



\* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ ITA Nos. 1157/2009

% Reserved on: 27<sup>th</sup> August, 2013  
Date of Decision: 25<sup>th</sup> November, 2013

Commissioner of Income Tax, Delhi XVI. ...Appellant  
Through Ms. Suruchi Aggarwal, Sr. Standing Counsel.

Versus

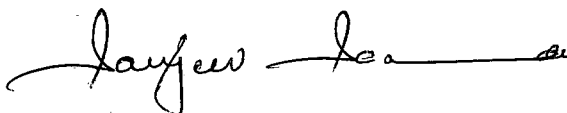
Arun Malhotra ...Respondent  
Through Mr. S. Krishnan, Advocate.

CORAM:  
HON'BLE MR. JUSTICE SANJIV KHANNA  
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJIV KHANNA, J.

For detailed order see ITA 923/2009, *Commissioner of Income Tax, Delhi XVI Vs. Arun Malhotra*, pronounced today.

  
(SANJIV KHANNA)  
JUDGE

  
(SANJEEV SACHDEVA)  
JUDGE

November 25<sup>th</sup>, 2013  
kkb



\*

## IN THE HIGH COURT OF DELHI AT NEW DELHI

+

ITA Nos. 923/2009 & 1157/2009

%

Reserved on: 27<sup>th</sup> August, 2013  
Date of Decision: 25<sup>th</sup> November, 2013

Commissioner of Income Tax, Delhi XVI. ....Appellant  
Through Ms. Suruchi Aggarwal, Sr. Standing  
Counsel.

Versus

Arun Malhotra ...Respondent  
Through Mr. S. Krishnan, Advocate.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJIV KHANNA, J.

This common order will dispose of the two appeals preferred by the Revenue i.e. Commissioner of Income Tax, Delhi XVI, against Arun Malhotra, respondent assessee. These appeals arise out of the common order of the tribunal dated 5<sup>th</sup> September, 2008 relating to block assessment period 1<sup>st</sup> April, 1989 to 14<sup>th</sup> July, 1999. Two appeals have been preferred by the Revenue as two cross appeals were filed against the order of the first appellate authority, Commissioner of Income Tax (Appeals) by both Revenue and the assessee.



2. By order dated 7<sup>th</sup> May, 2012 the following substantial question of law was framed:

“Whether the Income Tax Appellate Tribunal was right in deleting the addition of Rs.5,23,78,058/- in the block assessment proceedings on account of the transactions in question?”

3. Later on during the course of hearing on 6<sup>th</sup> August, 2013, the following order was passed:

“Keeping in view the aforesaid position and specifically ground ‘j’ as raised by the Revenue, we deem it appropriate to frame an additional substantial question of law:

“Whether the order of the Tribunal is erroneous and contrary to law as it has not adjudicated and decided the grounds of appeal placed by the Revenue and on this ground the entire order should be set aside?”

Thus, the second question of law was framed and we are required to answer the two question of law.

4. The respondent-assessee was subjected to search and seizure operations on 14<sup>th</sup> July, 1999 in which his residence was also covered. Pursuant to notice under Section 158BC dated 9<sup>th</sup> August, 2000, return for the block period was filed on 22<sup>nd</sup> September, 2000, declaring undisclosed income of Rs.2,10,000/-. The Assessing Officer



made addition of Rs.5,23,78,058/- as unexplained income under

Section 69A of the Act, holding that the transactions of purchase from M/s Sachdeva Trading Co. and M/s Rave Scans were not genuine and the transactions relating to export of graphic art films and brass tips for ball pens were bogus. The said transactions relate to the assessment year 1994-95, a year for which no return of income was filed. The assessing officer observed that the assessee had not filed the prescribed form No. 10CCAC as stipulated under Section 80HHC(4) of the Act and, therefore, deduction under said Section was not available. We refrain from referring to explication on aspects and findings recorded by the Assessing Officer at this stage to avoid prolixity.

