co.
16. P.M. Khandhar & Co.
17. Arkay Incorporated
18. Shah & Khandhar Bros.
19. Gaurav Enterprise Gaurav Family Trust
20. Tejas Enterprises-Khandhar Family Trust
21. Dhaksha P. Khandhar (Personal)
22. Bharti S. Khandhar (Personal)
23. Rajeshree B. Khandhar (Personal)
24. Asha R. Khandhar (Personal)
25. Bipin Khandhar-B.K. Trading Co. (Personal)
26. Snehal P. Khandhar Minor (Personal)-
27. Tejas S. Khandhar Minor (Personal)

28. Gaurav S. Khandhar Minor (Personal)

29. Mona P. Khandhar Minor (Personal)

30. Eshita P. Khandhar Minor (Personal)

31. Rupa R. Khandhar Minor (Personal)

32. Kushal S. Khandhar Minor (Personal)

33. Hiraben M. Khandhar (Personal)

Q..5

As regards, the peak amounts referred in the six pages under reference kindly clarify the concept of peak and also the status of Khandhar family concerns in respect of working of the peak for offering the same for the purpose of taxation.

Ans.

As regards the concept of peak I have to state that this will be valid in respect of all the concerns including my family concerns excluding Suman Motels and Highway Users Centres (India) Ltd. Since, I am enjoying bank facilities in my family concerns. My expansion activities will suffer, if I close down my family concerns.

However, my ultimate intention is to minimise even the family concerns also. I wish to clarify here that the working of peak as referred in this statement meant the maximum balance outstanding as on any date.

Q.6

During the course of search operation at the residence of Mr. Bipin M. Khandhar, at the office premises of Suman Motels at 42, India Printing House, Ambedkar Road and at the office premises at Parshva Chambers certain bank accounts, cheque-books, slip-books were found which indicated that the same belong to other individuals not being part of your family but the banks accounts were operated by you and your brother Bipin M. Khandhar. Kindly furnish details of those accounts and the status thereof and its tax implication.

Ans.

Following savings accounts are maintained by me and my family members. Please note all saving accounts persons are physically available.

(1) Deepak G. Bhatt

(2) Manjula B. Bhatt

(3) Haresh Gandhi

(4) Mahesh Kothari

(5) Mulraj B. Bhatt

(6) Suryakant Kothari

(7) Bakordas Bhatt

(8) Kishore T. Shah

(9) Saikh Muktar Husain

(10) Sudarshan Kumar

Out of the above accounts the accounts appearing at Serial Nos. 9 and 10 are disclosed to the Income Tax Department vide their respective return of income and wealth. As regards the rest of accounts which are appearing from Serial Nos. 1 to 8. I have to state that though the persons referred are existing the accounts are operated by us only and, therefore, the peak amount are being disclosed for income-tax purpose. In this connection, I wish to add that cheque-books are signed by actual parties and operated by us. Furthermore, I also wish to clarify that in respect of current also the relevant cheques are signed by actual persons and we are operating the same. The list of the persons who are actually signing the cheques will be furnished to you at a later date.

Q.7.

As regards quantification of income pertaining to the above concerns/persons under reference and the payment of tax due on them kindly give us a time frame.

Ans.

As regards quantification we require 21/2 months to work out and tax payment these will be paid as per tax norms as prescribed in the Income Tax Act, 1961.

Q.8.

In respect of the concerns referred in six pages as seized in Annexure A 3, please state whether in respect of concerns not falling under your family concerns also in respect of the persons referred in SB accounts whether beneficiary opened a locker and operated the same.

Ans.

No.

Q.9.

Do you wish to say anything further?

Ans.

No. Please.'

It may be noticed from the above deposition that the assessee has admitted that the assessee's group consists of as many as 33 concerns which includes even Eshita Dye Chem Pvt. Ltd. It may also be noticed that the bank accounts figuring in Annexure A 3 are admitted to belong to the Khandhar group and other concerns. It is also admitted that the persons in whose names the accounts figure were physically available but they are not genuine parties. In other words, it was admitted that the assessee was operating the bank accounts in Annexure A 3 in benami names. It may also be observed that at the residence of his brother, Shri Bipin Khandhar, not only the list of bank accounts but the relevant bank pass books, cheque-books and pay-in-slips were also located in respect of certain other

bank accounts which do not figure in Annexure A 3.

The assessee also agreed, during the deposition, to offer as income the peak amount of these accounts and by peak he explained that he meant the maximum balance on any day in each of the 110 accounts figuring in Annexure A 3. The assessee retracted from the above position in the course of the assessment proceedings. A copy of his statement dated 23-9-1993 given under section 131 of the Income Tax Act containing the retraction may be seen at pages 41 to 48 in Volume I of the APB and the relevant portion of it reads as follows :

'Q.3.

There was an income-tax raid under section 132(1) on 18-12-1991 in your case and in the case of your family members, firm/Co. operated by your family concerns. During the course of action under section 132(1), your statement under section 132(4) was recorded on oath on 20-12-1991. I am showing you the statement recorded. Please confirm that you had given the statement numbering in pages 1 to 8.

Ans.

Yes, I confirm that a statement was given by me, however, it is to be noted that my statement was taken by department on 18-12-1991 and it was concluded by 20-12-1991.

Q.4.

Please clarify what do you mean by me reply given by you in the earlier question No. 3.

Ans.

On 18-12-1991, search action was conducted in morning and ADI has recorded my statement at my residence upto late night, then I have attended my office, Premises at 8, Vadgadi and again ADI has started recording my statement upto early morning of 19-12-1991 and again third time my statement was recorded by ADI on 20-12-1991.

Q.5.

I am showing you the last page of the statement recorded on 20-12-1991 where it is written that 'Statement has been given voluntarily without any threat, pressure or coercion'. Please confirm that.

Ans.

Yes, I have given my statement voluntarily without any threat, however, it is pleased to be noted I was very much in tension, when my statement was recorded since search was conducted on page No. 3 dated 18-12-1991 and it was continued upto 20-12-1991.

Q.6.

Please refer to the question No. 4 of the statement recorded on 20-12-1991 in your case. Please confirm that you have given the statement as appearing in question No. 4 (Question No. 4 and reply given by him was shown to Shri Surendra M. Khandhar.

Ans.

Yes, I confirm, however, following points to be considered with my above referred statement (1) Khandhar group and all Khandhar family members are regularly assessed to him Income Tax Department.

(2) All other proprietorship and partnership concerns also regularly assessed to the Income Tax Department.

(3) It is general practice in our market that parties are not co-operative to the search party.

(4) I was in very much high tension at the time of search action.

(5) Considering that parties may not be in a position to give documentary evidence at the time of assessment since I do not have any business transaction with some of the parties and they may not co-operate me.

Q.7.

In reply to question No. 4 recorded on 20-12-1991, you had clearly stated that 'All partners and proprietors are physically available but these creditworthiness is not linked with the transactions in the concerns under reference and, therefore, I am offering the peak amount as appearing in this bank statement for taxation'. Even you had stated that 'I undertake to close all bank account and concern as referred in the pages under reference that is Annexure A3 except Khandhar group'. Further you went on recording that 'In this connection of particular concern due to some reason is not closed, I may be allowed one months more time, within which and will be positively able to close down the same'. You had given the name of the concerns belonging to Khandhar group. What is you have to say in this connection ?

Ans.

Initially, I was doing income-tax practice and I have given to some parties introductory signatures for opening bank accounts and doing their business activities. These bank accounts operated by my introductory signature, I have given in my statement to close all bank accounts, however, some of the parties accepted my request. Regarding creditworthiness I was not knowing their creditworthiness. I was also not sure about their co-operation and as earlier stated, I was in tense and, therefore, with above reasons I have above referred statement. Please to be noted that department could not found any other cheque-books, slip-books or any documents except Khandhar group in my office premises at the time of search action.

0.8.

You have not replied regarding offer of peak amount as appearing in the bank statement (reply to question No. 4 of statement recorded on 20-12-1991).

Ans.

I would like to clarify my statement that in case at the time of assessment parties could not co-operate or parties may not stand to the departmental strict evidence

to prove transactions, I may have to pay tax.

Q.9.

Please clarify parties may not stand to the departments strict evidence as replies in response to the question No. 8.

Ans.

Some of the parties with whom we do not have any business transaction nowadays may not co-operate us and may not produce all evidence as required by the department after two three years.

Q.10.

In reply to question No. 8, you have stated that 'I may have to pay the tax.' Please clarify what does this mean and how, it is related to different concerns appearing in reply to the question No. 4 of the statement recorded on 20-12-1991 are you taking the responsibility to pay the taxes in all the Khandhar group by mentioning that I am have to pay the tax Khandhar group here means as stated by you in reply to question No. 4 of your statement recorded on 20-12-1991.

Ans.

As I have stated earlier in case some of the parties may not cooperate and produce documentary evidence as required by the department. I have to offer for taxation.

It is to be noted that my statement is binding for S.M. Khandhar & Company, proprietorship concerns to some extent Suman Motels Ltd., in the capacity of director and partnership concern (to some extent) where I am partner. My statement is not binding to anybody else as they are separately assessed to Income Tax department.

Q. 11.

In reply to question No. 7, you have stated that department could not find cheque-books, slip-books any other documents except Khandhar group but in reply to question No. 6 of the statement recorded on 20-12-1991, there are 8 accounts that you have accepted are maintained by you and your family members. Bank accounts, cheque-books, slip books were found during the search operation. You have clearly mentioned that accounts are operated by us and, therefore, peak amount is being disclosed for income-tax purpose, thus you have given a false statement in response to the question No. 7 of your statement being recorded under section 131 today that is 23-9-1993. Please clarify your position.

Ans.

It is to be noted that documents relating to bank transactions are found at the residence of Shri Bipin M. Khandhar and cheque-book of Shaikh Mukhtar Hussain (Chairman of Suman Motels Ltd.) and cheque-book of Sudarshan Kumar (Director of Suman Motels Ltd.) found at Vadgadi premises. As I am handling finance, matter of the company and directors Shri S.M. Hussain and Mr. Kumar kept their cheque-book in my custody as most of time they are not available in Bombay. Regarding 1 to 8 Serial Nos. of question No. 6 of my statement dated 20-12-1991 to the best of my knowledge only one slip was found on the residential premises of Bipin Khandhar. Serial Nos. 1 to 8 either they are relatives to us or friends. They are doing their business activities using our office facilities. As earlier I have stated, I was in tense and because of us above referred parties should not suffer and, therefore, I have given my reply.

Q. 12.

In response to the different questions put to you today, you have repeatedly stated that you were tense during the statement recorded on 20-12-1991. You had signed the statement recorded on oath on 20-12-1991. Before concluding the statement. It is mentioned that the statement have been given voluntarily, without any threat or coercion the statement was recorded on 20-12-1991. Now, on 23-9-1993 when the same statement given by you that too on oath, you are taking the plea that I was tense and so I have given the statements in response to question No. 4, you have undertaken to close down all bank accounts and concerns except

Khandhar group. Vide reply to question No. 7, you had asked for 2 months times for quantification of the income again you fail to comply that you have committed in response to question No. 7 of your statement recorded on oath on 20-12-1991. I am hereby given you opportunity to state why penal action should not be initiated against you in view of your statement recorded on oath on 20-12-1991 that you fail to comply.

Ans.

I do hereby agree that I have given my statement voluntarily but it is human tendency that person gets tense at the time of normal situation. I am not taking any plead by stating repeatedly 'tense', but I am making my position clear.

Regarding closing down accounts except Khandhar group I would like to state that I could not force people to do as I want, they are all assessed to income-tax. I have given my statement and requested parties, to close down the bank accounts as these bank accounts most of them are introduced by us.

Q. 13.

Vide question No. 19 of statement recorded on 18-12-1991, you have accepted that you look after the mobilisation of finance of concerns of the group this implies that you are looking after the financial matters of the group do you confirm?

Ans.

Yes, I do confirm.'

It may be observed from the above statement that the assessee had retracted from his earlier offer to disclose the peak of the bank accounts figuring in Annexure A 3 as his income.

9. Before the assessing officer, various contentions were taken as to why the peak of the amounts figuring in the various bank accounts in Annexure A 3 should not be brought to tax as the undisclosed income of the assessee. Firstly, it was contended that the admission contained in the statement allegedly recorded under section 132(4) on 20-12-1991 has no validity because the assessee had nothing to

do with Eshita Dye Chem Pvt. Ltd. and while there was a search warrant against this concern, there was no search warrant against the assessee and so the statement recorded from him in the course of the search of Eshita Dye Chem Pvt. Ltd. in 208-210, Parshva Chambers, cannot be regarded as a statement under section 132(4). It was also contended that the said list of bank accounts in Annexure A 3 was seized from the table of the typist and not from his own cabin and so he had nothing to do with the said list. The assessing officer, however, mentioned that the assessee was controlling the entire operations of the group concerns from his cabin in 208-210, Parshva Chambers, and so the assessee must be regarded as having been fully in possession and control of the said premises within the meaning of section 132(4) and so the statement recorded from him on 20-12-1991 has to be correctly regarded only as a statement recorded under section 132(4) itself. So, on the basis of the admission contained in the said statement to the effect that the bank accounts were held in benami names by the assessee, the assessing officer brought to tax an amount of Rs. 12,86,70,053, being the aggregate of the deposits contained in the different bank accounts figuring in Annexure A 3. Apart from the above addition relating to the peak of the bank accounts, the assessing officer made another addition Rs. 26 lakhs on the ground that the assessee had advanced a loan of Rs. 20 lakhs to one Shri Bhupendra Chheda. He came to this conclusion on the basis of the contents of a paper seized during the search at 208-210, Parshva Chambers, on 18-12-1991. A copy of this seized paper may be seen at page 105 (Volume I) of the APB. The paper reads as follows:

'22-1-1991

(1) Mr. Surendra Khandhar

(2) Mr. Mahendra P. Shah

In the presence of

(3) Mr. Bhupen Chheda

On 22-1-1991, at 7.30 P.M. in the case of Surendra N. Khandhar v. Bhupen Chheda, it is decided as under :

(1)

On or before 28-2-1991 (Bhupen Chheda) myself will pay Rs. 5,00,000 (Rupees five lakhs) towards the payment of loan out of twenty lakhs rupees.

(2)

Balance amount will be paid by 50 per cent of collection cheques and current account will be operated by Mahendra P. Shah. I hereby agree to deposit all cheques only in United Western Bank, Mandvi Branch. However, I further confirm I will pay at least rupees live lakhs, even though I cannot collect collection to that extent. I further confirm, I will pay all loan amount on or before 31-5-1991.

Signed and Delivered

Sd/

Bhupen Chheda

22-1-1991

I, Mahendra P. Shah,

stand guarantee for the

above matter.'

During the course of the search, the assessee was examined in respect of the above paper and the relevant portion of his deposition on 18-12-1991 may be seen at paper 12 to 27 of the departments paper book (hereinafter referred to as the DPB) and the relevant queries, i.e., Question Nos. 20 and 21, put by the assessing officer and the replies given are as follows :

Q.20.

I am showing you page No. 82 of the loose paper file No. A20 as per which Mr. Bhupendra Chheda was liable to pay Rs. 20 lakhs to you on the dates mentioned therein but this amount which is receivable by you has not been reflected in the account maintained by you.

Ans.

I have not received any amount from Mr. Bhupendra Chheda that is why it is not reflected in the accounts.

Q.21.

On perusal of the accounts maintained by you it is seen that you have accounted for receipts and payments on accrual basis. In the light of this fact, do you like to revise your answer to the previous question ?

Ans.

No.'

The assessing officer rejected the contention of the assessee that the assessee had never advanced this amount and included this amount as the unexplained investment of the assessee under the provisions of section 69 of the Income Tax Act. The assessing officer also made a few other additions. He estimated the professional fees at Rs. 62,500 and disallowed an amount of Rs. 20,000 out of the expenses by way of salary and bonus claimed by the assessee. He also added an amount of Rs. 5,70,000 under the provisions of section 68, being loans from concerns figuring in Annexure A 3. He disallowed interest of Rs. 1,19,952 paid to concerns figuring in Annexure A 3. It may be clarified that the respective names of the concerns to which the said 110 bank accounts figuring in Annexure A 3 relate are noted on the seized document termed as Annexure A3. However, the contention of the assessee has all along been that the names of the relevant concerns were recorded by the assessee on the seized document at the instance of the authorised officer, whereas the stand of the department is that the notings relating to the concerns in the hand of the assessee were there on the seized document itself. In other words, the stand of the department is that the seized

document itself bore the names of the concerns to which the respective accounts related and the relevant notings were in the handwriting of the assessee himself. The assessing officer rejected the contention of the assessee that he recorded the notings on the seized document after it was found during the search on the ground that there is no evidence at all to this effect. In other words, according to the assessing officer, the contention of the assessee that he had written the relevant names of the concerns on the seized document subsequent to its being found during the search is unproved. Before the Commissioner (Appeals), the assessee reiterated the contentions made out before the assessing officer. Firstly, he contended that the admission contained in his statement dated 20-12-1991, regarding the peak of the bank accounts figuring in Annexure A 3 cannot be acted upon because the statement itself had no legal validity for the reasons mentioned by us hereinbefore.

It was also contended that the concerns to whom the accounts figuring in Annexure A 3 related were all assessees on file and as these accounts are disclosed by the respective concerns and their assessments had been made, no separate addition on the basis of the deposits figuring in the said accounts can be made in the individual assessment of the assessee. The method of working out the peak adopted by the assessing officer was also assailed. The Commissioner (Appeals), however, rejected these contentions but gave partial relief. While the assessing officer brought to tax the aggregate of the deposits figuring in the various bank accounts, the Commissioner (Appeals) held that only the maximum balance in each bank account should be taken for inclusion in the assessment of the assessee and, thus, he worked out the aggregate of the peaks of these accounts on the basis of the mode of disclosure given by the assessee in his deposition taken from him on 20-12-1991 which we have extracted hereinabove. On this basis, he reduced the addition by way of the deposits of the seized bank accounts from Rs. 12,86,70,053 to Rs. 3,05,40,285, subject to further verification by the assessing officer. He deleted the addition of Rs. 20 lakhs, being the alleged advance by the assessee to Shri Bhupendra Chheda on the ground that there was no evidence at all in support of, he said advance and giving certain other reasons which we shall advert to hereinafter. He deleted the addition of Rs. 5,70,000 on the ground that the said credits should be regarded as having emanated from the

bank accounts figuring in Annexure A 3 and so, according to him, as a separate addition is made on the basis of the said accounts, there was no justification for making the impugned addition of Rs. 5,70,000. The Commissioner (Appeals), however, confirmed the disallowance of interest of Rs. 1,19,952 on the ground that the relevant credits were held to be bogus in the context of the addition made by the assessing officer on the basis of the bank accounts figuring in Annexure A 3 and when the credits are held to be bogus, the disallowance of interest is justified. He also confirmed the addition on account of professional fees of Rs. 62,500 and the disallowance out of expenses of Rs. 20,000.

