IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
&
THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

TUESDAY, THE 12TH DAY OF JULY 2016/21ST ASHADHA, 1938

ITA.No. 34 of 2013 ()

AGAINST THE ORDER/JUDGMENT IN ITA 251/COCH/2011 of I.T.A.TRIBUNAL, COCHIN BENCH DATED 29-06-2012

APPELLANT(S)/RESPONDENT:

THE COMMISSIONER OF INCOME TAX
TRICHUR.

BY ADVS.SRI.P.K.R.MENON,SR.COUNSEL, GOI(TAXES)
SRI.JOSE JOSEPH, SC, FOR INCOME TAX

RESPONDENT(S)/APPELLANT:

DR. P.SASIKUMAR
POOJASREE, VALIYAPADAM, P.O CHOKKANATHAPURAM,
PALAKKAD 678 005.

R1 BY ADV. SRI.T.M.SREEDHARAN (SR.)
R1 BY ADV. SRI.V.P.NARAYANAN
R1 BY ADV. SMT.BOBY M.SEKHAR
R1 BY ADV. SMT.DIVYA RAVINDRAN

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 20.06.2016, ALONG WITH ITA. 47/2013 AND CONNECTED CASES, THE COURT ON 12.07.2016 DELIVERED THE FOLLOWING:

APPENDIX IN ITA.34/13

APPELLANTS' EXHIBITS:

ANNEXURE A: A TRUE COPY OF THE ASSESSMENT ORDER U/S.153A DATED 24.12.2009.

ANNEXURE B: TRUE COPY OF THE ORDER OF THE COMMISSIONER OF INCOME TAX (APPEALS) DATED 31.1.2011.

ANNEXURE C: TRUE COPY OF THE ORDER OF THE INCOME TAX APPELLATE TRIBUNAL DATED 29.6.2012.

ANNEXURE D: TRUE COPY OF THE STATEMENT RECORDED UNDER SEC.132(4) FROM DR.P.SASIKUMAR.

ANNEXURE E: TYPEWRITTEN COPY OF THE STATEMENT.

/TRUE COPY/

PS TO JUDGE

ANTONY DOMINIC & DAMA SESHADRI NAIDU, JJ.

I.T.A.Nos.34, 47, 48, 49, 50, 55, 56, 75, 76, 97, 98, 128, 131 and 132 of 2013

Dated this the 12th day of July, 2016

JUDGMENT

Antony Dominic, J.

1. These appeals are filed by the Revenue challenging the common order passed by the Income Tax Appellate Tribunal, Cochin Bench, disposing of ITA.Nos.251 to 257 of 2011 filed by the assessee and ITA.Nos.268 to 274 of 2011 filed by the Revenue. The appeals were in relation to the assessment years 2002-03 to 2008-09. Since common issues are involved, the cases were disposed of by the Tribunal by a common order, and for the same reason, these cases were also heard together and are disposed of by this common judgment.

2. The assessee is an Ophthalmic Surgeon working in Palakkad. He has a clinic called Vijayam Eye Clinic for treating outpatients, and he also performs surgeries in a hospital by name M/s.Sai Nursing Home, Olavakkode. The department conducted search and seizure operation on 5.12.2007. Consequent to that, assessments for the assessment years 2002-03 to 2008-

09 were reopened and completed under section 153A of the Income Tax Act, 1961, whereby, the assessing officer made additions under various heads. In the appeals filed, certain modifications were made by the Commissioner of Income Tax (Appeals). Aggrieved by the appellate orders, the assessee and the Revenue filed appeals before the Tribunal. By the impugned common order, the appeals filed by the Revenue were dismissed, and the assessee's appeals were partly allowed. It is challenging these orders, the Revenue has filed these appeals, and the questions of law raised are mainly regarding the scope of assessment under section 153A of the Act and the correctness of the deletion ordered.

3. We heard the learned senior standing counsel for the Revenue and the learned senior counsel who appeared for the assessee.

4. From the order of the Tribunal, we find that, at the outset, the Tribunal has answered the contention of the assessee with respect to the scope of assessments made under section 153A of the Act. Thereafter, the

Tribunal has dealt with each of the issues raised before it. For convenience, we shall also adopt by the same method.

5.The first issue that was dealt with in the impugned order and raised before us was regarding the scope of assessments made under section 153A. Tribunal has answered this issue, after referring to the orders passed by the Mumbai, Ahammedabad, Visakhapatnam, Kolkata, Bangalore and Delhi Benches of the Tribunal itself. Accordingly, the Tribunal concluded the issue thus:

> "Thus, we notice that various co-ordinate benches have taken the view that the completed assessments shall not abate and only the assessments or reassessments relating to any of the six assessment years, which are pending on the date of initiation of search, shall abate. Further it has been held that the completed assessments, through automatically reopened as per the provisions of sec.153A, yet they can be disturbed only in respect of those issues for which some incriminating materials requiring such disturbance is unearthed during the course of search proceeding. Since majority benches have taken the above said view in a consistent manner, we are also inclined to take the same

> view discussed above. However, we feel it pertinent to express the view that if the AO finds out any defect on any issue in respect of the pending assessments which got abated and such kind of issues are also available in other assessments, which have already been completed and did not abate, then in our view, the AO is entitled to examine those issues in those years also in order to find out whether similar defects exist in those years or not. In such a situation, in our view, it is not necessary to satisfy the condition that some incriminating materials concerning to those issues should have necessarily been found out in respect of those assessment years."

