

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

Reserved on: 06.01.2017
Pronounced on: 11.04.2017

+ **ITA 478/2007, C.M. APPL.6708/2007**

ANUJ CHAWLA

..... Appellant

versus

COMMISSIONER OF INCOME TAX, NEW DELHI Respondent

+ **ITA 1246/2007**

COMMISSIONER OF INCOME TAX

..... Appellant

versus

CENTAUR IMPEX P. LTD.

..... Respondent

+ **ITA 479/2007, C.M. APPL.6717/2007**

CENTAUR IMPEX P. LTD.

..... Appellant

versus

COMMISSIONER OF INCOME TAX, NEW DELHI Respondent

+ **ITA 495/2007, C.M. APPL.6783/2007, 6784/2007 & 10687/2008**

ASHOK CHAWLA

..... Appellant

versus

COMMISSIONER OF INCOME TAX, NEW DELHI Respondent

+ **ITA 817/2007**

COMMISSIONER OF INCOME TAX

..... Appellant

versus

ASHOK CHAWLA

..... Respondent

+ **ITA 988/2007**

CENTAUR HELICOPTER SERVICES P. LTD.

..... Appellant

versus

COMMISSIONER OF INCOME TAX

..... Respondent

+ **ITA 822/2008, C.M. APPL.9763/2008**

VIJAYA RAJAGOPAL

..... Appellant

versus

COMMISSIONER OF INCOME TAX, NEW DELHI Respondent

- + **W.P.(C) 4299/2007, C.M. APPL.8052/2007, 4030/2008, 3249/2009, 11752/2010, 2091/2014, 356-57/2017 & 499/2017**
 ASHOK CHAWLA & ORS. Appellants
 versus
 DIRECTOR OF INCOME TAX & ORS. Respondents
- + **W.P.(C) 7962/2009, C.M. APPL.4413/2009**
 ASHOK CHAWLA Appellant
 versus
 COMMISSIONER OF INCOME TAX Respondent
- + **W.P.(C) 3517/2011**
 ASHOK CHAWLA Appellant
 versus
 COMMISSIONER OF INCOME TAX Respondent
 Through : Sh. Roopchand, Advocate, for Sh. Ashok Chawla.
 Sh. Ankit Swarup and Ms. Tanya Swarup, Advocates, for applicants, in C.M. Appl.356-57/2017.
 Sh. Ashok. K. Manchanda, Sr. Standing Counsel, for Income Tax Department, in Item Nos. 1 to 10.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE R.K. GAUBA

MR. JUSTICE S. RAVINDRA BHAT

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1. This batch of appeals under Section 260-A of the Income Tax Act ("the Act" hereafter) and writ petitions arise from scrutiny assessments made pursuant to a search and seizure operations conducted in 1995. The assessees are aggrieved in one batch of matters; the Revenue claims to be aggrieved, in two appeals. The essential facts are narrated below, after which individual grounds urged in the various appeals and writ petitions would be dealt with.

2. The main assessee/appellant, Ashok Chawla (hereafter called by his name) had served in the Indian Army from which he retired in 1984 and went on to found M/s. Centaur Helicopter Services (P) Ltd (hereafter “Centaur”) with him and his wife as its directors. Centaur was an authorized dealer of M/s. Schweizer Aircraft Corporation USA (“Schweizer” hereafter) for purchase and sale of its helicopters in India. Ashok Chawla was also consultant to M/s. Capitex Impex (P) Ltd. for manufacture of leather goods. The Revenue had claimed or rather suspected that Ashok Chawla used to earn income from defense deals and contracts, which he did not account for in his income tax returns and he instead claimed to be an army pensioner and salary income earner from Centaur. On 31st August, 1995, a search and seizure operation was carried out by the Revenue in his premises as well as those of his companies, concerns and individuals associated with him. This resulted in seizure of several documents, cash and other materials.

