

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'A' अहमदाबाद ।
IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, AHMEDABAD
(Conducted through Virtual Court)
BEFORE SHRI RAJPAL YADAV, VICE-PRESIDENT
AND
SHRI AMARJIT SINH, ACCOUNTANT MEMBER

IT(SS)A No.239/Ahd/2014

निर्धारण वर्ष/ Asstt.Year : 2009-10

DCIT, Cent.Cir.1(1) Ahmedabad.	Vs.	Shri Babuprasad Ramdayalji Shah 13, Bhimath Society B/h. Circuit House Shahibaug Ahmedabad 380 004. PAN : ACOPS 3358 M
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IT(SS)A No.306/Ahd/2014

निर्धारण वर्ष/ Asstt.Year : 2010-11

Shri Babuprasad Ramdayalji Shah 13, Bhimath Society B/h. Circuit House Shahibaug Ahmedabad 380 004.	Vs.	ACIT, Cent.Cir.1(1) Ahmedabad.
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(Applicant)		(Responent)
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Assessee by :	Shri S.N. Soparkar, Sr.Adv. & Shri Parin Shah, AR
Revenue by :	Shri Virendra Ojha, CIT-DR

सुनवाई की तारीख/Date of Hearing : 23/03/2021

घोषणा की तारीख /Date of Pronouncement: 12/04/2021

आदेश/ORDER

PER RAJPAL YADAV, VICE-PRESIDENT:

Assessee is in appeal against order of the Id.CIT(A) dated 1.4.2014 passed for the Asstt.Year 2010-11; whereas the Revenue is in appeal against order of the Id.CIT(A)-I, Ahmedabad dated 31.3.2014 passed for the Asstt.Year 2009-10.

2. Registry has pointed out that appeal of the assessee is time barred by 40 days. In order to explain the delay, it has been pleaded by the assessee that impugned order was passed on 1.4.2014 and it was received by the assessee on 16.4.2014. Thereafter, the assessee had undergone coronary artery bypass on 19.4.2014. This appeal was to be filed on or before 15.6.2014, but since the assessee was hospitalized and treated for coronary artery disease, bypass surgery was conducted upon him, therefore, he could not look after income-tax litigation for short period, and this appeal was accordingly time barred by 40 days. The affidavit of the assessee along with certificate of the doctor has been placed on record.

3. With the assistance of the Id.representatives, we have gone through the affidavit as well as medical certificate. Considering the explanation given by the assessee, we are satisfied that he was prohibited by reasonable cause for not filing the appeal well in time, therefore, we condone the delay of 40 days and proceed to decide the appeal on merit.

4. Though these are cross appeals, they pertain to different assessment years. But issues agitated in both the appeals are inter-connected with each other. Before specifying the grounds of appeal raised by the parties, we deem it appropriate to take note of brief facts of the case.

5. Search under section 132 of the Income Tax Act, 1961 was conducted in the case of B.R. Metal group on 21.9.2010. The assessee was the director in the company, and therefore, an authorization under

section 132 was also issued in the case of the assessee. A notice under section 153A was issued on 30.6.2011. He has filed his return of income for the Asstt.Year 2009-10 and 2010-11 on 2.8.2011 declaring total income at Rs.2,12,44,312/- and Rs.22,50,46,040 respectively. It is pertinent to further note that during the course of search Department was able to lay its hand on some information that M/s.B.R. Metal & Alloys P.Ltd. has brought in fresh share capital. It had issued equity share at a premium of Rs.90/-, thus the share having face value at Rs.10/- was issued at a price of Rs.100/-. The total issued capital at premium was Rs.27.50 crores comprising share capital of Rs.2.75 crores and share premium of Rs.24.75 crores. The details tabulated by the AO in the assessment order for the Asstt.Year 2009-10 read as under:

Sr. No.	Name of Shareholder	No.of shares	Amount (in Rs.)
1.	Utsav Pharmaceuticals Ltd.	250000	25000000
2.	Grin BPO Services Pvt. Ltd.	185000	18500000
3.	Veemotech Exim Pvt. Ltd.	125000	12500000
4.	Suraj Corporate Services Pvt. Ltd.	100000	10000000
5.	Rang Udhyog Investment Pvt. Ltd.	125000	12500000
6.	Chopra Yarns Pvt. Ltd.	115000	11500000
7.	Platinum Corporation Pvt. Ltd.	100000	10000000
8.	Ken Securities Ltd.	175000	17500000
9.	Arcadia Merchantile Capital Ltd.	200000	20000000
10.	Genus Communion Trade Ltd.	200000	20000000
11.	Universal Credit Securities Ltd.	175000	17500000
12.	Adheshwar Cotton Industries	100000	10000000
13.	TPL Finance Ltd.	300000	30000000

14.	Siyaram Metals Pvt. Ltd.	150000	15000000
15.	Sharda Alloys Pvt. Ltd.	200000	20000000
16.	Yogesh Overseas Pvt. Ltd.	250000	25000000

6. When the assessee was confronted with regard to the source of the above share capital, then in a statement recorded under section 132(4) of the Act, the assessee has declared undisclosed income at Rs.20.50 crores. He deposed that return for the Asstt.Year 2010-11 has not been filed, and that he would declare this amount as his undisclosed income subject to the condition that no penalty etc. would be imposed upon him. Accordingly, for the Asstt.Year 2010-11, he has included this amount of Rs.20.50 crores in his returned income. The AO while framing the assessment order for the Asstt.Year 2009-10 was not satisfied with the above disclosure. He observed that since the capital was introduced in the Asstt.Year 2009-10, therefore, it be construed that the assessee must have arranged the cash to the entry providers in the financial year 2008-09, and this income deserves to be assessed in the Asstt.Year 2009-10 instead of A.Y.2010-11. The AO has recorded statement of some of the persons who alleged to have provided entries to the assessee in the list of above 16 share applicants. Similarly, he made addition on protective basis in the Asstt.Year 2010-11, because the amount was returned by the assessee.

7. Dissatisfied with the above addition in the Asstt.Year 2009-10 and protective addition in the Asstt.Year 2010-11, the assessee went in appeal before the Id.CIT(A). It is also pertinent to mention that the assessee has further challenged estimation of commission alleged to

have been paid for arranging such accommodation entry. The ld.AO has estimated at 2%. The ld.CIT(A) has accepted the appeal of the assessee in the Asstt.Year 2009-10 and deleted the addition by holding that this amount has already been offered for taxation in the Asstt.Year 2010-11 and taxes have been paid.

8. With regard to the estimation of commission income paid for arranging such entries in the Asstt.Year 2010-11, the ld.CIT(A) has reduced it to 1% as against estimated by the AO at 2%. Thus, in brief the grievance of the Revenue is that this unexplained income should have been assessed in the Asstt.Year 2009-10 instead of A.Y.2010-11, though the addition has been made on protective basis by the AO in the Asstt.Year 2010-11 also. Revenue further pleaded that the ld.CIT(A) has erred in deleting the addition of Rs.44.00 lakhs which was added by the AO by estimating the alleged commission/brokerage paid by the assessee for obtaining accommodation entries. In the Asstt.Year 2010-11, the assessee is impugning order of the ld.CIT(A) on the ground that the ld.CIT(A) has erred in holding that 1% of the brokerage was paid by the assessee as against 0.5% offered by the assessee.

9. With the above background, we have heard learned representatives and perused record carefully. We find that while deleting the addition from the Asstt.Year 2009-10, the ld.CIT(A) has lucidly considered each and every details noticed by the AO while making addition. The finding recorded by the ld.CIT(A) in the Asstt.Year 2009-10 reads as under:

“4. I have gone through the assessment order and the submissions and arguments of the AR of the appellant carefully. It is seen that the AO has made the addition in the hands of the appellant because the appellant is the director of M/S B R Metal & Alloys (Guj) Pvt. Ltd. and during the year the said company had received fresh share capital worth Rs. 20,50,00,000/-. The said share capital was admitted by the appellant to be arranged capital which had been routed through various entities and that the source of the funds was from the unaccounted income of the appellant for the A.Y. 2010-11. The AO held that since the appellant had accepted the fact that the share capital was not genuine and had been arranged by the appellant from his unaccounted funds and because the money had come to the bank account of M/S B R Metal & Alloys (Guj) Pvt. Ltd. in the F.Y. 2008-09 relevant to the A.Y. 2009-10, hence the unaccounted money had been provided by the appellant in F.Y. 2008-09 relevant to the A.Y. 2009-10 and not in the year A.Y. 2010-11 as stated by the appellant. For coming to this conclusion the AO relied on the statements of various persons who stated that they were part financiers of the share capital and that they had merely provided accommodation entries and that the funds had come from M/S B R Metal & Alloys (Guj) Pvt. Ltd. and was routed through a few bank accounts before being invested as share capital through them. The AO has also heavily relied on the statement of the appellant to hold that the unaccounted money of the appellant had been invested in the form of fresh share capital in M/S B R Metal & Alloys (Guj) Pvt. Ltd. The AO however has not accepted the other part of the statement of the appellant wherein he has categorically stated that the unaccounted income was for the F.Y. 2009-10 relevant to A.Y. 2010-11.

4.1 The main issue to be decided in this case .is whether on the basis of the statement of the appellant, who is also a director in M/S B R Metal & Alloys (Guj) Pvt. Ltd., that the share capital infused in the company M/S B R Metal & Alloys (Guj) Pvt. Ltd. represented his unaccounted income for A.Y. 2010-11 can the AO hold that the fresh share capital represented the unaccounted income of the appellant for F.Y. 2008-09 relevant to A.Y. 2009-10.

4.2 It is settled law that when any evidence is considered then the same has to be either accepted fully or has to be rejected. The only exception which can be carved out from this general rule is that when the person evaluating the evidence has some other evidence in his possession to establish that the other part is only a fabrication without any merit. It is also established that the onus of such part acceptance of the evidence lies heavily on the revenue which has to be discharged with concrete evidence.

4.3 As far as the source of income for generating this unaccounted income of Rs. 20,50,00,000/- is concerned, it is seen that no evidence has been gathered by the AO to establish whether the appellant had the ability

to generate funds to the extent of Rs. 20,50,00,000/-. This issue may be relevant, However it cannot be a decisive factor if it can be established that the money in the form of share capital had been provided by the appellant in F.Y. 2008-09 relevant to the A.Y. 2009-10.

4.4 When the facts of the present case are examined in light of the above discussion, it would be seen that the only evidences with the AO other than the statement of the appellant are the following:

- 1. The bank account of M/S B R Metal & Alloys (Guj) Pvt. Ltd. wherein the money has been deposited in F.Y. 2008-09 relevant to the A.Y. 2009-10*
- 2. Copies of bank accounts of the persons making the investment in purchase of shares of M/S B R Metal & Alloys (Guj) Pvt. Ltd.*
- 3. Statements of the persons in control of some of the entities making investment in the share capital of M/S B R Metal & Alloys (Guj) Pvt. Ltd. stating that cash had been provided by M/S B R Metal & Alloys (Guj) Pvt. Ltd.*
- 4. In the case of TPL finance evidence that cash had been deposited in the bank account of M/S Mahavir Enterprise which had thereafter issued cheque to Ms/ TPL Finance and TPL Finance had then issued cheque to M/S B R Metal & Alloys (Guj) Pvt. Ltd.*

4.5 The AO has recorded his finding about each of the issues in detail in the assessment order. In order to evaluate the evidence brought on record by the AO it is necessary to examine each of the evidences brought on record.

4.6 As far as the statement of the parties which have been brought on record and analysed by the AO in the assessment order are concerned, it is seen that the enquiries have been conducted in the cases of the only 7 companies which have together contributed a share capital of Rs. 12 crores and the AO has concluded that the entire share capital of Rs. 20.50 crores subscribed by 16 entities has been provided for by the appellant. Even amongst the 7 companies in respect of TPL Finance the AO has found cash deposit of Rs. 50,00,000/- only whereas the company has subscribed to an amount of Rs. 3.0 crores. No enquiry has been conducted about the balance Rs. 2.50 crores. No statement of the directors/ principal officers of this company was recorded.