In so far as the above conclusion of the Tribunal is concerned, we find that this very question has been considered by this Court in the judgment in ITA.169/15 and connected cases, where this Court has answered the question thus:

> "17. After considering the rival submissions and appreciating and perusing the pleadings and documents produced by the Revenue and the written submissions made by the learned counsel for the assessee, we find that the Tribunal without taking any efforts to find out

the facts and circumstances involved in the cases on hand has relied on the decision of the Special Bench of the ITAT in **All Cargo Logistics Ltd** (supra) and has held that there was no need to interfere with the order passed by the Appellate Tribunal. In order to consider the issue, we think it is profitable to extract Section 132 (1) and clause (a) and sub-section (4).

"**132. Search and seizure**

(1) Where the Director General or Director or the Chief Commissioner or Commissioner or Additional Director or Additional Commissioner or Joint Director or Joint Commissioner in consequence of information in his possession, has reason to believe that ---

(a) any person to whom a summons under sub-section (1) of section 37 of the Indian Income-tax Act, 1922 (11 of 1922), or under sub-section (1) of Section 131 of this Act, or a notice under sub-section (4) of section 22 of the Indian Income-tax Act, 1922 (11 of 1922), or under sub-section (1) of section 142 of this Act was issued to produce, or cause to be produced, any books of account or other documents has omitted or failed to produce, or cause to be produced, such books of account or other documents as required by such summons or notice, or etc. etc.

Sub-section (4): 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."

18. On going through Section 132 of the Income Tax Act, what we find is that if the authority specified therein has reason to believe that any person to whom a summons under sub-section (1) of section 37 of the Indian Income-tax Act, 1922 (11 of 1922), or under sub-section (1) of section 131 of the 1961 Act, or a notice under sub-section (4) of section 22 of the Indian Income-tax Act, 1922 (11 of 1922), or under sub-section (1) of section 142 of 1961 Act was issued to produce, or cause to be produced, any books of account or other documents has omitted or failed to produce, or cause to be produced, such books of account or other documents as required by such summons or notice etc. etc., can authorise the officers referred therein to enter and search any building etc. etc. Such authorised officer under sub-section (4) of Section 132 may during the course of search or seizure examine on oath any person who is found to be in possession or control of any books of account, document, 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 or under the Act 1961. Therefore, going by the said provision not only the books, documents etc. etc. that are unearthed during the course of search but a statement made by such person during such examination can also be used in evidence in any proceeding under the Income Tax Act, 1961. Thus viewing the provision in such manner, it is an admitted fact that the Managing Partner of the firms in question has given a voluntary statement to the Assessing Officer that there is a undisclosed income of Rs.2.75 Crores, which according to the learned counsel, was retracted by the Managing Partner subsequently. Thus it can be seen that even according to the assessee, there was a disclosure made by giving a statement during the course of search and therefore, the Assessing Officer, by virtue of the power conferred on him under section 153A was competent to issue notice under the said provision and require the assessee firms to furnish the returns as provided thereunder. Neither under section 132 or under section 153A, the phraseology "incriminating" is used by the Parliament. Therefore, any material

which was unearthed during search operations or any statement made during the course of search by the assessee is a valuable piece of evidence in order to invoke section 153A of the Income Tax Act, 1961.

19. In order to appreciate the provisions of Section 153A in a proper manner, it is appropriate to extract the said provision, which reads thus:

> 153A. [(1)] Notwithstanding anything contained in section 139, section 147, section 149, section 151 and section 153, in the case of the person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003, the Assessing Officer shall--
>
> (a) issue notice to such person requiring him to furnish within such period, as may be specified in the notice, in return of income in respect of each assessment year falling within six assessment years referred to in clause (b), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be, apply accordingly as if
> such return were a return required to be furnished under section 139;
>
> (b) assess or reassess the total income of six assessment years immediately preceding the

assessment year relevant to the previous year in which such search is conducted or requisition is made.

Provided that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years:

Provided further that assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years referred to in this sub-section pending on the date of initiation of the search under section 132 or making of requisition under section 132A, as the case may be, shall abate.

Provided also that the Central Government may by rules made by it and published in the Official Gazette (except in cases where any assessment or reassessment has abated under the second proviso), specify the class or classes of cases in which the Assessing Officer shall not be required to issue notice for assessing or reassessing the total income for six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made.

[(2)] If any proceeding initiated or any order of assessment or reassessment made under subsection (1) has been annulled in appeal or any other legal proceeding, then, notwithstanding anything contained in sub-section (1) or section 153, the assessment or reassessment relating to any assessment year which has abated under the second proviso to sub-section

(1), shall stand revived with effect from the date of receipt of the order of such annulment by the Commissioner.
Provided that such revival shall cease to have effect, if such order of annulment is set aside.
Explanation.-- For the removal of doubts, it is hereby declared that.--

(i) save as otherwise provided in this section, section 153B and section 153C, all other provisions of this Act shall apply to the assessment made under this section.

(ii) in an assessment or reassessment made in respect of an assessment year under this section, the tax shall be chargeable at the rate or rates as applicable to such assessment year."