3. Ashok Chawla and others who received notices, pursuant to the search, filed block returns for the period AY 1985-1995. Ashok Chawla declared undisclosed income to the extent of ₹39,86,916/-. In the assessment order by the Assessing Officer (AO), the income assessed for the block period that was brought to tax was ₹17,77,29,193/-. Ashok Chawla’s appeals to the Income Tax Appellate Tribunal (ITAT) failed; it dismissed his appeals by the impugned order, dated 26th December 2006. That impugned order is the subject matter of challenge in ITA 495/2007. Initially, the validity of search proceedings had been challenged in a writ petition, W.P.(C) 1518/1997, which was disposed of by an order dated 1st August, 2001, which expressed the opinion that since the issues concerned were factual, the ITAT ought to consider and return findings on them. The ITAT, in its impugned

order, held that it lacked competence to examine the validity or legality of search and seizure. Therefore, Ashok Chawla, in a freshly filed writ petition (W.P.(C) 4299/2007) questions the validity and legality of search and seizure proceedings, on diverse grounds, including that it was motivated by **legal malice**, *mala fides*, tainted inasmuch as it was premised upon the information of a former partner and his ability to bring about pressure, and technical grounds such as improper search in the absence of proper witnesses and lastly, that the assessment order was made by the officer who searched the premises. Ashok Chawla has also challenged the order of the ITAT, declining his application for rectification of its main order in his appeal (in his application MA 57/Del/2007 before the tribunal) by filing W.P.(C) 3517/2011.

4. The additions that were the subject of Ashok Chawla's appeals were discussed in relation to Ground Nos. 5 to 16. These were on account of various materials seized during the search and seizure operations listed below:

- (1) A slip of paper which contained the description of an account (No. 53745) with Discount Bank Trust Co, Switzerland (Discount Bank, for short);
- (2) Visiting card of Dr. VRS Fricker, Vice President of Discount Bank;
- (3) Telephone bills containing a record of several calls between Ashok Chawla and Dr. Fricker;
- (4) A typed telex addressed to Fricker which instructed the latter to transfer US \$ 40,000 to an account with National Westminster Bank and for also instructing him to transfer US \$ 10,000 to Anuj Chawla, son of Ashok Chawla. The document sought confirmation within an hour.

(5) A request for bank guarantee (dated 4th October, 1994) made to Discount Bank, in relation to an account number (No. 53745 ZV) clearly stated on the face of the document, which requested for issuance of a guarantee for GBP £100,000 favouring Duncan Lawry Ltd, London securing all accounts and securities held with the bank. The relevant portion of the said letter reads as follows:

“In this connection, I/we assume entire responsibility towards you for this co-operation as well as for all consequences of any kind or nature which may arise for you due to the issuance of this guarantee of your surety.”

(6) Documents showing that ₹1,15,72,668/- was paid for by Ashok Chawla, to purchase two Schweizer helicopters. This included a letter dated 31.08.1994 by Rocky G. Peter of Schweizer Corporation, USA addressed to the Director General, Civil Aviation, showing that they had been sold to Centaur. The letter stated that Schweizer had “recently sold two Schweizer 300C/Model 269 C helicopters to Centaur Helicopter Services in Delhi..” and that the helicopters were manufactured under production certificates of a particular type or standard which was acceptable in India. There was another letter, i.e of Micheal D. Oakle of Schweizer who was its treasurer, dated 3rd January, 1995 which indicated that the two helicopters were sold to Centaur for a consideration of US \$ 196,166.10 pursuant to its purchase order and that at the latter's request, it was being held by the said seller at its (Centaur's) risk at its premises; further the letter stated that the title had passed to the said buyer, i.e. Centaur.

(7) A letter dated 30.08.1994 from Centaur stating that payment would be made to Schweizer between 5th and 9th September, 1994. The letter stated

that the invoice would have to be changed to that of United India Airways Ltd. The assessee who had written the letter, stated further that:

“Also, a provision will have to be made to show that the source of funds for these Helicopters which I am claiming that these Helicopters are being brought on lease and therefore quarterly payments have to be repaid to you through the lease charges till the full payment along with interest of 7% has been made.”

(8) Documents showing Ashok Chawla's possession of a property at 105, Queens Road, Reading, Berkshire, London also showed renewal of insurance in respect of certain assets in that flat; further a letter by Ashok Chawla's wife to HUDA, disclosing that he lived in that flat, were also found and seized.