5. In the first appeal, Commissioner of Income Tax (Appeals) in order dated 18<sup>th</sup> January, 2002 has given somewhat confusing findings which are self-contradictory. It was held that proceedings under Section 158BC were validly initiated. Further, the assessee had not been able to show and establish purchases from M/s Sachdeva Trading Co and M/s Rave Scans as per statements made by Chander Prakash Sachdeva, the sole proprietor that he had not made



any sales and that the transactions in question were bo  
Simultaneously, Commissioner (Appeals) accepted the exports and  
the export proceeds as genuine being fully vouchèd and supported  
by shipping bills as well as payments through banking channels. It  
was held that the company Iram Group International Pvt. Ltd. had  
filed return for the assessment year 1995-96 along with copy of  
audited report in prescribed form and it being a case of succession  
benefit under section 80HHC should not be denied to the  
respondent-assessee, an individual. At the same time, it was held  
that expenditure incurred for purchasing the exported goods might  
have exceeded Rs.10,000/20,000/- and therefore Section 40A(3)  
might be attracted. The Assessing Officer was directed to  
recompute the deduction under Section 80HHC and determine if any  
disallowance under Section 40A(3) was required to be made. Thus,  
holding that purchases were from unknown parties.

6. It appears that thereafter the Assessing Officer made  
disallowance of Rs.1,19,881/- under Section 80HHC and this order  
was made subject matter of challenge before Commissioner of  
Income Tax (Appeals), where the said addition was deleted by order



dated 20<sup>th</sup> March, 2003. Revenue preferred appeal IT(SS)294(Del)2003, which was dismissed vide order dated 14<sup>th</sup> September, 2007. Subsequently, the Revenue preferred a misc. application under Section 254(2) on the ground that appeal against the original order of Commissioner (Appeals), ITA(SS) No. 85/D/02 was still pending but the said application was dismissed on 9<sup>th</sup> May, 2008.

7. We have referred to these facts in view of the contention raised by the counsel for the respondent-assessee which was discerned by us in our order dated 6<sup>th</sup> August, 2013. Counsel for the respondent-assessee had raised an erroneous plea and had incorrectly relied upon grounds of appeal subject matter of IT(SS)A 294(Del.)2003. A very limited and narrow issue on the question of computation of disallowance under Section 80HHC was raised. The main appeal by the Revenue was against the deletion of the additions and the finding recorded by the Commissioner (Appeal) in the order dated 18<sup>th</sup> March, 2002 which was made subject matter of cross-appeals IT(SS)A 77/Del/2002 filed by the respondent-assessee and IT(SS)A 85/Del/2002 filed by the Revenue.



8. For the sake of completeness and to avoid any confusion as to what was held by the tribunal while deciding appeals IT(SS) A77/Del/2002 and IT(SS) A85/Del/2002, we intend to reproduce the findings recorded by the tribunal in paragraph 5 and 6 of the impugned order dated 5<sup>th</sup> September, 2008, which read as under:-

"5. We have considered the rival submissions. It is an admitted fact that the sole basis of addition by the Assessing Officer was on the basis of statement of Shri Sachdeva. It is also admitted fact that no evidence was found as a result of search which suggest that the transaction entered into by the assessee are bogus or such material reveal any undisclosed income. It is settled law that when income is computed under section 158BB, the same can be only on the basis of evidence found as a result of search or other documents and such other material or information as are available with the Assessing Officer and relatable to such evidence. Since admittedly no evidence was found as a result of search to suggest that the transaction of purchase and sale were bogus, no addition could be made by way of undisclosed income in respect of such transaction. Hon'ble Delhi High Court in the case of Ravi Kant Jain (supra) held as under:-

"Block assessment under Chapter XIV-B of the Income tax Act, 1961, is not intended to be a substitute for regular assessment. Its scope and ambit is limited in that sense to materials unearthed during search. It is in addition to the regular assessment already done or to be done. The assessment for the block period can only be done on the basis of evidence found as a result of search or requisition of books of accounts or documents and such other materials or information as are available with the Assessing Officer. Evidence found as a result of search is clearly relatable to section 132 and 132A."