10. As is evident from the grounds taken by the assessee and the revenue before us, the assessee is mainly aggrieved by the addition of Rs. 3,05,40,285 sustained by the Commissioner (Appeals) on the basis of the bank accounts figuring in Annexure A 3 and also other smaller additions upheld by him. The department is mainly aggrieved by the reduction from Rs. 12,86,70,053 to Rs. 3,05,40,285 allowed by the Commissioner (Appeals) in the addition made on the basis of the bank accounts figuring in Annexure A 3 and also the deletion of Rs. 20 lakhs, being the addition made on the alleged advanced made by the assessee to Shri Bhupendra Chheda.

I.T.A. No. 5531/Bom/95:

11. Before us, the learned counsel for the assessee assailed the addition of Rs. 12,86,70,053 made by the assessing officer on the basis of the bank accounts figuring in Annexure A 3 from various angles. He has also reiterated the contentions made out before the revenue authorities. The main plank of his argument has been that the statement recorded from the assessee on 20-12-1991 on the basis of which the said addition of Rs. 12,86,70,053 has been made is totally an invalid statement. Firstly, he drew our attention to the fact that the authorised officer who recorded the said statement mentioned it as having been recorded under section 132(1) and not under section 132(4). So, as the statement can be recorded only under section 132(4) and not under section 132(1), it is claimed that statement is invalid. It is also claimed, as we have already mentioned, that there was no search warrant against the assessee when the department

searched 208-210, Parshva Chambers, and the relevant search warrant was only against M/s. Eshita Dye Chem Pvt. Ltd. and the assessee was not a director or a shareholder on the date of the search of the said concern and his position was only that of a stranger so far as that concern was concerned and so it is pleaded that his statement dated 20-12-1991, cannot be regarded by any stretch of imagination as a statement recorded under section 132(4), as under this section, the statement of only the person who is in possession and control of the searched premises can be recorded. It is claimed that being in the position of only a stranger, the assessee could not have been examined under the provisions of section 132(4) and in this context, reliance is placed upon the following decisions

(1) Nenmal Shankarlal Parmar v. Assistant CIT : [1992]195ITR582(KAR) ,

(2) Smt. Sita Devi v. CIT ,

(3) Income Tax Officer v. Seth Brothers : [1969]74ITR836(SC) ,

(4) Income Tax Officer v. Mohan Lal Vig ,

(5) Income Tax Officer v. Smt. Lajwanti Devi (1968) 66 ITD 95 (Chd),

(6) Nagesh Thakurdas Khandhari v. Income Tax Officer (IT Appeal No. 1324 (Bom) of 1991 dated 28-4-1998).

It is also claimed that this statement cannot be brought within the purview of any other section under the Income Tax Act. It is explained that under the provisions of section 131(1A), an authorised officer can record a statement only before a search and not during or after the search. As admittedly, the statement dated 20-12-1991, was not recorded before the search but only after the search, it is claimed that the said statement cannot be regarded as one recorded under section 131(1A). It is also explained that the statement cannot be brought even under the provisions of section 132(1)(iia). Under this section only, a stranger can be examined and his deposition taken, only if, anything is found on him. As, it is not the case of the department that anything was found on the person of the assessee, it is claimed that the said statement dated 20-12-1991 cannot be regarded as one recorded under section 132(1)(iia). It is also claimed that if it is claimed by the department

that even a stranger can be examined under the provisions of section 132(4), such an interpretation would render section 132(1)(ia) redundant. It is also claimed that even the provisions of section 131 cannot be roped in because this section is available only to an assessing officer and that too when an assessment is pending. So, it is claimed that the said statement dated 20-12-1991 does not answer the requirements of any of the relevant sections of the Income Tax Act and so, it is actually an invalid statement and as such, the admission contained in the said statement on the basis of which the assessee has been saddled with a huge liability of Rs. 12,86,70,053 by way of inclusion in the total income has only to be ignored. The next contention made out is that Annexure A 3 which contained the list of 110 bank accounts was found only in the table of the typist and not in the cabin of the assessee in 208-210, Parshva Chambers. It is also claimed that the assessee had written the names of the concerns against the bank accounts figuring in the said Annexure A 3 only at the instance of the authorised officer after the paper was seized and if this writing of the assessee on the paper is ignored, as it should be, there is nothing to link the paper or the contents of the paper with the assessee. It is claimed that the assessee was under great tension because of a prolonged search operation which lasted more than 24 hours and a statement given under such anxiety and tension has no evidentiary value and for this proposition he relied upon the following decisions and certain other unreported decisions which may be seen at pages 62 to 90 of Volume II of the APB

(1) Assistant CIT v. Mrs. Sushiladevi S. Agarwal ,

(2) Deepchand & Co. v. Assistant CIT (1995) 51 TTJ (Bom) 421,

(3) Jagdish Chand Gupta v. Assistant Commissioner .

It is also claimed that a statement given under tension cannot be acted upon and it can be retracted or modified and for this proposition, the learned counsel for the assessee has relied upon the following decisions

(1) Mrs. Sushiladevi S. Agarwals case (supra),

(2) Deepchand & Co.s case (supra),

(3) Maganbhai Becharbhai Patel & Co. v. Income Tax Officer BCAJ January 1995 Page 810 (Ahd-Trib),

(4) Jagdish Chand Guptas case (supra),

(5) Assistant Commissioner v. Mewar Garage BCAJ February 1998 Page 961 (Jp-Trib),

(6) Pranav Construction Co. v. Assistant CIT (Inv.) BCAJ February 1998 Page 962 (Bom-Trib).

It is also pleaded that when a statement given in the course of search is retracted or modified, the assessing officer has to bring in evidence in support of the addition made and in the absence of any such extraneous evidence, apart from the original admission, the addition cannot be sustained. In this context, reliance is placed upon the following decisions

(1) Deepchand & Co.s case (supra),

(2) Maganbhai Becharbhai Patel & Co.s case (supra),

(3) Jagdish Chand Guptas case (supra),

(4) Income Tax Officer v. M.A. Chidambaram (1997) 63 ITD 203 (Mad),

(5) Udeyraja Goliya (HUF) v. Assistant CIT (1998) 64 ITD 21 (Bom) (TM).

It is also claimed that the fact that no substantial assets were seized in the search should go in favour of the assessee and do no heavy additions can be made. In this context, reliance is placed upon the following decisions

(1) Income Tax Officer v. W.D. Estate (P) Ltd. (1993) 45 ITD 473 (Bom),

(2) Amar Natvarlal Shah v. Assistant CIT .

It is pointed out that the assessee had already been searched on two earlier occasions and in none of the searches substantial assets were located. It is also pleaded that the presumptions available under the provisions of section 132(4A)

are available only for making an order under section 132(5) but are not available for making the assessment under section 143(3) of the Income Tax Act. In this context, reliance is placed upon the following decisions

(1) Pushkar Narain Sarraf v. CIT : [1990]183ITR388(All) ,

(2) Additional Income Tax Officer v. T. Mudduveerappa & Sons (1993) 45 ITD 12 (Ban),

(3) Amar Natvarlal Shahs case (supra).

This argument is taken in support of the plea that no presumption can be drawn that the seized document Annexure A 3 containing the details of the various bank accounts related to the assessee can be drawn in the assessment, even if, it were to be assumed that it was found in the assessee's cabin, which fact of course had been denied, as mentioned by us earlier.

12. It is also claimed that a finding of benami ownership cannot be recorded on the basis of presumption and such a status has to be established by the department by bringing in evidence. In other words, the argument is that the finding that the bank accounts figuring in Annexure A 3 belong to the assessee is invalid in law as it is not supported by any other evidence, except the admission contained in the statement dated 20-12-1991. In this context, reliance is placed upon the decision of the Supreme Court in the case of CIT v. Daulat Ram Rawatmull : [1973]87ITR349(SC) and also other decisions mentioned below:

(1) Prakash Narain v. CIT : [1982]134ITR364(All) ,

(2) V. Balasubramanian v. Income Tax Officer (1985) 14 ITD 35 (Mad),

(3) Vinayakrao D. Chaudhary v. Income Tax Officer .

It is pleaded that assuming, without admitting, that the assessee is answerable for the contents of Annexure A 3, the bank accounts of concerns whose names appear in list A 3 but which are assessed to income-tax are to be excluded in working out the peak, as the genuineness of such concerns is beyond doubt. In the grounds taken before us, it is claimed that the concerns, who are assessee's

on file, fall into the following categories and the deposits in such accounts are as per the following :

(1) Deposits in bank accounts of concerns in which the members of the family of the assessee and his brothers are interested aggregate to Rs. 39,59,779 and the names of such family concerns are said to be as follows

(1)

Shah& Khandhar Bros.

Indian Bank, Mandvi Branch.

(2)

Tej Gaurav International

Indian Bank, Mandvi Branch.

(3)

Eshita Strap Mfg. Co.

Indian Bank, Mandvi Branch.

(4)

K. Bipinkumar & Co.

Co-operative Bank of Ahmedabad, Narshi Natha Street Branch.

(5)

D.K. Investment & Finance

Indian Bank, Mandvi Branch.

(6)

Khandhar Engg. Works

Indian Bank, Mandvi Branch.

(7)

Eshita Electronics

Indian Bank, Mandvi Branch.

(8)

H.P.S. International

State Bank of Saurashtra

(9)

Prabhavee

State Bank of Saurashtra

(10)

R.M. Shah & Co.

Bank of India, Khand Bazar Branch.

(11)

Gaurav Enterprises

UCO Bank, Mandvi Branch.

(12)

Raj Enterprise

Punjab National Bank, Bhat Bazar Branch.

(13)

Raj Enterprise

Canara Bank, Sion Branch.

(14)

H.P.S. International

Canara Bank, Sion Branch.

(15)

Shekakha & Co.

The United Western Bank Ltd., Vadgadi Branch.

(16)

H.P.S. International

The United Western Bank Ltd., Vadgadi Branch.

(17)

Raj Enterprise

The United Western Bank Ltd., Vadgadi Branch.

(18)

Arkay Incorporated

The United Western Bank Ltd., Vadgadi Branch.

(19)

Khandhar Bros.

The United Western Bank Ltd., Vadgadi Branch.

(20)

P.M. Khandhar & Co.

Indian Bank, Mandvi Branch.

(21)

Arkay Incorporated

Indian Bank, Mandvi Branch.

(22)

Ray Engg. Co.

UCO Bank, Mandvi Branch.

(23)

Shekakha & Co.

Canara Bank, Sion Branch.

(24)

Khandhar Engg. Works

Canara Bank, Sion. Branch.

(2) Deposits figuring in bank accounts of limited companies which are registered with the Registrar of Companies, Maharashtra, and assessed to income-tax are stated to aggregate to Rs. 37,06,640 and the names of such limited companies, which are assesseees on file, are stated to be the following

(1)

Gaurav Vessels Pvt. Ltd.

UCO Bank, Mandvi Branch.

(2)

Senior Marketing Pvt. Ltd.

Allahabad Bank, Sion Branch.

(3)

Amrut Marketing Pvt. Ltd.

Allahabad Bank, Sion Branch.

(4)

Kapil Marketing Pvt. Ltd.

Allahabad Bank, Sion Branch.

(5)

Naheshri Marketing Pvt. Ltd.

Indian Bank, Mandvi Branch.

(6)

Eshita Dye Chem Pvt. Ltd.

The United Western Bank Ltd., Vadgadi Branch.

(7)

Mona Traders Pvt. Ltd.

The United Western Bank Ltd., Vadgadi Branch.

(8)

Namrata Exports Pvt. Ltd.

State Bank of Saurashtra

(9)

Eshita Dye Chem Pvt. Ltd.

State Bank of Saurashtra

(10)

Suman Motels Ltd.

The United Western, Bank Ltd., Vadgadi Branch.

(3) The other concerns, i.e., those which are not family concerns, and those which are not limited companies, but which are assessed to tax, are stated to account for deposits aggregating to Rs. 1,85,35,562, and the details of such concerns are stated to be the following

(1)

Shital International

Indian Bank, Mandvi Branch.

(2)

Deepak Impex

Indian Bank, Mandvi Branch.

(3)

Shree & Associates

Indian Bank, Mandvi Branch.

(4)

Shailesh Trading Co.

Indian Bank, Mandvi Branch.

(5)

Unique Sales Corporation

Indian Bank, Mandvi Branch.

(6)

Vikas Sales Corporation

Indian Bank, Mandvi Branch.

(7)

Kapilesh Corporation

Indian Bank, Mandvi Branch.

(8)

Associated General Agency

Indian Bank, Mandvi Branch.

(9)

Divya International

Indian Bank, Mandvi Branch.

(10)

Shah Sales Corporation

Indian Bank, Mandvi Branch.

(11)

Subh Enterprises

Co- operative Bank of Ahmedabad, Narshi Natha Street Branch.

(12)

Express Commercial Corporation

Co- operative Bank of Ahmedabad, Narshi Natha Street Branch

(13)

United Trading Co.

Co- operative Bank of Ahmedabad, Narshi Natha Street Branch.

(14)

Cristal Industries

Co-operative Bank of Ahmedabad, Narshi Natha Street Branch.

(15)

Mamta Sales Agencies

Co- operative Bank of Ahmedabad, Narshi Natha Street Branch.

(16)

Supreme Agencies

Indian Bank, Mandvi Branch.

(17)

Meghna Trading Co.

Indian Bank, Mandvi Branch.

(18)

Tushar Enterprises

Indian Bank, Mandvi Branch.

(19)

Vivek Corporation

Indian Bank, Mandvi Branch.

(20)

Namrata Enterprises

State Bank of Saurashtra

(21)

Harmesh Trading Co.

Bank of India, Khand Bazar Branch.

(22)

Shreeji Corporation

UCO Bank, Mandvi Branch.

(23)

Kalpana Corporation

UCO Bank, Mandvi Branch.

(24)

Wrightco International

UCO Bank, Mandvi Branch.

(25)

Craft Enterprises

UCO Bank, Mandvi Branch.

(26)

Gayatri Enterprises

UCO Bank, Mandvi Branch.

(27)

Namrata Enterprises

UCO Bank, Mandvi Branch.

(28)

Saraj Sales Corporation

UCO Bank, Mandvi Branch.

(29)

Minaxi Trading Co.

UCO Bank, Mandvi Branch.

(30)

A. Anilkumar & Co.

The United Western Bank Ltd., Vadgadi Branch.

(31)

Shah Engineers

Satara Sahakari Bank Ltd.

(32)

Nagendra Enterprises

The Madhavpura Merchant Coop. Bank Ltd., Mandvi Branch.

(33)

Mrs. Deepak Desai

New bank of India, Khand Bazar Branch.

(34)

Bhogilal & Sons

Indian Bank, Mandvi Branch.

(35)

Vijay Industries

Indian Bank, Mandvi Branch.

(36)

K.T.K. Bricks Mfg. Co.

Indian Bank, Mandvi Branch.

(37)

Mahendra & Co.

The United Western Bank Ltd., Vadgadi Branch.

(38)

Best General Agency

The United Western Bank Ltd., Vadgadi Branch.

(39)

Rajesh Sales Corporation

The United Western Bank Ltd., Vadgadi Branch.

(40)

Venus Enterprises

UCO Bank, Mandvi Branch.

(41)

Sanjay Trading Corporation

UCO Bank, Mandvi Branch.

(42)

Kartiki Trading Co.

Union Bank of India, Khand Bazar Branch.

(43)

Snehal Enterprises

Bank of Baroda, Khand Bazar

(44)

K.T.K. Brick Mfg. Co.

Indian Bank

(45)

Bhogilal & Sons

Indian Bank, Mandvi Branch.

(46)

Veena Corporation

State Bank of Saurashtra

(47)

Deepali Enterprises

State Bank of Saurashtra

It is mentioned that, as mentioned at page 22 of the order of the Commissioner (Appeals), the maximum amount that could be added according to the assessee, if at all, is only Rs. 43,38,305 after excluding the deposits figuring in the accounts of the abovementioned three categories of concerns which are assessed to tax. The details as given by the Commissioner (Appeals) at page 22 work out as follows :

Aggregate of the maximum balance in the 110 bank accounts as per Annexure A

Rs. 3,05,40,286

Less:

(i)

Total of the maximum balances in the bank accounts of which the concerns in which the appellant and his brothers and family members are interested-as per Annexure B

Rs. 39,59,779

Rs. 39,59,779

Rs. 3,05,40,286

(ii)

Total of the maximum balances in the bank accounts of the limited companies which are registered with the Registrar of Companies and assessed to income-tax as per Annexure C

Rs. 37,06,640

(iii)

Total of the maximum balances in the bank accounts of the partnership and proprietary concerns which are assessed to income-tax in Bombay as per Annexure D

Rs. 1,85,35,562

Rs. 2,62,01,981

Peak amount

Rs. 43,38,305

Actually, it is pleaded that the 'peak' should be worked out by consolidating and working out the datewise balances. In other words, it is pleaded that the method adopted by the Commissioner (Appeals) of taking the aggregate of the maximum balance in each account is inherently incorrect, even if, only the accounts of the concerns which are not assessed to tax are to be considered for making the addition. It is also pleaded on the basis of the additional ground raised by the assessee that the 'peak' arrived at in the earlier assessment year should be deducted from the 'peak' in the succeeding assessment year. It is mentioned that this claim was allowed by the Commissioner (Appeals) for the assessment year 1992-93 but was not followed for the assessment year 1991-92. Regarding the admission of additional grounds, the learned counsel for the assessee pleaded

that in view of the decision of the Honble Bombay High Court in the case of Ahmedabad Electricity Co. Ltd. v. CIT : [1993]199ITR351(Bom) , the Appellate Tribunal has jurisdiction to permit additional grounds to be raised before it, even though, this may not arise from the order of the first appellate authority so long as such grounds are the subject-matter of the entire tax proceedings.

13. In the course of the hearing, we have enquired of the assessee the details and addresses of the concerns to whom the 110 accounts reflected in Annexure A 3 relate as it has been the case of the assessee that the accounts reflected in the books of those concerns should be excluded from consideration in the assessment of the assessee. The assessee has furnished the necessary details to the extent paid to be available with him and the names and addresses of the concerns may be seen at pages 155 to 170 of the APB (Volume III). We have also enquired as to how many of the concerns to whom the accounts reflected in Annexure A 3 are stated to relate have filed their income-tax return before 18-12-1991, i e., the date of the search. The relevant details, as furnished by the assessee, may be seen at page 143 of the APB (Volume III) and they are as follows:

Analysis of income-tax position of various concerns to whom the bank accounts reflected in Annexure A 3 relate.

Pertaining to concerns which filed the first return of income before 18-12-1991

Pertaining to concerns which filed first return of income after 18-12-1991

Pertaining to concerns whose tax details are not know to the assessee or concerns which did not file return of income

Total

1.