5. The assessee/Ashok Chawla's explanation was that the account number with Discount Bank, Switzerland was of M/s. Capitex of which he was only a consultant. The AO and the ITAT rejected this argument by saying that Swiss bank accounts were inherently kept confidential and that a consultant could not be expected to be in possession of details; furthermore, Ashok Chawla's frequent telephonic conversations with the Vice-President of the bank painted another picture. In addition, the bank had been asked to issue a guarantee in relation to that account. Another letter asking for transfer of funds from that account to other accounts, such as that of his son, were found. The assessee had also argued that a search party had planted documents - a plea that was rejected by the Tribunal. The Tribunal held that there was no material or correspondence found or disclosed showing linkage of the account with M/s. Capitex or any documents showing authorisation from M/s. Capitex to issue bank guarantees with respect to two Schweizer helicopters. The assessee had argued that M/s. Capitex had made the

payments. The AO and the Tribunal relied upon the documents of Rocky. G. Peter of Schweizer and the Treasurer of Schweizer USA's letter dated 03.01.1995, which confirmed that helicopters were sold to the assessee. The assessee's letter asking for change of invoice favoring United Airways India Ltd. was also relied upon. The assessee's explanation was that he had an office in Moscow maintained by Allan Saltmer, Director of M/s. Capitex, and his business associate and that he was visiting Moscow at the behest of the principal, i.e. M/s. Capitex and Allan Saltmer for which he would be given money was rejected. The Tribunal said, *"in case Mr. Saltmer had only occasionally given money for payment on his behalf, how a detailed and elaborate account of all expenses were found from the premises of the assessee. No logical explanation is coming forth. Moreover, no reliable and authenticated evidence has been produced showing that the office had been maintained by Saltmer and that expenses were declared in his account."*

6. With respect to the London flat, the assessee argued that the property was the rented office of M/s. Capitex and relied upon a letter. Such material was held to constitute ex-facie evidence to rebut the presumption that the assessee in fact owned the property and had paid substantial amounts towards it. The ITAT concluded that Ashok Chawla's explanation was an attempt to fabricate an explanation for the seized documents.

7. In Ground nos.7 and 8, the assessee had challenged the addition of ₹53,84,258/- explaining that the source of money was his son's income which he earned when he worked as a flight and ground instructor. The ITAT examined the appeal of Sh. Anuj Chawla, son of Ashok Chawla and held that the additions made to his tax returns were correctly done. The amounts were deleted by the ITAT on protective basis. The next ground, i.e.

No.8 related to an addition of ₹51,12,392/- in the bank guarantee of M/s. Centaur Impex on 01.11.1994, a transfer from Centaur Helicopters. This was found to be a foreign remittance by the AO, wrongly credited in the account of Centaur. According to Ashok Chawla, the source was an advance received from Centaur Impex by Thrustom Telecom UK for garment export. The addition of this amount was upheld in the case of Centaur Impex. Therefore, the protective assessment in the case of Ashok Chawla was deleted. Likewise, in respect of ₹40,65,086/- which was a credit in the account of Centaur Impex on 20.02.1995, the explanation given was that the source of deposit was an advance from M/s. Aviv Exports Moscow for export of leather jackets worth US\$ 130,000 in terms of the contract dated 30.09.1995. The AO held that the explanation was unsatisfactory and added it to the account of Centaur Impex on substantive basis and to the account of Ashok Chawla on protective basis. This was again like in the case of previous accounts, deleted.

8. After analyzing the documents and materials seized, the findings of the AO and the submissions of the parties, the ITAT rendered specific findings with respect to each heads of income and addition in para 20.1 to 20.7.7. It rendered its decisions with respect to certain miscellaneous items and grounds between para 21.1 to 21.9. The Tribunal concluded (para 7.10 and 20.3) that M/s. Capitex was only a front put up by Ashok Chawla to explain various transactions and could not be given any importance. It upheld the rejection of his explanation with respect to purchase of helicopters on behalf of M/s. Capitex. The ITAT therefore, upheld the findings that Ashok Chawla was bound to explain the source of payment - which he had not given satisfactorily. The discount allowed, i.e. \$ 85,364