We, therefore, delete the addition made solely on the basis of statement of Shri Sachdeva. Accordingly, the addition of Rs.5,23,78,058/- is required to be deleted.

6. It is also admitted fact that the basis of addition is the statement of Shri Sachdeva. Accordingly Shri Sachdeva is the witness of the Assessing Officer. It is settled law that when an adverse view is to be taken on the basis of statement of third party, the person affected should be afforded a reasonable opportunity of cross-examination, if requested for. In the present case the assessee emphatically asked for opportunity of cross-examination of Shri Sachdeva. For reasons best known to Shri Sachdeva, he refused to appear. We therefore, on the principles laid down by the Hon'ble Supreme Court in the case of Kishinchand Chellaram vs. CIT (125 ITR 713) and that by the Delhi High Court in the case of CIT vs. SMC Share Brokers Ltd. (288 ITR 345), hold that the Assessing Officer cannot take adverse view on the basis of statement of Shri Sachdeva. If the statement of Shri Sachdeva is discarded or is ignored while considering the evidence on record, there is no other material before the Assessing Officer to take an adverse view. We, therefore, deleted the addition as made by the Assessing Officer on the basis of the statement of Shri Sachdeva. Since, we have deleted the entire addition, the finding of the learned CIT(A) and addition is to be made as per section 40A(3) of the Act, no longer survives."

9. At this stage, we note and record that these are the only findings and reasoning recorded by the tribunal. The first finding relies upon the judgment of Delhi High court in **CIT vs. Ravi Kant Jain** (2001) 250 ITR 141 (Del.). In the said case, it was held that the block assessment proceedings were not a substitute for regular



assessment proceedings and their scope and ambit was limited that sense to the material unearthed during the search. The block assessment proceedings were in addition to regular proceedings done or to be done. In the block assessment proceedings evidence found as a result of search, on requisition of books of accounts or documents, could be relied upon but the said evidence should be found as a result of search under Section 132/132A of the Act.

10. There is clearly a failure on the part of the tribunal to notice the facts found and recorded by the Assessing Officer and the finding of the Commissioner (Appeals) in this regard. The Assessing Officer in the assessment order has recorded that the assessee had not filed return for the assessment year 1994-95. Further finding is that the respondent assessee was the sole proprietor of Iram Group International, which subsequently in the next assessment year was converted into a company M/s Iram Group International (P) Ltd. (IGI(P) Ltd for short). Assessment order mentions that during the course of search, purchase bills of Iram Group International were seized. As per the said purchase bills, the respondent had procured and purchased graphic art films and brass tips for ball pens from M/s



Sachdeva Trading Co. and M/s Rave Scans, operating from 3 Subhash Nagar, New Delhi and C B-8, Ring Road, Naraina, New Delhi, respectively. One Chander Prakash Sachdeva was stated to be sole proprietor of the said concerns. During pre-search enquiries, visits were made to the addresses mentioned but it was found that no such concerns were operating. 3/67 Subhash Nagar was residence of Chander Prakash Sachdeva and at the other address no concern in the name of M/s Rave Scans was operating for the last 10 years. Chander Prakash Sachdeva was summoned and his statements were recorded during the post search enquiries. He deposed not having sold the said goods to the respondent assessee, the transactions being bogus, he was made to sign blank papers including blank cheque books etc. He was working as a part time photographer, accountant and gave tuitions for livelihood. His monthly income was Rs.3000/- to Rs.4000/-. He had worked with New Light Plastic from 1985-86 to 1993-94 and Vinit Garg and Co. from 1994-95 to 1996-97 as an accountant. During his stint with Vinit Garg and Co, Vinit Aggarwal introduced him to the respondent Arun Malhotra. The said Arun Malhotra had expressed interest in doing export business with