20. On a plain reading of Section 153A, it is clear that once search is initiated under Section 132 or a requisition is made under Section 132A after the 31st day of May 2003, the Assessing Officer is empowered to issue notice to such person requiring him to furnish return of income in respect of each assessment year following within six assessment years referred to in clause (b). It further treats the returns so filed as if such return were a return required to be furnished under Section 139. So that on a reading of Section 153A(1) it is categoric and clear that once a notice is issued and the Assessing

Officer has required the assessee to furnish return for a period of six assessment years as contemplated under clause (b) then the assessee has to furnish all details with respect to each assessment year since the same is treated as a return filed under section 139. It is true that as per the first proviso, the Assessing Officer is bound to assess or reassess the total income with respect to each assessment year following the six assessment years specified in sub-clauses (a) and (b) of Section 153A. However, even if no documents are unearthed or any statement made by the assessee during the course of search under section 132 and no materials are received for the aforespecified period of six years, the assessee is bound to file a return, is the scheme of the provision. Even though the second proviso to Section 153A speaks of abatement of assessment or reassessment pending on the date of the initiation of search within the period of six assessment years specified under the provision that will also not absolve the assessee from his liability to submit returns as provided under Section 153A(1)(a). This being the scheme of the provisions of the Act, the Appellate Tribunal ought to have considered the issue with specific reference to the facts involved in the case and as provided under Section 153A."

In the light of the judgment of this Court, the aforesaid conclusion of the Tribunal cannot be sustained.

6. Having answered the first question in favour of the Revenue and against the assessee, we shall now proceed to examine the other findings of the Tribunal.

7. In paragraph 7 of its order, on the basis of its conclusion with respect to the scope of assessment under section 153A, the Tribunal has held that the assessments relating to the assessment years 2002-03 to 2006-07 have been concluded and were not pending as on the date of initiation of search, since no notice under section 143 has been issued. Accordingly, it was also held that the concluded assessments can be disturbed only if the department has unearthed any incriminating materials warranting such disturbance or any identical issues are available in the concluded assessment as in the pending assessment. It is on that footing, the

Tribunal proceeded to consider the issues raised before it.

8. The first issue considered by the Tribunal is in relation to the estimation of suppressed consultation fee. The assessing officer had estimated the suppressed consultation fee for the assessment years 2002-03 to 2008-09. This has been set aside by the Tribunal relying on its conclusion on the scope of the assessment under section 153A and by stating in paragraph 10 of its order thus:

> "in view of the legal position discussed in the preceding paragraphs, the assessing officer could not make any addition for assessment years 2002-03 to 2005-06. Accordingly, we uphold the decision of the Ld CIT(A) in respect of these four years, as the same is in accordance with legal position discussed in the preceding paragraphs".

9. Similarly, in so far the assessment years 2006-07 and 2007-08 are concerned, the Tribunal has found that the assessing officer himself did not make any addition as he did not find any suppression as per

his computation. For the assessment year 2008-09, the Tribunal has found that the seized record was applicable for the first 9 months of the financial year and, therefore, set aside the order of the CIT (Appeals) in this regard on the reasoning that:

> "Accordingly, we are of the view that no addition could be made for the assessment year 2008-09 also, as the department has failed to bring on record any actual suppression of consultation fee on the basis of seized record".

According to us, the findings of the Tribunal with respect to the addition towards suppression of consultation fee for the assessment years 2002-03 to 2005-06 and 2008-09 cannot be sustained and the order of the assessing officer has to be restored and we do so.

10. The next issue considered by the Tribunal is the suppression of income from surgeries and sale of lenses. The records seized on search were compared with the records maintained by M/s.Sai Nursing Home and the assessing officer did not find any difference

between the two. However, the cost of acrylic lens used in the package of surgery performed by the assessee was found to be only ₹600/- whereas the assessee was found to be charging ₹8400/- from the patients. In the other package of surgery where PMMA lenses are used, it was found that the assessee was charging ₹2000/- from patients, while the bill seized from the assessee showed that the price was only ₹208/-. When the assessee was questioned on the price difference, he maintained that the PMMA lens were being supplied by M/s.J.N.surgicure directly to the patients but conceded that there were some profit in the transaction. The assessing officer summoned the proprietor of M/s.J.N.surgicure and in his statement, he reiterated that lens was being supplied to the patients for ₹2000/- per lens, which was also shown in the books of accounts maintained by that concern.

11. Based on the enquiries conducted, the assessing officer took the view that M/s.J.N.surgicure has colluded with the assessee and that the assessee was

making a profit of about ₹1800/- per lens. Though it was the case of the assessee that the concern started its business only in the year relevant to the assessment year 2007-08, yet the suppressed income for all the years under consideration was computed by the assessing officer on the presumption that the assessee could have adopted the same methodology in those years also. On that basis, the assessing officer computed the gross collections for the relevant assessment year 2008-09 and treating that as the basis, computed the annual collection for other years also. Similarly, on the same basis, the assessing officer adopted an increase of 10% in the fee charged by the assessee for surgeries. Accordingly, the annual collection for other years was computed by reducing 5% every year from the amount computed for the assessment year 2008-09 and the difference between the receipts estimated by him and that reported by the assessee was treated as suppressed surgery receipts.