was held to be unsustainable and was therefore, deleted by following the reasoning that such amount merely reduced the value of the helicopter of which the assessee was the purchaser. Likewise, the claim of reimbursement of ₹1,37,79,186/- from Rakesh Gupta for which the Ashok Chawla gave an explanation was held to be unsatisfactory. This amount included a sum of ₹54.78 lakhs on account of payment to the helicopters and ₹29,51,186 on other counts. Reliance was placed upon payments made by M/s. Capitex - clear from a letter dated 08.03.1995 and MOU dated 05.07.1993 - both of which had been seized. These showed that M/s. Capitex had agreed to pay US \$ 1,66,000 to Swidnik. The ITAT therefore held that addition was unjustified only on the basis of statement of Rajesh Gupta. However, the ITAT also returned findings:

"20.4On careful consideration, we find that addition has been made not only on the basis of statement of Shri Rakesh Gupta. Details of these expenses had been found from the premises of the assessee. There is no dispute that the seized documents showed payment of Rs.5478000/- for purchase of Sokol Helicopter. The assessee is therefore, required to explain the source of these payments by a reliable evidence. As regards the letters from M/s. Capitex, we have already examined this aspect in paras 7.10 of this order and concluded that capitex is only a front company put up by the assessee to explain various transactions which had been seized. Several blank letter heads of the said company were found from the premises of the assessee. As mentioned in the earlier part of the order, a Swiss bank account number was also found in respect of which the assessee had issued a guarantee letter, which can be done by only an owner but the assessee had procured letters from Capitex claiming that the account belonged to them. The assessee is either the owner of the Capitex or the latter had been put up as a front to explain huge unaccounted money earned through different deals. The letters from Capitex cannot

therefore, be accepted as reliable evidence. No credible evidence such as copies of bank account/audited accounts has been produced regarding the source of payment for purchase of Sokol Helicopters by anybody else. The explanation of the assessee regarding source of payment has therefore, been rightly rejected by the AO"

9. The ITAT further upheld the commission at 15% not disclosed by the assessee from the documents seized, on account of supply of Kraz 260 trucks to Ukraine - ₹24,67,50,000/- and a contract for MI platforms for a consideration of US\$ 50,40,000/-. The addition made in these two accounts was ₹44,21,2500/- and ₹2,41,92,000/-. The addition made on account of reimbursement of expenses from Rakesh Gupta was ₹29,51,186/-.

10. On an overall analysis, the ITAT sustained the addition of ₹7,37,00,000/- as against addition of ₹14,98,66,417/- made by the AO which was the subject matter of Grounds 5, 6, and 10 to 16. The other substantial amounts brought to tax was ₹ 4 lakhs seized from the locker of ND Vault, Defence Colony - ₹2,36,000/- and ₹25,00,000/-. On these, the findings of ITAT are as follows:

"21.7 We have perused the records and considered the rival contentions carefully. The explanation of the assessee regarding the cash of Rs.4 lacs found from locker no.1403 is not convincing. It is not understandable as to why the assessee will withdraw money from bank account at different points of time and keep it in cash with his father to be deposited later in the locker. The money found in the locker was also found to be in the same denomination of Rs.500/- and serially numbered. The explanation has, therefore, been rightly rejected by the AO and the addition made on this account is upheld. As regards the cash of Rs.20,000/- found from locker no.6003, the amount being small, the explanation of the assessee in our view has to

be accepted. The addition made on this account is accordingly deleted.

21.8 As for the liquor bottles, it is an undisputed fact that large quantity of liquor had been recovered during the course of search. The explanation of the assessee that the same were bought on the visits abroad or gifted by friends abroad and brought to India but his pilot son, is not supported by any evidence and has to be rejected. However, as we have held that the assessee was engaged in the business of defense and other deals at international level on a large scale, the consumption of liquor has to be considered as normal business expenditure in connection with such deals. As we have already determined the income from such deals, no separate addition on account of such expenses is required to be made. The addition made on this account is, therefore, deleted.