him and thereafter M/s Sachdeva Trading Co. was setup, where  
was shown as a sole proprietor. Bank Account was opened in the  
name of the said concern at Bank of India, Connaught Place branch.  
He was made to sign documents including partnership deed. He had  
signed blank cheque books, bank opening forms, bond papers and  
some affidavits. But, he did not do business in the name of Sachdeva  
Trading Co. and the deposits in the bank account were made by Arun  
Malhotra. Similarly, he had opened bank account in Dena Bank in  
the name of M/s Rave Scans, in which he was again shown as a sole  
proprietor. He had signed documents including blank papers,  
cheques etc and had given them to Arun Malhotra. He was not in a  
position to supply goods of the value and all bills and invoices of  
Sachdeva Trading Co. and Rave Scans were bogus. The telephone  
number and sales tax number on the bills of Sachdeva Trading Co.  
were not genuine though his residential address was mentioned. He  
did not know the address C B-8, Ring Road, Naraina, printed on the  
bills of Rave Scans. He was unaware of brass tips for ball pens and  
did not know any person by the name of S.P. Batra.



11. We have referred to the aforesaid facts in detail to highlight that the legal finding on the first aspect recorded by the tribunal in the impugned order, are wrong and factually incorrect. The block assessment order was based on the search and post search material. It is a case in which no return of income was filed by the respondent-assessee for the relevant assessment year, i.e. 1994-95. These aspects have been ignored and went unnoticed. We would like to reproduce findings recorded by the Assessing Officer with regard to purchase bills of Sachdeva Trading Co. and Rave Scans found in the search. The said findings read as under:-

“During the search at the residence of Shri Arun Malhotra, following purchase bills of Sachdeva Trading Co. & Rave Scans were found and seized. During the post search enquiry Shri Arun Malhotra has also furnished the certified copies of the remaining purchase bills of Rave Scans and Sachdeva Trading Co. The details of the bills found and seized during the search as per annexure A-2 and certified bills furnished by Shri Arun Malhotra are as under:-

S. No.	Name of the party	Bill No.	Date	Amount	Page No./ Remarks
1.	M/s Sachdeva Trading Co.	165	25.7.94	39,42,400/-	37 as per annexure A-2
2.	-Do-	164	27.7.94	39,42,400/-	38 as per annexure A-2
3.	-Do-	163	20.7.94	32,25,600/-	39 as per annexure A-2
4.	-Do-	162	19.7.94	32,25,600/-	40 as per annexure A-2



5.	-Do-	160	18.7.94	16,53,120/-	41 as per annexure A-2
6.	-Do-	159	15.7.94	16,53,120	42 as per annexure A-2
7.	-Do-	158	11.7.94	14,58,240/-	43 as per annexure A-2
8.	-Do-	157	10.7.94	16,53,120/-	44 as per annexure A-2
9.	-Do-	156	9.7.94	14,58,240/-	45 as per annexure A-2
10.	-Do-	155	8.7.94	13,91,040/-	46 as per annexure A-2
11	-Do-	154	7.7.94	13,91,040/-	47 as per annexure A-2
12.	-Do-	153	6.7.94	14,51,520/-	48 as per annexure A-2
13.	-Do-	152	5.7.94	14,51,520/-	49 as per annexure A-2
14.	-Do-	151	1.7.94	8,06,400/-	50 as per annexure A-2
1.	M/s Rave Scans	026	25.8.94	15,00,000/-	56 as per annexure A-2
2.	-Do-	030	27.8.94	18,00,000/-	Certified copy of this bill furnished by Sh. Arun Malhotra
3.	-Do-	035	30.8.94	21,00,000/-	-Do-
4.	-Do-	040	2.9.94	21,00,000/-	-Do-
5.	-Do-	018	22.8.94	15,00,000/-	-Do-
6.	-Do-	017	20.8.94	12,00,000/-	-Do-
7.	-Do-	015	18.8.94	15,00,000/-	-Do-
8.	-Do-	008	13.8.94	15,00,000/-	-Do-

12. During post search enquiries Bank accounts of Iram Group International in the Central Bank of India, Barakhamba Road, New