12.The CIT (Appeals) disagreed with the estimation made by the assessing officer. In so far as the sale of

lens is concerned, it was concluded by the CIT (Appeals) that the profit of sale of PMMA lenses was ₹1800/- per lens in the year relevant to the assessment year 2008-09 and for other years, the profit was reduced by ₹50/- per year. He rejected the plea of the assessee that M/s.J.N.Surgicure had started business only in the assessment year 2008-09. Accordingly, the undisclosed income towards surgery also was estimated by the CIT (Appeals). These rival contentions were appreciated by the Tribunal and on facts, the Tribunal came to the following findings:

> "20. We have heard the rival contentions on this issue. As concluded by Ld CIT(A), the sum total of all evidences gathered during the course of search and also the result of investigations conducted thereafter was that the appellant was making profit on sale of PMMA lenses. There is no dispute with regard to the fact that the assessee has correctly reported the number of surgeries performed by him and it is also an undisputed fact that there was no difference in the surgery fees charged by the assessee. Both the AO as well as Ld CIT(A) has proceeded to compute the profit on sale of PMMA lens by following their own methods. From the observations of Ld CIT(A), which were extracted in the preceding paragraphs, we notice

that the methodology adopted by the AO was suffering from many defects and consequently it has given illogical results. Besides the mistakes pointed out by Ld CIT(A), we notice that the AO has made many assumptions while working out the suppressed receipts and such assumptions did not have any basis. Accordingly, we agree with the Ld CIT(A) that the methodology adopted by the AO cannot be considered as correct method of working out the suppressed surgery receipts. However, we notice that the Ld CIT(A) has also made certain assumptions without any basis. The department has noticed the price difference in sale of PMMA lens only in respect of the lens supplied by M/s.J.N Surgicure. The Ld CIT(A) also accepts the fact that the said concern came into existence only in the financial year relevant to the assessment year 2007-08. Having observed so, the Ld CIT(A) went on further to observe that "the pattern of earning profit margin on supply of lens to the patient did exist even in earlier years". This observation of Ld CIT(A) did not have support of any material. Thus we find that the first appellate authority has also proceeded to compute the suppressed surgery receipts on surmises and conjectures.

21. The fact remains that the only evidence found out by the department with regard to sale of PMMA lens was a bill sent through courier. The said bill showed the sale of value of lens at Rs.208/-. Apart from this bill, no other evidence

was found during the course of search. However, the AO has tried to corroborate this information from other customers of M/s J.N.Surgi cure and found out that the sale value of PMMA lens supplied to them was in the range of Rs.100/- to Rs.300/- per lens. In page 17 of MMA-24, the sale price of PMMA lens was shown at Rs.600/- per lens. Thus the sale price of PMMA lens was in the range of Rs.100/- to Rs.600/- as per the evidence gathered by the AO.

22. The AO has also conducted enquiries with Shri S.M.Ouseph, the proprietor of M/s.J.N. Surgi cure and also examined the books of accounts of the said concern. It was noticed that the said concern has accounted the sale price of the lens supplied to the patients of the assessee at Rs.2000/- only, i.e., as per the bills raised on the patients. Though the AO has tried to highlight the violation of sales tax rules by M/s.J.N. Surgi cure, in our view, they cannot be taken support to draw adverse inferences against the assessee. The AO has also failed to disprove the claim that the lens were supplied to the patients directly by M/s.J.N. Surgicure. Since the books of account maintained by M/s.J.N. Surgi cure also tallied with the amount collected from the patients, in our view, effectively, the AO could not establish that the assessee has actually made any profit on the sale of lenses. The conclusion reached by the AO that the assessee has made profit of Rs.1800/- per lens is also, in our view, on the basis of surmises

and conjectures, as the evidences found during the course of search itself showed that the cost of lens ranges from Rs.100/- to Rs.600/-. Hence, the profit, if any, could not be Rs.1800/- per lens, as worked out by the AO and Ld CIT(A).

23. In our view, the only point which goes against the assessee is the reply given by him to the question no.27 posed to him, wherein he had admitted that there was some profit margin on sale of PMMA lens to the assessee. Similarly, Shri S.M.Ouseph, the proprietor of M/s.J.N. Surgi cure also could not give any convincing explanation with regard to the difference in selling price of PMMA lens. Accordingly, since the department has found some evidence concerning M/s.J.N. Surgi cure and since the assessee has also accepted the existence of some profit element in respect of supplies made by that concern, we are of the view that the estimate, if any, in respect of suppressed surgical fee receipts could be made only in respect of PMMA lens supplied by M/s.J.N. Surgi cure and not by any other concern. Since the said concern has started business only in the year relevant to the assessment year 2007-08, in our view, the estimation of profit could be made only for assessment year 2007-08 and 2008-09 only in respect of the PMMA lens supplied by M/s.J.N. Surgi cure. For other years, the department did not unearth any incriminating material to suggest that such kind of practice was in vogue in those yeas also. The AO also did no

examine other suppliers, who supplied lens in the years relevant to the assessment years 2002-03 to 2006-07, to find out the practice followed by them. Thus, in the absence of any material or any information suggesting any suppressed profit element in respect of purchases made in other years, in our view, it would not be correct on the part of the tax authorities to estimate the profit from the purchase of PMMA lens/ suppression of surgery receipts for assessment years 2002-03 to 2006-07. Accordingly, we set aside the orders of Ld CIT(A) in respect of suppressed surgery receipts for assessment years 2002-03 to 2006-07 and direct the AO to delete the addition made on this issue in those years.