Limited Companies

9

2.

## Family Concerns

14

1

1

16

3.

## Outside Concerns

57

10

9

76

The learned counsel for the assessee has also furnished the income-tax position, such as upto what assessment year the returns have been filed and who is the relevant assessing officer in respect of the concerns to (whom the accounts figuring in Annexure A 3 relate and the relevant details may be seen at pages 95 to 112 of the APB (Volume III). From the above statements, the learned counsel for the assessee pleaded that even going by the details furnished by the assessee during the search in respect of the bank accounts figuring in Annexure A 3, a large number of the concerns to whom the accounts relate had already filed their returns before the date of the search and they had also disclosed the said accounts in their books of account and so, it is claimed that there is no basis or justification all for including the deposits figuring in those accounts in the assessment of the assessee. In other words, the argument made out is that the admission made by

the assessee in the course of his statement dated 20-12-1991, on the basis of incorrect appreciation of the legal position, is invalid. It is further pleaded that the assessee had stated that he would close down all the bank accounts appearing in Annexure A 3 and the said accounts relate to concerns which had already been assesseees on file and some of them were even limited companies and the assessee had no interest in any one of them and any person who is aware of his legal rights would not give such a statement as he cannot close down the bank accounts of such other concerns which have an independent status. It is claimed that the said statement was given in ignorance of his legal rights and so cannot be acted upon. In this context, reliance is placed upon the Apex Court decision in the case of *Shri Krishan v. Kurukshetra University* : AIR 1976 SC376 . It is also claimed that the said decision of the Apex Court has been followed by the Tribunal in the case of *Jagdish Chand Gupta* (supra). In the above circumstances, it is pleaded that the assessing officer wrongly made the addition of Rs. 12,86,70,053 on account of the aggregate amount of the deposits figuring in the bank accounts mentioned in Annexure A 3. It is claimed that this addition cannot be made under the provisions of section 68 as this section applies only where the amounts appear as credits in the books of account of the assessee. In this case, the accounts mentioned in Annexure A 3 do not appear in the books of account of the assessee and, hence, section 68 cannot be invoked. It is mentioned that, if at all, only the provisions of section 69 may be attracted, but this section can be invoked, only if, the assessing officer finds that the assessee has invested his monies in the accounts appearing in Annexure A 3. It is claimed that the onus of proving that the assessee had invested his funds in the various accounts lies on the assessee and in this context, reliance is placed upon the decision of the Honble Allahabad High Court in the case of *CIT v. Day a Chand Jain Vaidya* : [1975]98ITR280(All) . It is claimed that the assessing officer had not brought any evidence or established that it is the assessee who had invested the funds in the various bank accounts appearing in list A 3 and, accordingly, it is claimed that the addition of Rs. 12,86,70,053 is unwarranted. It is also pleaded that even the addition at the reduced figure of Rs. 3,05,40,285, as upheld by the Commissioner (Appeals), is not warranted because the requirements of the provisions of section 68 or 69 are not satisfied, as mentioned above.

14. Regarding the addition of Rs. 62,500 sustained by the Commissioner (Appeals) in respect of the professional income, it is claimed that the assessee had furnished monthwise details of the professional income and the assessing officer had not noticed any understatement of receipts and so, he was not justified in estimating the professional receipts of the assessee at Rs. 5,00,000 as against the admitted receipts Rs. 4,37,500.

15. Regarding the disallowance of Rs. 20,000 out of salary and bonus paid, sustained by the Commissioner (Appeals), it is claimed that the assessee had to rely more on his assistants during this year because he had to devote more time to M/s. Suman Motels Ltd., which went public in May 1990 and so a higher expenditure on salary and bonus was incurred during the year and no overstatement or discrepancies were noticed by the Assistant Commissioner and so, it is claimed that the revenue authorities were not justified in effecting this disallowance of Rs. 20,000.

16. Regarding the disallowance of Rs. 1,19,952 out of interest claimed by the assessee, it is explained that this addition had been made on the ground that the relevant borrowals on which interest was paid had been from concerns whose accounts figure in Annexure A 3, on the basis of which the main addition of Rs. 12,86,70,053 had been made by the assessing officer and as it is not established that the said concerns were the benamis of the assessee, the said disallowance of interest is not warranted.

17. Regarding the levy of interest under sections 234A and 234B, it is claimed that the assessing officer in his order under section 143(3) dated 31-3-1994, only directed his office to 'charge interest as per law' and such a direction was not an order charging interest, in the light of the decision of the Honble Patna High Court in the case of Uday Mistanna Bhandar & Complex v. CIT : [1996]222ITR44(Patna) . It is also pleaded that the interest under section 234A should not have been charged as the assessee had voluntarily filed his return of income and no notice under section 142(1) was served on the assessee. It is also pleaded that the interest under sections 234A and 234B should be charged only on income returned and not on income assessed in view of the decision of the Honble Patna

High Court in the case of Ranchi Club Ltd. v. CIT : [1996]217ITR72(Patna) .

18. The learned Departmental Representative argued that there was a search on 18-12-1991 on the assessee and his three brothers and the premises that were searched included 278, Samuel Street, and 208-210, Parshva Chambers. There was a warrant against the assessee in respect of his residential premises. Searches were conducted on the residential premises of the assessee and also the residences of his three brothers. It is explained that the premises at 208-210, Parshva Chambers, housed the corporate office of M/s. Suman Motels Pvt. Ltd., of which the assessee is a director, M/s. Eshita Dye Chem Pvt. Ltd. and many other family concerns of the Khandhar group. The assessee had a separate cabin in this premises. This premises was searched on 18-12-1991 and books of account of as many as 17 concerns like M/s. P.M. Khandhar & Co. and M/s. Tej Gaurav Industries Ltd. relating to the Khandhar group were seized. The search proceedings were temporarily ceased at 8 a.m. the next day, i.e., 19-12-1991 and a prohibitory order was placed under section 132(3) on the cabin of the assessee and a computer room and the search was resumed on 20-12-1991 when the said cabin of the assessee and the computer room were searched. It is mentioned that it is in the course of the search of the cabin of the assessee that six pages marked as Annexure A 3 containing the list of 110 unaccounted bank accounts referred to hereinabove were seized, as per the Panchnama dated 20-12-1991 relating to M/s. Eshita Dye Chem Pvt. Ltd., 208-210, Parshva Chambers, and a copy of this Panchnama may be seen at pages 7 to 11 of the departments paper book (DPB). It is claimed that this document was not found during the search on 18-12-1991 when the rest of the premises, except the cabin of the assessee and the computer room, were searched. It is also explained that the said premises, 208-210, Parshva Chambers, had an area of about 1,500 sq. ft. and a large area of about 1,000 sq. ft. was occupied by the cabin of the assessee and the computer room and only the remaining portion was occupied by the staff. It is also mentioned that there was only one ingress and egress for the area covered by all the three municipal Nos. in 208-210, Parshva Chambers, and in this context, the learned Departmental Representative has filed a letter dated 5-2-1999 from Parshva Chambers Premises Co-operative Society Ltd. addressed to the assessing officer may be seen at page 245 of the DPB and the same reads as follows :

'Dear Madam,

As per your letter, we are furnishing following details for our 'Parshva Chambers, 17/21, Issaji Street, Vadgadi, Mumbai - 400003. Our building is constructed and completed in the year 1987.

Our building is built as ground plus five floors 1st floor is having room Nos. 101 to 110, i.e., 10 rooms. 2nd floor is having room Nos. 201 to 210, i.e., 10 rooms. Out of that 201 to 207 is a separate individual rooms and separate entrance is there for each room. Room Nos. 208, 209 and 210 these three rooms have only one entrance and interior decorator has design it in such way that 3 rooms become one big hall and it has only one entrance not just three entrance, this is the position from 1987 till date.'

It is claimed that the assessee had been called on 20-12-1991 to 208-210, Parshva Chambers, and his deposition had been taken on that day in which he had admitted that the 110 bank accounts figuring in Annexure A 3 were his own accounts. It is also pleaded that the assessee had been generally in control of the entire group and in this context, attention is invited to answer to question No. 19 given by the assessee in his deposition dated 18-12-1991, which reads as follows, and which may be seen at page 14 of the APB (Volume I)

'Q. 19.

Who looks after the financial matters of the concerns of your group ?

A. 19.

The day to day finance is looked after by Shri Praful M. Khandhar and I am looking after administrative matters. In addition to this, I also look after mobilisation of finance.'

Attention is also invited to the reply to question No. 13 given by tile assessee in the deposition taken from him by the assessing officer under section 131 on 23-9-1993. We have already extracted the relevant portion of this deposition at pages 10 to 14 of this order. It is pointed out by the learned Departmental Representative

that from this deposition, it is evident that the assessee has been generally in control of the entire group, inclusive of Eshita Dye Chem Pvt. Ltd. So, as the assessee has been generally in control of the entire Khandhar group, which included M/s. Eshita Dye Chem Pvt. Ltd., it is claimed that the statement recorded on 20-12-1991 has to be regarded only as a statement recorded under the provisions of section 132(4). In this context, attention is also invited to a letter dated 17-2-1992, signed by the assessee on behalf of the director of M/s. Eshita Dye Chem Pvt. Ltd. and addressed to the assessing officer, a copy of which may be seen at page 70 of the DPB and which reads as follows

'Dear Sir,

Sub. :Your Notice under rule 112A of the Income Tax Rules dated 7-2-1992;

Ref :No. ITO/W-2(2)/32-E/91-92.

We refer to your Notice under rule 112A dated 7-2-1992.

We hereby state that, Shri S.M. Khandhar - Managing Director of Suman Motels Ltd., has also received notice under rule 112A from Assistant Commissioner Cir. 14(1) (Inv.) for seizure of share certificates of Suman Motels Ltd., valued at Rs. 95,12,500. We also state that company's and Shri S.M. Khandhar's premises is one and the same. Further, we state that the shares of Suman Motels Ltd., valued at Rs. 95,12,500 are not belongs to the company at all. The shares are belongs to Shri S.M. Khandhar and his family members. The shares are duly reflected and accounted in their personal respective accounts. Shri S.M. Khandhar is assessed to tax with the Assistant Commissioner Circle-14(1) (Inv.), Bombay. Hence, the necessary explanation under rule 112A may be submitted to Assistant Commissioner Cir. 14(1) (Inv.) by Shri S.M. Khandhar only, for the purpose of order under section 132(5) of the Income Tax Act, 1961.

We request you to do the needful in the matter.

Thanking you,

Yours faithfully,

For Eshita Dye Chem Pvt. Ltd.

Sd/

Director.'

Further attention is also invited to the letter dated 29-4-1992, addressed by the assessee in which he gave explanation about the shareholdings of M/s. Eshita Dye Chem. Pvt. Ltd., and signed for S.M. Khandhar & Co.

This letter may be seen at pages 72 and 73 of the DPB and reads as follows

'Dear Sir,

Sub. : Search and Seizure Explanation.

Reg. : Eshita Dye Chem Pvt. Ltd.

We refer your letter dated 7-2-1992 and furnish the following explanation as desired by you.

9,22,050 Number of Shares amounting to Rs. 95,12,500

The above equity shares does not belong to Eshita Dye Chem. We furnish a list of the person who are the real owners :

Sr. No.

Name of Share Certificate Holders

Units Nos.

1.

Bipin M. Khandhar

95,000

2.

Surendra M. Khandhar

3,03,550

3.

Mrs. Bharati S. Khandhar

3,01,500

4.

Mrs. Hiraben M. Khandhar

2,050

5.

Mrs. Daxa P. Khandhar

2,050

6.

Rajesh M. Khandhar

2,050

7.

Mrs. Rajshree B. Khandhar

2,000

8.

Mrs. Pushpa J. Khandhar

2,050

9.

Asha Rajesh

2,050

10.

Mahesh Kothari

19,400

11.

Praful M. Khandhar

2,150

12.

Sheikh Mukhtar Hussain

1,35,000

13.

Sudarshan Harichand Kumar

50,000

14.

Mukesh Kanailal Parekh

100

15.

Do

100

16.

Hemant K. Parekh

1,500

17.

Deepak K. Parekh

1,500

9,22,050

We furnish photocopy of balance sheet of the persons named above in which investment was duly reflected. We request you to grant about 5 days time to prepare and submit the rest of the details.

Thanking you,

Yours faithfully,

For S.M. Khandhar & Co.

Sd/

(S.M. Khandhar).'

Attention is also invited to another letter dated 5-5-1992, addressed by the assessee to the assessing officer, which may be seen at pages 74 to 76 of the DPB and which reads as follows :

'Dear Sir,

Sub: Eshita Dye Chem (P) Ltd.

Search & Seizure Explanation

Further to our letter dated 29-4-1992, we furnish the following :

1.

Details of Income Tax Numbers of the persons who are the real owners of equity shares of Suman Motels Ltd.(Ann-A).

2.

Copy of acknowledgement of income-tax returns filed, for the above persons, as per Annexures B 1 to B3.

3.

Family Tree of Khandhar family Annexure C.

4.

Cash found and not seized Rs. 78,961 - The cash found on 18-12-1991 at the premises belong to Shekhakha & Co., a partnership firm in which Shri Bipin M. Khandhar is a partner. The amount of Rs. 89,500 was withdrawn on 17-12-1991 from State Bank of Saurashtra, Mandvi Branch, A/c. No. 7615 and was kept for office expenditures.

5.

Promissory Notes :

(i)

Sitaram

Rs. 50,000 Dated 25-1-1990

(ii)

Sitaram

Rs. 3,20,000 Dated 25-1-1990

(iii)

Murarilal

Rs. 80,000 Dated 4-2-1991

(iv)

Sanjay Dodhiwala

Rs. 80,000 Dated 17-4-1990

The sums under Nos. i, ii, iii are given as advances by Raj Enterprises for supply of chemicals and marbles, etc. The promissory notes were kept with Mr. Bipin M. Khandhar a partner in Raj Enterprises. The amounts were duly shown under the hand assets. Copy of balance sheet for the year ending 31-3-1991 (Ann-D) and income-tax acknowledgement (Annexure-E) enclosed.

The item under (iv) Sanjay Dodhiwala:Mr. Bipin M. Khandhar had entered into a deal for purchase and sale of shares jointly with Mr. Dodhiwala. They incurred a loss of Rs. 1,60,000, which Mr. Dodhiwala agreed in writing to share to the extent of 50 per cent. It was a speculation loss for the assessment year 1991-92.

6.

Naheshri Marketing Ltd.It is a limited company. The Investment in 95,000 shares was made by the company as under :

Date

Amount

Cheque No.

Bank

25-5-1990

3,00,000

173

Indian Bank, Mandvi

17-7-1990

2,50,000

427

Indian Bank, Mandvi

31-8-1990

1,00,000

443

Indian Bank, Mandvi

1-11-1990

36,950

598

Indian Bank, Mandvi

26-12-1990

11,165

532

Indian Bank, Mandvi

9-3-1991

50,115

722

Indian Bank, Mandvi

29-12-1990

5,075

531

Indian Bank, Mandvi

9-3-1991

46,288

723

Indian Bank, Mandvi

Total

7,99,593

Date

Shares

Amount (CR)

12-4-1991

1,200

11,790.00

25-4-1991

1,000

9,890.00

21-5-1991

8,400

80,425.00

4-6-1991

500

5,060.00

20-6-1991

600

5,845.00

20-6-1991

200

1,850.00

4-7-1991

3,600

33,805.00

15,500

1,48,665.00

It was decided by the Board of Directors to hold the shares in the name of a director Mr. Bipin M. Khandhar. We enclose copy of balance sheet of Naheshri Marketing Ltd., for the year ending 31-3-1991 (Annexure-E) and acknowledgement of return filed (Annexure-F).

Thanking you,

Yours faithfully,

For S.M. Khandhar & Co.,

Sd/

(Surendra M. Khandhar).'

In the light of the above correspondence, it is claimed that the assessee had not only admitted to be looking after the administrative and financial matters of the entire group in the depositions taken from him during the search but had also signed the correspondence on behalf of the group, as is evident from the above letters. In other words, the contention made out by the learned Departmental Representatives that, undoubtedly, the assessee is the key figure in the entire group and had been generally in control of the entire group, inclusive of Eshita Dye Chem Pvt. Ltd., and so is not a stranger to M/s. Eshita Dye Chem Pvt. Ltd., against whom the search warrant was issued and during the execution of which warrant, the deposition dated 20-12-1991 from the assessee had been taken. The crux of the argument is that the statement dated 20-12-1991 recorded from the assessee is undoubtedly a statement recorded under the provisions of section 132(4) and as such, admission contained in that deposition had an evidentiary value, it cannot be ignored. The learned Departmental Representative also mentioned that the reference to section 132(1) at the head of his statement, to which the learned counsel for the assessee had pointed out, makes no difference to the fact that this is a statement recorded during the search and under the provisions of section 132(4). In this context, it is pleaded that the mention of a wrong section, which is almost in the nature of a typographical error, does not invalidate the statement, and in this context, reliance is placed upon the provisions of section 292B of the Income Tax Act. It is also mentioned that the contention of the learned counsel for the assessee that the said statement dated 20-12-1991, was given in complete ignorance of the legal rights is totally untenable, because the assessee was an income-tax practitioner and fully aware of his rights and is also used to facing searches because this was not the first time that he had been

searched. It is also pleaded that the plea that the assessee had been under tension and so gave a statement which was against himself is also untenable because the search was discontinued on the morning of 19-12-1991 and was resumed only on 20-12-1991 and so the assessee did have a break in which he must have rested and even consulted outside counsels. It is pointed out that in replies to question Nos. 26, 29 and 32 in the statement given even on 18-12-1991, the assessee had stated to be fully fit and claimed not to be exhausted and actually refused to take rest. It is also pointed out that the plea of tension was taken only two years after the search, i.e., in the course of the deposition recorded on 23-9-1993 and so is clearly an afterthought. It is also claimed that the list of six pages containing the bank accounts in question in Annexure A-3 was not a dumb document but contained the names of the branch and it also contained the names of the holders of the accounts in the handwriting of the assessee. It is pleaded that there is no evidence at all in support of the contention of the assessee that the names of the account holders were written by the assessee only at the instance of the authorised officer. It is further pleaded that even assuming that the names of the account holders or the relevant concerns thereof had been written only at the instance of the authorised officer, the fact remains that the assessee had been fully aware of the details of the relevant account holders or concerns in whose names the accounts stood and such intimate knowledge is possible only because the assessee was generally in control of the affairs of the entire group and also because they actually represented the accounts of the assessee himself in benami names, as admitted by him in the deposition dated 20-12-1991. It is also pleaded that even assuming that the statement dated 20-12-1991, cannot be regarded as a statement recorded under section 132(4) of the Income Tax Act or under other provisions of the Income Tax Act, it still cannot be regarded as an invalid statement without any evidentiary value. It is claimed that even if the seizure of the document Annexure A-3 is illegal, inasmuch as there is no warrant under section 132 against the assessee in respect of the search of 208-210, Parshva Chambers, where the said document had been seized and as such, even if the deposition dated 20-12-1991 given by the assessee cannot be regarded as having been taken under section 132(4), the user of the statement in the assessment of the assessee cannot be faulted in view of the following decisions :

