

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Reserved on: 18th July, 2012*
Date of Decision: 31st August, 2012

+ **ITA 713/2008**

COMMISSIONER OF INCOME TAX Appellant
Through: Mr. N. P. Sahni, Sr. Standing Counsel
with Mr. Ruchesh Sinha, Advocate.

Versus

KEDAR NATH GUPTA Respondent
Through: Mr. Anoop Sharma and Mr. Manu K.
Giri, Advocates.

+ **ITA 948/2008**

COMMISSIONER OF INCOME TAX Appellant
Through: Mr. N. P. Sahni, Sr. Standing Counsel
with Mr. Ruchesh Sinha, Advocate.

Versus

ASHA KEDAR NATH GUPTA Respondent
Through: Mr. Anoop Sharma and Mr. Manu K.
Giri, Advocates.

+ **ITA 892/2008**

COMMISSIONER OF INCOME TAX Appellant
Through: Mr. N. P. Sahni, Sr. Standing Counsel
with Mr. Ruchesh Sinha, Advocate.

Versus

MANI KAKKAR Respondent
Through: Mr. Anoop Sharma and Mr. Manu K.
Giri, Advocates.

+ **ITA 707/2008**

COMMISSIONER OF INCOME TAX Appellant
Through: Mr. N. P. Sahni, Sr. Standing Counsel
with Mr. Ruchesh Sinha, Advocate.

Versus

ROHIT KEDAR NATH GUPTA Respondent
Through: Mr. Anoop Sharma and Mr. Manu K.
Giri, Advocates.

+ **ITA 706/2008**

COMMISSIONER OF INCOME TAX

.....Appellant

Through: Mr. N. P. Sahni, Sr. Standing Counsel
with Mr. Ruchesh Sinha, Advocate.

Versus

NITIN KEDAR NATH GUPTA

.....Respondent

Through: Mr. Anoop Sharma and Mr. Manu K.
Giri, Advocates.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE R.V. EASWAR

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

R.V. EASWAR, J.:

1. These are five appeals filed by the Commissioner of Income Tax before this Court under Section 260A of the Income Tax Act, 1961, hereinafter referred to as the 'Act'. They relate to the different assesseees but since they are all connected, they are disposed of by a common judgment.

2. Substantial questions of law were framed in the case of Kedarnath Gupta and Mani Kakkar in ITA No.713/2008 and 892/2008 respectively. These are as follows: -

Kedarnath Gupta

“(1) Whether the Income Tax Appellate Tribunal was right in affirming the order of the Commissioner of Income Tax (Appeals) and deleting the addition of ₹4,71,05,000/-made by the Assessing Officer towards unexplained investment in KG Farms and Jyoti Farms?

(2) Whether the Income Tax Appellate Tribunal was right in confirming deletion of addition of ₹19,35,769/- on account of undisclosed capital gains on sale of land at Jaipur Highway?

(3) *Whether the Income Tax Appellate Tribunal was right in upholding deletion of addition of ₹2.30 lacs made by the Assessing Officer on account of unexplained commission paid to the broker in connection with the sale of KG Farms?*

(4) *Whether the order passed by the Income Tax Appellate Tribunal is perverse?”*

Mani Kakkar

“(1) *Whether the Income Tax Appellate Tribunal was correct in deleting addition of ₹2,27,80,000/- and ₹2,50,000/- made on account of undisclosed capital gains and undisclosed brokerage paid by the respondent assessee?*

(2) *Whether the order passed by the Income Tax Appellate Tribunal is perverse?”*

In ITA No.948/2008, 707/2008 and 706/2008 (Asha Kedarnath Gupta, Rohit Kedarnath Gupta and Nitin Kedarnath Gupta respectively), no substantial questions of law have been framed because the assessment in these cases were made on protective basis.

3. The facts giving rise to the present appeals, shorn of irrelevant details, are these. A search was conducted in the premises of one Rajinder Gupta under Section 132 of the Act on 27.08.1998. Rajinder Gupta is the brother of Kedarnath Gupta. In the course of the search several documents were found including originals and photocopies in respect of purchase of farm houses in the name of the sons of Kedarnath Gupta, namely, Nitin Kedarnath Gupta and Rohit Kedarnath Gupta. The documents found also reveal that Kedarnath Gupta had incurred substantial expenditure on the construction/ renovation as well as the maintenance of the farm houses in Jaunpur (KG Farms) and Kishangarh (Jyoti Farms). In the course of the search, a statement was recorded from Rajinder Gupta on oath under Section 132 (4) of the Act. We may refer to the statement in some detail later but suffice here to note that he stated, *inter alia*, that he was the power of attorney holder of the family of

Kedarnath Gupta and that Kedarnath Gupta was incurring about ₹10,000/- to ₹11,000/- per month on the maintenance of the farm houses and salaries of watchman and gardeners for the last three years till the date of search. He also stated that Kedarnath Gupta had purchased these farm houses with his on-monies and they were registered in the names of his sons.

4. On the basis of the above, proceedings were initiated under Section 158BD of the Act against Kedarnath Gupta who is the respondent in ITA No.713/2008. He was required to file a return declaring his undisclosed income for the block period consisting of the period from 01.04.1988 to 27.08.1998. Kedarnath Gupta filed the block return declaring “nil” undisclosed income. Since he was stationed in Dubai, he would appear to have appointed one Anil Khatri as his power of attorney to sign the block return. The Assessing Officer appears to have issued a notice under Section 143(2) of the Act to Kedarnath Gupta at his Punjabi Bagh address in New Delhi requiring him to furnish the information regarding the sources of investment in KG Farm and Jyoti Farm, the sources of expenses incurred on the maintenance of the farm houses and also the details of all moveable and immoveable properties purchased and sold by him during the block period along with the capital gains or loss, if any. The bank accounts of Kedarnath Gupta were also called for. In addition, he was required to produce Rajinder Gupta on 15.03.2002 in connection with the sworn statement recorded from him on the date of search where he had referred to the purchase of farm houses by his brother Kedarnath Gupta. There was no response from the Kedarnath Gupta to this.

5. Thereafter, the Assessing Officer would appear to have invited objections from Rajinder Gupta as to why he should not be treated as the agent of Kedarnath Gupta, who is hereinafter referred to as the “assessee”, under Section 163 of the Act. The basis for this proposal was (a) that Rajinder Gupta was operating the NRO account of the assessee from Citi Bank, New Delhi, (b) he was also involved in the purchase of the farm houses for the assessee in the names of the assessee’s sons. Rajinder Gupta

objected to the proposal to appoint him as the agent of the assessee, though he did not rebut the fact that he was power of attorney holder of the assessee and was also authorised to operate the assessee's bank account; nor did he deny the allegation that he was involved in the negotiations and payments for the transaction of purchase of the farm houses. These facts, coupled with the fact that Rajinder Gupta himself had admitted in the course of the sworn statement that he had withdrawn the cash found during the search from the assessee's bank account, enabled the Assessing Officer to treat Rajinder Gupta as the assessee's agent.

6. The Assessing Officer thereupon proceeded to examine the investment made by the assessee in the purchase of the KG Farms (at Jaunpur) and Jyoti Farm at Kishangarh (Vasant Kunj). He referred to the fact that simultaneously a search was conducted on 27.08.1998 in the business premises of M/s. Pandit Estates, a broker firm which was involved in the transaction as also in the residential premises of Suraj Bhan Sharma who was an operative of Pandit Estates. A statement was recorded from him under Section 132 (4) of the Act in response to which he stated that he is a teacher in a Govt. School and also operates as real estate dealer/ agent from the office of Pandit Estates, Chhattarpur Mandir Mor, Mehrauli along with two of his relatives, namely, Radhey Shyam Sharma and Dharampal Sharma who was also an associate of Pandit Estates. Suraj Bhan Sharma was questioned about the purchase of farm houses for the assessee, which was finalised through him. The relevant portions of the statement are extracted in the assessment order of Kedarnath Gupta but it is not necessary to reproduce the same and we need only refer to the gist thereof: -

- (a). Suraj Bhan Sharma confirmed that the purchase of the two Farm houses by the assessee was done through him. He confirmed that KG Farms was purchased in May/ June, 1995 for a total consideration of ₹2.49 crores, out of which ₹26,00,000/- was paid through cheque and the remaining amount of ₹2.23 crores was paid in cash. This property was sold to the assessee by one Ashok Kakkar and consisted of 2.5 acres and 3 biswas of farm land having a two

storied house therein with built up area of 5000 Sq. ft. The property was registered showing sale consideration of ₹26,00,000/- in the office of Sub-registrar Vikas, Sadan, New Delhi. At the time of registration, Dharampal Sharma partner of Pandit Estates who also signed as witness was present along with Ashok Kakkar and his wife. Suraj Bhan Sharma was also present.

- (b). Since the normal rate of commission or brokerage was 1% of the actual sale consideration, an amount of ₹2,50,000/- was received from Ashok Kakkar by Suraj Bhan Sharma.
- (c). KG Farms was sold by the assessee about 4 months earlier (to the date of search); but in this transaction he or his firm was not involved. The sale transaction was put through M/s. Ravinder Properties (Proprietor Ravinder Sharma) who had his office at Andheria Mor, New Delhi. According to the market information, the property was sold for ₹3.10 crores. When the assessee had earlier asked Pandit Estates to search for a buyer for the property the price expected was in the range of ₹3.25 crores.
- (d). Kedarnath Gupta and Rajinder Gupta purchased Jyoti Farm measuring 2.5 acres of land and built up area of 5000 Sq. ft. It was a double storied property purchased in August or September, 1995 for a total consideration of ₹2.60 crores, from one M. K. Subba. Out of the total consideration an amount of ₹26.10 lakhs was paid through cheque and the remaining amount of ₹2.39 crores was paid in cash. No commission was received by Suraj Bhan Sharma in the transaction, but he was assured by the assessee that he will be duly compensated in the next deal, if any. A commission of ₹2,60,000/- was, however, received from M. K. Subba.
- (e). Suraj Bhan Sharma confirmed in the statement that all the cash as well as cheque payment were made in his presence or in the presence of Dharam Pal Sharma, the other partner of Pandit Estates. He also confirmed that cash

payment of the token money of ₹5,00,000/- and another sum of ₹20,00,000/- were paid by Rajinder Gupta to M. K. Subba. The same modality for payment of cash was adopted by the parties in the case of KG Farm by paying a token money of ₹5,00,000/- in cash by Rajinder Gupta to Ashok Kakkar and the balance payment of cash were spread over a period of three months. Suraj Bhan Sharma confirmed that “all the cash payments were made by the buyer to the seller in presence of either me or Shri Dharam Pal Sharma”.

- (f). Suraj Bhan Sharma also brokered the purchase by Rajinder Gupta family of 4 acres of land near Bondsia Farm at Sohna. Though the total amount paid was ₹24 lakhs. He could not remember the cash/ cheque break up.