21.9 The seized documents have shown that the assessee contributed a sum of Rs.25 lacs in cash towards the setting up of the company - Centaur Impex. The explanation by the assessee is that the contribution has been made through Centaur Helicopters and the method adopted was to have cross holdings of shares worth Rs.25 lacs in two companies and the same money was shown as capital in both the companies. However, this does not explain the source of investment made by the assessee. The claim of the assessee that the peak amount was only Rs.5 lacs, has not been examined by the AO. In our view, this aspect requires fresh examination. We, therefore, consider it appropriate to restore the matter to the file of the AO for passing a fresh order after examining various details given by the assessee and after allowing opportunity of being heard to the assessee."

11. Since these appeals and writ petitions were pending for a long time and had been repeatedly adjourned at the request of one or the other party, and on account of the Court's inability to devote substantial time, questions of law had not been framed. Therefore, with the assistance and consent of the

learned counsel, the appeals were taken up. The following questions of law are formulated in ITA 495/2007, W.P.(C) 4299/2007, W.P.(C)7962/2009 and W.P.(C) 3517/2011.

- (i) Whether there was legal justification for the search and seizure operations;
- (ii) Did the ITAT fall into error in concluding that there was no infirmity in the framing of the assessment by an officer who was involved in the search and seizure operations?
- (iii) Whether Ashok Chawla was given sufficient opportunity during the assessment proceedings;
- (iv) Whether the additions sustained by the ITAT are justified or are unreasonable or perverse.

First question: Legality of the search and seizure operations

12. Attacking the validity of the search, Ms. Premalata Bansal, learned senior counsel relied upon the decision of the Allahabad High Court in *Shyam Jewellers & Anr. v. Chief Commissioner of Income Tax* 1992 (196) ITR 243 which held that there should be sufficient objective material to believe that a person is in possession of money, bullion or jewellery to record satisfaction under Section 132 of the Act, justifying a warrant for search of the premises. Similarly, learned counsel relied upon *ITO v. Seth Brothers* 1969 (74) ITR 836 (SC) for a similar proposition. The Supreme Court had also observed that the provision cannot be construed as offering arbitrary authority upon the revenue officers. The Commissioner or the Director should have reason to believe consequent to information that statutory conditions for exercise of power to search exist. The reasons should be recorded and should precede the authorisation. If and only if the officer

has reason to believe that there are books or accounts otherwise useful for or relevant to proceed under the Act would be justified in authorizing the search and seizure of such material. The court had then stressed that, "*since by the exercise of the power a serious invasion is made upon the rights, privacy and freedom of the tax payer, the power must be exercised strictly in accordance with law and only for the purpose of which the law authorises it to be exercised*".

13. Learned senior counsel for the assessee also relied upon the judgment in *HL Sibal v. Commissioner of Income Tax* 1975 (101) ITR 112 (P&H), to say that information is not something which is part of the existing record but something outside of and new. Furthermore, such information should be relevant for concluding a satisfaction that they would be material, in the course of an assessment. Learned counsel relied upon the observations that if an assessee has been regularly producing his books of accounts before the authorities who is accepting those books and has been maintaining in the proper course, it would be unjustified use of power to issue search warrant for production of those books of accounts unless information is to the effect that he has been keeping some secret books as well. The judgment in *Harnet Singh v. UOI* 1993 04 ITR 334 (P&H) and *CIT v. Davy Ashmore India Ltd.* 1982 137 ITR 456 were relied upon.

14. It was furthermore submitted that the *post facto* justification in the form of findings concluded has been sufficient to justify a search, would be of no avail. Learned senior counsel stressed here that the precondition for exercise of the power is the reasonable plea as to the existence of material and the recording thereof in the official file, as a necessary step towards the issuance of the warrant. Learned senior counsel submitted that in the facts of

this case, the entire effort of the Revenue was to justify its unlawful search in the premises of the assessee and his relatives and associates by such post facto justification. It was submitted that search and seizure proceedings were in any event motivated by malice on account of the unlawful pressure that was sought to be put upon Ashok Chawla at the behest of one of his associates who was closely related to an Income Tax Commissioner. Since he did not budge and did not accede to the demands made, the premises were unlawfully searched. In this his previous associate, Sh. Rakesh Gupta appeared to have a prime involvement.