- (1) Pooran Mal v. Director of Inspection : [1974]93ITR505(SC)
- (2) Dr. Partap Singh v. Director of Enforcement : 1986 CriLJ824
- (3) Lan Eseda Steels Ltd. v. Assistant CIT : [1994]209ITR901(AP)
- (4) Vimalchand Jain v. Assistant CIT
- (5) Smt. Vasanti Sethi v. CIT
- (6) Param Anand Builders (P) Ltd. v. Income Tax Officer

In other words, the claim is that irrespective of the validity of the search proceedings or of the deposition taken from the assessee on 20-12-1991, the evidence of testimony cannot be wiped out and does not become non-existent and the assessing officer correctly utilised the evidence of that deposition in question and framed the assessment on that basis. It is also claimed that it is the duty of the court to get behind the smokescreen created by a tax dodger and discover the true state of affairs. It is pleaded that the court is not to be satisfied with form and leave alone the substance of the transaction. In support of these propositions, the learned Departmental Representative relied upon the following decisions of the Apex Court

- (1) Workmen of Associated Rubber Industry Ltd. v. Associated Rubber Industry Ltd. : (1986)ILLJ142SC
- (2) McDowell & Co. Ltd. v. CTO : [1985]154ITR148(SC)
- (3) CIT v. Sri Meenakshi Mills Ltd. : [1967]63ITR609(SC)

It is also claimed that under the provisions of section 132(4A), an irrevocable presumption is cast upon the assessee that the Annexure A-3 seized during the search from the premises of Eshita Dye Chem Pvt. Ltd., which was under the control of the assessee, belonged to him and he is answerable for it. In this context, reliance is placed upon the decision of the Delhi Bench of the Tribunal in the case of Ashwani Kumar v. Income Tax Officer . It is pleaded that the contention of the learned counsel for the assessee that the presumption contained

in section 132(4A) is available only while passing an order under section 132(5) and not while framing an assessment under section 143(3) is untenable because the provisions of section 132(4A) still survive in the Act, even though section 132(5) has since been deleted. In other words, the argument is that if the presumption contained in the provisions of section 132(4A) is only for the purposes of framing an order under section 132(5), its survival after the deletion of section 132(5) cannot be explained unless it is held that the presumption contained in this provision is available even for regular assessment purposes. It is claimed that as the assessee had clearly admitted to be the owner of the 110 bank accounts figuring in Annexure A-3 in his deposition dated 20-12-1991, the subsequent retraction from this position by itself does not absolve the assessee from being answerable to the revenue in this regard. In this context, attention is invited to the decision of the Apex Court in the case of CIT v. Durga Prasad More : [1971]82ITR540(SC) wherein it was held that where a party relied on self-serving recitals and documents, it was for that party to establish the truth of those recitals and that the taxing authorities were entitled to look into the surrounding circumstances to find out the reality of such recitals. It is claimed that in view of the admission contained in the statement dated 20-12-1991, it is not sufficient if, the assessee simply disowns any connection with the said accounts. The onus of proving that he did not, in fact, have anything to do with those accounts squarely lay on the assessee. It is also pleaded that simply because some assessments had been made as claimed by the assessee on some of the concerns holding the accounts figuring in Annexure A-3, it does not follow that the revenue is debarred from bringing the deposits in the accounts to tax in the hands of the assessee. It is claimed that simply because an assessment had been made in wrong hands, the revenue does not lose its right to bring to tax a particular income in the hands of the right assessee and for this proposition, reliance is placed upon the decision of the Apex Court in the case of Income Tax Officer v. Ch. Atchiaiah : [1996]218ITR239(SC) . It is also pleaded that there is no proof that the bank accounts figuring in Annexure A-3 had been reflected in the books of the concerns which are alleged to be on the rolls of the department. The learned Departmental Representative also requested for permission to file certain additional evidence vide the assessing Officers letter dated 11-6-1999 and this letter, after initial

narration of facts and reference to the admission of the assessee contained in his statement dated 20-12-1991 which we have already referred to hereinbefore, reads as follows :

'3. The assessee instead of offering the peak credit of these bank accounts as his undisclosed income, he has resorted to delay tactics and has turned totally uncooperative in finalising his tax liabilities. The assessee has not produced parties who are appearing in the A-3 list before the assessing officer but has started making a claim towards the end of the proceedings that he did not know these parties and is not aware of their whereabouts.

4. During the course of hearing before the Honble Members, the assessee's Authorised Representative Shri Bhaskar Rao on 3-11-1998 has stated that the A-3 list contains several names with whom the assessee has no contacts. In this connection, the revenue would like to request the Honble C Bench Income Tax Appellate Tribunal to consider the following evidence which goes to prove that the 110 bank accounts operated by Shri S.M. Khandhar and his family members/concerns are in fact opened on the introduction of the assessee, his family concerns or those concerns whose bank accounts were introduced by the assessee/family concerns. The account opening forms are annexed to this petition which may kindly be allowed to be admitted.

5. This evidence was not available at the time of the initial assessment because the assessee was totally uncooperative and has resorted to delay tactics as a result of which the revenue had no time to gather this vital information. This evidence only strengthens the admission made by the assessee during the course of the search proceedings that these 110 bank accounts appearing in A-3 list were operated by him or his family members and that he offers the peak as his income.

6. The Honble Members may kindly consider the importance attached to the introduction given by the assessee or his family concerns in introducing the 110 bank accounts in various names as appearing in A-3 list. There is a direct nexus with the assessee and the address is that of the assessee.

7. Undisputable evidence showing the nexus between the concerns in A-3 list and the assessee M/s. Suman Motels Ltd. will be evident from the bank accounts of Harmesh Trading Co. in the United Western Bank, Vadgadi, Mumbai, M/s. Harmesh Trading Co. whose name appears in A-3 list has received Rs. 1,00,50,000 on 31-3-1995 from Lok Housing and the amount was immediately withdrawn/transferred to Suman Motels Ltd., through Best General Agency, A. Anilkumar & Sons, Tej Gaurav Enterprises, Smt. Bharati S. Khandhar whose names figure A-3 list. There is flow of funds from Suman Motels Ltd. to Harmesh Trading Co. on 8-4-1995, 24-2-1995, 22-4-1995, etc. Thus there is interlacing and interlocking of transactions between the A-3 concerns and Suman Motels Ltd., Bharati S. Khandhar.

8. Further, the evidence gathered from the bank reveals that the amount was transferred from Harmesh Trading Co. to Best General Agency (Rs. 17,00,000) on 4-4-1995 on the same day the amount was transferred to Suman Motels Ltd. The Bank Account No. 1716 of M/s. Best General Agency with address, 278, Samuel Street, Vadgadi in United Western Bank Ltd., is enclosed.

(b) The amount transferred by Harmesh Trading Co. to Anilkumar & Sons amounting to Rs. 15,00,000 was transferred to Suman Motels Ltd. on 4-4-1995, Bank Account No. 1596 of M/s. Anilkumar & Co., 279, Samuel Street in the United Western Bank is enclosed.

(c) The amount transferred by Harmesh Trading Co. to Rajesh Sales Corporation was transferred to Suman Motels Ltd. on 4-4-1995. The Bank Account No. 1600 of M/s. Rajesh Sales Corporation 274, Samuel Street is enclosed.

(d) Harmesh Trading Co. transferred Rs. 16,00,000 to Patel Construction Co. on 4-4-1995 and M/s. Patel Construction Co. (A-3 list) transferred this amount of Rs. 16,00,000 on the same date to Suman Motels Ltd. The S.B. Account No. 2164 of M/s. Patel Construction Co., 278, Samuel Street in United Western Bank is enclosed.

(e) Harmesh Trading Co. transferred Rs. 18,00,000 on 4-4-1995 to Super Investment (A-3 concern) and M/s. Super Investment Co. transferred the entire

amount on the same day to Suman Motels Ltd. SB Account No. 2456 of Super Investment Co. with address at 210, Parshva Chambers in United Western Bank is enclosed.

(f) Harmesh Trading Co. transferred Rs. 19.5 lakhs on 4-4-1995 to Glorious Constructions and on the same day this amount was transferred by Glorious Construction Co. to Suman Motels Ltd. The bank Account No. 2421 of Glorious Construction, 208, Parshva Chambers in United Western Bank is enclosed.

(g) Harmesh Trading Co. transferred Rs. 50,00,000 to Tej Gaurav Industries, sister concern on 4-4-1995. On the same day, this amount was transferred to Suman Motels Ltd.

9. In the nutshell, the amount of Rs. 1,00,50,000 received by Harmesh Trading Co. (A-3 concern) was transferred to the assessee's main concern, i.e., Suman Motels Ltd. through the media of various other A-3 concerns discussed above. The point which the revenue would like to stress before the Honble members of the Income Tax Appellate Tribunal is that the assessee is fully aware of the activities of the various A-3 concerns and the ultimate beneficiary is the assessee. Therefore, it is incorrect to state that the assessee does not know about the A-3 concerns and he has no contacts with them. The bank account as in 1995 clearly proves to the hilt that the assessee still has connection with those A-3 concerns and there is interlacing and interlocking of funds with A-3 list.

10. Another glaring example of transfer of funds by the A-3 concerns, i.e., Harmesh Trading Co. is evident from the transfer of its funds received from Industrial Development Bank of India amounting of Rs. 99,40,000 on 27-10-1995 to Suman Motels Ltd. immediately thereafter. The Bank Account No. 2191 of Harmesh Trading Co. in United Western Bank is enclosed.

11. Mona Traders Pvt. Ltd. whose name appears in A-3 list received Rs. 80,32,000 from Industrial Development Bank of India on 31-10-1995. On the same day, part of the funds were transferred to Suman Motels Ltd. Harmesh Trading Co. (whose case was discussed earlier wherein the funds were further transferred to Suman Motels Ltd.). The substantial funds were transferred to Suman Motels Ltd.

on 2-11-1995 and partly to its concerns like Shree Agencies, Raj Electrical, HPS International, Harmesh Trading Co., whose name appears in A-3 list. The Bank Account No. 1566 as appearing in United Western Bank is enclosed. Thus, it would be evident that from one of the A-3 concerns, huge funds from the bank were diverted to Suman Motels Ltd. either directly or through other concerns of A-3. Therefore, the A-3 concerns are inter-connected which are managed and controlled by Shri Surendra M. Khandhar wherein the funds have ultimately come to the main concern, i.e., Suman Motels Ltd. Accordingly, the statement made by the Authorised Representative for the assessee that the assessee does not know the whereabouts of A-3 concerns is blatantly incorrect.

12. Kapilesh Corporation whose name is appearing in A-3 list has received Rs. 85,28,400 from Industrial Development Bank of India on 27/28-10-1995 and on the same day the funds were transferred to Suman Motels Ltd. Saving Bank Account No. 10404 of Kapilesh Corporation in Indian Bank, Mandvi Branch, is enclosed.

13. It is the case of revenue that A-3 concerns were floated by the assessee and the funds were ultimately ploughed back to the assessee. This goes to prove that the statement given by the assessee at the time of search that he wanted to offer the peak of those accounts as income and that he would close down his bank accounts show the degree of ownership of the assessee and has rightly offered the peak as his income.

14. Gaurav Vessels (P) Ltd. is a concern whose name appear in A-3 list which has received Rs. 1,31,02,000 from Industrial Development Bank of India on 20-11-1995 and on the same day and subsequent two days, the funds were transferred to Suman Motels Ltd. Saving Bank Account No. 2401 of Gaurav Vessels Ltd., 209, Parshva Chambers in United Western Bank Ltd., is enclosed. Therefore, it would be evident that there is a direct nexus between the A-3 concerns and the assessee.

15. The above evidence in the form of bank accounts leading to the interlacing and interlocking of transactions between the A-3 concerns and the assessee was detected at the time of assessment proceedings of the assessee and his group concerns. Since the assessee was highly uncooperative in furnishing the details to

the department, it took considerable time for the revenue to lay its hands on the bank statements which goes to prove that the assessee still has dealings with the A-3 concerns and his averment that he has no dealings with A-3 concerns is incorrect and misleading. Therefore, it is prayed that the Honble Members may kindly consider the above evidence gathered by the revenue subsequent to the assessment proceedings as it was only due to the non-co-operation of the assessee and moreover, in the present appeals, the point which the department would like to stress is that Shri S.M. Khandhar is fully aware of the benami nature of the bank accounts appearing in the A-3 list and that the assessee still has dealings with these concerns even subsequent to the search and his averment that he does not know the whereabouts of the A-3 concerns is incorrect.

16. The respected members of Income Tax Appellate Tribunal C Bench may kindly admit the letter of Parshva Chambers Premises Co-operative Society Ltd. dated 5-2-1999, stating that Room Nos. 208, 209 and 210 are three rooms which were converted into one big hall. It has only one entrance for ingress and egress which is the position from 1-9-1987 till date. This evidence has now become necessary since the assessee has challenged the search proceedings at the above premises. The revenue would like to stress that the warrant issued against the premises 208-210 is valid and covers the entire premises, which houses Eshita Dye Chem, Suman Motels Ltd. and other family concerns and other than family concerns.

17. It is prayed that the Honble Members of C. Bench, Income Tax Appellate Tribunal may kindly admit and consider the above fresh evidence, while deciding the appeals of Shri S.M. Khandhar for assessment years 1991-92, 1992-93.

Sd/

(S.H. Shirudkar)

Deponent

Dy. Commissioner

of Income-tax,

Central Circle-14,

Mumbai.'

Vide his letter dated 3-8-1999 addressed to the Registrar, Income Tax Appellate Tribunal, the assessing officer, Shri S.H. Shirudkar, Deputy Commissioner, Central Circle-14, Mumbai, filed another petition requesting for admission of additional evidence, and after initial narration of the facts of the case and the admission contained in the statement of the assessee dated 20-12-1991 which we have already referred to, the assessing officer proceeded to state as follows :

'4. During the course of hearing before the Honble Members the assessee's Authorised Representative Shri Bhaskar Rao on 3-11-1998 has stated that the A-3 list contains several names with whom the assessee has no contacts. In this connection, the revenue has filed additional evidence on 11-6-1999 enclosing the account opening forms of the unaccounted bank account where in the assessee and his family members and the concerns which were introduced by the assessee have introduced the bank accounts appearing in A-3 list.

5. During the course of the arguments before the Honble Members a paper-book was filed with page Nos. 245 to 295. In the above said paper-book the income-tax return details of M/s. Vipko Sales Corporation was filed (pages 271 to 274). Similarly, the income-tax status details of Dipali Enterprises was enclosed as page Nos. 275 to 289 so also the income-tax status of Kapilesh Corporation as appearing in the paper-book as pages 292 to 295. The intention to file the income-tax return details of Vipko Sales Corporation is to depict incorrect statements made by the assessee's Authorised Representative before the Honble Members. It was communicated by the assessee's Authorised Representative that Vipko Sales Corporation is a partnership concern which filed its return of income for assessment year 1989/90 before the Income Tax Officer Ward 24(3), Bombay. On verification of the income-tax records it was noticed that return of Vipko Sales Corporation was filed with Income Tax Officer, 17(12) for assessment year 1995-96 on 2-7-1997 as a new return. Thus, it would be clear that the Vipko Sales Corporation filed its return for the first time for assessment year 1995-96 and not as the assessee's Authorised Representative has stated that it has filed the return

of income for assessment year 1989-90 on 18-1-1990. To show this incorrect statement page No. 271 was filed.

6. As regards Dipali Enterprises the assessee's Authorised Representative stated that the return of income was filed for the first time for assessment year 1984-85 on 26-9-1994 before the Income Tax Officer, BSD(N), Bombay. But on verification, it is seen that the return of income was filed for the first time for assessment year 1995-96 on 2-7-1997 before the Income Tax Officer, Ward 17(7) as a new case. The photocopy of its acknowledgement which is appearing as page no. 75 shows that the return of income filed was in respect of a new case. As regards the Kapilesh Corporation, the assessee claimed that the return of income for assessment year 1978-79 was filed on 26-12-1979 before the Income Tax Officer, C-11 Ward, Bombay. But on verification, the return of income for assessment year 1996-97 was not available with the Income Tax Officer, C-II Ward. Only a return of income for assessment year 1996-97 could be traced out from Income Tax Officer Ward 17(9).

7. Another issue which assumes significance is that in the balance-sheet of Vipko Sales Corporation, the assessee and his family members were not shown as sundry debtors. On perusal of the records of the assessee and his family members, it is seen that Vipko Sales Corporation is a sundry creditor. In this connection the additional evidence which I would like to submit before the Honble Members for their kind consideration is the paper-book with pages 438 to 478. As regards, the balance sheet of Shri S.M. Khandhar as appearing at page 445 the amount of Rs. 7,79,630 was shown to have been received from Vipko Sales Corporation, but the same is not reflected in Vipko Sales Corporation. This shows the fallacy of the facts in the returns filed by the Vipko Sales Corporation which shows that these are the bogus concerns floated by the assessee and his family members. Similarly, the balance-sheet of Mrs. Bharati S. Khandhar shows an amount of Rs. 13,30,300 as having been received from Vipko Sales Corporation and the same is reflected on page No. 459 but Vipko Sales Corporation does not show this transaction in the balance-sheet of Shri P.M. Khandhar as appearing in page No. 465 Vipko Sales Corporation was shown as sundry creditor to the extent of Rs. 94,525. The same is not reflected in the books of account of Vipko Sales

Corporation.

8. In the case of Dipali Enterprises as appearing in pages 275 to 289 with specific reference to page No. 279 (i.e., balance-sheet) Shri S.M. Khandhar was not shown as sundry debtor but in the books of S.M. Khandhar page No. 441, Dipali Enterprises was shown as a sundry debtor to the extent of Rs. 1,78,158.'

The learned Departmental Representative filed a paper-book relating to bank account opening forms and the final accounts relating to the concerns figuring in Annexure A-3. It may be seen in sections 6,7 and 13 of the DPB which, as we have already mentioned before, has not been serially numbered. On the basis of the paper-books sought to be filed, the learned Departmental Representative argued that the assessee cannot dissociate himself from the bank accounts figuring in Annexure A-3 because the accounts were introduced in the various banks either by the assessee or by his family concerns or the address as given related to that of the assessee or his family concerns and the funds also moved to and fro between the concerns relating to the 110 bank accounts figuring in Annexure A-3 and M/s. Suman Motels Pvt. Ltd. of which the assessee and his family members were directors, or other family concerns. Adverting to the contention of the learned counsel for the assessee that on the day the statement dated 20-12-1991 was obtained from the assessee by the authorised officer, no proceeding was pending, it is claimed that as the statement had been obtained under the provisions of section 132(4) during the search, the pendency or otherwise of any assessment proceeding is irrelevant.