In the course of the search at the residence of Suraj Bhan Sharma, the search authorities found a register marked Annexure A-1, pages 1 to 12 of which were found written as statement of income and expenditure. When he was asked to explain the entries in the register, Suraj Bhan Sharma replied that the details are regarding the sale of Jaunpur Farm to the assessee by Ashok Kakkar and the sale of Sohna land to Rajinder Gupta.

7. Dharam Pal Sharma, the partner of the Pandit Estate, also gave a sworn statement on 27.08.1998 under Section 132(4) of the Act in which he confirmed the statement of Suraj Bhan Sharma regarding the property transaction and also confirmed that the total price for KG Farms, paid by the assessee, was ₹2.49 crores and the total price for Jyoti Farms paid by the assessee was ₹2.6 crores. The statements of Suraj Bhan Sharma and Dharam Pal Sharma were shown to the Rajinder Gupta along with the register seized from the premises of Pandit Estate upon which he admitted that the total price paid for KG Farms and Jyoti Farms was ₹2.49 crores and ₹2.60 crores respectively and that the assessee purchased them in the names of his sons Rohit and Nitin.

8. So far as KG Farms is concerned, certain further facts were also brought on record by the Assessing Officer. There was a survey under Section 133A of the Act in the premises of M/s. Ravinder Properties of Andheria Mor, New Delhi. A sworn statement was recorded from Ravinder Sharma, the proprietor of Ravinder Properties, in which he had “graphically described” that Rjender Gupta had negotiated the sale of KG Farms for ₹3.10 crores to one Darshan Kumar Khosla and that the document was registered with the office of the Sub-registrar, INA, New Delhi for ₹40,00,000/-, with the remaining amount of ₹2.70 crores being paid in cash to the seller, before the registration. He further stated that he had received his commission in the deal also in the same proportion i.e. ₹80,000/- by cheque and ₹2,30,000/- by cash from the buyer Darshan Kumar Khosla, who was also known as Kumar Sahib. Another important fact noticed by the Assessing Officer was that during the survey an envelope addressed to M/s. PTC Bearing Pvt. Ltd., No.2392, Gupta Manson, Shradhanand Marg, G. P. Road, Delhi – 110006 was found. The envelope was sent by Pal India Shipping agency of Bombay. Ravinder Sharma, when asked to explain, stated that the received ₹1,00,000/- in cash as his commission on one of the installments of the price, from Ravinder Gupta in the envelope in which the cash had been put in ₹100/- and ₹50/- notes. A rough plan of the farm house was also found in the same envelope.

9. The Assessing Officer, from the statements of the two brokers recorded on the date of the search and from the statement of Rajinder Gupta recorded also on the day of the search concluded that the purchase consideration of KG Farms and Jyoti Farms and the sale consideration of KG Farms were heavily understated and substantial amounts of cash had changed hands.

10. There was also an additional fact which was noticed in the assessment order of the assessee. The documents in respect of the purchase of KG Farm by the assessee was dated 03.05.1995 and it consisted of 10 sale deeds showing consideration at ₹1,87,000/- each, totalling to ₹18,17,000/-. These documents were signed by Suraj Bhan Sharma as a witness. Similarly, the documentation for the purchase of Jyoti

Farm from M. K. Subba was in 5 registered deeds and each of the deeds showed the purchase price at ₹4,35,000/- aggregating to ₹21,75,000/-. In these documents the other partner of the Pandit Estates, Dharam Pal Sharma, had signed as witness. The Assessing Officer thought it quite strange that farm houses which consisted of double storied building could be registered in this manner in split documents each showing a uniform consideration. According to the Assessing Officer, some of the documents showed only agricultural land whereas some of them showed both agricultural lands and double storied building; nevertheless, every document showed a uniform price of ₹4,35,000/-. This, according to the Assessing Officer, showed that the documents were registered without much examination and in a routine or mechanical fashion apparently without any field inspection. He, therefore, refused to accord any credence to the averments made and the authenticity of the consideration shown in the documents. It was also noticed by the Assessing Officer that even the sale of KG Farms was done in a similar fashion through 10 split documents each showing a consideration of ₹4,10,000/- and they were registered on 09.10.1997. Ravinder Sharma, who brokered the deal, had signed the documents as one of the witnesses.

11. The Assessing Officer after marshalling all the aforesaid facts and bringing them on record called upon the assessee to explain them. In response thereto, written submissions were filed on 24.04.2002 in which it was stated that there was no understatement of the purchase price which was correctly recorded in the registered documents, that the registration fee and the stamp duty was duly paid on the declared consideration as shown in the registered documents and that Rajinder Gupta as well as the brokers have retracted from their statements given on the date of the search and in these circumstances there was no material or evidence to support the allegation that the assessee indulged in understatement of the investment in the farm houses and the sale price of KG Farm house.

12. The submissions of the assessee were rejected by the Assessing Officer in the following words: -

“The averments of the A.R. are considered carefully with reference to the material available on record. Abundant evidence in the form of the entries made in the register maintained by the brokers M/s Pandit Estates and the envelope carrying cash towards commission paid to another broker Sh. Ravinder Sharma was found from the respective premises on 27.8.1998. On the same day all the brokers have stated in detail the actual transactions that had taken place and corroborated then statements with the material found during search/ survey. The graphic descriptions given by the brokers in their sworn statements on the date of search lends lot of credence to the unadulterated statements given by the brokers on the date of search which were not influenced by any extraneous consideration. The detailed description in the statement of the brokers recorded on the date of search appears natural and logical in the nature of their business. The statements of the brokers were put to the comments of Sh. Rajinder Gupta who is the Power Attorney holder of the assessee and who was involved in these transactions on the same day of their recording. Having gone through the contents of these statements and the evidence supporting them. Sh. Rajinder Gupta admitted on oath the veracity of the transactions as described by them. The subsequent retractions were only self-serving statements because the brokers were influenced/induced by the assessee and his agents and also with a view to avoiding taxes themselves on the commission income. It has already been discussed above that the registration of the documents were done without and (sic) inspection on field and in routine and clerical manner and without an elementary scrutiny of their contents. Thus no credence can be given for the consideration shown in these documents. Not even the token money which is given by the prospective buyer to the seller on the finalization of the deal is mentioned in these documents.”

13. On the aforesaid reasoning the Assessing Officer computed the unexplained investment in the purchase of the two farm houses and the addition to be made in the assessment as follows: -

“1. Unexplained investment in the purchase of KG Farm :

Actual consideration paid	₹2,49,00,000/-	
Add: Commission paid to Broker	₹2,50,000/-	
	₹2,51,50,000/-	
Less: Amount paid from NRO A/c	₹18,70,000/-	₹2,32,80,000/-

2.	<i>Unexplained Investment in Jyoti Farm:</i>	
	<i>Actual Consideration Paid</i>	₹2,60,00,000/-
	<i>Add: Commission paid to Broker</i>	<u>₹Nil</u>
		₹2,60,00,000/-

Less: Amount paid from NRO A/c ₹ 21,75,000/- ₹2,38,25,000/-”

14. The undisclosed capital gain on the sale of KG Farm was taken at ₹47,86,893/- this was computed as follows: -

“*Actual Sale Consideration received* ₹3,10,00,000/-

Less:

1. *Actual cost of acquisition* ₹ 2,49,00,000/-

Add : Others expenses Like
Stamp paper, repair
& renovation ₹ 10,01,107/-
 ₹2,59,01,107/-

2. *Cost of Transfer*

Commission paid to Ravinder Sharma
By Cheque ₹80,000/-
By Cash ₹2,30,000/- ₹3,12,000/- ₹6,62,13,107/-

Capital Gain ₹47,86,893/-”

15. In the course of the assessment proceedings the Assessing Officer estimated the total monthly expenses for maintenance of the two Farm house at ₹40,000/- and computed the total expenditure at ₹14,40,000/- for a period of 36 months and added the same as unexplained expenditure. An amount of ₹2,30,000/- was also added on account of unexplained commission paid in cash to Ravinder Sharma at the time of sale of KG Farm. This was on the basis of the statement of Ravinder Sharma that he received commission of ₹3,10,000/- from the assessee for brokering the sale of KG Farms out of which ₹80,000/- was paid to him in cheque and the balance of ₹2,30,000/- was paid to him in cash.

16. One more addition made by the Assessing Officer in the block assessment order passed in the assessee's case is the amount of ₹19,35,769/- as "*undisclosed capital gains on sale of land at Jaipur Highway*". The brief facts in connection with this addition may be noted. Pages 40 to 42 of the Annexure A-11 seized during the search consisted of three undated cheques of ₹4,24,000/- each issued by M/s. Azaad Coach Pvt. Ltd. in favour of Mrs. Asha Kedarnath Gupta, the wife of the assessee. The seized material also consisted of four photocopies of undated cheques, each for ₹3,25,000/- issued by Azaad Coach Pvt. Ltd. in favour of the assessee. The assessee was asked to furnish the details regarding the transactions to which these cheques related. The assessee replied as follows: -

"The land at Jaipur Highway including approach road was purchased during the year 1994-95 and 1995-96 and the total registered documents were twenty six in number. The net consideration for the same including payment of registration charges and documentation was ₹ 44,82,535.00. Part of the land was sold during the financial year 1996-97 for a total consideration of ₹ 35,19,000.00 and the capital gains of ₹ 157098.75 arising on the sale of the above land has duly been reflected in the income tax computation. The balance land was also proposed to be sold during the financial year 1997-98 for a sum of ₹ 12,72,000/- but the deal did not mature as the buyer of the property Azad Coaches Pvt. Ltd. And not make the payments and the files were also not transferred in their favour. The assessee is still therefore holding a part of the Jaipur Highway land. The three unpaid cheques of ₹ 4,24,000/- (totaling ₹ 12,72,000) which were seized during the course of search operations hence stands explained. No amount has been incurred on the renovation/repair/construction of the aforementioned land."