4.7 The account analysed by the AO other than the case of TPL Finance and that too to extent of only Rs. 50,00,000/- do not show cash deposits. This negates the theory of the AO that cash had been provided by the appellant for deposit in the bank account for onward transmission as. share capital in the hands of M/S B R Metal & Alloys (Guj) Pvt. Ltd. If all

the money had come by cheques from various entities then there could not be a case of the cash belonging to the appellant being deposited in these accounts. The AO has not conducted enough enquiries to establish the deposit of cash in the accounts in order to establish the chain leading to the deposit of share capital in M/S B R Metal & Alloys (Guj) Pvt. Ltd.

4.8 No person who has been examined has categorically stated that the money had been provided for by the appellant. All the persons whose statements have been referred to by the AO in the assessment order have categorically stated that the cash had come from M/S B R Metal & Alloys (Guj) Pvt. Ltd.. No enquiry has been made by the AO about the cash coming from M/S B R Metal & Alloys (Guj) Pvt. Ltd. Further the AO has not made any addition in the hands of the company M/S B R Metal & Alloys (Guj) Pvt. Ltd. thereby holding that the share capital of the company is genuine.

4.9 The statement of Modaram Modi, it has been stated that M/s Veemotech Exim P. Ltd. has invested Rs. 1.25 crores in M/S B R Metal & Alloys (Guj) Pvt. Ltd. and M/s Chopra Yarn P. Ltd. has invested Rs. 1.15 crores in M/S B R Metal & Alloys (Guj) Pvt. Ltd. Shri Modi has stated that he is not associated with any other concern other than the two noted above. He has further stated that he does not have any other bank account other than that of the two companies. It is to be noted that there are no cash deposits of matching amounts in the bank account of the two companies. If Shri Modaram Modi is stating the truth then it is impossible to have received the money from the appellant since no cash deposits have been made in any of the two accounts. It is also to be noted that Shri Modi has given vague answer to the question regarding which person had given him the cash. The other very important aspect is that the appellant was not provided any opportunity to cross-examine Shri Modi despite requests for the same to the AO. In such situation where the opportunity of cross-examination was not provided and there are inherent anomalies in the statement, the complete reliance of the AO on the statement of Shri Modaram Modi does not appear to be justified.

4.10 Similarly, the statement of Deepak Patel, it has been stated that M/s Kens Securities Ltd. has invested Rs. 1.75 crores in M/S B R Metal & Alloys (Guj) Pvt. Ltd. Shri Patel has stated that he is not associated with any other concern other than M/s Kens Secutirities Ltd. noted above. He has further stated that he does not have any other bank account other than the two bank accounts belonging to M/s Kens Secutirities Ltd. It is to be noted that there are no cash deposits of matching amounts in the bank account of M/s Kens Secutirities Ltd.. If Shri Deepak Patel is stating the truth then it is impossible to have received the money from the appellant since no cash deposits have been made in any of the two accounts belonging to M/s Kens Secutirities Ltd.. It is also to be noted that Shri Patel has given vague answer to the question regarding which person had

given him the cash. The other very important aspect is that the appellant was not provided any opportunity to cross-examine Shri Patel despite requests for the same to the AO. In such situation where the opportunity of cross-examination was not provided and there are inherent anomalies in the statement, the complete reliance of the AO on the statement of Shri Deepak Patel does not appear to be justified.

4.11 Similarly, the statement of Shri Hitesh Panchal, it has been stated that M/s Genus Commu Trade Ltd. has invested Rs. 2.0 crores in M/S B R Metal & Alloys (Guj) Pvt. Ltd. Shri Panchal has stated that he is not associated with any other concern other than M M/s Genus Commu Trade Ltd. noted above. He has further stated that he does not have any other bank account other than the two accounts belonging to M/s Genus Commu Trade Ltd. It is to be noted that there are no cash deposits of matching amounts in the bank account of M/s Genus Commu Trade Ltd. If Shri Hitesh Panchal is stating the truth then it is impossible to have received the money from the appellant since no cash deposits have been made in any of the two accounts belonging to M/s Genus Commu Trade Ltd. It is also to be noted that Shri Panchal has given vague answer to the question regarding which person had given him the cash. The other very important aspect is that the appellant was not provided any opportunity to cross-examine Shri Panchal despite requests for the same to the AO.- In such situation where the opportunity of cross-examination was not provided and there are inherent anomalies in the statement, the complete reliance of the AO on the statement of Shri Hitesh Pancha! does not appear to be justified.