Delhi were requisitioned and produced. Similarly bank account Dena Bank relating to Rave Scans and Bank of India relating to Sachdeva Trading Co. were called for and placed on record. As per the bills seized during the course of search, respondent had shown purchases of Rs.1,91,65,440/- from Sachdeva Trading Co. and Rs.1,47,00,000/- from Rave Scans, totaling Rs.3,38,65,440/-. The respondent had received export proceeds of Rs.5,21,72,843/- from M/s Triwood Ltd., Hong Kong between 17<sup>th</sup> October, 1994 to 1<sup>st</sup> March, 1995. After the proceeds were received, the same were transferred to the bank account of Sachdeva Trading Co. and Rave Scans from where they were withdrawn by way of cash withdrawals. The respondent assessee has accepted and admitted that Iram Group International nor he had not filed any return for the assessment year 1994-95.

13. On the said aspect, the Commissioner (Appeals) had recorded that the respondent had not filed any return and, therefore, books of accounts and documents cannot be treated as part of any return filed, besides several purchase invoices were seized in order to establish that the purchases were not genuine. Commissioner



(Appeals) thus upheld initiation of the block assessment proceedings.

14. Initiation of block assessment proceedings under Section 158BC depends upon the facts at the initial stage and not upon the final outcome pursuant to appellate order or even the assessment order. At the beginning or initiation stage, the final outcome was not known and not relevant. In view of what has been stated above, we have to hold that the findings recorded by the tribunal on the first aspect is entirely unjustified, devoid of merits besides being cryptic as it does not refer to the findings and facts found and held by the Assessing Officer and Commissioner (Appeals). The findings recorded by the tribunal are incorrect and legally unacceptable as the tribunal has not disturbed the clear factual matrix/position recorded by the Assessing Officer and Commissioner (Appeals). Incorrect assertion, without material/basis has been made in paragraph 5 to the effect that it was an admitted fact that no evidence was found as a result of search to find that the transactions by the respondent assessee were bogus and no such material revealed any undisclosed income. In view of the aforesaid position,



the tribunal has erred in holding that proceedings under Section 158BC were invalid.

15. The said finding of the tribunal is contrary to the findings recorded in paragraph 6, with reference to the statement made by Chander Prakash Sachdeva and the observation that respondent-assessee was not granted opportunity to cross examine the said person. Cross examination was matter relating to block assessment proceedings and not initiation or issue of notice under Section 158 BC of the Act. Tribunal has observed that statement of Chander Prakash Sachdeva has to be ignored and cannot be relied upon for adverse findings. Reference was made to the decision of Supreme Court in *Kishinchand Chellarama vs. CIT, (1980)* 125 ITR 713 (SC) and decision of Delhi High Court in *CIT vs. SMC Share Brokers Ltd. (2007)* 288 ITR 345 (Del). It has been observed that as the entire addition had been deleted, findings of the Commissioner (Appeals) regarding Section 40A(3) no longer survived.

16. It is a fact that Chander Prakash Sachdeva refused cross-examination by the respondent-assessee. The Tribunal was required to examine the reason and effect thereof. Factual matrix of each



case has to be examined to ascertain the cause/reason and decide why the witness did not appear or refused and did not agree to be subjected to cross-examination. Evidence Act is not directly and specifically made applicable to income tax assessment proceedings. However, principles of natural justice and fair play apply. Principles of natural justice require and mandate, a fair, equitable and just procedure and what could be fair and just in a given case is premised on the factual matrix and cannot be put in a strait jacket formula. The Delhi High Court in ***J & K Cigarettes Ltd. vs. Collector of Central Excise***, 2009 (242) ELT 189 (Del.) examined the constitutional validity of Section 9D of the Central Excise Act, 1944 which confers power or discretion upon the Central Excise Officer to rely upon statement of witnesses who have not been subjected to cross-examination, if any of the following conditions are satisfied:

- “(a) when the person who had given the statement is dead;
- (b) when he cannot be found;
- (c) when he is incapable of giving evidence;
- (d) when he is kept out of the way by the adverse party; and
- (e) when his presence cannot be obtained without an amount of delay or expense, which the Officer considers unreasonable.”