17. The explanation of the assessee was considered by the Assessing Officer in detail. He noticed that the assessee was unable to furnish the bifurcation of the total extent of land purchased and how much thereof was sold. He could not even explain whether his wife, shown to be a co-owner, had any independent sources of income to make the payment for purchase of the land. In this background, the Assessing Officer first held that the entire land would be taken to be that of the assessee and, therefore,

the entire capital gains arising out of the sale of the land would be taken as the assessee's income. Since the assessee was not able to give a bifurcation between the extent of the land purchased and extent of land sold, the Assessing Officer made an attempt to reconcile the figures from the seized material. He noticed that the material seized from the residence of Rajinder Gupta consisted of three sale deeds, all of them dated 12.10.1994, by which the assessee had purchased 39/314th share of land of 15 bighas 4 biswas, each for an apparent consideration of ₹1,87,000/- in the joint names of himself and his wife. This land was purchased from Azaad Coach Pvt. Ltd. and the total purchase price was ₹6,31,125/- including stamp duty of ₹70,125/-. From the bank account of the assessee with Citi Bank, New Delhi, the Assessing Officer noted that the assessee received four cheques of ₹4,25,000/- each and two cheques of ₹3,25,000/- each in December, 1996 from Azaad Coach Pvt. Ltd. This totals to ₹23,46,000/-. According to the assessee, he was to receive another three cheques of ₹4,25,000/- each which did not materialise since the deal for the sale of the remaining land did not materialise. From these facts the Assessing Officer concluded that the land which was purchased by the assessee in 1994 from Azaad Coach Pvt. Ltd. was sold back to Azaad Coach Pvt. Ltd., but a part of the land could not be sold and the corresponding amount could not be realised. Since the assessee could not give any bifurcation of the cost of acquisition of ₹6,31,125/-, the Assessing Officer bifurcated the cost of *pro rata* according to the consideration received. The assessee has received consideration of ₹23,46,000/-, but did not receive ₹12,72,000/- as the sale did not materialise in part. This gave a ratio of 65:35. The cost of the land, that is, ₹6,31,125/- was bifurcated in this ratio and the cost attributable to the land sold came to ₹4,10,231/-. The capital gains were accordingly computed at ₹19,36,769/-, which was the excess of the sale consideration of ₹23,46,000/- over the cost of ₹4,10,231/-. The capital gains were also taken as the undisclosed income of the assessee since there was no disclosure of the same prior to the date of the search.

18. The assessee appealed against the assessment order to the CIT (Appeals) who disposed of the appeal by order dated 31.03.2003. We shall summarise the findings of the CIT (Appeals) only with regard to the issues on which substantial questions of law have been framed by us.

19. As regards the addition of the undisclosed investment of ₹4,71,05,000/- in respect of the KG Farms and Jyoti Farms, the CIT (Appeals) recorded the following findings: -

“(a). The entire case of the Assessing Officer is based on the statements of Rajinder Kumar Gupta, the brother of the assessee, and those of the brokers Dharam Pal Sharma and Suraj Bhan Sharma there is no corroboration of these statements.

(b). The assessment has been taken up at the fag end of the period of limitation. The statements referred to above were not put to the assessee for rebuttal in the course of the assessment proceedings.

(c). The Assessing Officer has not been appointed to source of alleged money paid for the two Farm houses.

(d). No action was taken against the sellers of the Farm houses.

(e). The assessee has submitted a valuation report of the registered valuer in support of the amounts invested in those properties as also a chart of properties in the vicinity for comparison purpose along with photocopies of the total Deeds of these properties. The consideration for those properties compares well with the consideration paid by the assessee for the two Farm houses. These details have not been disputed by the Assessing Officer.

(f). No extra ordinary amount of cash or assets or investments or any agreement to sell, etc. was found during the search.”

On the basis of the above findings, the CIT (Appeals) deleted the addition of ₹4,71,05,000/-.

20. As regards the alleged undisclosed capital gains on sale of land at Jaipur Highway in the amount of ₹19,35,769/-, the findings of the CIT (Appeals) can be

summarised as follows: the capital gains can arise only if property is sold within the meaning of Section 2 (47) of the Act. The assessee is still holding a part of the land for which no consideration has been received. Therefore, there is no sale of the property which can be said to give rise to any capital gain. Even the original cheques form part of the seized documents which shows that the transfer did not take place. Therefore, there is no question of any undisclosed capital gains. In this view of the matter the addition of ₹19,35,769/- was deleted.

21. The addition of ₹2,30,000/- on account of unexplained commission paid to the broker in connection with the sale of KG Farm was also deleted by the CIT (Appeals) consequent to his decision that the sale of KG Farms was made only for ₹41,00,000/- and not for ₹3,10,00,000/- as assessed by the Assessing Officer. Since the commission was payable at the rate of 2% of the sale price, the CIT (Appeals) held that the actual commission paid was only ₹80,000/- which has been paid by cheque and there was no question of assessee paying any commission in cash. In this view he deleted the addition of ₹2,30,000/-.

22. The Revenue carried the matter in appeal to the Tribunal. The Tribunal examined the rival contentions and the facts and agreed with the decision of the CIT (Appeals) that there was no basis for addition of ₹4,71,05,000/-. The findings and conclusion of the Tribunal on this issue are as follows: -

“2.1.5 We have perused the records and considered the matter carefully. The dispute raised in this ground of appeal relates to addition made by the A.O. on account of undisclosed investment in purchase of K G Farms and Jyoti Farms. The additions have been made on the basis of statement of Sh. Rajinder Gupta, the brother of the assessee and the two brokers who had subsequently retracted from their earlier statements. The brokers in their fresh statements supported by sworn affidavits have made it clear that the statements made earlier were under influence of threat and dire consequences by the official. No other material has been placed on record by the A.O. in support of the claim that the assessee had made undisclosed investments. Neither the vendors of the two properties have admitted

receiving any money over and above the stated consideration nor any extra ordinary cash was found during the course of search. On the contrary, the assessee has provided valuation report from registered valuer as well as some comparable cases of sale deeds in the adjoining area. These facts have not been controverted before us. Under the circumstances, we see no infirmity in the order of CIT (A) deleting the addition and the same is upheld.”

23. With regard to the addition of ₹19,35,769/- as undisclosed capital gains on sale of land at Jaipur Highway, the Tribunal’s findings and conclusions are reproduced below: -

“2.3.4 We have perused the records and considered the matter carefully. The A.O. had made addition of ₹1935769/- on account of undisclosed capital gain on sale of land at Jaipur Highway. The addition has been made only on the basis of some amount deposited in the bank account and on the basis of unpaid cheques found during search. The assessee had been purchased during the year 1994-95 and part of which was sold during financial year 1996-97 on which capital gain of ₹157098.75 had been declared by the assessee in the return of income. The balance land was proposed to be sold in financial year 1997-98 but the deal did not mature as the buyer i.e. Azad Coaches Pvt. Ltd. did not make the payments and the titles were therefore, not transferred. The assessee also submitted that the very fact that unpaid cheques were found during search showed that the payments had not been received by the assessee. We find that no material is available with the revenue to controvert the claim of the assessee. No inquiry had been made either from Azad Coaches Pvt. Ltd. or from any other person to substantiate the allegation of sale of land. There is no material to show that the land was transferred during the year and therefore, no capital gain could be charged. In the absence of any such material, capital gain cannot be charged to tax only on the basis of some unpaid cheques found during search or some amount deposited in the bank account. We see no infirmity in the order of CIT (A) deleting the additions and same is upheld.”

24. As regards the addition of ₹2,30,000/- for unexplained commission paid in cash to broker Rajinder Sharma, the Tribunal accepted the decision of the CIT

(Appeals) that it was consequential to the deletion of the addition made for unexplained investment in KG Farms. Since the assessee was held to have invested only ₹41,00,000/- as against the investment of ₹3,10,000/- crores as estimated by the Assessing Officer, the corresponding commission of ₹2,30,000/- was also directed to be deleted by the CIT (Appeals) and this finding was upheld by the Tribunal.

25. Before we examine the rival contentions in the appeals, it is necessary to refer to the assessment of Mani Kakkar in ITA No.892/2008. She is the wife of Ashok Kakkar. It may be recalled that Kedarnath Gupta, the assessee in ITA No.713/2008, had purchased a farm house from Mani Kakkar, the name of which was “KG Farms” at village Jaunpur, Mehrauli. This property had been purchased by Kedarnath Gupta in the name of his son Rohit Kedarnath Gupta. The property was purchased on 03.05.1995. The corresponding sale price was dealt with in the assessment of Mani Kakkar, who is hereinafter referred to as the “assessee”. According to the Assessing Officer who completed the assessment of Mani Kakkar under Section 158BD of the Act consequent to the search in the case of Rajinder Gupta, the property was sold by Mani Kakkar to Kedarnath Gupta for ₹2.59 crores and not for ₹18,70,000/- as declared by the assessee herein. The Assessing Officer also found that the assessee had executed 10 registered sale deeds for ₹1,87,000/- each, aggregating to ₹18,70,000/- and had denied that the farm house was sold for ₹2.49 crores. On a perusal of the sale documents, the Assessing Officer found that there was no reference therein to the superstructure which existed on the land. According to him, since material facts were not disclosed to the registering authority and the documents did not mention the fact that there was a super structure on the land, no credence can be given to the consideration declared in the documents. The Assessing Officer also referred to the statement of Ravinder Sharma, broker and proprietor of Ravinder Properties, through him the deal was done. He has stated that the KG Farms was purchased in the name of Rohit Kedarnath Gupta for a consideration of ₹2.49 crores and he had been paid brokerage accordingly, though the consideration stated in the sale deeds was much

less. The statement of Suraj Bhan Sharma, who was associated with Pandit Estates, the brokerage firm, was put to the assessee for rebuttal. By written submissions dated 05.01.2005 the assessee stated that the land sold was agricultural land and reiterated that the total consideration was only ₹18,70,000/- and not ₹2.49 crores. The assessee again submitted in writing on 19.01.2005 that the reliance placed by the Assessing Officer on the statement of Suraj Bhan Sharma was unwarranted. These written submissions are reproduced at pages 6 and 7 of the assessment order dated 28.01.2005 passed by the Assessing Officer in the case of Mani Kakkar. The Assessing Officer, however, rejected the submissions of the assessee for the reasons given in the assessment order at pages 7 and 8 thereof and ultimately computed the capital gains on the basis that the actual sale consideration was ₹2.49 crores as against ₹18,70,000/- disclosed by the assessee. The ultimate addition came to ₹2,27,80,000/- as “undisclosed capital gains”.

26. The assessee had denied payment of any commission for putting through the transaction which was not accepted by the Assessing Officer on the ground that the broker himself has admitted to have received commission of ₹2,50,000/- in respect of the sale transaction. The amount was added in the block assessment as undisclosed brokerage.

27. These two additions were challenged in appeal by the assessee before the CIT (Appeals). A preliminary objection was raised by the assessee to the effect that no proper “satisfaction” was recorded by the Assessing Officer under Section 158BD of the Act and, therefore, the assessment was without jurisdiction. This aspect of the matter was considered by the CIT (Appeals) in detail by calling for a remand report from the Assessing Officer. After reproducing the “satisfaction note” recorded on 20.11.2002 and after examining the legal position, the CIT (Appeals) upheld the objection of the assessee in the following words: -

“4.18 I have considered the reasoning given by the AO and the submissions made by the Ld Counsel. As far as the reasoning of the

Ld. Counsel that no satisfaction has been recorded by the AO of the person searched i.e Sh. Kedar Gupta is concerned, the same is not tenable. This is so because the first satisfaction which is for centralization of case of the appellant has been recorded by DCIT, CC-6, March 02. In the second satisfaction in November 2002, the AO has issued u/s 158BD on the basis of reasons recorded by his predecessor. The issue that needs examination is whether the initial satisfaction can be said to be satisfaction within the meaning of sec. 158BD or not. A plain reading of this satisfaction indicates that the same was recorded for the purpose of centralization of the case of appellant and to investigate whether any capital gain has been declared by the appellant. Notice u/s 158BD of the Act was to be issued to the appellant. In the second satisfaction, the succeeding officer relied on this reason and issued the notice. In other words neither the first officer nor the second one ever recorded the satisfaction that any undisclosed income of the appellant has been detected as a result of search u/s 132 in the case of Sh. Kedar Gupta. I am also in agreement with the submissions of Ld. Counsel that notice u/s 158 BD was issued on 6.1.2003 which is much beyond the date of assessment in the case of Sh. Kedar Nath Gupta and decision of Hon'ble Gujarat High Court in the case of Khandu Bhai Vasantji Desai (Supra) is thus applicable to the facts of appellant.”