4.12 As far as TPL Finance is concerned, no statement of any person has been recorded. There is no evidence of any deposit of cash other than the Rs. 50,00,000/- deposited in the bank account of Mahavir Enterprise. Even regarding this amount there is no evidence of who deposited the money. Only on the basis of cash deposited amounting to Rs. 50,00,000/- in the account of a person who gave a cheque to another person who in turn had invested Rs. 3,00,00,000/- in M/S B R Metal & Alloys (Guj) Pvt. Ltd. it cannot be said that the appellant had provided the entire funds in the A.Y. 2009-10 from his unaccounted sources.

4.13 When the statement of the appellant is analysed, it is seen that the appellant has very clearly stated that he had unaccounted income in A.Y. 2010-11 and not in A.Y. 2009-10. As discussed in the earlier paragraphs the AO has not brought on record any concrete evidence to prove that the appellant had income in A.Y. 2009-10. The mere fact that the investment in the share capital has been made in A.Y. 2009-10 does not mean that the appellant had income in that year. If the AO contradicts the statement of the appellant he has to bring on record evidence for the same. As discussed earlier no evidence in this regard has been brought on record. The AR of the appellant has relied on the following cases:

Glasslines Equipment Co. Ltd Vs CIT 253 ITR 454 (Guj)
Ghanshyambhai R. Thakkar (1996) 88 Taxman 65 (AHD)
Chander Mohan Mehta Vs ACIT (1999) 65 TTJ 327 Pune
DCIT Vs Glamour Restaurant (2003) 80 TTJ 763 Mum
The Dhanvarsha Builders And.... Vs DCIT 102 ITD 375 Pune
(2002)

4.14 I have gone through the facts of these cases. It is seen that in these cases uniformly the proposition upheld is that the complete statement or evidence has to be considered. It is not open to the AO to choose part of the statement or evidence and reject the other part. In the case of *Glasslines Equipment Co. Ltd Vs CIT 253 ITR 454 (Guj)* the jurisdictional High Court has upheld that the contents of an uncontraverted affidavit have to be accepted. The jurisdictional ITAT in the case of *Ghanshyambhai R. Thakkar (1996) 88 Taxman 65 (AHD)* has held that part of the statement cannot be accepted while negating another part. In the case of *Chander Mohan Mehta Vs ACIT (1999) 65 TTJ 327 Pune* the tribunal in Para 8 of the order has categorically held that "Revenue cannot be permitted to use that part of the statement which is beneficial to it and reject the other part of the statement which is detrimental to it". In the case of *DCIT Vs Glamour Restaurant (2003) 80 TTJ 763 Mum* in which it was seen that in the statement recorded, the assessee had offered income for A.Y. 1989-90. During the order passed u/s 132(5), the AO assessed the income as that of A.Y. 1989-90. However, during the assessment proceedings the AO assessed the income offered in different years from A.Y. 1986-87 to A.Y. 1988-89. It is seen that the income assessed was nearly the same as had been offered voluntarily, it was held by the ITAT that the department cannot accept one part of the statement and reject the other part just because it chose to do so. The ITAT held that either the department relies on the statement as a whole and assess the assessee in A.Y. 1989-90 or the department should reject the statement and assess the incomes in individual years based on independent evidence. When the department rejects the statement then no relevance be given to statement at all.

4.15 In view of the above, it is clear that the AO was not justified in holding that the appellant had contributed to the entire fresh share capital invested in *M/S B R Metal & Alloys (Guj) Pvt. Ltd.* of Rs.20,50,00,000/- in A.Y. 2009-10 out of unaccounted sources.

The addition made by the AO of Rs. 20,50,00,000/- is deleted."