17. It was accordingly held as under:-



"25. Section 9-D of the Act stipulates following five circumstances, already taken note of, under which statements previously recorded can be made relevant.

These are :-

- (a) when the person who had given the statement is dead;
- (b) when he cannot be found; (c) when he is incapable of giving evidence;
- (d) when he is kept out of the way by the adverse party; and
- (e) when his presence cannot be obtained without an amount of delay or expense, which the Officer considers unreasonable.

26. Interestingly, the learned senior counsel for the petitioners did not join the issue that the aforesaid circumstances are not exceptional circumstances. They are the circumstances which naturally would be beyond the control of the parties and it would not be possible to produce such a person for cross-examination who had made a statement on earlier occasion. The provisions under Section 9-D of the Act are necessary to ensure that under certain circumstances, as enumerated therein, viz. if the witness has been won over by the adverse party or is avoiding appearance despite several opportunities being given. The rationale is that decision making in a case cannot be allowed to continue in perpetuity. These provisions are based on the Doctrine of Necessity. It provides for relevancy of statements recorded under Section 14 of the Act dispensing with or without the opportunity for testing the truth of such evidence by cross-examination. For, when a person is dead or incapable of giving evidence or cannot be found, no better evidence can be had in the circumstances than the statement tendered by witnesses before a quasi-judicial authority.

The safeguards which are enumerated in the provision under Section 32 of the Evidence Act are essential as the provision provides for an exception to the rule of exclusion of hearsay evidence, while proving for relevancy of even direct oral evidence of the fact under enquiry, which otherwise is not admissible, to



ensure that there is no miscarriage of justice. Similarly, provisions under Section 9-D provide for relevancy of statements recorded under Section 14 of the Act, under certain circumstances, in criminal as well as quasi judicial proceedings, to meet the ends of justice.

27. We, thus, are intent to agree with the submission of the learned Addl. Solicitor General that if an Act of Parliament uses the same language which was used in a former Act of Parliament referring to the same subject, viz. relevancy of statement of fact by person who is dead or cannot be found under certain circumstances, passed with the same purpose and for the same object, the safe and well known rule of construction is to assume that the legislature, when using well known words upon which there have been well known decisions, use those words in the sense which the decisions have attached to them. The provisions under Section 32 of the Evidence Act have not been found to be ultra vires of the Constitution. Therefore, the provisions under Section 9-D of the Act, which are pari materia with the provisions under Section 32 of the Evidence Act, cannot be held as ultra vires of the Constitution."

18. The Division Bench, thereafter, referred to the provisions and position of law de hors Section 9D and it was observed that whenever power was given to an adjudicating authority to pass quasi judicial order which might have adverse civil consequences, it must be exercised in just, fair and bonafide manner and in good faith. It should not be arbitrary. The said conditions were sine qua non to the pillars of democratic set up but they cannot and should not be extended beyond limits. Decision by one of us (Sanjiv Khanna, J.) in Central Excise Act Case No. 15/2010 decided on 8<sup>th</sup>



November, 2011 titled *Slotco Steel Products Pvt. Ltd.*

*Commissioner of Central Excise, Delhi-I*, is not different and proceeded on the same line and ratio. In view of the facts of the said case, an order of remand was passed.

19. Here, we would like to reproduce certain other facts which have been categorically recorded by the Assessing Officer:-

(i) Chander Prakash Sachdeva was not a man of means. He had no business and was never engaged in any business activities, except alleged transactions in the present case. He had claimed that he did not even own a cycle.

(ii) Vinit Aggarwal, Chartered Accountant was known to Arun Malhotra and had audited accounts of IGI (P) Ltd. Vinit Aggarwal was known to Chander Prakash Sachdeva.

(iii) The respondent had purportedly received export proceeds of Rs.5,21,72,843/- on sale of graphic films and brass tips of ball pen to M/s Triwood Ltd., Hong Kong.