28. Even though the CIT (Appeals) upheld the preliminary objection of the assessee (Mani Kakkar), he proceeded to deal with the merits of the additions. After examining the issue in detail, he noted that in the case of the buyer of the property, namely Kedarnath Gupta, the CIT (Appeals) has deleted the addition made for unexplained or undisclosed investment in the purchase of KG Farms. Eventually the CIT (Appeals) summarised his findings in the following words: -

“5.23 I have considered the reasoning given by the AO and the submissions made by the Ld Counsel. the main reasoning of the AO in treating the sake (sic) consideration of the KG Farms at ₹2,49,00,000/- against declared sale consideration of ₹18,70,000/- is the statement of Sh. Suraj Bhan Sharma. The AO did not allow appellant any opportunity to cross-examine this person. I am in agreement with the submissions of Ld. Counsel that without allowing appellant such an opportunity no adverse view can be taken. Even the persons viz Sh. S B Sharma and Sh Dharma Pal Sharma have

retracted from the statements given by them. Thus also no adverse view can be taken. The AO has also drawn adverse inference from the fact that the said sale deeds. I fail to understand as to how an adverse view can be drawn from not mentioning the built up portion on the land if no evidence of payment over and above the stated consideration is found. The Ld. CIT(A) has in appeal no 137/2002-03 vide his order dated 31.3.2003 has deleted the addition in the case of Sh. Kedar Nath Gupta, a person who purchased the said KG Farms. While deleting the addition, the Ld. CIT (A)–I held that there is no corroborative positive evidences in addition to the statements of the search parties to draw a conclusion that the appellant had undisclosed income which he has invested in the purchase of these agricultural farm lands. The Ld. CIT(A)-I further observed that addition has been made merely on the basis of statements of the two brokers which have not been confronted to the appellant. Based on facts of the case Ld. CIT(A)-I deleted the addition in the case of Sh. Kedar Nath Gupta. In view of detailed reasoning given by CIT(A)-I and the facts of the case, I find no reason to differ from the finding given by Ld. CIT(A)-I. I am thus of the view that the AO was not justified in making the addition of ₹2,27,80,000/- to the undisclosed income of the appellant as short term capital gains. The same is deleted.

5.24 Regarding the brokerage of 2,50,000/- which is calculated @ 1% of the sale consideration of ₹2.49 crores, the same is also not sustainable. Since the sale consideration of ₹2.49 crores is held to be incorrect. This addition is also therefore, deleted.”

On the above basis, the CIT (Appeals) deleted both the additions, namely the addition of ₹2,27,80,000/- made to the computation of the capital gains on sale of KG Farms and the addition of ₹2,50,000/- for undisclosed brokerage paid by the assessee.

29. The Revenue carried the matter in appeal before the Tribunal. By the time the Tribunal took up the appeal for hearing, the order of the Tribunal in the case of Kedarnath Gupta was available, having been pronounced in August, 2007. Since the case of Mani Kakkar and Kedarnath Gupta were connected as seller and buyer of the same property respectively, the Tribunal thought it fit to follow the order passed by it in the case of Kedarnath Gupta. The Tribunal accordingly dismissed the appeal filed

by the Revenue. It may be noted that there is no independent reasoning in the order of the Tribunal in the case of Mani Kakkar.

30. In support of the appeal in the case of Kedarnath Gupta, Mr. N. P. Sahni, learned Senior Standing Counsel for the income tax department contended that the factual findings recorded by the Tribunal and the reasons given by it for deleting the three additions are without any merit and are arbitrary. It is pointed out that the Tribunal has predominantly relied upon the fact that the statements made by Rajinder Kumar Gupta, the brother of Kedarnath Gupta and the brokers were retracted. According to the learned Senior Standing Counsel, the retraction cannot be given any credence since it was done by the brokers in the year 2000, almost two years after the original statements were made at the time of the search. It is submitted that even in the case of Rajinder Kumar Gupta, though the statement was retracted within 15 to 20 days from the date on which it was recorded, it lacked conviction and the reasons given were flimsy. It is pointed out that stereotyped reasons were given by all of them for retracting their earlier statements, such as being under a confused state of mind because of the search proceedings or that they were unreasonably compelled or pressurised by the income tax authorities into giving the earlier statements. It is contended that the Tribunal ought to have taken note of the circumstantial evidence, surrounding circumstances and the preponderance of probabilities before confirming the decision of the CIT (Appeals) to delete the additions. Drawing our attention to the statements given by the Rajinder Kumar Gupta, Suraj Bhan Sharma, Dharam Pal Sharma and Ravinder Kumar Sharma, Mr. Sahni submitted that four different persons have given full details of the on-money transactions without reference to each other and, therefore, these statements were rightly relied upon by the Assessing Officer as natural or spontaneous statements made containing the truth. It is pointed out that though the deponents had alleged threat and coercion by the search party, nothing prevented them from making a complaint to the higher departmental authorities and in the absence of any such complaint by them, their retractions made solely on the

ground of threat or coercion at the time of making the earlier statements, cannot be accepted with any credibility. Our attention was drawn to the judgment of the Supreme Court in *Vinod Solanki v. Union of India*, (233) ELT 157 in which the Supreme Court has held that serious allegations of threat or coercion must be substantiated before the retractions are accepted. According to the learned Senior Standing Counsel, there was no reason for the unreasonable delay in making the retractions on the part of the Suraj Bhan Sharma, Dharam Pal Sharma and Ravinder Sharma.

31. With particular reference to the addition made in respect of the capital gains on sale of land at Jaipur Highway, Mr. Sahni submitted that the assessee was not prepared to reveal any details or bifurcation of the cost which prompted the Assessing Officer to recompute the capital gains by bifurcating the cost on the basis of the ratio between the amount received as consideration and the amount not received, though receivable, as consideration. It is pointed out that the recomputation of the capital gains was due to the reapportionment of the cost of the property, which has been overlooked by the Tribunal.

32. As regards the reference by the Tribunal to the effect that the assessee was not afforded any opportunity to cross examine the witnesses, Mr. Sahni submitted that no such cross-examination was required nor were the rules of natural justice breached, because the witnesses had retracted before the completion of the assessment and, therefore, it would be meaningless to ask the assessee to cross-examine those very witnesses who had retracted their earlier statements implicating the assessee. Mr. Sahni, on the basis of the above submissions, strongly contended that the order of the Tribunal was vitiated by perversity in as much as it failed to take into account the relevant material and evidence and the Tribunal has put on blinkers without probing the matter in the manner expected of a fact finding authority. The Tribunal, according to him, failed to take note of the normal course of human conduct and preponderance of probabilities and took a perverse view of the matter which should not be approved.

33. On behalf of the assessee Kedarnath Gupta, strong reliance was placed on the concurrent findings of the CIT (Appeals) and the Tribunal. It was asserted that the Tribunal has rightly taken note of the retractions and has attached proper weight to the fact that the earlier statements lacked corroboration. It is further contended that the investment made by the assessee in the two farm houses was supported by the report of registered valuer as well as by instances of sale of properties situated in the vicinity, a list of which was submitted by the assessee before the Assessing Officer. It is pointed out that the order of the Tribunal cannot be said to be perverse on any ground; it has taken into account all relevant material and evidence and has not ignored any vital aspect of the conspectus of the facts nor has the Tribunal failed to draw the appropriate inferences from the facts on record. With reference to the capital gains on sale of land in Jaipur Highway, it is strongly contended that the seized material itself contained evidence to show that the sale of a part of the property did not materialise and no consideration was actually received by the assessee in respect of the same and that the Tribunal has rightly held that when there is no sale, there is no question of assessing any capital gains. It is further contended that the Tribunal has rightly found flaw in the method adopted by the Assessing Officer for computing the capital gains, i.e., to apportion the cost of the property in the ratio between the consideration received and the consideration not received, which there was no factual or legal basis.

34. In the appeal by the department in the case of Mani Kakkar, the argument of the learned Senior Standing Counsel is substantially the same. However, Mr. Anoop Sharma, the learned counsel appearing for Mani Kakkar, made a few general submissions in defence of his client. He contended as follows: -

- (a). Since, the assessment is made under Chapter XIV-B, there should be concrete evidence found during the search to justify the additions. No such material has been found.

- (b). The sale deeds which were found only showed the consideration for the sale of KG Farm house to Kedarnath Gupta and it was on this basis that Mani Kakkar has earned capital gains.
- (c). All the witnesses whose statements were recorded by the Assessing Officer in the course of the search proceedings were retracted for valid reasons and, therefore, no reliance can be placed on them.
- (d). The findings recorded by the Tribunal in para 2.15 of its order in the case of Kedarnath Gupta, particularly the finding that the vendors of the two farm house, of which Mani Kakkar was one, have not admitted to receiving any money over and above the stated consideration nor any extraordinary cash was found during the course of the search have not been controverted by the departments at any stage.
- (e). The statements made under Section 132(4) in the course of the search do not represent material or evidence seized during the search and cannot be acted upon as if it is evidence unearthed during the search. It has been so held by a Division Bench of this Court in ITA Nos.276/2009, 302/2009 and 396/2009 on 29.11.2010.
- (f). All the findings recorded by the Tribunal are findings of fact which any authority, properly instructed in law, would have come to and therefore, they cannot be said to be perverse or arbitrary.

On the basis of the aforesaid submissions, Mr. Sharma contended that the Tribunal has come to the correct conclusion and its order cannot be termed as arbitrary or perverse.