10. The only dispute relates to the year of taxability. There is no dispute with regard to the fact that the share capital introduced by B.R.Metal & Alloys P.Ltd. is concerned, it was accepted by the

assessee as arranged by him. The assessee has offered for taxation in the Asstt.Year 2010-11, whereas the AO was of the view that this unexplained income deserves to be assessed in the Asstt.year 2009-10. At this stage, we would like to make reference to the question and answer asked during the search as well as post-search inquiry. These have been reproduced by the AO on page no.3 of the assessment order in the Asstt.Year 2009-10. The relevant part of the order reads as under:

could be seized from them (Refer Question No. 35 of statement on oath dated 21-09-2010). However in order to purchase peace of mind and to end litigation on 27-09-2010 in reply to Question No.6, Shri Babuprasad R. Shah disclosed Rs. 20,50,00,000 in his personal capacity with respect to issue of shares to parties (his nominees) listed at Sr. No.1 to 11 and 13. Shri Babuprasad R. Shah has clearly stated in reply to Question No. 6 that this amount of Rs. 20,50,00,000 has been disclosed in FY 2009-10 as he has passed on cash to the respective applicants in FY 2009-10. The said reply is reproduced here under:

“Q.6 मेसर्स केन सिक्वोरिटीज लिमिटेड, जीनस कोम्मुत्रदे लिमिटेड., सूरत कॉर्पोरेट सर्विसेज प्रा. ली. etc. के डायरेक्टर ने अपने बयान में यह कहा है की उनकी कंपनियों के द्वारा कमीशन ले कर cash के बदले cheque देने का business किया है. इस बारे में आपका क्या कहना है.

Ans. जी Sr. No. 12 से 22 और 24 जो की मैंने आपको इन्वेस्टर्स की list दी है. इस नंबर पर जो कंपनिया है जिनके द्वारा Rs . 20,50,00,000/- (Rs. Twenty Crore Fifty Lacs) जो की शेयर कैपिटल में आया है वह मैं अपने व्यक्तिगत अघोषित आय (undisclosed income) के रूप में declare करता हूँ. यह मैंने F.Y. 2009-10 (A.Y. 2010-11) में transactions किया है. उपरोक्त सभी पार्टियों को मैंने F.Y. 2009-10 में मैंने cash के transactions किये है और मैं A.Y. 2010-11 के रिटर्न में मेरी अघोषित आय के रूप में declare कर दूंगा क्योंकि अभी मेरा A.Y. 2010-11 का रिटर्न भरना बाकी है. मेरी आपसे बिनती है की उसके पर मुझे penalty नहीं लगाये, क्योंकि मेरा यह disclosure u/s 132(4) r.w.s 271(1)(C) के explanation 5 में दिया जा रहा है.”

4. It may not be out of place to mention here that the director of the company Shri Babuprasad R. Shah has in his statement recorded on oath on 16-11-2010 in reply to Question No. 2 has once again informed the authorized officer of the fact that he is making this disclosure in FY 2009-10 and hence he would offer the same for taxation in AY 2010-11. For the sake of convenience the said reply is reproduced here under:

“Q 2. दिनांक 27/09/2010 को अपने घर में दिए गए बयान में एवं 29/09/2010 को अपने ऑफिस में दिए गए बयान में आपने Rs 20 .50 crore (Twenty crore fifty lacks only) B.R. Metal & Alloys (Guj.) Pvt. Ltd. में शेयर कैपिटल इंट्रोडक्शन के रूप में अपनी स्वयं की अघोषित आय के रूप में स्वीकार किये थे. उस बारे में आपका क्या कहना है.

उत्तर. इस search के दौरान आपकी तरफ से मेरी कंपनी B.R. Metal & Alloys (Guj.) Pvt. Ltd. द्वारा allot किये गए shares एवं share premium के बारे में पूछा गया था . इस सन्दर्भ में आपकी और से यह जानकारी दी गयी थी की जिनको share allot किये गए है उसमे 12 companies ऐसी है जिनके लेवड देवड शंकास्पद है. एवं इनमे से कुछ parties ने department की पूछपरछ में बताया है की हमने जो भी share लिए है उसका payment हमने मध्यस्थ के द्वारा मोहैया कराया गया था. उपरोक्त बाबत में मेरा कहना है की जो भी लेवड देवड हुए है उसका पूरा विवरण हमारी किताबों में निहित है. परन्तु share लेनेवाली पार्टी इस बात का खंडन करती

है तो उपरोक्त share value की रकम में मेरे financial year 2009-10 के आयकर रिटर्न जो की अभी भरना बाकी है उसमें यह रकम अघोषित आय के रूप में घोषित करता हूँ और उस पर आयकर की जवाबदारी बनेगी वह मैं पूरा tax का भुगतान कर दूंगा. यह disclosure मैंने आयकर धारा 132 (4) के अंतर्गत और 271(1)(c) के विवेचन 5 के अंतर्गत कर रहा हूँ.”