19. Regarding the claim of the learned counsel for the assessee that no substantial assets were seized during the search, the learned Departmental Representative pointed out that assets comprising jewellery, silver, National Savings Certificates, Share Certificates, Indira Vikas Patras and share certificates worth more than Rs. 1 crore were seized during the search, as per the following details :

(1)

Praful M. Khandhar

Rs.

1,43,805

(2)

Surendra M. Khandhar

Rs.

4,81,418

(3)

Rajesh M. Khandhar

Rs.

81,500

(4)

Bipin M. Khandhar

Rs.

1,20,821

(5)

Eshita Dye Chem Pvt. Ltd.

Rs.

95,12,500

Total

Rs.

20. Regarding the claim of the learned counsel for the assessee that the peak of the deposits in the 110 bank accounts has to be worked out datewise, the learned Departmental Representative argued that the benefit of adding the peak of the deposits in the 110 bank accounts can be given, only if, the assessee surrenders the deposits as his income and also he proves that the withdrawals figuring in the bank accounts have not been utilised elsewhere and the funds represented by the withdrawals were available for making the deposits. In other words, the argument is that the benefit of the peak can be given, only if, the assessee proves the recycling of funds. The same argument is advanced in respect of the claim of the assessee raised in the additional grounds that the peak worked out for the assessment year 1991-92 may be deducted from the peak arrived at for the assessment year 1990-91 and only the balance may be considered for the assessment year 1991-92.

21. Regarding the ground taken by the assessee in respect of the disallowance of Rs. 1,19,952, it is claimed that as the 110 bank accounts figuring in Annexure A-3 are admitted by the assessee in his deposition dated 20-12-1991 to be owned by him in benami names and as interest is paid on borrowals in effected from the concerns holding the said 100 bank accounts, it is argued that the borrowals in question are bogus and so the disallowance of the interest is also justified.

22. Regarding the additional ground raised by the assessee to the effect that interest under section 234A cannot be charged as no notice under section 142(1) had been served on the assessee and the assessee had filed the return voluntarily, it is pointed out that the due date for the filing of the return was 31-8-1991 but it was filed belatedly on 20-9-1991 and in the circumstances of the case, the assessee cannot take the benefit of the decision of the Honble Patna High Court in the case of Ranchi Club Ltd. (supra).

It is also pointed out that the interest under section 234A is not penal in nature and it is only compensatory in character, and in this context, reliance is placed upon the following two decisions :

(1) Sant Lal v. Union of India .

(2) Union Home Products Ltd. v. Union of India : [1995]215ITR758(KAR) .

It is argued that in the Ranchi Club case (supra) relied on by the learned counsel for the assessee, there was no default in filing of the return of income or in payment of advance tax/self-assessment tax and in the assessee's case, the return of income had been filed belatedly and so the facts of the assessee's case are distinguishable from those of the Ranchi Club case (supra) considered by the Honble Patna High Court.

23. Regarding the additional ground raised by the assessee in respect of the levy of interest under section 234B, it is mentioned that the advance tax paid is less than 90 per cent of the assessed tax and, therefore, the provisions of section 234B are attracted, and in this context, reliance is placed upon the decision of the Punjab and Haryana High Court in the case of Sant Lal (supra) and that of the Karnataka High Court in the case of Union Home Products Ltd. (supra). Objection is taken even to the raising of additional grounds in respect of the levy of interest under sections 234A and 234B.

24. Regarding the contention of the learned counsel for the assessee that the direction of the assessing officer to the effect 'Charge interest as per law' is not a valid order and the further contention that where there is no specific order levying interest in the assessment order, interest cannot be levied through notice of demand, it is claimed that where the assessment order is accompanied by ITNS 150, which is the tax calculation sheet signed by the assessing officer, the levy of interest is valid, and for this proposition, reliance is placed upon the decision of the Apex Court in the case of Kalyankumar Ray v. CIT : [1991]191ITR634(SC) .

25. Regarding the estimation of professional income and the disallowance of certain expenditure effected by the assessing officer, the learned Departmental Representative supported the action of the assessing officer on the ground that the assessee did not furnish the relevant details before the assessing officer nor produced the vouchers and bills in support of the claim.

26. In the rejoinder by the learned counsel for the assessee, strong exception is taken to the admission of the additional evidence produced by the department. It is claimed that the admission of additional evidence at the appellate stage is not referable to any right of the party but is dependent solely on the requirement of the court. It is claimed that rule 29 of the Appellate Tribunal Rules, 1963, is clear that the parties to the appeal shall not be entitled to produce any additional evidence, either oral or documentary, before the Tribunal. It is also claimed that the additional evidence sought to be filed by the department before the Tribunal is not of decisive or of clinching value and so cannot be admitted. In support of these propositions, reliance is placed upon the following decisions :

(1) Velji Deoraj & Co. v. CIT : [1968]68ITR708(Bom) .

(2) CIT v. Smt. Kamal C. Mehboobbani : [1995]214ITR15(Bom) .

(3) A.K. Babu Khan v. CWT : [1976]102ITR757(AP) .

(4) Dy. CIT v. Vira Construction Co. (1997) 61 ITD 33 (Bom) .

(5) Y.W.C.A. of India v. Inspecting Assistant Commissioner(1989) 29 ITD 620 (Del).

In the written submissions filed by the learned counsel for the assessee, which may be seen at pages 67 and 68 of APB (Volume IV) the value of the additional evidence sought to be filed by the department is assailed as follows :

'(i) The papers given by the Departmental Representative relate to the details of income-tax assessments of (i) S.M. Khandhar (ii) Suman Motels Ltd., (iii) Mrs. Bharati S. Khandhar, (iv) Praful M. Khandhar, (v) Shaikh Mukhtar Hussain and (vi) Late Sudershan Kumar. These papers relating to the assessment year 1996-97 have no relevance for the issues which are now involved in the appeals for the assessment year 1991-92.

(ii) The facts of the case for the assessment year 1996-97 are entirely different from the facts for the assessment year 1991-92.

(a) In the accounting year relevant for the assessment year 1996-97, the assessee borrowed amounts from some concerns, and such borrowals appear in the books of account of the assessee. Therefore, section 68 of the Income Tax Act applies for the assessment year 1996-97.

(b) For the assessment year 1991-92, addition was made by the assessing officer (1) on the basis of the alleged statement under section 132(4) recorded from SMK and (2) that the bank accounts appearing in list A-3 were the benami accounts of SMK. In the books of the assessee for the year ended 31-3-1991, relevant for the assessment year 1991-92, these amounts do not appear.

(c) In the assessee's statement dated 23-9-1993, recorded by the assessing officer, the assessee clearly stated that wherever he borrowed amounts from the others, he would produce necessary evidence in support of such borrowals made and if he fails to do so he would have to pay tax on such borrowals.

Thus, while the onus of approving borrowals for the assessment year 1996-97 lies on the assessee, for the assessment year 1991-92, there is no such onus.

The facts of the case for the assessment year 1996-97, cannot be imported into the assessment for the assessment year 1991-92.

(iii) The papers at page Nos. 273, 279, 288 and 294 filed by the Departmental Representative show that (1) Vipko Sales Corporation, (2) Dipali Enterprises and (3) Kapilesh Corporation Ltd. advanced moneys to others, realised interest thereon and claimed deduction of tax deducted at source from out of such interests received. Similarly, in the later years these and other concerns might have advanced funds to the six persons, in the accounting year relevant for the assessment year 1996-97.

(iv) The papers filed by Departmental Representative and available at pages 271 to 295 of his paper compilation are incomplete, as balance-sheets/list of debtors are not given. It is not proper to say that the details given by S.M. Khandhar for the assessment year 1996-97 are incorrect.

(v) The additional evidence filed by the Departmental Representative on 28-7-1999, clearly shows that several of these concerns advanced funds not only to the assessee, but to others as well.

(vi) In the income-tax assessment of the assessee for the assessment year 1996-97, no finding is recorded so far by the assessing officer regarding the amounts borrowed by the assessee from the several creditors.'

27. Regarding the claim of the learned Departmental Representative that the assessee was controlling the finances of the various concerns it is pleaded that the day to day finance was looked after only by Shri P.M. Khandhar, brother of the assessee. It is, however, not denied that Shri S.M. Khandhar, the assessee, was looking after the mobilisation of finance.

28. It is refuted that the assessee has introduced various concerns to the banks. It is mentioned that the bank requires that only a person holding an account with it, can introduce other parties and the assessee had accounts only with a few branches and so could not have introduced new parties to other branches. Adverting to the argument of the learned Departmental Representative that certain pay-in-slips and cheque books were also seized in the course of the search, it is mentioned that such material was seized only from Shri B.M. Khandhar, brother of the assessee, and that material was considered in the assessment of Shri B.M. Khandhar and so the assessee cannot be held responsible in any way for such material. Similarly, it is contended that even though the seized assets in the group were of the order of Rs. 1,03,40,044, they largely represent the share certificates and they are accounted for and considered for assessment purposes in the hands of various concerns like Eshita Dye Chem Pvt. Ltd. and no adverse inference can be drawn against the assessee on the basis of such seized assets.

29. The learned counsel for the assessee argued that the assertion of the learned Departmental Representative that the Annexure A-3 containing the 110 bank accounts was found in the cabin of the assessee, was only a presumption. In other words, the contention is that it could have been located even in the computer room on 20-12-1991 and not necessarily in the cabin of the assessee.

30. After the hearing was over, the learned counsel for the assessee wanted to file some written submissions and the Bench permitted it with the caution that no fresh argument should be advanced in the written submissions. However, we find that in the written submissions filed by the assessee, marked as Volume IV of the APB, certain arguments and case law are advanced which were not mentioned in the course of the hearing. Certain points are mentioned on financial control and administrative matters at pages 38 to 40 of the said APB under the headings 'Financial Control' and 'Administrative Matters' but these points were not made in the course of the hearing and the learned Departmental Representative had no opportunity to refute them and so we do not find it fit or necessary to refer to these arguments in detail. The drift of these arguments is that the assessee was not in control of administrative or financial matters of Eshita Dye Chem Pvt. Ltd.

31. Regarding the working of the peak of the deposits in the bank accounts, it is reiterated that the department did not locate any investments in the search and so it is to be deemed that the withdrawals were available for making the deposits in the bank accounts and so it is only just that the 'peak' worked out on the basis of the datewise arrangement of all the accounts concerned is added and not simply the aggregate of the maximum balances figuring in each account, as done by the Commissioner (Appeals). As already mentioned, it is also claimed that the peak of the earlier year has to be reduced from the peak of the year relevant for the present assessment year.

32. We have considered the rival arguments in this appeal, which as must be evident by now, has been hotly contested by both the sides. The crucial question to be decided is whether the statement recorded from the assessee on 20-12-1991 in which he made certain admissions regarding the ownership of the 110 bank accounts in the list of six pages marked as Annexure A-3 to the Panchnama is a valid statement under the Income Tax Act and whether it has any evidentiary value for framing the assessment in the case of the assessee for the assessment year 1991-92 and other years. We agree with the contention of the learned Departmental Representative that this is a valid statement recorded under the provisions of section 132(4) and the admission contained therein regarding the ownership of the 110 bank accounts has an evidentiary value for framing the

assessment in the case of the assessee for the assessment year 1991-92 and other years. It is, of course termed as a statement under section 132(1), but we are of the view that this is only a typographical error and the evidentiary value of the statement cannot be detracted by such an error, specially in view of the provisions of section 292B of the Income Tax Act. The power exercised by a competent authority cannot be regarded as illegal simply because a wrong section is mentioned, if the said authority has jurisdiction under some other provision. So, we are of the view that the mention of a wrong sub-section, i.e., the mention of sub-section (1) of section 132, instead of sub-section (4) of section 132, at the head of the statement recorded on 20-12-1991 is not fatal to the validity of the statement. Now, the question to be considered is, whether the statement could have been validly recorded under section 132(4), as claimed by the learned Departmental Representative section 132(4) reads as follows

'The authorised officer may, during the course of the search or seizure, examine on oath any person who is found to be in possession or control of any books of account, documents, money, bullion, jewellery or other valuable article or thing and any statement made by such person during such examination may thereafter be used in evidence in any proceeding under the Indian Income Tax Act, 1922 (11 of 1922), or under this Act.

Explanation. For the removal of doubts, it is hereby declared that the examination of any person under this sub-section may be not merely in respect of any books of account, other documents or assets found as a result of the search, but also in respect of all matters relevant for the purposes of any investigation connected with any proceeding under the Indian Income Tax Act, 1922 (11 of 1922), or under this Act.'

We find that the search warrant was issued in the name of Eshita Dye Chem Pvt. Ltd. to search the premises at 208-210, Parshva Chambers, and the search commenced on 18-12-1991. Actually, the entire group of the assessee was searched and there was a separate warrant in the name of the assessee to search his residence at Matunga, and his brothers premises at 278, Samuel Street. There was also a search warrant in the name of Eshita Dye Chem Pvt. Ltd., 208-210,

Parshva Chambers, and also another search warrant in the name of Suman Motels Pvt. Ltd., of which the assessee is the director, in the same premises, i.e., 208-210, Parshva Chambers. The two streets, Samuel Street and Essaji Street, are also adjacent to each other. The assessee and his family own a number of concerns and in answer to Question No. 4 recorded from the assessee on 20-12-1991, which we have extracted at pages 7 to 9 of this order, he has mentioned as many as 33 family concerns, which included Eshita Dye Chem Pvt. Ltd. and Suman Motels Pvt. Ltd. In answer to Question No. 19 in the statement dated 18-12-1991, recorded from the assessee at his residence at Matunga, the assessee clearly admitted that he looked after administrative matters and also the mobilisation of finance of the entire group of his family, and as already mentioned, the group included Eshita Dye Chem, in the course of the search of which concern Annexure A-3 containing 110 bank accounts in question was located. We have already extracted this reply at page 35 of this order. Even in the statement dated 23-9-1993 in which he retracted from the admission given in the statement dated 20-12-1991, regarding the ownership of the 110 bank accounts in question figuring on the six pages marked as Annexure A-3, the assessee clearly admitted in his answer to Question No. 13 that he looked after the mobilisation of finance of the entire group and even this reply we have page 14 of this order. The same position is repeated in the other questions in the statement dated 23-9-1993, and as an example, reply to Question No. 15 may be noticed. This appears at page 46 of the APB (Volume I) and reads as follows :

'Q. 15.

Have you arranged unsecured loans from Mrs. Bharati S. Khandhar, please give answer either Yes or No.

Ans.

I cannot say in my reply to your question yes or no. I arranged mobilisation of finance for the group but it is a joint decision to take loan or not.'

It may be noticed that this statement was recorded on 23-9-1993, i.e., almost two years after the statement dated 20-12-1991 was recorded during the search. Even

in the course of the attempted retraction from the admission contained in the statement dated 20-12-1991, the assessee could not dissociate himself from the fact that he was looking after the finances of the entire group. Even the brother of the assessee, Shri Praful Khandhar, in the statement recorded on 18-12-1991 in 208, Parshva Chambers, admitted in answer to Question No. 2, that only his brother would be able to tell how the books of account are maintained. A copy of his deposition may be seen at page 54 of the DPB and is as follows :

'Q. 2

Please explain way the books of account are maintained and available in this office.

A.2

I do not know. Shri Surendra Khandhar will be knowing about the method of accounting. I do not know for which concern books are maintained here. Shri Surendra will be able to tell you.'

We have already extracted the letter of the assessee dated 17-2-1992 addressed to the assessing officer on behalf of the Director of Eshita Dye Chem Pvt. Ltd. at page 36 of this order, explaining the position about the shares of Rs. 95,12,500 held in Suman Motels Ltd. It was explained that these shares did not belong to Eshita Dye Chem Pvt. Ltd. but only to the assessee and his family members. In the written arguments filed by the learned counsel for the assessee at the end of the hearing, it is explained that this letter was on the letterhead of the assessee and so the assessee cannot be held to be in control of M/s. Eshita Dye Chem Pvt. Ltd. We have already mentioned that some of these arguments were not advanced in the course of the hearing, but they figure only in the written submissions which were furnished at the end of the hearing and so could not be controverted by the Departmental Representative. At any rate, we fail to see, how it makes a difference that the letter is on the letterhead of the assessee when he is signing for the Director of Eshita Dye Chem Pvt. Ltd. He could not have signed on behalf of the Director of Eshita Dye Chem Pvt. Ltd. without being actually in control of the affairs of the said company. At no point of time, did the said company

dissociate itself from the representations made on behalf of them by the assessee before the assessing officer. In this context, we may also refer to the letter dated 31-1-1992, addressed by the assessee to the authorised officer asking for the lifting of the prohibitory order in respect of certain bank accounts. A copy of the letter may be seen at page 71 of the DPB and it reads as follows:

'We refer your search on 17-12-1991 and prohibitory order in respect of the following bank account:

1.

Deepak B. Bhatt

A/c No.

102220

2.

Bakurdas M. Bhatt

A/c No.

102221

3.

B.M. Shah

A/c No.

101389

4.

Rajeshree B. Shah

A/c No.

101540

5.

B.M. Khandhar

A/c No.

100128

6.

M/s. Shree International

A/c No.

500305

Hereby, we request you kindly withdraw the above order so that we can operate the same and oblige.'

Again, in the written submissions which were filed at the end of the hearing, the learned counsel for the assessee sought to explain that this letter was on the letterhead of the assessee and it was written because Shri B.M. Khandhar was not available in Bombay during the relevant time. The question is not whether a particular person is available during the relevant time. The fact of the matter is that the assessee was in charge of the affairs of the group and he was its manager and mouthpiece.