35. We may first take up the order of the Tribunal in the case of Kedarnath Gupta for examination. We have already quoted the relevant portions of the order in so far as they relate to the three substantial questions of law framed by us. The first and third questions are interconnected. It seems to us that the criticism of the findings of the

Tribunal by the learned Senior Standing Counsel for the department, to the effect that they are arbitrary or perverse, must be upheld. The search was conducted in the premises of Rajinder Kumar Gupta who is the assessee's brother. The assessee resides in Dubai. His assessment was taken up under Section 158BD of the Act. We may clarify that in his case there was no challenge at any point of time to the validity of the assessment or to the satisfaction arrived at for the purpose of invoking the Section. The addition of ₹4,71,05,000/- was made on the basis of the statements of Suraj Bhan Sharma and Dharam Pal Sharma. Suraj Bhan Sharma was not a partner in Pandit Estates, the broker firm, which put through the transaction of purchase of the two Farm houses. He was, according to his statement made on the date of the search, merely connected or associated with Pandit Estates as he used to sit in the office of the firm and also helped the firm in getting property deals finalised. In answer to question No.3 he categorically stated as follows: -

“Q-3: Please intimate about the deals in property finalized through you?”

Ans: One of the deal in property finalized through M/s Pandit Estate was purchased of property caused as K.G. farm (named by the buyer after purchase). This property was purchased by Shri Kedar Gupta R/o Dubai and his son (name not remembered) in may/June, 1995. The property was purchased for total consideration of ₹2 Crores 49 Lacs. ₹26 Lacs was paid through cheque and remaining amount of ₹2 Crores and 23 lacs was paid in cash. The property was sold by Shri Ashok Kakkar, E-499, G.K.II, New Delhi. The property consisted of 2.5 Crore and 3 Biswa of farm land having two storied house in it of build up area of about 5000 sq. feats. The deal was registered showing sale consideration as ₹26 Lacs in office of Sub-Registrar, INA, Vikas Sadan, New Delhi.”

36. It may be noticed from the answer that full details of the transaction relating to the purchase of KG Farms by the assessee were given by Suraj Bhan Sharma, even though he was not a partner of the Pandit Estate and was merely “sitting in the office” of that firm. Such minute details relating to the property can be given only by a

person who was closely connected to the deal and had an involved role in the transaction. The fact that he was not a partner of Pandit Estates is not relevant, since he knew the full details of the transaction. In answer to question No.4, he stated the names of the persons who were present in the office of the Sub-registrar at the time of registration. His answer to question No.4 is reproduced below: -

“Q-4:- Who were perusal (sic.) at the time of registered of deed. Also intimate the names of sons who signed as witness in the registrar office?”

Ans:- The name of the persons who were present in the office of sub Registrar at the time of registration are (a) Dharam Pal Sharma, (b) W/o Shri Ashok Kakkar in whose name the property was existing (c) Shri Ahsok Kakkar (d) Myself. The signatures of witness were made by Shri Dharam Pal Sharma and advocate (name not remembered by me).”

37. From the answer to question No.5 it is seen that he even knew the percentage and amount of commission which Pandit Estate charged on the transaction from Ashok Kakkar, husband of Mani Kakkar, who sold the property to the assessee. He stated that the normal rate of commission was 1% of the “actual sale consideration” and that in the transaction relating to the KG Farms, “an amount of ₹2,50,000/- was received from Ashok Kakkar”. Thus, not only the normal rate of the commission charged by Pandit Estate was known to Suraj Bhan Sharma but he also quantified the same in respect of the transaction between Ashok Kakkar and Kedarnath Gupta and mentioned the same as ₹2,50,000/- which matched the normal rate of 1% of the actual sale consideration, which was ₹2.49 crores. All these details were given by him more than three years after the purchase of the property by Kedarnath Gupta. The date on which he acquired the property was 03.05.2005 and the search took place on 27.08.1998. Despite the three year time lag minute details of transaction were furnished by him. At the time of the search of his residence, there is nothing to show that he bore any enmity or ill will towards the assessee or Ashok Kakkar and wanted to implicate them.

38. It is also interesting to note that in answer to question No.6, Suraj Bhan Sharma stated that when Kedarnath Gupta sold the property about 4 months before the date of search, neither he nor Pandit Estate were involved in the deal which was transacted through M/s. Ravinder Properties of which Ravinder Sharma was the proprietor. He stated further that “as per market information the sale consideration of ₹3.10 crores was paid”. He has thus made a clear distinction between a transaction which was put through him and the transaction which was not; with regard to the purchase of KG Farms he was able to give complete details of the transaction including the persons who were present at the time of registration, whereas he was cautious enough to state that he only had market information about the actual sale consideration when the same property was sold through another broker. When a question was then put to him as to why the Guptas did not contact him, which would have been the most natural thing to do, when the property was being sold and he was also asked to state whether he was contacted and whether any price was being mentioned by them, he answered in the affirmative and stated that the Guptas had asked Pandit Estate to search for a buyer in the price range of about ₹3.25 crores.

39. In answer to question No.10, Suraj Bhan Sharma furnished the details regarding the purchase of Jyoti Farms in Vasant Kunj in August/ September, 1995. The relevant details regarding the transaction were given by him in answers to question Nos.10 to 13 are as follows: -

“Q-10: Please intimate about the other transaction done in real estate through M/s Pandit Estate for Shri Kedar Gupta, Rajender Gupta?”

Ans: Farm at Vasant Kunj measuring 2.5 Acres land and build-up area of 5000 sq.ft. (double storied). This farm house was purchased in Aug/Sept. 1995, for a total consideration of ₹2.6 crore (Two Crore and Sixty lacs). The property was purchase (sic.) from Shri M.K.Subba. An amount of ₹26.10 Lacs (Twenty six lacs and ten thousand) was paid through cheque and remaining amount of ₹233.90 lacs (₹ Two hundred thirty three lacs and ninety thousand only) was paid in cash.

Q-11: Please give the address and telephone no. of Shri M. K. Subba?

Ans: Shri M. K. Subba is residing at Mehrauli, Gurgaon Road near, opposite new Mangla puri, Mehrauli, New Delhi.

Q-12: What is the amount of commission earned by M/s Pandit Estate on the aforesaid deal (i.e. Jyoti Farm house)?

Ans: We did not receive any commission from guptas. They gave an assurance that we will be fully compensated in any next deal done from them. However, an amount of ₹2.6 lacs (₹ Two Lacs sixty thousand only) was taken from Shri M.K. Subba.

Q-13: Is Jyoti Farm house deal was finalized? What was the token amount received by you and was the modality for balance payment?

Ans: ₹5 lacs in cash was paid at the time of deed in my presence and remaining amount was agreed to be paid in 2-3 months time.”

40. He further stated that though all the cash payments were not made in his presence, but all the cash and cheque payments were made in the presence of either him or Dharam Pal Sharma, a partner of Pandit Estate. This reply was given to question No.14. However, though this question was asked only in the context of Jyoti Farms transaction, Suraj Bhan Sharma volunteered information about KG Farms also, even though questions relating to KG Farms had been completed with question No.7. He stated, going back or recalling the purchase of KG Farm, that token money of ₹5,00,000/- was paid by Rajinder Gupta to Ashok Kakkar when the deal was settled and further payments in cash were made over a period of 3 months and further that all cash payments were made by the buyer to the seller either in his presence or in the presence of Dharam Pal Sharma.

41. From the answers to question No.15 and 16, it is seen that Suraj Bhan Sharma had acted as broker, in his capacity as an associate or a person “sitting in the office” of Pandit Estate, in several property transactions and the register found at his residence during the search contained the details of the commission income earned by him in these transactions as well as other transactions.

42. The statement of Suraj Bhan Sharma discussed above, it may be readily appreciated, is a compendious one giving full details about the purchase of KG Farms and Jyoti Farms by the assessee Kedarnath Gupta from Mani Kakkar and M. K. Subba respectively. In the retraction statement given by him under oath on 10.03.2000 in connection with the assessment of Rajinder Gupta, he has disowned the statement made earlier by stating that it was given in a very confused state of mind and under tremendous pressure without understanding the implications and without verifying the facts from the owners of Pandit Estate. Further his wife was also not well at that time and he was, therefore, not in a fit condition to think with clarity. He, therefore, had no option but to agree to whatever the officer of the search party told him to do. But when a opportunity came his way in the course of the search operation on M. K. Subba in June, 1999, who is the person who sold Jyoti Farms to Kedarnath Gupta, he came forward to state the correct and true facts. These are the reasons given by him for retracting his earlier statement. When he was asked to confirm the earlier statement about the assessee purchasing KG Farm for ₹2.49 crores and Jyoti Farm for ₹2.60 crores, he could not remember what he had stated earlier and stated that he had kept on doing what was told to him by the officers of the search party and that he did not have any knowledge of any cash being paid over and above the stated consideration for the two farm houses. He also denied having ever received any commission from Rajinder Gupta and denied being associated with Pandit Estate, though he admitted that Dharam Pal Sharma, who was associated with Pandit Estate was a distant relative. He stated that he only helped Pandit Estate in the documentation work occasionally, on request. These statements made on 10.03.2000 were followed by an affidavit dated 11.03.2000.

43. We have no doubt that the retraction is motivated by ulterior considerations and that whatever Suraj Bhan Sharma stated in the earlier statement made on 27.08.1998 discloses the correct facts. The reason given for retraction is flimsy as rightly pointed out on behalf of the Revenue. If there was any pressure from the

officers conducting the search, there was nothing which prevented Suraj Bhan Sharma from taking up the matter with the higher officials who monitored the search or even if that was not possible, he could have always filed a written complaint with the higher officers of the income tax department after the completion of the search. He did nothing of that sort and we are asked to believe that he waited for almost 18 months and for a search to take place in the premises of M. K. Subba to retract the statement. It is not possible to believe that all the facts and figures which he gave in his statement made on 27.08.1998, the date of search, were a figment of imagination. Nobody can possibly give such elaborate details of the property transaction unless he was closely involved in the deal and was privy to all the details relating to the deal including the cash and cheque payments. We see no reason to give any credence to the retraction of Suraj Bhan Sharma.

44. We may now examine the statement of Rajinder Gupta, the brother of Kedarnath Gupta. This was given on the date of search on the premises on 27.08.1998. Question No.13 and 14 and the answers thereto are as under: -

“Q-13: Please let us know about the purchase of K.G. Farm & Jyoti Farm?”

Ans: K.G. Farm was purchased with begning (sic) of the years 1995 from Shri Ashok Kakkar for a sum of ₹2.49 Crores and the property shown of ₹2.6 Crores from Shri Subhash Sharma house at Mehrauli, Gurgaon Road. Shri Ahsok Kakkar resides at Greater Kailash-II, Jyoti Farm transaction was finalized in the month of Aug/Sep.95. Both the documents were registered at Vikas Sadan, INA. These details were brokered through the Pandit Estate Shri S.B. Sharma and Shri Dharam Pal Sharma. The K.G. Farm house is located at Village Jaun Pur, and Jyoti Farm is located at Vasant Kunj. Area of both these farm gouses (sic.) is approximately 2.5 Acres.

Q-14: Please let us know what is the present ownership status of these two properties?

Ans: The farm house called the K.G. Farm has sold around 6-7 months back through Shri Ravinder Sharma of Ravinder Properties for a consideration of ₹3.10 Crores to Mr. Kumar Sarv Priya vihar, alias

Mr. Darshan Kumar Khosla. The other property called Jyoti Farm is still with us.”