5. It is an admitted fact that apart from this statement made on oath by Shri Babuprasad R. Shah there is no evidence with the department with respect to payment of cash to the nominees. The petitioner has to submit that the shares have been allotted to the applicants by B. R. Metal & Alloys (Guj.) Pvt. Ltd. on payments received by cheques. All the requisite procedure with respect to allotment of shares by company has been followed and there is no violation of law. The petitioner has complied with the statement made on oath by disclosing this amount of Rs. 20.50 Crores in the return of income of Shri Babuprasad R. Shah and Rs. 7.00 Crores in the Income-tax Return of Company i.e. B.R. Metal & Alloys (Guj.) Pvt. Ltd. in AY 2010-11 on the basis of cash paid to the nominees.

11. From the above reply of the assessee to the question no.6 showed that the assessee has made disclosure on his individual capacity and stated that transactions of payment of cash and making such investment was made by him in the financial year 2009-10 relevant to the Asstt.Year 2010-11, and therefore, the assessee had rightly included the said disclosure amount in the return for the Asstt.Year 2010-11, which was as per the statement made under section 132(4) of the Act. The assessee has stated that the transaction between him and the alleged paper companies took place in financial year 2009-10, and the amount in question paid in the F.Y.2009-10, the relevant assessment year is 2010-11. The Id.AO should have considered the statement made by the assessee under section 132(4) of the Act. The Id.AO has twice taxed the assessee on the same amount; one on substantive basis in the Asstt.Year 2009-10 and other on protective basis in the Asstt.Year 2010-11. The Id.CIT(A) has observed that when the AO has accepted and acted upon one portion of the statement of the assessee made under section 132(4) of the Act, he cannot renege from acting the second part of the same statement

of the assessee for sheer interest of the Revenue. In other words, the law does not permit a person to both approbate and reprobate. In other words, the AO cannot choose a part of the statement and reject the other part of the same statement. In the instant case, question is what are the corroborative pieces of evidences with the Department which would goad any adjudicating authority to confirm the action of the AO ? Answer is nothing except voluntary statement of the assessee himself, and merely based on which the Id.AO has made the impugned addition for the Asstt.Year 2009-10. Addition has been made only on the basis of the voluntary admission on the part of the assessee; there is no material with the Department that the undisclosed income declared by the assessee pertained to the Asstt.Year 2009-10, which fact rightly observed by the Id.CIT(A) in his impugned order. The assessee has categorically stated in his statement recorded on oath on 27.09.2010 in reply to question no.6 that the amount of Rs.20.50 crores was offered for taxation in the Asstt.Year 2010-11, as cash has been paid to the nominees during F.Y.2009-10. Even in reply to question no.2, the assessee stated that he has paid cash to the intermediary during F.Y.2009-10, and therefore the disclosure pertains to Asstt.Year 2010-11. The Id.CIT(A) further observed that the AO has not cross examined the assessee to establish that assessee had funds available with him in the A.Y.2009-10; nor any evidence of income for the Asstt.Year 2009-10 was available with the AO. Except voluntary disclosure of the assessee about the undisclosed income, there is nothing with the department to establish that the undisclosed income declared by the assessee pertained to the year 2009-10. The Id.CIT(A) recorded a finding that enquires have been

conducted in the case of only seven companies, which together contributed a share capital of Rs.12 crores and the AO straight away assumed and concluded that entire share capital of Rs.20.50 crores subscribed by 16 entities has been provided by the appellant; and even amongst the seven companies in respect of TPL Finance, the AO has found cash deposit of Rs.50.00 lakhs whereas the company has subscribed to an amount of Rs.3.00 crores, but no inquiry has been conducted by the AO about the balance amount of Rs.2.50 crores; nor any statement of the directors/principal officers of this company was record. This being the factual position, the action of the AO is highly disputable and no merit to stand. The basis for the impugned addition is merely the statement of the assessee and nothing else. The mere investment in the share capital made in the Asstt.Year 2009-10, *ipso facto* does not suggest that the assessee had income in that year, in the absence of any concrete material evidence to prove accordingly. Even otherwise also ultimately the impugned amount has suffered tax in the Asstt.Year 2010-11 and even the AO has not given credit of amount of taxation in the Asstt.Year 2010-11, while assessing the amount in the Asstt.Year 2009-10, it amounts to double taxation. Considering all these aspects, and after going through the well reasoned order of the Id.CIT(A) on this issue, we do not find any merit in the ground of appeal of the Revenue challenging deletion of addition of Rs.20,50,00,000/-. We uphold the same and reject this ground of appeal.