24. In view of the foregoing discussions, we are of the view that the profit on PMMA lens supplied by M/s.J.N. Surgi cure during the years relevant to the assessment years 2007-08 and 2008-09 can only be treated as the suppressed income in the hands of the assessee. Both the tax authorities have taken the view that the profit was Rs.1800/- per lens. However, we have already noticed that the sale value of PMMA lens was in the range of Rs.100/- to Rs.600/- per lens. Hence the presumption of the tax authorities that the profit was Rs.1800/- per lens, is also in our view, not correct. It is also not established that M/s.J.N. Surgi cure has parted the entire profit with the assessee. The business deal is normally finalized according to the understanding reached between

> the seller and buyer. It is also quiet common that the businessmen fixes different selling price to different customers. Hence the selling price charged to one customer cannot always be taken as the base for determining the selling price for others. Hence, on a conspectus of the matter, we are of the view that the profit that might have accrued to the assessee on purchase of PMMA lens may be taken at Rs.600/- per lens (30% of the sales value) and in our view the same would meet the ends of justice. We order accordingly. The PMMA lens used by the assessee in the years relevant to the assessment years 2007-08 and 2008-09 were 1414 lens and 1450 lens respectively. Accordingly, the AO is directed to calculate the profit on the above quantities by applying a rate of Rs.600/- per lens. The order of Ld CIT(A) stands modified accordingly. "

13. A reading of the above findings of the Tribunal would show that the findings are completely factual and these findings do not give rise to any question of law for the consideration of this Court in an appeal filed under section 260A of the IT Act. That apart, in respect of the assessment years other than 2007-08 and 2008-09, we find that absence of any incriminating material unearthed on search is one of the reasons stated by the Tribunal. Though we do not

approve this reasoning, we find that there is no other material at all to sustain the finding of the CIT(Appeals) or interfere with the finding of the Tribunal. Therefore, we confirm the findings of the Tribunal in so far as these issues are concerned.

14.The next issue considered by the Tribunal is with reference to the disallowance of a portion of salary and expenses claimed by the assessee. Here again, on the basis of the sworn statement of the assessee, the assessing officer has come to the conclusion that the assessee was incurring ₹10,000/- per month as salary and, accordingly, restricted the salary to ₹1,20,000/- for the year relevant for the assessment years 2007-08 and 2008-09. For other years, proportionate reduction was allowed in salary. These additions were confirmed by the CIT (Appeals). Reading of paragraph 26 of the order of the Tribunal shows that it has taken note of the fact that the addition was made by the assessing officer entirely on the basis of the sworn statement of the assessee, the inaccuracy of which was evident from the statement of the employees of the assessee recorded

by the assessing officer himself. The Tribunal has, therefore, found that the facts contained in the statement ought to have been corroborated and that the assessing officer did not cross verify the statement with other employees. It was also found that the assessing officer has factually ignored the salary payments made to two cousin brothers of the assessee, whose services were availed of by him. On this basis, the Tribunal, after recognizing that the only option was to estimate a reasonable amount towards salary expenses, estimated ₹21,500/- as the monthly salary payment for the assessment year 2008-09. On that basis, the Tribunal has estimated the salary payments for the years 2002-03 to 2008-09 and directed the assessing officer to work out the disallowance charges estimated by it. This finding again is completely a factual one and we see no reason to interfere with the same.

15. The next issue is with respect to disallowance of a part of the expenditure claimed under the head 'consumables and medicines'. We find that the assessing officer disallowed 80% of the amount

claimed by the assessee which was confirmed by the CIT (Appeals). The Tribunal, however, modified the same and directed the assessing officer to restrict disallowance to 30% of the expenditure claimed. This again is a factual finding and there is no reason to upset the same.

16. The issue that was thereafter considered by the Tribunal is with respect to the assessments of gifts under section 68 of the Act. Admittedly, the assessee had received gifts from his father-in-law, brother-in-law and brother during the years relevant to the assessment years 2002-03 to 2007-08. The assessing officer has disallowed the claim and made addition on the ground that the donors have failed to prove their respective creditworthiness, placing reliance on Commissioner of Income Tax v. C.P.Mohanakala [2007 291 ITR 278]. This addition was confirmed by the CIT (Appeals) also. In so far as this issue is concerned, the relevant findings of the Tribunal contained in paragraphs 33 to 38 are the following:

"33. We shall examine the facts prevailing in the instant case. There is no dispute with regard to the identities of the donors and all the donors are close relatives of the assessee herein. In the instant cases, the gifts have not been received in instruments issued by the foreign banks. Instead, all the donors have issued cheques from their respective "Non Resident External bank accounts" maintained in the Indian banks. The peculiar feature of these bank accounts are that the deposits into these bank accounts could be made only in foreign currencies, i.e., the account holders cannot deposit Indian currencies into these bank accounts. These peculiar characteristics of the NRE bank accounts have been lost sight of by both the tax authorities. The AO, apparently placing reliance on noting made in a seized book (A/TC-32), has observed that the donors have received cash from the assessee and gave cheques in return to him, i.e. He has presumed that the donors have been compensated by the assessee. However, the AO has failed to substantiate his conclusions by comparing the noting made in the above cited seized book with the bank accounts of the donors. On a perusal of the said noting, in our view, it is possible to interpret that they were pertaining to some other transactions, altogether not connected with the gifts. The AO has also failed to understand that the Indian cheques or Indian currencies cannot be deposited into NRE bank accounts. Hence, it cannot normally be presumed that the assessee has funded the money required

for issuing the gift cheques. Thus, in our view, the AO has reached such conclusions on the basis of surmises and conjectures.

34. Under the Indian Tax laws, the "Non Resident External Accounts" always enjoyed a special status. According to sec.10(4)(ii) of the Income tax Act, the interest earned on NRE account is exempt. Under the old scheme of Wealth tax Act, the balance outstanding in the NRE account was exempt from wealth tax. Similarly under the old scheme of Gift tax Act, the gifts given from out of NRE account was exempt from the Gift tax.