45. It will be noticed from the above that in material particulars his statement matches with the statement of Suraj Bhan Sharma. He has also stated that the deals were brokered through Pandit Estate, Suraj Bhan Sharma and Dharam Pal Sharma. The other parts of the statement are not relevant. This statement was, however, retracted by Rajinder Gupta in a letter (undated) alleged to have been written by him to the ADI (Investigation) Unit-II, New Delhi. Here again the reason given for the retraction is that the authorised officers unreasonably compelled him to indirectly admit that the consideration paid for the two farm houses which belong to his nephews (sons of Kedarnath Gupta), was much more than what was declared. Possibly in order to circumvent the embarrassing situation that Suraj Bhan and Ravinder Sharma had also mentioned the real consideration paid by the assessee for the two farm houses, Rajinder Gupta stated in the letter that it was the authorised officers of the search party who told him that those two brokers have admitted in their statements as to what the real consideration was and that they told him that it would be safe for him to corroborate their statements so as to get immunity against any penal action which may be taken against him in the event of the story of the brokers being proved correct. There is nothing on record to support this allegation of Rajinder Kumar Gupta. If he felt threatened by the authorised officers, he could have complained to the higher officials of the income tax department if not during the search, but once the search was closed. His retraction is unconvincing and we are unable to act on that basis.

46. We may now examine the statement of Dharam Pal Sharma given by him during the search of his premises on 27.08.1998. He stated that Suraj Bhan Sharma was distantly related to him and that he was also engaged in part-time property dealing. He admitted that he also came and sat in the office of the Pandit Estate and carried on his independent property dealings. Question No.12 and the answer thereto are relevant and are reproduced as under: -

“Q-12: Please let us know about the pruchses (sic) of K.G.Farm & Jyoti farm?”

*Ans: These five transaction were brokered by us for Rajender Gupta with drafts ***** bearings. In the first case gupta’s purchased farm house from Shri Ashok Kakkar & in the other the farm house called Jyoti farm was purchased from Shri M.K. Subba. I have seen details statement of Shri S.B. Sharma recorded u/s 132(4), wherein he has mentioned in details about one said transactions. I have also personally discussed the same with Shri S.B.Sharma and I fully abide by whatever he had stated about these transactions in short an amount of ₹2.49 Crore for K.G.Farms and ₹2.6 Crores for Jyoti Farm was paid by Guptas for the purchase of the same.”*

47. It will be seen from the above reply that he was shown the statement of Suraj Bhan Sharma recorded under Section 132(4) and he chose to corroborate the same after discussing with Suraj Bhan Sharma.

48. We have thought it fit to discuss the statements of Rajinder Kumar Gupta, Suraj Bhan Sharma and Dharam Pal Sharma in some detail since the main plank of the argument of the Revenue is that the conclusions of the Tribunal are perverse. There is nothing in the order of the Tribunal to show how it considered the statements made at the time of the search to be unreliable and what reasons prevailed upon them to hold that the retractions supported by sworn affidavits were genuine and should be upheld. It is also not clear as to what the Tribunal means when it says that no other material was placed on record by the Assessing Officer in support of the claim that the assessee had made undisclosed investment. The statements are good material on which the conclusions can be drawn. Several decades back the Supreme Court held in the case of *Gauri Prasad Bagaria v. CIT*, (1961) 42 ITR 112 that the statement of a person constituted good material on which a finding can be based. In the present case the statements, as we have noticed, are fairly elaborate and corroborate each other in material particulars. There is no evidence of any threat or coercion from the officers of the search party and the allegation of the deponents to the contrary remains

unsupported. They did not choose to complain against any high handed behavior of the authorised officers. It is also not known as to what the Tribunal means when it says that neither the vendors of the properties have admitted to receiving any money over and above the stated consideration nor any extra ordinary cash was found in the course of the search. It is common knowledge that both the buyer and seller of the real estate are interested in secrecy about the on-monies that pass between them in these transactions and it would not accord with the normal course of the human conduct or probabilities to expect a seller of the property to admit before the authorities to having received on-monies. It was not in the interest of either M. K. Subba or Mani Kakkar to admit in their assessment proceedings that they received on-monies in respect of the sale of the farm houses to Kedarnath Gupta. It is, therefore, not a relevant consideration that there was no admission by the seller of the property that he received on-monies from the buyer. The non-seizure of any substantial amount of cash during the search is also not relevant in the case of the buyer of the property. He has actually parted with the cash and if at all, the unaccounted monies can only be found with the seller and that too only if swift and prompt action is taken. If there is a time-lag between the date of the transaction and the date of the search the chances of unaccounted cash being found in the possession of the seller will also dwindle drastically. In the present case the transaction took place in the year 1995 in respect of both KG Farms and Jyoti Farms; there was no search of Mani Kakkar's premises and her assessment was also made only under Section 158BD. The search in the case of M. K. Subba was in June, 1999 (23.06.1999). By that time almost 4 years had passed from the date of the transaction and almost 10 months had passed from the date of the search made in the premises of Rajinder Kumar Gupta. There was a long time gap and thus the chances of the cash being found in the premises of the seller had dwindled. In any case there is nothing on record to show whether any cash was seized from the M. K. Subba in the course of the search of his premises. Thus the statement of the Tribunal that the vendors did not admit to having received on-monies and that no substantial cash was seized in the course of the search of Rajinder Gupta or the others

cannot constitute a valid ground for holding that no unaccounted monies were involved in the transaction. The fact that the assessee submitted a valuation report from the registered valuer and also provided comparable cases of the sale in the adjoining area is entitled to some weight, but they cannot be clinching evidence in favour of the assessee. These are vital aspects which the Tribunal has omitted to take into consideration; on the contrary it took into consideration irrelevant material such as retractions, absence of any statements by the sellers of the properties that they received on-monies and the fact that there was no seizure of any “extra ordinary” cash during the search. The Tribunal overlooked that the statements made during the search were made spontaneously and contained complete details of the property deals.

49. The fact that the assessee was not afforded an opportunity to cross-examine the deponents is neither here nor there because as pointed out rightly on behalf of the Revenue, the witnesses of the Assessing Officer had turned hostile and had retracted their statements and also filed affidavits in support of the retractions. In other words, what a cross-examination would have brought out was achieved by the retractions and the affidavits and, therefore, it would be idle on the part of the assessee to complain of any violation of the rules of natural justice. It is a different matter that we have not accepted the retractions.

50. On the question of retractions, in *Commissioner of Income-tax v. Lekh Raj Dhunna*, (2012) 344 ITR 352 (P&H) it was held by the Punjab & Haryana High Court that where there is no explanation as to why the statement which was retracted in the course of the assessment proceedings was not withdrawn earlier, the Assessing Officer was justified in drawing the presumption against the assessee and in making the addition. It was observed as under: -

“Thus, in view of sub-sections (4) and (4A) of section 132 of the Act, the Assessing Officer was justified in drawing presumption against the assessee and had made addition of ₹ 9 lakhs in his income under section 68 of the Act. The onus was upon the assessee to have produced cogent material to rebut the aforesaid presumption which he

had failed to displace. The assessee retracted from the said statement, vide letters dated November 24, 1998, and March 11, 1999, during the course of assessment proceedings. However, no value could be attached thereto in the present case. In case the statement which was made by the assessee at the time of search and seizure was under pressure or due to coercion, the assessee could have retracted from the same at the earliest. No plausible explanation has been furnished as to why the said statement could not be withdrawn earlier. In such a situation, the authenticity of the statement by virtue of which surrender had been made at the time of search cannot be held to be bad. The Tribunal, thus, erred in concluding otherwise. The Tribunal, therefore, was not justified in reversing the order of the Assessing Officer which was affirmed by the Commissioner of Income-tax (Appeals) also.”

51. For the aforesaid reasons, we are of the view that the Tribunal erred in endorsing the order of the CIT (Appeals) deleting the addition of ₹4,71,05,000/- made by the Assessing Officer for unexplained investment in KG Farms and Jyoti Farms. The findings of the Tribunal have been arrived at, with respect, by ignoring relevant material and by taking into consideration irrelevant material. Its conclusion is such that no person properly instructed on facts and law would have come to. We accordingly answer the first substantial question of law in ITA No.713/2008 in negative, in favour of the Revenue and against the assessee.

52. The third substantial question of law is consequential to our answer to the first question. Accordingly, that is also answered in the negative, in favour of the Revenue and against the assessee.

53. The fourth question raises the point of perversity, which, for the reasons given above is answered in the affirmative in so far as it relates to the first and third substantial questions of law are concerned.

54. The second substantial question of law is whether the Tribunal was right in confirming the deletion of the addition of ₹19,35,769/- made on account of undisclosed capital gains on sale of land at Jaipur Highway. We have already

discussed the relevant facts and extracted the conclusion of the Tribunal. It has been found by the Tribunal on the basis of material found during the search that a part of the land in Jaipur Highway, which was purchased in the financial year 1994-95, was sold in the financial year 1996-97 on which the assessee declared capital gains of ₹1,57,098/-. The balance of the land was proposed to be sold in the financial year 1997-98 but the deal did not mature as the buyer Azaad Coaches Pvt. Ltd. did not make the payments as promised and the title to the land did not get transferred. The property continued to remain with the assessee. The unpaid cheques were found during the search which was indication enough that no payments were received by the assessee in respect of the land proposed to be sold. This evidence, as rightly found by the Tribunal, was not controverted by the Revenue on the basis of any other material or evidence. The Tribunal rightly observed that the Assessing Officer could have made inquiries from Azaad Coaches Pvt. Ltd. to find out whether any payment was made for the land and whether the title to the land had actually passed to that company. It cannot be controverted that there can be no liability to capital gains tax without the transfer of the property in the relevant previous year within the meaning of Section 2 (47) of the Act. The learned Senior Standing Counsel made a passing mention of Section 53A of the Transfer of Property Act as incorporated in Section 2 (47)(v) of the Act. However, there is no evidence of possession being handed over to the above company; in any case there is no passing of consideration as the unpaid cheques were found during the search. Thus some of the essential conditions of Section 53A of the Transfer of Property Act is missing. We are unable to find fault with the order of the Tribunal on this point. It is based on the seized material which has been rightly taken into consideration. The Tribunal has not ignored any relevant material or circumstance nor has it taken into account any irrelevant material in agreeing with the CIT (Appeals) that the addition was unjustified. In this view we answer the second substantial question of law in the affirmative, in favour of the assessee and against the Revenue.

55. We now turn to ITA No.892/2008 which concerns the assessment of Mani Kakkar who sold KG Farms to Kedarnath Gupta. As noted earlier, the Tribunal has merely followed its order in the case of Kedarnath Gupta to delete the addition of ₹2,27,80,000/- made to the capital gains on the sale of KG Farms and consequently to delete the addition of ₹2,50,000/- made on account of undisclosed brokerage paid by the assessee. The relevant part of the Tribunal's order is as under: -

“We have heard the rival contentions of both the parties, perused the records and carefully gone through the orders of the tax authorities below.