This is not, however, to say that all the members of the group are only his benamis, but that the assessee was generally in control of the affairs of the group, inclusive of M/s Eshita Dye Chem. Pvt. Ltd. and as such, the statement recorded from the assessee during the search of the premises of M/s Eshita Dye Chem Pvt. Ltd. at 208-210, Parshva Chambers, is a valid statement, recorded validly under the provisions of section 132(4). This point need not be laboured further. At page 37 of this order, we have already extracted another letter dated 29-4-1992, wherein again he offered an explanation on behalf of Eshita Dye Chem Pvt. Ltd. In

the written submissions filed by the assessee in Volume IV of the APB, the learned counsel for the assessee tried to again explain this letter also on the same footing as others, i.e., it is on the letterhead of the assessee. We have already refuted this argument hereinabove. So, we find ourselves in agreement with the stand of the department that the assessee is the fulcrum of the entire Khandhar group, inclusive of Eshita Dye Chem Pvt. Ltd., and he was generally both in administrative and financial control of these concerns and so he cannot be allowed to wriggle out, obviously on second thoughts, from the admission made by him regarding the 110 bank accounts in the statement dated 20-12-1991. In the view we have taken, we find that the case law cited by the learned counsel for the assessee is distinguishable on facts and is not of much assistance to him. We may, however, refer to some of the important cases cited by the learned counsel for the assessee. The learned counsel for the assessee referred to the decision of the Honble Karnataka High Court in the case of Nenmal Shankarlal Parmer (supra) and mentioned that in this case the Honble High Court held that when the warrant was issued to search the common residential premises of the partners of the firm in connection with the investigation in the case of the firm, assets (other than assets relating to the firm) pertaining to a partner in his individual status could not be seized under section 132 of the Income Tax Act. We do not see the applicability of this decision in the case before us. In the present case, no seizure of assets is involved. It is only taking the deposition under the provisions of section 132(4) from the assessee during the search of the premises of M/s Eshita Dye Chem Pvt. Ltd. in pursuance of a warrant issued on that company. Our finding is that the assessee has been in control of the affairs of M/s Eshita Dye Chem Pvt. Ltd. He had a cabin there and he was incharge of its administrative and financial matters and he was also offering explanations on behalf of that company before the assessing officer. In the circumstances, we are of the view that the statement recorded from the assessee has to be regarded as one legitimately taken under the provisions of section 132(4) under which any person who is in control of the premises and things in the premises can be examined and his deposition taken. We may also refer to the decision of the Honble Punjab and Haryana High Court in the case of Smt. Sita Devi (supra) on which the learned counsel for the assessee had relied. This is also a case where some seizure of jewellery was involved and

the jewellery belonging to the mother of the assessee was seized in the course of the search of the premises of her sons, but it is pleaded that such seizure of the jewellery could be effected only after the issue of a separate warrant for the search of the mother. We have already mentioned that no seizure of assets is involved in the present case and only a deposition taken under section 132(4) from a person who is in control of the affairs of the premises and so we are of the view that this case is also distinguishable. Next, we may refer to the decision of the Apex Court in the case of Seth Brothers (supra). In this case, during the execution of a search warrant on Seth Bi-s. the books of account relating to other concerns in which the partners of Seth Brothers, were interested were seized and this action was upheld by the Apex Court. The relevant portion of the head note of this decision reads as follows

'Where a warrant is issued in relation to a firm, the officer authorised thereunder is not restricted to searching for and taking possession of only those books of account and other documents which directly relate to the business carried on by the partners of in the name of the firm. The books of account and other documents in respect of other businesses carried on by the partners would certainly be relevant because they would tend to show interrelation between the dealings and supply materials having a bearing on the case of evasion of income tax by the firm. Merely because the Income Tax Officers made a search for and seized the books of account and documents in relation to business carried on in the names of other firms and companies, the search and seizure would not be illegal.'

We do not see how this decision helps the assessee. Annexure A-3 contained a list of bank accounts and the authorised officer seized it as relevant for the assessment of M/s. Eshita Dye Chem Pvt. Ltd. He took tile deposition of the person who is incharge of the affairs of M/s. Eshita Dye Chem Pvt. Ltd., i.e., the assessee, and it turned out that on the admission of the assessee himself, the deposits in the bank accounts had to be brought to tax in the hands of the assessee. Simply because it turned out that the seized document was utilised in the assessment of the assessee whose deposition was validly taken in the search of M/s. Eshita Dye Chem Pvt. Ltd., it does not follow that the seizure of the document in the course of the said search was invalid or the statement of the

assessee was invalidly taken in the course of the search. As already mentioned by us, the statement had been validly taken because there was a connection between the assessee and Eshita Dye Chem Pvt. Ltd. against whom there was admittedly a warrant of search, inasmuch as the assessee was in charge of the affairs of the said company and as such was in control of the premises and affairs of that company within the meaning of section 132(4). It may also be mentioned that the Apex Court observed in the case of Seth Bros. (supra) that any irregularity in the course of entry, search and seizure committed by an officer acting in pursuance of the authorisation will not be sufficient to vitiate the action taken provided the officer has, in executing the authorisation, acted bona fide. We find that this decision of the Apex Court actually supports the case of the department and not of the assessee. In the written submissions filed at the end of the hearing, the learned counsel for the assessee, at page 18 of Volume IV of the APB, mentioned that Shri Arvind Kumar who recorded the statement from the assessee on 20-12-1991 was not mentioned as an authorised officer in the warrant of authorisation dated 17-12-1991. This argument, however, was not taken during the hearing and the learned Departmental Representative had no occasion to counter this contention and so we have no option but to ignore this contention which is advanced only in the written submissions and the written submissions were not supposed to go beyond the arguments taken in the course of the hearing as per the caution indicated by the Bench in the course of the hearing itself. At any rate, the learned counsel for the assessee himself has admitted at page 35 of the said APB (Volume IV) that as per the Panchnama dated 20-12-1991, Shri Arvind Kumar, Assistant Commissioner (Inv.), Unit III(1), was also an authorised officer and there is no reason to think that he was not the authorised officer in the search warrant issued in the case of Eshita Dye Chem Pvt. Ltd. in respect of 208-210, Parshva Chambers. The learned counsel for the assessee has also mentioned that the term 'possession' used in section 132(4) refers to physical possession and not deemed or constructive possession and it cannot be said that the assessee was in physical possession of the list marked as Annexure A-3. In this context, reliance is placed upon the decision of the Apex Court in the case of CIT v. Tarsem Kumar : [1986]161ITR505(SC) . This is a case where certain monies were in the custody of the customs department and so, it was held that the money was not in the

possession of the assessee as contemplated by section 132 of the Income Tax Act. We are of the view that this case is altogether inapplicable to the facts of the present case inasmuch as in the present case, the assessee was in both physical and constructive control of the premises of Eshita Dye Chem Pvt. Ltd. at 208-210, Parshva Chambers, not only because he has a cabin therein but also because he was in control of its affairs, as already mentioned. He was also at least in constructive possession of the document Annexure A-3 inasmuch as he was overall in control of the premises and so the assessing officer was entitled to take his deposition under section 132(4) and also in terms of the said section utilise it in any proceedings under the Income Tax Act, which includes proceedings against the deponent himself, i.e., the assessee. We may also mention that the question is not whether there are any other persons besides the assessee in control of the said 208-210, Parshva Chambers, occupied by M/s Eshita Dye Chem Pvt. Ltd. The question simply is, whether the assessee is the person in control of the said premises, may be along with others. Viewed from this angle, we are of the opinion that the authorised officer was quite justified in taking the said deposition dated 20-12-1991 from the assessee under section 132(4). We have perused the other decisions cited by the learned counsel for the assessee in this regard and find that they are all distinguishable. On the other hand, we are of the view that the case law cited by the learned Departmental Representative, such as the Andhra Pradesh High Court decision in the case of Lan Eseda Steels Ltd. (supra) support the case of the department. In respect of the contention of the learned counsel for the assessee that the said Annexure A-3 was not seized from the cabin of the assessee in Parshva Chambers and that it was seized only from the drawer of a typist in Parshva Chambers, we are of the view that the probabilities are against the assessee, even though, no firm conclusion against the assessee can be given in this regard. It is not denied by the learned counsel for the assessee that the search was temporarily ceased on the morning of 19-12-1991 and that a prohibitory order was served on the cabin of the assessee and the computer room. If it had been seized during the search proceedings conducted on 18-12-1991, there would normally have been an interrogation of the assessee on the said paper but there is no such indication on this matter in the deposition taken from the assessee on 18-12-1991. The assessee was interrogated only on 20-12-1991

when only the cabin of the assessee and the computer room were searched. The contention of the learned counsel for the assessee before us is that the said paper was seized from the table of a typist. It is not normal to assume that a typist was accommodated in a computer room. It was not the contention of the learned counsel for the assessee before us that it was seized from the computer room during the search on 20-12-1991. So, we are of the view that the probabilities are against the assessee, even though, as we have already mentioned, no firm conclusion against the assessee can be drawn that it was not seized either from the computer room or from the table of the typist placed in the computer room during the search on 20-12-1991 and not from the cabin of the assessee which was also searched on that day. But the Tribunal is entitled to go by probabilities in judging an issue in respect of which there is no firm material one way or the other. On probabilities we come to the conclusion that it was seized only from the cabin of the assessee on 20-12-1991, as contended by the department. We have perused the refutation of the stand of the learned Departmental Representative contained in the written submissions given by the learned counsel for the assessee at page 7 of the APB (Volume IV). As already mentioned by us in some other context, some of these arguments were not raised in the course of the hearing and as such, we do not deem it fit to deal with them. We are also of the view that we need not go into the niceties of the exact location from where the Annexure A-3 was seized. It is included in the Panchnama dated 20-12-1991, drawn up in the case of Eshita Dye Chem Pvt. Ltd. Even if, the seizure of this document is to be held to be illegal inasmuch as it does not relate to Eshita Dye Chem Pvt. Ltd. against which the authorisation under section 132 is given but is held to relate to the assessee against whom no authorisation was given in respect of the search of this premises, nonetheless its user in the assessment of the assessee cannot be faulted in view of the decision of the Apex Court in the case of Pooran Mal (supra) relied on by the learned Departmental Representative. As per the relevant portion of the headnote of this decision, it has been observed as Follows :

'In India, as in England, where the test of admissibility of evidence lies in relevancy, unless there is an express or necessarily implied prohibition in the Constitution or other law, evidence obtained as a result of illegal search or seizure

is not liable to be shut out. Even though, a search and seizure may be in contravention of section 132 of the Income Tax Act, 1961, still the material obtained thereby is liable to be used subject to law before the income-tax authorities against the person from whose custody it is seized and, therefore, no writ of prohibition in restraint of such use can be granted.'

In the course of the said decision, the Apex Court referred to the decision of the Honble Allahabad High Court in the case of Emperor v. Allahdad Khan ILR (1913) 35 (All) 358, where in the Superintendent of Police and a Sub-inspector searched the house of a person without an authorisation but the excisable articles illicitly found in the possession of the persons searched were held to be proper evidence for conviction of the owner of the house under section 63 of the United Provinces Excise Act, 1910. They also referred to the decision of the Privy Council in Kurma v. Queen (1955) AC 197 of the Report wherein it has been held as follows :

'The test to be applied, both in civil and in criminal cases, in considering whether evidence is admissible is, whether it is relevant to the matters in issue. If it is admissible and the court is not concerned with how it was obtained.'

In Smt. Kusum Lata Singhal v. CIT : [1990]185ITR56(SC) , it was held that irrespective of the validity of the proceedings, the evidence of testimony cannot be wiped out and does not become non-existent. In CIT v. Dr. Nandlal Tahiliani : [1988]172ITR627(SC) , this proposition has been reiterated. In this case, the Allahabad High Court held that the authorisation was not proper as it was given on the basis of a mere rumour against the assessee. However, on a special writ petition filed by the department against the judgment of the Honble Allahabad High Court, the Apex Court held that as the articles and money seized had been released by that time, no useful purpose would be served by entertaining the petition. It still observed that it was open to the department to resort to other proceedings which were permissible in law and to take into account any information derived from the beneficiaries prepared in the said search and seizure action. So, we have to hold that even if Annexure A-3 had not been properly seized, it is good evidence for being utilised in the assessment of the assessee. There are a number of cases on these lines in the Commentary on income-tax by

Chaturvedi and Pithisaria at pages 3167, 3168 (Volume-3), which may be seen. We have already referred to some of the other decisions cited by the learned Departmental Representative in this regard at pages 41 and 42 of this order. For these reasons, we are of the view that the recording of the statement under section 132(4) from the assessee on 20-12-1991 in respect of the 110 bank accounts figuring in Annexure A3 is valid and on the basis of the admission contained therein to the effect that the assessee is the owner of the funds figuring in those accounts, the assessing officer is entitled to hold that the amounts are assessable in the hands of the assessee unless there is any evidence to the contrary forthcoming from the assessee.

33. At this stage, we may also refer to the contention of the learned counsel for the assessee that the particulars relating to the concerns to which the 110 bank accounts in question related were written on the relevant papers by the assessee in his own hand only at the instance of the Authorised Officer and such details were not there on the document itself before it was located by the Authorised Officer. Firstly, there is no evidence that the pages did not bear the handwriting of the assessee but we are prepared to give the benefit of doubt to the assessee in this matter. Even going by the contention of the assessee that he had given those particulars only at the instance of the Authorised Officer, the fact of the matter still remains that the assessee was aware of the correct particulars relating to 110 bank accounts. The bank accounts were introduced in 14 branches of different banks either by the assessee or by his family concerns or the addresses of the account holders were those with which the assessee had connection one way or the other. The question remains as to how did the assessee know the particulars regarding the correct account holders of 110 bank accounts unless he was in control of all those accounts, as admitted by the assessee himself in the course of his deposition. It is of course true that no supporting evidence like cheque-books or pay-in-slips were located in respect of these 110 bank accounts, but such material was available in the premises of his brother and it means that the members of the group are not unfamiliar with the practice of putting their own funds into benami accounts. It is also to be noted that the assessee admitted to be looking after the finances of the entire group. Simply because supporting evidence in respect of the 110 bank accounts were not located during the search, it does not

follow that the evidentiary value of the admission of the assessee contained in the statement dated 20-12-1991 regarding the ownership of the funds in the 110 bank accounts in question is in any way vitiated.

34. Regarding the contention of the learned counsel for the assessee that the presumption contained in section 132(4A) is restricted to the proceedings under section 132(5) and is not available in the assessment proceedings, we are of the view that this contention does not deserve to be accepted. In this connection we refer to the decision of the Tribunal in the case of Ashwini Kumar v. Income Tax Officer (supra) wherein, while distinguishing the decision of the Hon'ble Allahabad High Court in the case of Pushkar Narain Sarraf (supra), the Tribunal proceeded to observe as follows :

'21. We may first dispose of the contention of the learned counsel for the assessee that the presumption that is permissible under section 132(4A) cannot be raised in the proceedings for regular assessment. The Hon'ble Allahabad High Court in the case referred to above was concerned with a different situation. In that case, during the course of search certain account books were seized in which certain cash credits were recorded. In the assessment proceedings the assessee pleaded that by virtue of section 132(4A) the correctness of those credits, as recorded in the books of account, should be presumed. This contention was negated by the Hon'ble High Court by holding that section 68 overrides section 132(4A) and it is in that connection that it was also observed that the presumption under section 132(4A) is limited only to the summary adjudication contemplated in sub-section (5) of section 132. These observations, in our view, are obiter dicta as that was not the controversy before the court. Section 132(4A) is a special provision dealing with documents and other things recovered during a search and its very purpose would be frustrated if the presumption is restricted to the interim proceedings under section 132(5). We, therefore, reject this contention of the assessee.'

As also mentioned by the learned Departmental Representative, section 132(4A) survives the deletion of section 132(5) as on today and this also supports the view that the presumption under section 132(4A) is available for assessment proceedings also. In the case of R. Bharathan v. Income Tax Officer :

[1990]182ITR146(Ker) , the Hon'ble Kerala High Court held that there was no irregularity in applying the presumption available under section 132(4A) in regular assessment. The document Annexure A3 was in the constructive possession of the assessee and so we are of the view that any presumption formed by the department is valid, though such presumption is rebuttable on further evidence to the contrary produced by the assessee.

35. Now the question to be considered is whether the assessing officer is justified in bringing to tax the funds lying in the 110 bank accounts in question in the hands of the assessee in spite of the latter's subsequent retraction solely on the basis of the admission contained in the statement recorded from the assessee on 20-12-1991. For answering this question, it is necessary to consider as to what was the stand taken by the assessee before the assessing officer. The assessing officer repeatedly asked the assessee to offer the undisclosed amounts lying in the said 110 bank accounts on the basis of his admission contained in the deposition dated 20-12-1991. In the face of the assessee's failure to disclose such amount and in view of his subsequent retraction, the assessing officer asked the assessee to produce certain details regarding those parties, and as a specimen, his letter dated 4-3-1994 figuring in page 209 of the DPB may be seen, which reads as follows:

'Sir,

Sub: Income Tax Assessment for assessment year 1991-92

Please refer to this office letter No. AC CC.14/93-94 dated 17-2-1994 you have not furnished the details as asked for. You are requested to furnish the details as called for within three days of the receipt of this letter failing which it will be taken that you are not interested in furnishing the details and you have nothing to explain.

Please refer to this office letter No. AC CC.14/93-94 dated 15-2-1994, you have not furnished the details so far. You are requested to furnish the details as called for within three days of the receipt of this letter. Failing which it will be taken that you are not interested in furnishing the details and you have nothing to explain.

Please refer to order noting dated 4-1-1994. You have failed to furnish the details as called for. You are requested to furnish the details as called for within three days of the receipt of this letter.

You are requested to produce M/s Associated General Agencies M/s Shree and Associates along with books of account i.e., sales bill, purchase bill, sales register, purchase register, delivery challan, ledger, cash book, bank book, bank statement etc. and working partner of M/s Associated General Agency and M/s Shree & Associates should be present, so that the loan taken by you can be taken as genuine and the credit worthiness of the party from whom you had taken loan can be established.

Thanking You.'

The stand of the assessee before the assessing officer with regard to such requests made by the assessing officer is contained in the letter dated 7-12-1993 which may be seen at pages 49 and 50 of the APB (Volume-1) and it reads as follows :

'I invite reference to the summons dated 1-12-1993 issued by you under section 131 of the Income Tax Act, asking me to appear before you on 8-12-1993 and furnish the information as required in your letter No. AC/CC. 14/SMK/93-94 dated 1-12-1993.

In compliance with your summons dated 3-8-1993 addressed to me, I furnished the information to the extent I knew, in my letter dated 17-8-1993 addressed to you. As already stated in my letter dated 3-8-1992 on the above subject addressed to you, as some of the persons mentioned in the list, were my clients when I was in active practice as an Income Tax Practitioner, I could furnish their addresses to you. In respect of other names appearing in the list, as they ceased to be my clients long back, their income-tax papers were handed over by me to them. I am, therefore, not aware of their present office or residential addresses. I am unable to add anything to the details already furnished in my letter dated 17-8-1993 addressed to you.

As regards the statement under section 132(4) of the Income Tax Act recorded from me on 18-12-1991, a copy of the same has not been furnished to me so far. As the details of the statement given on 18-12-1991 are not available with me, I am unable to recollect what I have stated. I am separately applying to you for a copy of the same. On receiving a copy of the statement dated 18-12-1991, I shall be in a position to answer your query with reference to that statement dated 18-12-1991.

Regarding section 132(4A) of the Income Tax Act, mentioned in your above letter I am to state that no list of bank accounts was found in the course of search under section 132 of the Income Tax Act, in my possession or control. In my case, there was search under section 132 of the Income Tax Act only at my residence in Matunga, Bombay on 18-12-1991. There is, therefore, no question of invoking the presumptions available under section 132(4A) of the Income Tax Act in my case. Apart from this I also state that the presumptions under section 132(4A) of the Income Tax Act are available only for the purpose of passing an order under section 132(5) of the Income Tax Act. Such presumptions are not available while making an income-tax assessment under section 143(3) of the Income Tax Act.