35. There is no dispute with regard to the fact that the donors have made deposits into these NRE accounts by bringing foreign currencies from abroad. The assessee herein, being resident Indian, could not have foreign currencies with him. The AO has taken adverse view on the ground that the donors have failed to produce copies of certain forms required to be filed under the Foreign Exchange Management Act. In our view, the failure on the part of the donors to comply with the procedural formalities, if any, under any other Act cannot be used to take adverse view against the assessee. Since the donors have made deposits by bringing money from abroad and since the impugned gifts have been made from the balance available with their respective NRE bank accounts, in our view, the creditworthiness of the donors also stand proved.

36. Further, all the donors have confirmed the payment of gifts by giving affidavits/letters. The occasion for making gift has also been stated, i.e, the construction of house by the assessee. There is no dispute that all the donors are close relatives of the assessee. There is no material on record to suggest that the assessee has compensated these donors in lieu of receipt of gifts. All these facts go to establish the genuineness of gift. Though the tax authorities have relied upon host of decisions, all those decisions lay down various principles for accepting the cash credits. In our view, the assessee has discharged the primary burden of proof placed upon him u/s 68 of the Act.

37. Even if an assessee fails to prove the three main ingredients, viz, identify of the creditor, credit worthiness of the creditor and the genuineness of the transactions, the Hon'ble Supreme Court in the case of P.Mohanakala & Ors has held that the assessees can still contend that the cash credits cannot be treated as his income by bringing on record the attending circumstances and other material. In this regard, we extract below the following observations made by Hon'ble Apex Court in the above cited case:-

> "The authorities upheld the opinion formed by the AO that the explanation offered was not satisfactory. The assessees did not take the

> plea that even if the explanation is not acceptable the material and attending circumstances available on record do not justify the sum found credited in the books to be treated as a receipt of an income nature. The burden in this regard was on the assessees."
>
> We have already explained the peculiar characteristics of the NRE bank accounts and the assessee has brought to the notice of the AO that the donors have made gifts from their respective NRE accounts. Thus the material and the attending circumstances show that the assessee could not have funded these donors for making the impugned gifts to the assessee.
>
> 38. In view of the foregoing discussions, we are of the view that the assessee has discharged the primary burden of proof placed upon him and the Ld CIT(A) was not right in law in confirming the additions pertaining to the gifts. Accordingly, we set aside the order of Ld CIT(A) on this issue and direct the AO to delete the additions relating to the gifts."

17. The above reasoning of the Tribunal would show that in so far as this case is concerned, on facts, there was sufficient materials before the Tribunal to prove the identity of the donors who are close relatives of the assessee, the source and the creditworthiness of

the donors. As far as the genuineness of the transactions is concerned, there was nothing on record to doubt the same. Therefore, the assessee had satisfied the dictum laid down by the Apex Court in C.P.Mohanakala (supra). It was taking note of these facts that the Tribunal has set aside the order of the CIT (Appeals) and directed the assessing officer to delete the addition relating to the gifts. We do not find any illegality in this finding of the Tribunal.

18.The next issue considered by the Tribunal was with respect to the additions made to various years on the basis of cash flow statement submitted by the assessee under the head 'Deficiency in Cash flow'. The additions made under this head were confirmed by the first appellate authority. The Tribunal has set aside the additions and remitted the matter to the assessing authority for the reason that it was satisfied that the additions on account of cash deficiencies require re-examination. In so far as this order is concerned, we see no reason to interfere with that finding either.

19.The Tribunal has gone into certain additions made in the assessment year 2005-06. These additions are of ₹15,59,880/- relating to interior decoration and ₹16.75 lakhs towards the difference in the purchase price of a property in Bangalore. In so far as the addition towards interior decoration is concerned, the Tribunal has remanded the matter to the assessing officer with a direction to examine the claim of the assessee with regard to the theory of gift of ₹10 lakhs. However, reading of paragraphs 42 ad 43 of the order of the Tribunal would show that the case of the assessee itself was a contradictory one. Initially the assessee had claimed that he had received a gift from his father-in-law, though his father-in-law had not declared the cost of the item in his cash flow statement. Subsequently, the assessee himself represented that he had included ₹10 lakhs in his cash flow statement filed before the assessing officer and pleaded that credit should be given to him. After taking note of this fact and also holding that the assessee had failed to

substantiate his claim, the Tribunal concluded that the theory of gift needs to be rejected. Thereafter, the Tribunal has set aside the order of the first appellate authority and remitted the matter to the assessing officer to examine the claim of the assessee with regard to ₹10 lakhs. This, according to us, is totally contradictory and perverse and cannot be sustained. Therefore, we set aside the order of the Tribunal in so far as it has interfered with the order of the first appellate authority upholding addition of ₹15,59,880/- and restore the order of the assessing officer.