6. *In the instant case, the important fact to be noted is that the CIT(A) while deleting the addition in the case of assessee, Smt. Mani Kakkar, i.e. the seller, observed that in the case of the purchaser of the land alongwith the super structure, Shri Kedar Nath Gupta, the addition was deleted by the CIT(A) on the reasoning that there was no corroborative positive evidence except the statements of two brokers recorded by the search party to show that undisclosed income was invested by the assessee in the purchase of the lands. In that very order it was even observed that the statements of those two brokers have also not been confronted to the assessee. The CIT(A), thereafter, concluded that once addition made in the case of the purchaser, Shri Kedar Nath Gupta, has been deleted by the CIT(A) for the same very transaction involving the assessee as a seller no addition can be made in the case of the assessee.*

7. *Now, it is brought to the notice of the Tribunal by the learned AR for the assessee that the ITAT vide consolidated order passed in the case of the purchase, Shri Kedar Nath Gupta etc., has upheld the order of the CIT(A) regarding deletion of the addition in the case of the purchaser, Shri Kedar Nath Gupta, with regard to the investment in the purchase of the land in I.T.(SS) A. No. 298/Del/2003 [Block assessment period 1.4.1988 to 27.8.1998]. Further, that in view of the order (supra) of the Tribunal once addition in the case of the purchaser, involving the same transaction has been deleted by the CIT (A) and the same having been upheld by the Tribunal no addition can be made in the case of the seller for the same truncation (sic.).*

8. *Learned DR for the Revenue was fair enough to concede to the above submissions of the learned AR for the assessee.*

9. *In this view of the matter and respectfully following the decision (supra) of the Tribunal, it is held that the CIT(A), in the existing facts and circumstances of the case of the assessee, has rightly deleted the impugned addition made by the Assessing Officer. Accordingly, the order of the CIT(A) in this regard is upheld and Ground No. 1 of the appeal of the Revenue is rejected.*

10. *Now, we shall deal with Ground No. 2 of the Revenue's appeal relating to the addition made on account of undisclosed brokerage of ₹ 2,50,000/- paid by the assessee in respect of the sale transaction of the land.*

11. *Once the addition made by the Assessing Officer involving sale consideration of ₹ 2.49 crores has been deleted by the Tribunal while disposing of Ground No.1 herein above in this order, hence, for the same transaction the alleged brokerage paid @ 1% amounting to ₹ 2,50,000/- is also liable to be deleted and the same is deleted accordingly and the impugned order of the CIT(A) in this regard is upheld. The Ground No.2 of the Revenue's appeal is rejected."*

56. Since we have held in ITA No.713/2008 (CIT v. Kedarnath Gupta) that the Tribunal was not right in holding that no on-monies were paid by Kedarnath Gupta for purchasing KG Farms from Mani Kakkar and that the addition made by the Assessing Officer was justified, it follows that the addition made to the computation of the capital gains in the assessment of Mani Kakkar should also be held to be correct as also the consequential addition of undisclosed brokerage. However, in deference to the arguments of Mr. Anoop Sharma, learned counsel for Mani Kakkar, we proceed to examine them.

57. It was contended that there was no material or evidence, except the sale deeds, found during the search under Section 132 in the premises of Rajinder Gupta and, therefore, there was no basis for the view that the assessee received more than what was shown in the sale deeds as consideration for KG Farms. It is true that the case of the assessee was initiated and proceeded under Section 158BD of the Act and that there was no search of the assessee's premises under Section 132. However, the

statements of the brokers as well as that of Rajinder Gupta constituted relevant evidence for the purpose of drawing the conclusion that the assessee received ₹2.49 crores for the sale of KG Farms and not merely ₹18,70,000/- as shown in the sale documents. We have referred to those statements while dealing with the case of Kedarnath Gupta. We have also referred to the retractions and held that the retractions cannot be accepted as convincing.

58. Mr. Sharma's argument that the statements made under Section 132 (4) do not constitute material seized during the search does not take him further. Obviously, no material was seized from the assessee's premises for the simple reason that the assessee was not searched under Section 132. The search was carried out in the premises of Rajinder Kumar Gupta and the brokers. The assessment of the assessee, Mani Kakkar, was initiated as a consequence thereof, under Section 158BD of the Act. The sale documents were found during the search of the premises of Rajinder Gupta and they disclosed that the property was sold by the assessee. Accordingly, a satisfaction note was recorded and proceedings were initiated under Section 158BD against the assessee. There is no bar on the statements recorded under Section 132 (4) being used in the assessment of the assessee made under Section 158BD of the Act. Even if it is assumed, without deciding the question one way or the other, that a statement made during the search under Section 132 (4) of the Act does not amount to material seized during the search, we do not think that the income tax authorities are debarred from using those statements in the assessment proceedings made under Section 158BD. In the very nature of things, there cannot be any seized material in the case of the person who is assessed under Section 158BD. It can be argued that even an assessment under Section 158BD has to follow the procedure prescribed by Section 158BC as it is mandated in the former. Section 158BC prescribes the procedure for the block assessment. However, section 158BB(1) which governs Section 158BC requires that the undisclosed income of the block period shall be computed in accordance with the provisions of the Act "*on the basis of evidence found*

as a result of search or requisition of books of accounts or other documents and such other materials or information as are available with the Assessing Officer and relatable to such evidence.....”. The crucial words are “*relatable to such evidence*”. Therefore, the other materials or information which are gathered by the Assessing Officer post search can form the basis of the computation of the undisclosed income, provided they relate to the evidence found during the search. This requirement has to be read into the case of an assessment which is governed by Section 158BD.

59. If we examine the case of Mani Kakkar in the light of the foregoing discussion the position that emerges is this. In the course of the search in the case of Rajinder Gupta, certain documents were found which related to the purchase of KG Farms from the present assessee. These documents showed that the assessee had sold KG Farms which consisted of land with superstructure for ₹18,70,000/-. In all there were 10 registered sale deeds dated 03.05.1995, each for ₹1,87,000/-. The authorised officer conducting the search also recorded the statement of Suraj Bhan Sharma who himself was searched under Section 132. In the statement he had admitted that the property was purchased by Kedarnath Gupta in the name of his son for a total consideration of ₹2.49 crores, out of which ₹26,00,000/- was paid in cheque and the remaining amount of ₹2.23 crores was paid in cash. This statement of Suraj Bhan Sharma was put to Mani Kakkar in the course of the block assessment proceedings for rebuttal. The statement of Suraj Bhan Sharma cannot be said to be unconnected to the material found during the search, namely, the registered sale deeds showing that the aggregate sale price of KG Farms was ₹18,70,000/-. The provisions of Section 158BB (1) are thus satisfied in the sense that the statement of Suraj Bhan is relatable to the evidence found during the search.

60. The contention of Mr. Anoop Sharma that in the case of Kedarnath Gupta, a valuation report from registered valuer and comparable cases of property transactions in the nearby areas were furnished which would indicate that the price received by the assessee reflected the market price has already been dealt with by us while deciding

the case of Kedarnath Gupta. These may be relevant pieces of evidence but are not clinching, more so in the light of the other evidence brought on record.

61. Mr. Sharma finally contended that the findings of Tribunal are findings of fact and the High Court which is seized of the appeal against the order of the Tribunal is bound by those findings as Section 260A of the Act permits of an examination of the order of the Tribunal only on substantial questions of law. This proposition is unexceptionable, but it is subject to the exception, namely, that the findings of fact recorded by the Tribunal are not binding on the High Court if they are such that no reasonable person properly instructed in law would have come to or they are not based on the evidence or material on record or the findings are rendered ignoring relevant material or taking into account irrelevant material. Such findings are liable to be characterized as perverse findings and the High Court is not bound by them. In the case of Mani Kakkar the Tribunal has merely followed its earlier order passed in the case of Kedarnath Gupta; there is no independent examination of the assessee's case. This is perhaps natural because Kedarnath Gupta and Mani Kakkar are two sides of the same coin in as much as the property KG Farms was sold by Mani Kakkar to Kedarnath Gupta. However, the findings of the Tribunal recorded in the case of Kedarnath Gupta, to which we have alluded earlier, are not findings which are binding on us, for the reasons already stated by us while dealing with the appeal in the case of Kedarnath Gupta. We, therefore, do not feel incommoded by those findings.

62. Having said all that, there is an important aspect of the case of Mani Kakkar which needs to be dealt with. Section 158BD requires the Assessing Officer, while dealing with the assessment proceedings of the person searched, to record a satisfaction note if any undisclosed income noticed by him in the course of the assessment proceedings of the searched person under Section 158BC does not belong to that person but belongs to somebody else. After recording the satisfaction to that effect all the seized documents and the relevant record has to be handed over to the Assessing Officer having jurisdiction over the person to whom such undisclosed

income belongs. In his case also the assessment proceedings would be governed by Section 158BC. In the present case the assessee has challenged the satisfaction note of the Assessing Officer on the ground that it does not meet the requirement of Section 158BD. Several objections to the satisfaction note were raised by the assessee before the CIT (Appeals) and these are all noted by him in paragraphs 4 to 4.17 of his order. It is important to remember that recording of the satisfaction by the Assessing Officer is a jurisdictional pre-condition for the assessment of the person under Section 158BD. Before the CIT (Appeals), it was contended by the assessee that there was no satisfaction note recorded by the Assessing Officer having jurisdiction over Kedarnath Gupta who was subjected to search. It was also pointed out that despite a specific request made to the Assessing Officer, the satisfaction note was not supplied to the assessee. It was pointed out that if there is no recorded satisfaction, the Assessing Officer did not have the jurisdiction to make an assessment under Section 158BD. Reliance was placed on the judgment of this Court in *Amity Hotels Pvt. Ltd. v. CIT*, (2005) 272 ITR 75 wherein it was held that the satisfaction has to be recorded by the Assessing Officer having jurisdiction over the person who was searched, before issuing any notice under Section 158BD of the Act. According to the assessee if no satisfaction was found recorded, the entire assessment proceedings made under Section 158BD would be without jurisdiction. These contentions were forwarded by the CIT (Appeals) to the Assessing Officer for a remand report. The Assessing Officer submitted in the remand report that the requisite satisfaction was recorded on 20.11.2002 and a copy of the satisfaction note was submitted to the CIT (Appeals). It was also submitted by the Assessing Officer that notice under Section 158BD was issued to the assessee on the basis of satisfaction note. The satisfaction note is reproduced in para 4.16 of the order of the CIT (Appeals) and the same is reproduced below: -

“Smt. Mani Kakkar W/o Sh. Ashok Kakkar

Add: 12 Convenient Centre S.E.S. Hauz Khas, New Delhi.