(iv) Respondent had claimed that he had made purchases of Rs.2,87,03,360/- from Sachdeva Trading Co. and Rave Scans and three bills dated 25.7.1994, 27.7.1994 and 10.7.1994 of



Rs.39,42,400/-, Rs.39,42,400/- and Rs.16,53,120/- were not paid for goods supplied were defective.

(v) The respondent had earned substantial profit of Rs.2,34,69,483/-(Rs.5,21,72,843/- less Rs. 2,87,03,360/-).

(vi) Aforesaid foreign exchange proceeds on receipt of Rs.5,21,72,843/- was deposited in the bank account of Iram Group International between 17<sup>th</sup> October, 1994 and 1<sup>st</sup> March, 1995. Payments were not made to Sachdeva Trading co. and Rave Scans at the time of alleged purchase. These receipts were subsequently transferred to the bank accounts of Sachdeva Trading Co. and Rave Scans and the amounts deposited were withdrawn in cash.

(vii) The respondent assessee Arun Malhotra had not filed his return for the assessment year 1994-95 and income was not disclosed in his return.

(vii) Iram Group International was established on 1<sup>st</sup> July, 1992 as a proprietorship concern of Arun Malhotra. Import Export Code was applied for in the name of Iram Group International on 27<sup>th</sup> August, 1992 and was issued. Iram Group International was registered with Apparel Export Promotion Council. RBI Code was also issued for the



said proprietorship concern. Invoice in question were issued by Iram Group International. Sales bills were also raised by them. Papers were signed by Arun Malhotra as sole proprietor. Certificate of Export and Realization was issued in the name of Iram Group International with Arun Malhotra as the proprietor. Proceeds were deposited in the Central Bank of India account of Iram Group International.

20. The Assessing Officer has referred to several statements of Chander Prakash Sachdeva recorded on different dates. Copies of these statements were made available to the respondent for his comments. Chander Prakash Sachdeva was also summoned for cross-examination by the respondent-assessee. However, Chander Prakash Sachdeva refused cross-examination on the ground that he feared for his life. The said fact is specifically mentioned in the assessment order, though at another place it is also mentioned that for reasons best known to him, Chander Prakash Sachdeva refused cross-examination. The fact that Chander Prakash Sachdeva had feared for his life, stands recorded in the order passed by the Commissioner (Appeals). It is recorded that during the course of



statement on 9<sup>th</sup> November, 1998, Chander Prakash Sachdeva |  
asserted that he had been threatened and warned that he would be  
killed. The Commissioner (Appeal), however, disbelieved him as  
Chander Prakash Sachdeva had made complaint to Custom  
authorities etc. but had claimed that he did not file a police  
complaint for fear to his life. The said fact and the assertion that  
Chander Prakash Sachdeva feared for his life has not been adverted  
to and mentioned in the order passed by the tribunal. Witness  
protection to those threatened and terrorized has engaged attention  
of the courts. Right to cross-examine though an important and  
valuable right, is not absolute and inalienable. It should not become  
a cause or a ground to intimidate witnesses and non-appearance or  
reluctance to stand for cross-examination, an alibi or excuse to  
escape legal liability. The perpetrator or the culprit, should not be  
permitted and allowed to take advantage or benefit of execrable  
situation which is his own creation. Of course, the authorities and  
tribunal should be satisfied that the witness was being prevented,  
intimidated or threatened and the said finding must have some basis  
or foundation. Failure to answer questions or appear as witness is



violation of law and an offence. Considered answer at examination of all facts is required and should form basis of an opinion, whether the statement should be relied on. Further surrounding and corroborated evidence and material is required to be examined, for deciding whether there is truth in the statement. Even if the statement is not relied upon, there should be reference and examination of corroborative and surrounding facts and material. This aspect and examination is clearly absent in the order of the tribunal.