15. It was argued on behalf of the assessee by learned senior counsel that one concern, M/s. Mals Deoghar Airlines Limited was incorporated in India, headquartered in Delhi in 1992 by 7 individuals, four of whom were Indians and three Russians with authorized share capital of ₹1 crore. The initial share capital issued was only ₹7000/- in August 1992. The company was later on taken over by Rakesh Gupta; Ms. Sudesh Kapila, wife of KK Kapila, IRS; Sh. Vinod Jain and Sh. Yogesh who were appointed as Directors in various companies in 1993. The company showed its balance sheet with paid up capital of ₹50,07,000/- and share capital money of ₹31,00,62,500/-. The assets showed aircraft valued at ₹31,00,62,500/-.

16. It was argued that Rakesh Gupta approached Ashok Chawla with the balance sheet and induced him to join the Airlines and acquire 50% of its issued paid up share capital. He therefore, invested ₹22,50,000/- (₹ 5 lakh shares @ ₹ 4.5 per share). Ashok Chawla and his wife later joined the Board of Directors in 1994. In 1995 he became aware that the aircraft worth ₹31 crores shown in the balance sheet never existed and was owned by a Russian company, being Mals Airways and that the share application of ₹31 crores

shown in the balance sheets were bogus. Ashok Chawla, therefore, submits that he was cheated by being induced to invest ₹22.5 lakhs in Mals Airways. Yet another company, i.e. United India Airways Ltd. was incorporated in 1993. Sudesh Kapila; Suresh Batra and Rakesh Gupta took over this company from him in 1994. On 07.09.1994, an agreement was entered into between Rakesh Gupta and Ashok Chawla by which ₹21 lakhs was invested by Ashok Chawla in the company, i.e., United India Airlines Ltd. towards share capital during the period November 1994 to March 1995. The assessee, however, was never consulted. Thus, Ashok Chawla invested ₹43 lakhs in these two companies. He later became aware that both the companies were non-functional and was induced to make substantial investments in them by Rakesh Gupta.

17. It was submitted that Rakesh Gupta and K.K. Kapila agreed to pay ₹1.34 crores to Ashok Chawla. This, however, did not materialize and on 06.07.1995, the assessee agreed to pay ₹25 lakhs to K.K. Kapila and Rakesh Gupta who were to leave the two companies. As the amounts were to be paid by 30.08.1995, Ashok Chawla could not arrange for the payment but instead subjected to write off his premises on 31.08.1995. Relying upon these allegations, it was urged that the search was dented by *mala fides* and motivating complaints in the form of information engineered by K.K. Kapila at the behest of Rakesh Gupta.

18. It was submitted that the appellant cannot be left remediless and that there has to be proper adjudication of these facts, i.e. the manner in which warrant was issued and reliance on information that preceded it. Though extensive arguments were made on behalf of the assessee, the ITAT declined to return a finding on account of its special bench ruling in *Promam Limited*

v. DCIT 2005 (95) ITD 489. It was submitted that the search in the present case was used as a claw to damage the assessee's business reputation and goodwill and to wreck vengeance and to destroy him. Furthermore, the search itself was dented on account of various irregularities during the process such as planting of evidence in the form of letters, documents, illegalities in the form of absence of independent witnesses, forcible entry into the premises of Ms. Vijaya Rajagopal etc. Learned counsel submitted that despite requests, the assessee had not been permitted and denied access to any inspection of the documents seized. Therefore, they in fact make any meaningful submissions to utterly unjustified inferences and findings based on conjectures, drawn by the Revenue, which formed the basis of AO's decision.

19. Learned counsel submitted that such violation of principles of natural justice vitiates the order and relied upon *L.R. Gupta v. UOI* 1992 194 ITR 32. Learned senior counsel relied upon the letters dated 22.11.1995, 26.08.1996 and 17.09.1996.

20. In the course of hearing, the Revenue had produced copy of the documents and material as well as file notings which formed the basis for the warrant in a sealed cover, no doubt, a perusal of the impugned order of the Tribunal establishes that it declined to pronounce upon the validity of the search proceedings on account of its previous special bench ruling as well as the judgment of this Court in *M.B. Lal v. CIT* 279 ITR 298. No fault therefore, can be found with the impugned order.