It was suggested in the appraisal report (in the Ball Bearing Group of cases) that Sh. Ashok Kakkar has sold a farm house known as K G Farm to Sh. Kedar Gupta for a consideration of 2.49 Crores therefore, assessment proceedings were initiated issuing notice u/s 158 BC of the I T Act, 1961. During the course of assessment, it was noticed that the K G Farm was not sold by Sh Kakkar but, it was actually sold by Smt. Mani Kakkar w/o Sh. Ashok Kakkar. To investigate whether any capital gain has been declared or not declared by Smt. Mani Kakkar notice u/s 158BD of the I T Act is to be issued in the case of Smt. Mani Kakkar.

A separate proposal for centralization of these cases are being sent to the DGIT through the CIT Central 1, New Delhi as Smt. Mani Kakkar is not assessed with undersigned.

(Sd/)
Avinish Kumar,
Dy. Commissioner of Income Tax,
C Cir. 6, New Delhi”

In response to the remand report, the assessee pointed out that the satisfaction note merely noted that the Assessing Officer wanted to investigate whether any capital gain has been declared or not by Mani Kakkar and it was only for this purpose that notice was being issued under Section 158BD. The contention was that the satisfaction note did not record that the Assessing Officer assessing Kedarnath Gupta was satisfied, even prima facie, that the undisclosed income thrown up during the search belonged to the assessee herein, namely Mani Kakkar.

63. The CIT (Appeals) found merit in the contentions raised by the assessee and held as follows: -

“4.18 I have considered the reasoning given by the AO and the submissions made by the Ld Counsel. As far as the reasoning of the Ld. Counsel that no satisfaction has been recorded by the AO of the person searched i.e. Sh. Kedar Gupta is concerned, the same is not tenable. This is so because the first satisfaction which is for centralization of case of the appellant has been recorded by DCIT, CC-6, March 02. In the second satisfaction in November 2002, the AO has issued u/s 158BD on the basis of reasons recorded by his predecessor. The issue that needs examination is whether the initial

satisfaction can be said to be satisfaction within the meaning of sec. 158BD or not. A plain reading of this satisfaction indicates that the same was recorded for the purpose of centralization of the case of appellant and to investigate whether any capital gain has been declared by the appellant. Notice u/s 158BD of the Act was to be issued to the appellant. In the second satisfaction, the succeeding officer relied on this reason and issued the notice. In other words neither the first officer nor the second one ever recorded the satisfaction that any undisclosed income of the appellant has been detected as a result of search u/s 132 in the case of Sh. Kedar Gupta. I am also in agreement with the submissions of Ld. Counsel that notice u/s 158 BD was issued on 6.1.2003 which is much beyond the date of assessment in the case of Sh. Kedar Nath Gupta and decision of Hon'ble Gujarat High Court in the case of Khandu Bhai Vasantji Desai (Supra) is thus applicable to the facts of appellant.”

64. Despite having held that the Assessing Officer had not recorded the satisfaction that any undisclosed income of Mani Kakkar had been detected in the course of the search under Section 132 in the case of Rajinder Gupta/ Kedarnath Gupta, the CIT (Appeals), apparently for the sake of completeness, proceeded to examine the merits of the additions of ₹2,27,80,000/- and ₹2,50,000/- made by the Assessing Officer towards undisclosed capital gains and undisclosed brokerage respectively. We have already noted that on merits also he decided in favour of the assessee, deleting the two additions, following the order of the CIT (Appeals) dated 31.03.2003 passed in the case of Kedarnath Gupta who purchased the KG Farms. In the appeal filed by the Revenue against the order passed by the CIT (Appeals) on 22.12.2005 in the case of Mani Kakkar, the assessee herein, the grounds taken were as follows: -

“1. On the facts and in the circumstances of the case, the Ld. CIT (A) has erred in deleting the addition of ₹2,27,80,000/- made on account of undisclosed capital gain ignoring the fact that the addition has been made on the basis of seized material.

2. On the facts and in circumstances of the case, the Ld. CIT (A) has erred in deleting the addition of ₹2,50,000/- made on account of undisclosed brokerage ignoring the fact that the addition has been

made on the basis of seized material and the statement of broker Shri Suraj Bhan Sharma.”

65. It will be seen from the grounds that the Revenue did not challenge the decision of the CIT (Appeals) that the Assessing Officer erroneously assumed jurisdiction under Section 158BD of the Act as no satisfaction, as required by the section, had been recorded by the Assessing Officer. If the Assessing Officer lacked jurisdiction, that should have been the end of the matter so far as the present assessee is concerned. But either for the sake of completeness of the contentions or for whatever reasons, the CIT (Appeals) also disposed of the appeal on merits, in favour of the assessee. The Revenue chose to file an appeal against the order of the CIT (Appeals) only with regard to the merits of the additions; no ground was taken against the decision of the CIT (Appeals) on the jurisdictional aspect. This aspect of the matter was pointed out by Mr. Anoop Sharma, the learned counsel for Mani Kakkar. He contended that the Revenue having failed to take any grounds of appeal before the Tribunal with regard to the jurisdictional aspect or to even urge before the Tribunal on this aspect after obtaining the leave of the Tribunal under Rule 11 of the Income Tax Appellate Tribunal Rules, 1963, was precluded from putting forth its submissions on merits before the High Court which would only be an academic exercise. He contended that the issue of jurisdiction to make an assessment under Section 158BD attained finality when the CIT (Appeals) decided the issue in favour of the assessee and no appeal was filed against that decision of the CIT (Appeals) before the Tribunal by the Revenue. He, therefore, contends that the entire appellate exercise before this Court, so far as Mani Kakkar is concerned is purely academic and infructuous.

66. The contention of Mr. Sharma cannot be resisted and must be given effect to. It is trite law that if the Assessing Officer does not have the jurisdiction to make an assessment, whatever decision he takes on the merits of the matter and all subsequent proceedings, including appellate proceedings, vis-à-vis the merits of the matter are only an academic exercise or a nullity, not having any legal effect. It cannot be

disputed that the recording of the satisfaction that the undisclosed income found in the course of the search belongs to another person is a pre-condition for validly assuming jurisdiction to make an assessment under Section 158BD. The CIT (Appeals) has held that since no satisfaction to this effect was recorded by the Assessing Officer making the assessment of Kedarnath Gupta, the Assessing Officer having jurisdiction over Mani Kakkar had not validly assumed jurisdiction to issue a notice under Section 158BD and to make an assessment on her. This decision of the CIT (Appeals) has become final, the Revenue not having taken up the issue before the Tribunal. Only the merits of the additions were taken up by the Revenue before the Tribunal since they were also decided in favour of the assessee. It, therefore, follows that the assessment under Section 158BD cannot be upheld. We must however acknowledge that in our order dated 08.02.2012, when this point was sought to be raised before us at the time of the admission of the appeal and framing the substantial questions of law, we did observe as follows: -

“5. Learned counsel for the respondent assessee submits that the CIT (Appeals) had deleted the addition on various grounds, including the legal ground that there was failure to record satisfaction as mandated under Section 158BD. He submits that the Revenue had raised two grounds of appeal before the tribunal and did not specifically challenged the findings recorded by the CIT (Appeals) with regard to satisfaction and assumption of jurisdiction. He relies upon order dated 18th November, 2011 passed in ITA No.942/2009, Commissioner of Income Tax versus Orient Crafts Limited.

6. We are not inclined to accept the said submission in view of the grounds of appeal, which have been referred to in paragraph 1 of the order passed by the tribunal. The grounds of appeal raised by the Revenue were comprehensive and wide enough. However, it will be open to the respondent assessee to raise all legal contentions and issues as are permitted and allowed in terms of Order XLXI, Rule 22 of the Code of Civil Procedure, 1908.

7. List for hearing in the category of “After Notice Miscellaneous Matters” on 1st May, 2012.”

67. When further arguments were heard after framing the substantial questions of law we are satisfied that the assessee cannot be precluded from raising the issue not only because it is an issue concerning jurisdiction to make the assessment, but also because the grounds raised by the Revenue before the Tribunal, which we have extracted earlier do not appear to us, on closer scrutiny, to be so wide as to cover the jurisdictional aspect of the case as well. In any case our observations made on 08.02.2012 were made at the time of admission of the appeal and while framing the substantial questions of law and constituted only a tentative view and cannot be said to be final and conclusive. In any case arguments were heard on that aspect. Moreover, the provisions of Order 41, Rule 22 of the Code of Civil Procedure, 1908 do not appear to permit the assessee to raise the legal contention by way of a cross appeal because that provision can apply only to a situation where there has been a finding against the respondent in the Court below. In the case before us there is no finding on the jurisdictional aspect by the Tribunal. Furthermore that issue having become final against the revenue after the order of CIT (Appeals), the stage for it to argue in favour of jurisdiction could have been an appeal or cross-objection to the Tribunal. Section 253(4) enables the Assessing Officer to prefer a cross-objection to the Tribunal against a part of the order of the Appellate Commissioner. Having elected to forgo that option, the Assessing Officer therefore cannot be allowed to urge that point at this stage. To such a situation, Order 41, Rule 22 cannot have any application and no cross appeal can be filed thereunder. The only way the respondent can resist the appeal is to show that the appeal itself is devoid of substance and must be dismissed as an academic exercise since the appellant (the Revenue) has failed to challenge before the Tribunal the jurisdictional aspect decided against it by the CIT (Appeals). Mr. Anoop Sharma has done only that and we think he is entitled to do so. We accordingly hold that the appeal filed by the Revenue in ITA No.892/2008 should be held to be infructuous on the ground that the issue of lack of jurisdiction to make an assessment under Section 158BD has attained finality and has remained unchallenged.

68. We are aware that there may appear to be some incongruity between our decision in the case of Kedarnath Gupta and in the case of Mani Kakkar, in as much as it produces the result that Kedarnath Gupta paid on-monies to Mani Kakkar and is, therefore, assessable on them, but the same on-monies cannot be assessed in the hands of Mani Kakkar because the Assessing Officer did not properly assume jurisdiction. However, we cannot ignore the crucial aspect of jurisdiction which can be set up as a defence at any point of time.

69. For the above reasons we answer the two substantial questions of law in ITA No.892/2008 in favour of the assessee and against the Revenue.

70. In ITA No.948/2008, 707/2008 and 706/2008, which relate to the assessments of Ashok Kedarnath Gupta, Rohit Kedarnath Gupta and Nitin Kedarnath Gupta, there is no need to frame any substantial question of law and decide them since the assessments in those cases were made on protective basis, the substantive assessments being made in the case of Kedarnath Gupta. Those cases were tagged with the appeals in the cases of Kedarnath Gupta and Mani Kakkar since they were connected to them, particularly the case of Kedarnath Gupta.

(R.V. EASWAR)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

AUGUST 31, 2012
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