I understand that typed list was seized in the course of the search under section 132 of the Income Tax Act in the case of Eshita Dye Chem Pvt. Ltd. as per the Panchnama in the case of Eshita Dye Chem. Pvt. Ltd. I have to state here that I was not a Director of Eshita Dye Chem Pvt. Ltd. at any time.

For the above reasons, I state that section 132(4A) of the Income Tax Act cannot be invoked in my case with reference to the typed list seized from the office premises of Eshita Dye Chem Pvt. Ltd. on 18-12-1991.

As already stated above, I have separately made an application for furnishing to me a copy of the statement under section 132(4) of the Income Tax Act, recorded from me on 18-12-1991. After the receipt of the same I shall furnish, if necessary, a further reply to you.

Thanking you.'

It is noteworthy that in the above letter, the assessee has distanced himself from the said Annexure A 3 to the extent of stating that he understood that a typed list was seized in the course of the search under section 132 of M/s Eshita Dye Chem Pvt. Ltd. He conveniently forgot the deposition given by him in respect of the said list on 20-12-1991 and even the so-called tension stated to have been experienced by him at that stage as per the contention of the learned counsel for the assessee before us during the hearing. In other words, the assessee was not cooperative at all. He did not think that it was his duty to discharge the burden cast upon him of proving the correctness of his retraction to the effect that he did not have anything to do with the 110 bank accounts. It is in this context that we have to see the correctness of the additional evidence produced by the department before us, to which the learned counsel for the assessee has vehemently objected before us. It is only in the course of the hearing before us and it is only at our instance that the learned counsel for the assessee chose to give the present addresses and the incomes-tax position of a large number of the concerns figuring in Annexure A3. We have already detailed in the course of this order such details furnished by the learned counsel before us. We had to ask for such details entirely because of the stand taken before us by the learned counsel for the assessee that all such concerns were separately assessed to tax and those concerns had also reflected the relevant bank accounts figuring in the list of 100 bank accounts in Annexure A3 in their books and for income-tax purposes. When a contention like that was taken before us we had to obtain the particulars of such concerns with their addresses and their income-tax position, i.e., as to where they are assessed and upto what assessment year returns had been filed etc. These particulars furnished by the assessee before us were not made available before the assessing officer. Further, mere production of such details is not enough. The correctness of such details has to be verified. To our mind, it is quite clear that it is not sufficient if in assessment has been made on a particular party to hold that, that party is genuine. It is common knowledge that in all cases of benami holdings, assessments are got framed in the normal course. It is only when a search is conducted and when incriminating material is found during the search that it becomes evident that wrong assessments had been made on wrong parties and at that stage nothing prohibits the department from making the correct assessment in

the hands of the correct party in view of the decision of the Apex Court in the case of C.H. Atchiaiah (supra) relied on by the learned Departmental Representative. That is exactly what has happened in this case. A large number of concerns have been floated and assessments also seem to have been got framed on them. Simply because assessments had already been made, it does not automatically follow that the deposits in the said bank accounts standing in the names of different concerns in Annexure A3 are not the funds of the assessee, as admitted by him. The additional evidence filed by the learned Departmental Representative proves that there is a flow of funds between the said 110 bank accounts and the other concerns of the Khandhar Group, particularly Suman Motels Ltd., of which the assessee is the director, and in which the family members of the assessee hold a large number of shares. The exercise of verification of the genuineness of the concerns has to be undertaken. This can be done only by the assessing officer and not by the Tribunal. It is contended that the additional evidence sought to be filed by the learned Departmental Representative had been obtained, as admitted by himself, after the assessment for the assessment year 1991- 92 in the case of the assessee had been completed and this material could not have been considered. It is found that some of these concerns have not been responding to summons in their own assessments, nor were they produced by the assessee in support of his retraction before the assessing officer in the context of the assessment framed on the assessee for the assessment year 1991-92. If we simply accept the claim of the assessee that they are all assessees on file and so the bank accounts standing in their names should be excluded for the purpose of framing the assessment on the assessee, it could mean that a person who has possibly created a labyrinth of 110 bank accounts in spurious names escapes scot-free without any verification. That would be the inevitable result if we do not allow the department to file its additional evidence, which has become necessary only in response to the particulars of the concerns furnished by the assessee only during the hearing before the Tribunal. Without such particulars, the assessing officer was entitled to act on the admission contained in the statement dated 20-12-1991, but in view of these particulars and the contentions raised before the Tribunal, it has become necessary to test the veracity of the admission on the one side and the subsequent retraction on the other side with reference to extraneous

evidence, such as the assessments framed on the concerns to whom the 110 accounts allegedly relate and the genuineness of such concerns.

36. Rule 29 of the Appellate Tribunal Rules, 1963, reads as follows:

'The parties to the appeal shall not be entitled to produce additional evidence either oral or documentary before the Tribunal, but if the Tribunal requires any document to be produced or any witness to be examined or any affidavit to be filed to enable it to pass orders for any other substantial cause, or if the income-tax authorities have decided the case without giving sufficient opportunity to the assessee to adduce evidence either on points specified by them or not specified by them, the Tribunal, for reasons to be recorded, may allow such document to be produced or witness to be examined or affidavit to be filed or may, allow such evidence to be adduced.'

37. In the circumstances narrated above, the Tribunal required from the assessee the particulars of the concerns figuring in Annexure A3 and the income-tax position of those concerns. To judge the correctness of those particulars, it requires the material furnished by the learned Departmental Representative by way of additional evidence. So we see no merit in the contention of the learned counsel for the assessee that the department should be barred from filing this additional evidence at this stage. We are of the view that the case law cited by him has no relevance to the facts of this case. The assessee has retracted from his admission and has not furnished any evidence in support of his retraction before the assessing officer and has chosen to file some evidence in support of the retraction only before the Tribunal. In the circumstances, the department is, to our mind, clearly entitled to counter those contentions by adducing whatever evidence is available with it in respect of those concerns, though it came into the possession of such evidence only subsequent to the assessment. The Tribunal should not either call for any particulars from the assessee in respect of the said concerns, or if it chooses to call for such particulars, it should allow the department also to produce additional evidence. We have opted to call from the assessee any evidence he has in support of his subsequent retraction from the admission contained in the statement dated 20-12-1991 and also to allow the department to

produce any evidence it has in its possession to judge the correctness of such retraction and the particulars furnished by the assessee in support of that retraction. We see no irregularity in the procedure adopted by us. We are of the view that this is the only procedure that can be adopted which can be fair to both the sides. Accordingly, we reject the contention of the learned counsel for the assessee that the department should be barred from filing any evidence at this stage. The reasons for admission of the additional evidence are recorded in this order itself in terms of the abovementioned rule 29 of the Appellate Tribunal Rules. Actually, we find certain amount of contradiction between the stand of the learned counsel for the assessee that the additional evidence sought to be filed by the department should not be admitted and his other stand that when a statement given in the course of the search is retracted, the assessing officer is not justified to make any addition without bringing any evidence in support of the said addition. This would amount to pleading that the assessing officer should simply accept the retraction because the assessee did not produce the concerned parties before the assessing officer nor did he file the relevant particulars at that stage, and so the assessing officer could not have verified the correctness of the retraction in the light of any other evidence. If now the additional evidence sought to be filed by the department is not admitted, it would mean that the retraction has to be accepted simply on the basis of the unilateral statement of the assessee. There is no way of judging whether the retraction is simply self-serving or not if the additional evidence sought to be filed by the revenue before us is not admitted, we find it necessary to admit this additional evidence sought to be filed by the revenue to enable the assessing officer to examine, verify and judge the correctness of the retraction in the face of the earlier admission regarding the ownership of the 110 bank accounts in question and the other surrounding circumstances relating to the seizure of Annexure A3. Even the decision of the jurisdictional High Court in the case of Velji Deoraj & Co. (supra), relied on by the learned counsel for the assessee, supports our view because it holds that while the parties to the dispute have no right to produce additional evidence at the appellate stage, it holds that the admission is solely on the requirement of the court. In the circumstances of the case, we deem it fit to admit the additional evidence filed by the department, just as we admit the additional evidence filed by the learned counsel for the assessee.

However, it is evident that the material furnished by the department before us has not been put to the assessee at any stage and his explanation sought. In terms of the canons of natural justice, no adverse inference can be drawn against the assessee without putting to the assessee any material in the possession of the assessing officer and on which he wants to rely to the prejudice of the assessee. In the circumstances, we deem it fit to set aside the assessment on the addition of Rs. 3,05,40,285 sustained by the Commissioner (Appeals) in respect of the 110 bank accounting figuring in Annexure A3 and remit the matter to the file of the assessing officer who may put the material in his possession and which has been filed before us by way of additional evidence to the assessee and call for his explanations.

37.1 The question regarding benami is a question of fact and normally the burden of proof regarding benami status is on the person alleging such status or position, as held by the Apex Court in the case of *Heirs of Vrajlal J. Ganatra v. Heirs of Parshottam S. Shah* : [1996]222ITR391(SC) . However, to our mind, this position does not hold good when the statute provides a special rule of evidence as in section 132(4A) of the Income Tax Act. A similar rule of evidence stipulated in section 118 of the Negotiable Instruments Act has been the subject of consideration by the Apex Court in the case of *Kundan Lal Rallaram v. Custodian, Evacuee Property* AIR 1961 SC 1316 and the court observed that the presumption contained in the said section is one of law and it proceeded to observe as follows :

'The presumption is one of law and thereunder a court shall presume, inter alia, that the negotiable instrument or the endorsement was made or endorsed for consideration. In effect it throws the burden of proof of failure of consideration on the maker of the note or the endorser, as the case may be. The question is, how the burden can be discharged The rules of evidence pertaining to burden of proof are embodied in Chapter VII of the Evidence Act. The phrase 'burden of proof' has two meanings - one the burden of proof as a matter of law and pleading and the other the burden of establishing a case; the former is fixed as a question of law on the basis of the pleadings and is unchanged during the entire trial, whereas the latter is not constant but shifts as soon as a party adduces sufficient evidence to raise a presumption in his favour. The evidence required to shift the burden need

not necessarily be direct evidence, i.e., oral or documentary evidence or admissions made by opposite party; it may comprise circumstantial evidence or presumptions of law or fact.'

The above position about a presumption of law finds a place in section 103 of the Indian Evidence Act, 1872, which reads as follows :

'The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that shall lie on any particular person.' (Emphasis here italicized in print, Supplied)

In *Raghavamma v. Chennama* AIR 1994 SC 136 (sic) the Apex Court observed that there is an essential distinction between 'burden of proof' and 'onus of proof' and that burden of proof lies upon the person who has to prove a fact and it never shifts, but the onus of proof shifts and that such a shift of onus is a continuous process in the evaluation of evidence. In the present case, we are of the view that the onus of proving that the 110 bank accounts figuring in Annexure A3 are not owned by the assessee in benami names lies on the assessee. This is because of, firstly, the presumption contained in section 132(4A) of the Income Tax Act. The document was seized from the premises of Eshita Dye Chem Pvt. Ltd. over which, according to us, the assessee had control within the meaning of section 132(4A) and the assessee was in constructive possession of the seized document. Secondly, even apart from the statutory presumption, when the document was put to the assessee and his deposition taken on 20-12-1991, the assessee had admitted the ownership of the bank accounts in benami names and actually offered to disclose the deposits as his income. It is only almost two years after this admission that he retracted and tried to distance himself from the admission. So the question to be examined is, whether the original document was correct or the subsequent retraction. Even accepting the version of the assessee that the document did not bear the details of the account-holders before its seizure by the Authorised Officer, the fact remains that the assessee knew the details of the account-holders, which he could readily furnish before the Authorised Officer, and actually wrote such details in his own hand on the document. In the circumstances, we are of the view that the department has produced sufficient

evidence for the Tribunal to draw the presumption that the assessee is the owner of all the accounts in question, even though such a presumption or inference is rebuttable by the assessee by providing evidence to the contrary. For these reasons, we are of the view that the onus of proving that the assessee had nothing to do with the 110 bank accounts in question and that his subsequent retraction reflects the correct state of affairs lies on the assessee. In other words, we hold that the department is entitled to proceed on the presumption that the 110 bank accounts figuring in Annexure A3 belong to the assessee, as admitted by himself in his statement dated 20-12-1991. We reject the contention of the learned counsel for the assessee that the assessee was under tension and made this statement. We accordingly uphold the contentions of the learned Departmental Representative in this regard. The assessee clearly admitted that the 110 bank accounts related to him and he also volunteered to disclose the maximum balances figuring in these accounts. Subsequently, the assessee retracted from this position. In the circumstances, the onus of proving the correctness of the retraction, according to us, lies clearly on the assessee. For this purpose, he is entitled to produce the parties before the assessing officer for his examination. He is also entitled to produce all relevant particulars like their income-tax assessments. In other words, it is for the assessee to prove the correctness of his retraction. The assessee not only gave the particulars of the concerns to which the 110 bank accounts related but also admitted that the funds lying in those accounts belonged to him. There is also extraneous evidence that there is a flow of funds between these accounts and M/s Suman Motels Ltd. and other family concerns. So, the assessing officer will be within his rights to call for the said parties to whom the accounts are alleged to relate and examine them and verify their genuineness in the light of their income-tax numbers and other evidence. This exercise has not been done by the assessing officer evidently because no particulars were forthcoming from the assessee and the assessee did not produce those parties before him. On the other hand, as we have already mentioned, the assessee dissociated himself from the seizure of Annexure A3 and his original admission that the accounts therein related to him and was stating as though he read from a newspaper report that some paper was seized from M/s Eshita Dye Chem Pvt. Ltd. We are of the view that the assessee, who was an erstwhile Income Tax

Practitioner, and who has given the particulars of 110 bank accounts, after the admission contained in the statement dated 20-12-1991 and in the face of evidence of the flow of funds between the 110 bank accounts and the family concerns of the assessee, cannot be allowed to get away with a simple denial like that.

38. So far as the working of the peak is concerned, it is again for the assessee to prove that the withdrawals were not utilised for other expenses or investments and were available for making subsequent deposits in the said bank accounts. The benefit of peak can be given only when the recycling of funds is proved, as contended by the learned Departmental Representative. We find merit in the contention of the learned counsel for the assessee that the peak of the earlier year should be reduced from the peak of the subsequent year. Actually, this contention has not been seriously controverted before us by the learned Departmental Representative. We also find merit in the contention of the learned counsel for the assessee that there is no reason for including the aggregate of the maximum balances in the accounts in the assessment, though that was the basis on which the assessee offered to disclose the amounts lying in the accounts for assessment purposes. It is of course easier to work out the peak on the basis of the aggregate of the maximum balances in the accounts, but that is not the correct way of framing an assessment. We direct that the peak be worked out by arranging the transactions in the accounts datewise. The assessing officer should first ascertain the bank accounts in respect of which there is evidence that they related to the assessee or were owned by him. Then such accounts should be considered for consolidation and datewise balances have to be worked out. The peak of all the deposits should be ascertained if the assessee is able to prove that the earlier withdrawals were not utilised elsewhere and such peak should be brought to tax after reducing the peak already brought to tax, if any, in the earlier year. As already mentioned, it is for the assessee to adduce evidence to the satisfaction of the assessing officer that the said 110 bank accounts figuring in Annexure A3 do not relate to him. The assessee should also work out the datewise balances and cooperate with the assessing officer in the working out of the peak with reference to the relevant bank accounts. If he is unable to produce any party because of the non-cooperation on the part of the party in question, he is free to request the

assessing officer to exercise his powers of summons and enforce his attendance. The assessing officer, in the absence of any such evidence to his satisfaction, is free to draw an adverse inference in respect of any particular bank account or all the bank accounts in question relying on the admission contained in the statement dated 20-12-1991. After ascertaining such bank accounts, which according to the assessing officer, are owned by the assessee in benami names, he should work out the peak as per our remarks made earlier.

38.1 We may point out that we have to admit the additional grounds raised by the assessee in this appeal because they relate to legal points and do not require any fresh enquiry into facts.

39. In the light of the above remarks, we set aside the orders of the revenue authorities on the main ground taken by the assessee in this appeal regarding the addition of Rs. 3,05,40,285 sustained by the Commissioner (Appeals). The assessing officer should frame the assessment afresh after verification of the genuineness of the assessee's subsequent retraction regarding the ownership of the 110 bank accounts in the light of the above available evidence.

40. Regarding the estimation of the professional receipts at Rs. 5 lakhs and the disallowance of expenses on salary and bonus at Rs. 20,000, we deem it fit to set aside the assessment on these issues also, because we are setting aside the assessment on the larger issue of the ownership of the 110 bank accounts.

41. Regarding the disallowance of the interest of Rs. 1,19,952 out of the interest claimed by the assessee, on the ground that the relevant borrowals were made from concerns whose names appear in Annexure A3, this is a consequential ground, and as we have set aside the assessment on the main ground relating to the addition to be made on the basis of the 110 bank accounts, we deem it fit to set aside the assessment on this issue also.

If the assessing officer should come to the conclusion that the interest has been paid to any of the concerns who are held to be benamis of the assessee in the assessment to be made by him afresh, he is entitled to disallow the interest relatable to those concerns. Subject to this remark, the assessment is set aside on

this issue also.

42. Regarding the additional ground taken by the assessee about the peak of the earlier year being reduced from the peak to be assessed for this year, we have already given our remarks hereinabove.

43. Regarding the ground taken by the assessee in respect of the charging of interest under section 234A, the contention made out is that the assessee had filed the return voluntarily and no notice under section 142(1) was served on the assessee and so no interest under section 234A is to be levied. We see no merit in this connection because the language of section 234A clearly authorises the levy of interest whenever there is a delay in the filing of the return. It is not contended in the present case that there has been no delay in the filing of the return. In the course of the hearing, the learned counsel for the assessee has also raised an argument that the interest, even if it is to be levied, has to be levied only with reference to the returned income and not with reference to the assessed income. In support of this proposition, the learned counsel for the assessee has relied on the decision of the Honble Patna High Court in the case of Ranchi Club Ltd. (supra). Even though this decision, prima facie appears to support the stand of the learned counsel for the assessee, on a close look we are of the view that this decision is not applicable in a case where there is a delay in the filing of the return. This is evident from the following remarks of the Honble High Court figuring at pages 77 and 78 of the Report :

'Where the assessee fails to file the return of income either under section 139(1) or (4) or section 142(1), pursuant to the notice issued thereunder, or files the same after the due date, in terms of section 234A he is no doubt liable to pay interest. He is also liable to pay interest if he commits any default in payment of advance tax under the provisions of section 234B.'

In the present case, it is not denied that there has been a delay in the filing of the return. The language of section 234A is clear that in such a situation, interest has to be levied with reference to the assessed income.

44. The above remarks hold good with reference to the levy of interest under section 234B also and so we reject the additional ground taken by the assessee in respect of the levy of interest under section 234B.