12. Next ground raised by the Revenue is against deletion of addition of Rs.41.00 lakhs by the Id.CIT(A), which was imposed by

the AO on account of brokerage and commission income earned from undisclosed income.

13. After going through the record, we find that the impugned brokerage and commission income was allegedly incurred by the assessee on the undisclosed income of Rs.20.50 crores. However, since the said undisclosed income disclosed by the assessee has been deleted by the Id.CIT(A) and confirmed by the ITAT as per the discussion hereinabove, the impugned addition of Rs.41.00 lakhs for the Asstt.Year 2009-10 has no leg to stand, and the same is accordingly cancelled. This ground of appeal of the Revenue is dismissed.

14. In the result appeal of the Revenue is dismissed.

15. Coming to the appeal of the assessee for the assessment year 2010-11, the assessee has four grounds of appeal. However, the main ground is with regard to confirmation addition on account of brokerage expenses incurred by the assessee for introduction of share capital/premium. The assessee alternatively pleaded that instead of 1% as estimated by the Id.CIT(A), a reasonable rate of brokerage be restricted to 0.5%.

16. As facts emerge from the record, the Id.AO has made addition of Rs.41.00 lakhs assuming that the assessee has incurred expenditure of 2% to 4% for the purpose of obtaining entry of introduction of share capital. The assessee submitted that this being a notional addition without any basis, as most of entry operators has stated that

they had received 0.25% to 0.50% as against 2% to 4% estimated by the AO. The Id.AO however made a notional addition of Rs.41.00 lakhs at the rate of 2% of the capital introduced by the assessee. The issue was agitated before the Id.first appellate authority, who after considering order of the Id.AO and submissions of the assessee restricted the addition to 1% of the capital introduced. Against part addition, the assessee is now before the Tribunal.

17. Before us, the Id.counsel for the assessee reiterated submissions as were made before the Revenue authorities. He further submitted that both the authorities estimated the notional addition without any basis. He further submitted that even entry operators have made statement before the authorities below that they have received brokerage commission between 0.25% to 0.50%, and therefore, the same be restricted accordingly. On the other hand, the Id.DR supported the orders of the Revenue authorities.

18. On due consideration of the above facts and circumstances of the case, and after going through the material available on record, we find that both the authorities below calculated the brokerage commission on some assumption without any basis. It may be noted that no incriminating material was found during the course of search pertaining to brokerage stated to be paid by the assessee. The authorities below mentioned in their impugned order that as per the prevailing market practice, the range of commission/brokerage would be in the range of 2% to 4%, but there is no such instance mentioned at the end of the authorities to corroborate the same. The only material with the Revenue authorities is that of the statement of entry

operators confirming that they have received brokerage/commission at the rate of 0.25% to 0.5% from the assessee, which fact has not been doubted by the authorities. Though the Id.CIT(A) has to some extent justified to restrict the impugned disallowance, but he has not given due weightage to the only evidence available on record in form of statement of entry operators has not been considered logically. Therefore, we incline to give further relief to the assessee by restricting addition at 0.5% of the share capital/premium introduced by the assessee. Accordingly, impugned addition is hereby restricted to 0.5% i.e. assessee would get further relief of Rs.10,50,000/-, in other words, addition now stand confirmed at Rs.10,50,000/-.

10. In the result, appeal of the Revenue is dismissed and that of assessee is partly allowed.

Order pronounced in the Court on 12th April, 2021 at Ahmedabad.

**Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER**

**Sd/-
(RAJPAL YADAV)
VICE-PRESIDENT**

Ahmedabad; Dated 12/04/2021