20. In so far as the Bangalore property is concerned, there also, the case has been dealt with by the Tribunal in paragraphs 44 and 45 which read thus:

> "44. The next specific issue in the appeal of the assessee relates to the addition of Rs.16.75 lakhs made towards the difference in the purchase cost of Bangalore property. The said property was purchased by the assessee in December, 2006. However, the AO had wrongly made the addition in the assessment year 2006-07. The Ld (CIT(A)

corrected the mistake and sustained the addition in the assessment year 2007-08. The facts relating to the same are stated in brief. The assessee purchased a house property in Bangalore in Dec.2006. In the sworn statement he mentioned that he paid the consideration in case as per the requirement of seller and the purchase consideration was Rs.45.00 lakhs. However, it was noticed that the assessee has actually accounted only Rs.28.25 lakhs in his books. The AO also noticed that he had withdrawn a sum of Rs.14.50 lakhs on the same day through two cheques. When questioned about the contradictions between his reply given in the sworn statement and the books of account, the assessee submitted that he originally contemplated to purchase a property jointly with another person named Shri.Michael of Ernakulam for a sum of Rs.50.00 lakhs. Subsequently, they decided to register the property separately in their respective names. Accordingly, the assessee purchased his property by paying the consideration by way of cheque. With regard to the cash withdrawal, he submitted that the same was withdrawn at the request of Shri.Michael, but could not be utilized by him as he did not purchase his property.

45. The said explanation was not convincing to the AO and accordingly he made an addition of Rs.16.50 lakhs as difference in consideration. The Ld CIT(A) also confirmed the said addition. The case of the assessee is that the AO did not find

> any material to show that the assessee has actually paid Rs.45.00 lakhs for purchase of Bangalore property."

21. A reading of the findings of the Tribunal shows that the assessee did not have a consistent case that the Tribunal has set aside the order of the fist appellate authority by putting the entire burden of proof on the assessing officer. Secondly, if the case of the assessee was that the property was purchased along with another person as claimed by him, it was for the assessee to have examined that person. Therefore, the interference of the Tribunal on this issue was totally unwarranted. Accordingly, we set aside the order of the Tribunal to the extent it has set aside the addition of ₹16.75 lakhs made towards difference in the purchase price of Bangalore property.

22. Thereafter, the Tribunal has proceeded to examine the issues raised in the appeals filed by the Revenue. The first issue considered by the Tribunal was regarding the correctness of the first appellate

authority's order in telescoping the benefit. Having considered the issue in the light of the reasons given by the Tribunal in paragraph 47 of its order, we are inclined to think that the Tribunal was justified in its conclusion. Proceeding to the correctness of the findings of the Tribunal with respect to the addition of difference in cost of construction of residential building made in the assessment years 2004-05 to 2006-07, we find that the same has been considered by the Tribunal in paragraphs 48 to 52 of its order. P 47-52.

> "48. The specific issue raised in the appeal of the revenue relates to the addition of difference in cost of construction of residential building made in the assessment years 2004-05 to 2006-07. The facts relating to the same are stated in brief. The assessee constructed a residential building and declared the cost of construction at Rs.1,10,05,000/-. During the course of search, the department seized a report given by a registered architect for the purpose of bank, in which the cost of construction was shown at Rs.1,70,00,000/-. The AO treated the difference of Rs.59,95,000/- between the two figures cited above as the income of the assessee and assessed the same in three years as detailed below:-

Assessment year 2004-05	- 10,79,000
Assessment year 2005-06	- 23,98,000
Assessment year 2006-07	- 25,18,000

It is pertinent to note that the AO had referred the matter of valuation to the DVO during the course of assessment proceeding, but he did not receive the report of the DVO by the time he completed the assessment.

49. Before Ld CIT(A), the assessee made a plea to consider the report of the DVO. Accordingly, the Ld CIT(A) called for the DVO's report and found that the DVO had estimated the cost of construction at Rs.99,94,000/-, i.e. lesser than the cost disclosed by the assessee. The AO filed a written submission before the Ld CIT(A), wherein he requested the Ld CIT(A) to consider only the Registered Architect's report and not the DVO's report. The AO contended so on the ground that the report of the Architect was submitted to the bank and it was also counter signed by the assessee. The AO further submitted that the report of the DVO could be rejected in favour of more reliable evidence, i.e., architect's report seized by the department.

50. However, the assessee brought to the notice of Ld CIT(A) that the report prepared by the architect was only an estimate for the proposed construction and not the estimate of cost of actual construction. The assessee highlighted the

following observation made by the architect in his report.

"Almost 80 lakhs work completed. The balance 90 lakhs considered for personal loan (sd.) 17.11.06"

The assessee, by placing reliance on the following case law, further submitted that the Ld CIT(A) was empowered to consider fresh evidences and can also consider the issues not specifically raised before the Ld CIT(A).

a) CIT vs. Kashi Nath Chandiwala (2006) (228 ITR 318) (All)

b) CIT Vs. Mcmillan & Co (1958) (33 ITR 182) (SC)

c) CIT Vs. Shapoorfi Pallonji Mistry (1962) (44 ITR 891) (SC)

d) CIT Vs. Kanpur coal syndicate (1964) (53 ITR 225) (Cal)

e) CIT Vs. Hardutory Motilal Chamaia (1967) (66 ITR 443) (SC)

The assessee further submitted that the report of the architect do not certify that he has inspected the premises. Accordingly he submitted that the report of the DVO has more evidentiary value than that of the architect in the facts and circumstances of the case. It was also brought to the notice of Ld CIT(A) that the loan was obtained on the basis of architect's report and the said loan was not used for construction purpose, by some other purpose.

51. The Ld CIT(A) considered the matter and found merit in the arguments of the assessee. Accordingly, he deleted the additions relating to

the cost of construction of the residential building in all the three years with the following observation.