21. The factual decision and adjudication must take into account the facts relevant and material and no undue importance to irrelevant or neutral facts should be given. The question in the present case is genuineness of the transactions for purchase and the exports. The Revenue does not doubt or dispute receipt of payment through banking channels. This is not the issue and indeed in most money laundering cases this would not be in issue as receipt through banking channels becomes the starting point of investigation. A holistic and pragmatic view, taking into consideration relevant facts, has to be taken and should form the basis of any factual adjudication.



applying the principle of preponderance of probabilit

Adjudicating authorities and courts while deciding disputes of such nature, cannot take a myopic view but a holistic approach is required. The surrounding circumstances and milieu have to be gone into and examined and indeed would reflect and help in ascertainment of truth. In the present case, the order of the tribunal is lacking on the said aspects. Even if there may be justification and reason to ignore or not entirely base the case on statements of Chander Prakash Sachdeva, several facts required explanation and elucidation from the respondent. Absence or failure to explain may in fact be reflective and help in adjudicating the contention whether any threats were extended to Chander Prakash Sachdeva or whether the facts corroborate the statement and together establish the stand of the Revenue.

22. We would now like to refer to the written submissions filed by the respondent and notice the contentions. The respondent-assessee has incorrectly submitted that the Commissioner (Appeals) had held that the purchases from Sachdeva Trading Co. and Rave Scans were genuine. There is no such finding by the Commissioner



(Appeals). Findings of Commissioner (Appeals) as noticed above are vague, contradictory and not coherent. Commissioner (Appeals) had not agreed that the purchases of the exported goods were made from Sachdeva Trading Co. or Rave Scans and has observed that purchases were made in cash from third parties and, therefore, the Assessing Officer should examine the applicability of Section 40A of the Act. Our attention was also drawn to the fact that the goods were rejected and returned by the Hong Kong party and this had made Chander Prakash Sachdeva unhappy and he backed out. The said finding has been recorded by the Commissioner (Appeals) but without recording on what basis. Tribunal has not given any finding on the said aspect and their order is silent. Submission by the respondent before the Assessing Officer was that three bills totaling to Rs.95,37,920/- were returned and not paid as the material supplied was rejected and returned. The assessment order does not refer to re-import and rejection of material by the Hong Kong party after export. At this stage, we may notice that the decision of the Delhi High Court in the case of ***CIT vs. SMC Share Brokers Ltd. (2007)*** 288 ITR 345 was overruled by the Supreme Court with an order of



remand in the decision reported as *Income Tax Officer vs. M. Pi*

*Chrodi* (2011) 334 ITR 262 (SC) with a direction that the High court was not correct in taking the view and an order of remand was passed for cross examination. Even if we ignore the statement of Chander Prakash Sachdeva, the appellant's contention is that there was sufficient evidence or material to show that transactions were not genuine. Further in case statements of Chander Prakash Sachdeva were debatable, it has to be analyzed as to what weight was to be given to the said statements and whether the corroborative/surrounding circumstances, justify clean purgation of the respondent assessee.

23. We have also noticed and record that tribunal has not decided the ground of appeal that the respondent had not filed certificate as postulated under Section 80HHC(4) and, therefore, was not eligible for deduction in the said Section. The contention of the Revenue is that there is contradiction in the order of the Commissioner (Appeals) because on one hand he has recorded that material was not purchased from Sachdeva Trading Co./Rave Scans but at the



same time she had directed benefit of Section 80HHC. The sa  
aspect has not been looked into and examined by the tribunal.

24. In view of the aforesaid, we answer the questions of law in  
favour of the Revenue and against the respondent but with an order  
of remand to the tribunal to discuss the entire evidence in detail on  
all aspects. The issues and contentions will be examined afresh.  
Factual findings in this order and the impugned order will not be  
treated as conclusive and final. To cut short delay, we direct that  
the parties shall appear before the tribunal on 16<sup>th</sup> December, 2013,  
when a date of hearing shall be fixed.

25. The appeals are accordingly disposed of with no orders as to  
costs.

  
(SANJIV KHANNA)  
JUDGE

  
(SANJEEV SACHDEVA)  
JUDGE

November 25<sup>th</sup>, 2013  
kkb