45. Subject to the above remarks, the assessment is set aside on the main ground taken by the assessee relating to the addition of Rs. 3,05,40,285 out of the addition made by the assessing officer of Rs. 12,86,70,053 on the basis of the 110 bank accounts owned up by the assessee in his statement dated 20-12-1991. The assessment on other issues, namely, (1) estimation of professional receipts at Rs. 5 lakhs, (2) disallowance of expenses at Rs. 20,000, and (3) disallowance of interest at Rs. 1, 19,952, is also set aside in the light of our remarks at paras 39 and 40 above.

46. Before we close, we may mention that while we have covered the important arguments advanced by the learned counsel for the assessee, we have not found it fit to refer to each of the decisions mentioned by him for two reasons. Firstly, they are distinguishable. Secondly, some of the cases were referred and even some of the points were raised only in the written submissions filed at the end of the hearing in respect of which the learned Departmental Representative had no opportunity of countering.

47. Subject to the above, the assessee's appeal is partly allowed.

ITA No. 6181/Bom/95 :

48. We have reproduced the grounds taken by the department in this appeal at pages 2 and 3 of this order.

49. Regarding the addition of Rs. 5,70,000, the learned Departmental Representative pleaded that the Commissioner (Appeals) was not justified in deleting this addition because the assessee had not produced the creditors in whose names loans to the extent of Rs. 5,70,000 stood. The loans were credited in the books of account of the assessee as follows :

(1) M/s Indian Carrier Freight

Rs. 1,70,000

(2) M/s Kapilesh Corporation

Rs. 4,00,000

Rs. 5,70,000

The assessing officer added these amounts with the following remarks:

'5. Loans taken by the assessee:

During the year, the assessee had taken loan from

M/s Indian Carrier Freight

Rs. 1,70,000

M/s Kapilesh Corporation

Rs. 4,00,000

Vide letter dated 4-11-1993, the assessee was asked to give the latest residential and office address which he did not give. Vide letter dated 10-3-1994, it was intimated to the assessee. He was requested to produce the parties along with the books but the assessee did not produce the parties. It is to be noted that at no stage of assessment proceedings, the assessee expressed his inability in producing the parties. The two names appear in the list A3. The examination of the two parties becomes more important in view of the statement of Shri S.M. Khandhar himself recorded on oath under section 132(4) on 20-12-1991.

Thus, the assessee fails to prove the genuineness of the loan taken by him, the addition of Rs. 5,70,000 is made under section 68 of the Income Tax Act as unexplained cash credits.'

The Commissioner (Appeals) did not differ from any of the above findings of the assessing officer but he deleted the addition with the following remarks which appear at page 4 of his order:

'However, I find from the facts of the case that this addition made is rather infructuous being in the nature of double taxation of same income in appellant's hands. This is so far the simple reason that the assessing officer has already taxed this amount as an unexplained income of the appellant while making an addition of Rs. 12,86,70,053 under section 68 which comprises of credits appearing in the bank accounts of all the concerns whose names appear in the 'A-3 list', a document seized from the premises of company belonging to the appellant's group. The assessing officer has made this addition of Rs. 5,70,000 inspite of having recognised the fact that names of both these parties appear in the said 'A 3 document'. Thus, the addition made is seen to be uncalled for and the same is hereby deleted.'

50. The learned Departmental Representative argued before us that the Commissioner (Appeals) was not justified in deleting the addition of Rs. 5,70,000 as the addition was made under section 68 of the Income Tax Act and the assessee had never discharged the onus of proving the genuineness of the credits standing in the names of the above two creditors.

51. The learned counsel for the assessee on the other hand mentioned that the loans were obtained by cheques and the full addresses of the two creditors were furnished by the assessee. It is, however, not denied before us that the assessee did not produce the creditors before the assessing officer even though the assessing officer required them to be produced. It is also not denied that the assessee never requested the assessing officer to summon the parties concerned.

52. We are of the view that the addition of Rs. 5,70,000 deserves to be sustained. We do not agree with the comment of the Commissioner (Appeals) that the addition of Rs. 12,86,70,053 was made by the assessing officer under the provisions of section 68 of the Income Tax Act. This amount, as already mentioned hereinbefore, represented the deposits in various bank accounts which were owned up by the assessee in the deposition dated 20-12-1991 taken from him. The addition of this amount, running into crores, was not made under the provisions of section 68 but under the provisions of section 69 of the Act, which is a some what different matter. The two loans in question aggregating to Rs.

5,70,000 figure in the books of account of the assessee, whereas his books did not reflect the transactions in the 110 bank accounts. There is clearly an onus under section 68 of the Income Tax Act on the assessee to prove the loans figuring in his books of account. To our mind, the assessee could not have simply rested with the fact that the amounts were received by cheques, particularly when the bank accounts relating to the creditors were found under the control of the assessee and the assessee has, in fact, admitted that the bank accounts were owned by him and operated by him in benami names, in his statement dated 20-12-1991 referred to hereinabove. If the assessee had any difficulty in producing the parties because of their non-cooperation, he should at least have requested the assessing officer to exercise his powers of summons to enforce their attendance, which was not done. In the circumstances, we are of the view that the assessee has not discharged the onus lying on him under section 68 of proving the credits and we are also of the view that the assessing officer was justified in treating them as unproved credits, in view of the admission contained in the statement of the assessee dated 20-12-1991. So we set aside the order of the Commissioner (Appeals) on this issue and restore the addition of Rs. 5,70,000. This is, however, subject to the same addition not being repeated in the fresh assessment to be done consequent to our directions to examine the veracity of the retraction of the assessee in respect of the ownership of the 110 bank accounts, which has been discussed by us hereinabove. The ground is allowed.

53. Regarding the addition of Rs. 20,00,000, representing loan alleged to have been advanced to Shri Bhupen Chheda, we have reproduced the seized paper dated 22-1-1991 at pages 15 and 16 of this order. We have also reproduced the answers to question Nos. 20 and 21 given by the assessee on this alleged loan advanced by him to Shri Bhupendra Chheda in his statement dated 18-12-1991, at page 16 of this order. The assessing officer referred to the replies given by the assessee to question Nos. 20 and 21 in his statement dated 18-12-1991 and made the addition of Rs. 20 lakhs with the following remarks, which appear at page 5 of his order:

'The above admission made by the assessee clearly shows that the assessee has made a memorandum of understanding for the repayment of loan of Rs. 20 lakhs

advanced to Shri Bhupendra Chheda which he had not accounted in its books. Thus the assessee had made investment out of books and it is not reflected in the books. Hence the sum of Rs. 20 lakhs is added under section 69 as unexplained investment. Penalty proceedings under section 271 (1)(c) is initiated.'

The Commissioner (Appeals) referred to the following written submission dated 31-8-1994 made before him and which is reproduced at pages 7 and 8 of his order:

'During the course of assessment proceedings I understand that (i) Shri Mahendra P. Shah and (ii) Shri Bhupendra Chheda whose names appear in the seized paper were called and examined by the AC. In clear terms Shri Bhupendra Chheda denies having received any amount from me during the year ended 31-3-1991. I understand that Shri Mahendra P. Shah also, stated before the AC that no loan of Rs. 20,00,000 was given by me in the year ended 31-3-1991 to Shri Bhupendra Chheda. The United Western Bank Ltd., Vadgadi Branch, Bombay, with which the sum of Rs. 20,00,000 was to be deposited for withdrawal as per the seized paper, has also issued a certificate to Shri Mahendra P. Shah that no savings or current account was opened with that bank in the joint names of Shri Bhupendra Chheda and Shri Mahendra P. Shah. The bank also certified that there was also no account in the name of Shri Bhupendra Chheda with that bank. A copy of this certificate was also stated to have been filed by Shri Mahendra P. Shah before the AC. In spite of the denial made by the parties concerned that no such advance of Rs. 20,00,000 was made by me in the year ended 31-3-1991 to Shri Bhupendra Chheda, the AC has chosen to make this addition ignoring the evidence.

I request the Commissioner (Appeals) to call for the following papers which were collected by the AC which clearly show that the transaction did not materialise:

- (i) The slip of paper seized at the time of search.
- (ii) The letter filed by Shri Bhupendra Chheda.
- (iii) The letter filed by Shri Mahendra P. Shah.
- (iv) The certificate issued by the United Western Bank Ltd.

On this point, I rely on the decision of the Bangalore Bench of the Income Tax Appellate Tribunal in the case of Additional Income Tax Officer v. T. Mudduveerappa Sons ( ) 45 ITD 12 (Bang). In giving this decision, the Income Tax Appellate Tribunal relied on the decision of the Allahabad High Court in the case of Pushkar Narain Sarraf v. CIT ( ) 183 ITR 388 (All) and Income Tax Officer v. Mohan Lal Vig ( ) . In accordance with this decision, in the course of a regular assessment made under the Income Tax Act, it is for the assessing officer to prove the truth of the contents of the papers seized in the course of the search. As the AC did not bring on record any independent evidence other than the seized paper to show that the sum of Rs. 20,00,000 was advanced by me in the year ended 31-3-1991 to Shri Bhupendra Chheda, the AC was not justified in making this addition of Rs. 20,00,000.'

The Commissioner (Appeals) deleted the addition, inter alia, with the following remarks, which may be seen at pages 8 and 9 of his order:

'In this connection vide my predecessor Commissioner (Appeals)'s letter No. Commissioner (Appeals) C-III/IT 78/94-95 dated 31-3-1994 the assessing officer was supplied with a copy of the aforesaid written submission dated 31-8-1994 and was directed to make available the copies of documents mentioned by the appellant and submit a speaking report after taking into consideration the explanation given by the appellant and after affording him reasonable opportunity of being heard. In spite of this fresh opportunity given the assessing officer has failed to bring on record any material evidence in support of the case made out by him as is evident from the reply received vide his letter No. ACIT/CC 1/SMK/94-95 dated 19-12-1994 which reads as under:-

'The addition was made on the basis of the seized paper and the loose paper file No. A20. The copies of which was given vide order sheet noting dated 26-10-1994. During the appellate proceedings the assessee had taken the plea before the Commissioner (Appeals) that letter filed by Shri Bhupendra Chheda, letter filed by Shri Mahendra P. Shah & United Western Bank should be given him. But it is to be noted that there is no reference of letter in the assessment order and it is to be noted that it is not used against the assessee.'

In view of the foregoing discussions it would be evident that the case made out by the assessing officer has no legs to stand. Accordingly the addition made stands deleted.'

While deleting the addition, the Commissioner (Appeals) accepted the contention of the assessee that the intended transaction, i.e., the advance of Rs. 20 lakhs by the assessee to Shri Bhupendra Chheda, did not materialise. He also observed that the assessing officer had not examined the issue properly and has not led any material evidence in support of his premises that the money did, in fact, pass hands in this case. He commented as follows, which appears at page 6 of his order:

'The assessing officer has nothing to say about how and in what manner the loan can be said to have been advanced; or for that matter during which time period it can be said to have been advanced. The appellant has rightly pointed out that at no point of time in any of his statements, he had admitted having advanced this loan to Shri Bhupendra Chheda. On the contrary, he has specifically denied having received any repayment money which fact is cited as conclusive proof that the loan was never advanced even though it might have been stipulated at one point of time as evidenced by the seized letter.

It is also submitted before me by the appellant's A.R. that merely fixing the repayment schedule of a stipulated loan does not go to prove that the transaction has actually taken place. Further, it is argued that any loan given would also be expected to carry interest and the document seized does not mention the same.'

54. The learned Departmental Representative argued that even if all the parties had denied the transaction, it amounted only to a collusive ganging-up and the Commissioner (Appeals) has not correctly appreciated the evidentiary value of the seized document or of the implicit admission contained in the replies given to the questions on this issue by the assessee in his statement dated 18-12-1991.

55. The learned counsel for the assessee on the other hand supported the order of the Commissioner (Appeals). Before us, he further made out the point that the said seized paper reproduced by us at pages 15 and 16 of this order was not seized

from the assessee but was seized only from the office of the premises of Eshita Dye Chem Pvt. Ltd. It is also made out that the document is not in the handwriting of the assessee, nor is it signed by the assessee. So it is claimed that when a paper is seized from another person, it is for the department which should prove the transaction, as laid down in the following Third Member decisions of the Tribunal:

(1) M.A. Chidambaram's case (supra),

(2) Udeyraja Goliya's case (HUF) (supra)

Even assuming that the paper had been seized from the assessee, it is argued that the transaction has to be proved by the department, as held by the Punjab and Haryana High Court in the case of Income Tax Officer v. Mohanlal Vig ( ) (P&H;) and by the Bangalore Bench of the Tribunal in T. Mudduveerappa & Sons' case (supra). The following points are also made in the written submissions :

'5. The paper shows that the transaction was to be completed by 31-5-1991, long before the date of search (18-12-1991). If the paper (Memorandum of Understanding) was acted upon, amounts should have been deposited in the bank before 31-5-1991. The bank certified on 29-3-1994, that there was no account and no deposits were made. This clearly shows that the Memorandum of Understanding was not acted upon. The assessing officer cannot act on a part of the seized paper, ignoring the other part of depositing the amounts in bank account.

6. No question of collusion (or ganging-up as the Departmental Representative chose to put it) arises even as per the paper seized, the transaction was to be completed by 31-5-1991 and the search was made much later.

7. The A.C. made exhaustive enquiries from (a) Mahesh P. Shah, the guarantor, (b) Bhupendra Chhedda, and (c) the bank, and all of them denied the transaction.

8. Section 69 is a deeming provision and should therefore be strictly construed.

9. Addition on the basis of this paper was made under section 69 of the Income Tax Act under section 69 the onus of establishing that the assessee actually made the investment lies on the department.

10. Even assuming that the loan of Rs. 20 lakhs was advanced by the assessee, as the date on which the advance was made is not available on the paper seized, no addition can be made in the assessment year 1991-92.'

56. We are of the view that the above contentions of the learned counsel for the assessee have to be rejected. It is immaterial, as contended by the learned Departmental Representative, whether the document was seized from the assessee or from M/s Eshita Dye Chem Pvt. Ltd. We have already held that the assessee was in full control of the affairs of M/s Eshita Dye Chem Pvt. Ltd. in the context of the assessee's appeal discussed hereinabove. The document was put to the assessee and he did not deny, in his statement dated 18-12-1991 referred to by us hereinabove that the document related to him nor did he deny his transaction with Shri Bhupendra Chhedda. It is also immaterial that the document is not in assessee's own hand. It appears to us that Shri Bhupendra Chhedda executed the document in his own hand. The purport of the document is, to our mind, very clear. As held by the assessing officer, it only refers to an arrangement for the recovery on the loan of Rs. 20 lakhs. The question of recovery arises only when there had been an advance. It is immaterial that the measures contemplated for the recovery of the advance had not been implemented. Whether the recovery measures as contemplated in the document were actually implemented or not is totally irrelevant. What is relevant is only whether the advance had been made and whether such an advance if made had been reflected in the books. It is not denied that no such advance is reflected in the books. The contention is that the advance itself had not been made. This position, to our mind, goes quite contrary to the plain language of the document. Clause (1) of the document refers to the payment of Rs. 5 lakhs 'towards the payment of loan out of Twenty lakh rupees'. Clause (2) refers to the payment of the balance amount which can only refer to Rs. 15 lakhs (20 lakhs - 5 lakhs). It stipulates that the balance of Rs. 15 lakhs will be paid by '50% of collection cheques'. In other words, it contemplates that the collection cheques received by Shri Bhupendra Chhedda would be diverted to the extent of

half of their proceeds towards the recovery of the balance amount of loan. It also contemplates that the collection cheques would be deposited into a current account which shall be operated by Mahendra P. Shah, who presumably, is an intermediary between the assessee and Shri Bhupendra Chhedda, and so stood guarantee for the above matter. Clause (2) also give an undertaking that Shri Bhupendra Chhedda will clear the entire loan amount on or before 31-5-1991. The clear language of the document leaves no doubt in our mind that it is an arrangement for recovery of a loan which had already been advanced before 22-1-1991, which is the date of the seized document. The denial of the implementation of the recovery measures as contemplated in the seized document could be a collusive affair between all the parties concerned. That, however, has no bearing at all on the question of the advance, which is clearly witnessed by the seized document. Documents do not collude and can bear only one interpretation. This position is further confirmed by the replies given by the assessee to question Nos. 20 and 21 in his deposition dated 18-12-1991, which, as already mentioned, we have reproduced at page 16 of this order. In his reply, the assessee had only mentioned that he had not reflected the amount receivable from Shri Bhupendra Chhedda in his books because it was not actually received. He did not deny, that the amount had ever been advanced by him. If that had really been the position, he would simply have said that the transaction does not figure in his books, simply because it never took place. The reply given by him is quite far from the position taken by the assessee during the proceedings before the Commissioner (Appeals) and before us. Now that leaves us the question of the year in which the amount can be brought to tax. The document is dated 22-1-1991 and so falls during the year of account relevant for the assessment year 1991-92 and hence we are of the view that the assessing officer was justified in holding that the amount of advance is assessable in the assessment year 1991-92 under the provisions of section 69 of the Income Tax Act. We are also of the view that the Commissioner (Appeals) was wrong in observing that the assessing officer had not discharged the onus of proving that the advance had in fact been made by the assessee. In the light of the contents of the seized document and the reply given by the assessee in his deposition dated 18-12-1991, we are clearly of the view that the onus of proving that such advance clearly witnessed by the document had not been actually made

lay on the assessee and such an onus had not been discharged by him. The evidence advanced by the assessee only proves, if at all, that the recovery measures contemplated in the document had not been actually implemented. That does not prove at all that the advance had not been made. At any rate, any evidence in favour of the assessee to the effect that the advance had not been made cannot prevail against the weight of the documentary evidence of the seized document supported by the implicit admission of the advance contained in the replies given by the assessee in his statement dated 18-12-1991. In this view of the matter, we are of the view that the case law cited by, the learned counsel for the assessee is not of any help to him. We are of the view that the assessing officer was justified in bringing to tax the amount of Rs. 20 lakhs under the provisions of section 69 of the Income Tax Act. We accordingly set aside the order of the Commissioner (Appeals) on this issue and restore that of the assessing officer. The ground is allowed.

57. Regarding the main ground taken by the department in respect of the reduction allowed by the Commissioner (Appeals) from the addition of Rs. 12,86,70,053 made by the assessing officer on the basis of the 110 bank accounts figuring in Annexure A-3, we have only to mention that this issue has been discussed by us in detail in the context of the assessee's appeal. We have set aside the assessment in respect of the addition of Rs. 3,05,40,285 sustained by the Commissioner (Appeals) and our directions given in this regard in the assessee's appeal cover this issue also. In other words, the assessment is set aside on this issue and restored to the file of the assessing officer who may examine this issue in the light of our directions in the context of the assessee's appeal.

58. Subject to the above, the department's appeal is partly allowed.