"29. I have considered the relevant facts and provisions of law with regard to the issue involved. I find that the addition based by the Assessing Officer on the basis of certificate of registered architect seized during the course of search action which estimated the cost of construction of residence of the appellant at Rs.1.7 cr as against Rs.1,00,05,000 disclosed by the appellant during period relevant to A.Yrs. 2004-05 to 2006-07. The Assessing Officer accordingly made addition in respective assessment years in proportion to the investments shown by the appellant in these years. I find that the property was refereed by the Assessing Officer for valuation to the EVO, who valued the cost of construction at Rs.99.94 lakhs as against investment of Rs.1.05 crore shown by the appellant. The argument pur forth by the Assessing Officer is that the valuation of DVO was not binding and therefore, should not be relied upon in preference to the seized document wherein higher estimation is done by a registered architect and on the basis of which the addition has been made. The Assessing Officer also pleaded that no addition was made on the basis of report of the DVO and therefore, the same cannot be depended upon to deal with this addition. It is seen that the seized document on which the Assessing Officer relied upon is not the valuation of cost of construction but an estimate prepared by an Architect for the proposed cost of construction of the residence of

the appellant. The title of this document itself reads as under:-

"Cost estimate for the proposed residence of Dr.Sasi Kumar ....."

On this document itself, it is further written that as on 17.11.2006, the construction work completed was almost worth Rs.80 lakhs and further construction with estimated cost of Rs.90 lakhs was proposed and was to be considered for further loan. On the strength of this document, the appellant was seeking to procure a loan from the bank. I therefore, find that the additions made by the Assessing Officer in A.Yrs. 2004-05 to 2006-07 were not sustainable even on the basis of the above seized document which estimates the cost of construction completed up to 17.11.2006 to be only of Rs.80 lakhs as against over Rs.1 Crore declared by the Appellant. I, therefore, find that no unaccounted investment can be determined even on the basis of specific seized document relied upon by the Assessing Officer for making the addition. For this reason itself, it was essential to know the actual cost of construction of the appellant's residence. The report of the DVO was an important and crucial document for the purpose and therefore, was required to be considered as an important, vital and reliable piece of evidence to ascertain the truth and impart justice even though the same was not used by the Assessing Officer for making the addition. It was a material fact on record and Appellant was fully aware of the same as his property was inspected and he responded to the proceedings before DVO. The report of the DVO in all fairness, therefore, ought

to have been supplied to the appellant as it was his normal right to know the outcome of proceedings before DVO and more particularly so when a huge addition had been slapped on his alleging unaccounted investment in the construction of house. The decision of Guwahati high court (supra) relied upon by the Assessing officer was not relevant in the matter because right of the Assessing Officer to refer the matter to the DVO was not under dispute. The DVO was a technical person of the department and there was no reason to disbelieve the valuation done by the DVO with detailed reasoning and on the basis of actual measurement of construction work and inspection of the property on 29.10.2009. No defect in the report of the DVO has been brought on record to justifiably discard the same. It is an admitted position that the construction of residential building of the appellant was completed in march 2006 and therefore, the seized document dated 17.11.2006 prepared for procuring a bank loan from HDFC Bank only projecting further construction of Rs.90 lakhs. Such construction was not done by the Appellant upto 29.10.2009 when his property was inspected by the DVO. The Appellant also informed to the Assessing Officer vide letter of 15.12.2009 that no part of this loan from HDFC Bank procured on 20.11.2006 was used for any further construction. The issue in any case was not relevant in this assessment year and cannot be made basis for making an addition. In view of above, I hold that the addition made by the Assessing Officer on this account was not sustainable. The same is therefore, directed to be withdrawn. This ground of appeal is therefore, allowed".

23.In this part of its order, the Tribunal has dealt with the reasoning of the assessing officer and extracted the relevant portion of the order passed by the CIT (Appeals) deleting the additions made and finally concluded thus:

> "We have carefully considered the facts and circumstances of the issue and also the decision taken by Ld CIT(A). We notice that the Ld CIT(A) has specifically noticed that the title of the report given by Architect reads as "Cost estimate for the **proposed residence** of Dr.Sasikumar". Further he has also considered the final observations made by the architect and came to the conclusion that the report of the architect does not relate to the estimate of actual cost of construction. The AO had also given stress to the loan obtained from HDFC bank on the basis of the report of the architect. In this regard, the Ld CIT(A) has given a specific finding that the loan obtained from HDFC bank on 20.11.06 was not used for any further construction. Thus, it is seen that the assessee had obtained loan from HDFC bank on the basis of the report of the architect for some other purpose and not for the purpose of construction of residential building and hence the assumption made by the AO was proved to be wrong. Under these facts and circumstances, we

> are of the view that the Ld CIT(A) has taken a conscious view on this issue by properly appreciating the available evidences and accordingly granted relief. Hence, we do not find any infirmity in his decision on this issue and accordingly uphold the same."

24.These findings, again, are completely factual and arrived in the light of the materials considered by the Tribunal. Therefore, we are not inclined to interfere with these findings.

In the result, these appeals are disposed of restoring the additions made by the Assessing Officer towards suppressed consultation fee for the assessment years 2002-03 to 2005-06 and also additions of ₹15,59,880/- and ₹16.75 lakhs for the assessment years 2005-06. The Assessing Officer will issue consequential orders. In other respects, the order of the tribunal is confirmed.

Sd/-
ANTONY DOMINIC, Judge.

Sd/-
DAMA SESHADRI NAIDU, Judge.

kkb.