21. At the same time, this Court has to nevertheless examine independently whether the search proceedings were indeed justified having regard to the entirety of the circumstances. Since elaborate submissions were

made in this regard, in fact the petitioner had approached this Court earlier by filing W.P.(C)1518/1997, which was subsequently disposed of. The validity of the warrant and the search proceedings is the subject matter of challenge in W.P.(C) 4299/2007.

22. It is sufficient to record that the material, which led the Director of Income Tax to authorise search, was based upon information supplied. These spoke of substantial assets held by the assessee, which was not accounted for as well as receipts, which were not declared. The assessee's principal submissions with respect to reliance upon such material primarily stems from Ashok Chawla's narrative of his being duped by Sh. Rakesh Gupta and Ms. Kapila. According to him, the inducements extracted through investments in M/s. Mals Airways and M/s. United India Airways Ltd. were duds and that he sought a return of that money when it was discovered that he was duped. Apparently the two individuals agreed to return the amounts and the sum of ₹1.34 crore was initially agreed. Later they expressed their inability to do so and a counter offer was made by Ashok Chawla to buy out their shares from the two companies by acquisition and pay them ₹25 lakhs by 30.8.1995. As far as the narration goes, the argument is plausible. The difficulty, however, for this Court to accepting these submissions is that such contentions is entirely unsubstantiated. To compound the matter, there are internal contradictions as well. If in fact, M/s. Mals did not possess the assets declared, i.e the form of aircraft valued at over ₹31 crores, Sh. Ashok Chawla was undoubtedly justified in asking for the return of the money. Thus, his argument with respect to the counter offer for ₹25 lakhs to acquire the shareholding of the two companies begs an explanation. In other words, if the entire corporate entity is a dud and in fact a shell company (as Mas and

United India Airways Ltd. were, allegedly according to the assessee Ashok Chawla) in which he had substantial holding, there was no explanation forthcoming as to why after asking for return of that money for exiting from that company, he wished to acquire the entire shareholding of the company. Furthermore, if indeed, the assessee wished to exit from United India Airways Ltd. (of which he was a substantial shareholder) there is no explanation from him as to why he wrote - which he did, a letter to Schweizer Helicopter, requesting that the invoice for the helicopter be made out in the name of the United India Airways. Therefore, this Court is unpersuaded in regard to the arguments that the motivation for the complaint that led to the search were on account of some business falling out or differences between him and his earlier colleagues. As to why in fact the submissions of the assessee that search was at the behest of Ms. Kapila's husband since he was powerfully placed in the Income Tax department at that stage, did not appear to be well founded. In fact Mr. Ashok Chawla was well aware of Ms. Sudhir Kapila was the wife of senior Income Tax official despite which he did not involve himself in the business of two companies where he invested. More importantly, the allegation that Sh. K.K. Kapila brought pressure and used his official position in an unfair manner can no doubt be made; yet it has to be established by credible evidence. In this case, there is no evidence whatsoever - either direct or in the form of letters or material, giving Ms. Sudhir or her husband, or circumstantial evidence. Having regard to these factors, the Court holds that the plea that the search was on account of motivated allegations is without substance.

23. It was argued that Ravi Kumar, one of *panchas* at 2 Under Hill Road, Civil Lines, New Delhi, was shown as witness at C-517, Defence Colony

garage where search was started on 31.08.1995 at 08.10 PM and was concluded on 01.09.1995 in the morning at 4.30 AM. Counsel for the assessee argued that in his affidavit, Ravi Kumar stated that the search at Civil Lines was started at 08.00 AM and concluded at 09.55 PM on 31.08.1995. The search of Defence Colony was at about 11.00 PM after conclusion of search at Civil Lines which is at a distance of 20 KM approx. Thus the search was already started 03 hours prior to his reaching at Defence Colony. Mr. Ravi Kumar was not aware of the activities which took place between 08.10 PM to 11.00 PM. This wholly improbabilizes the search proceedings. Counsel next submitted that the raiding party had taken ingress by forcing the locked premises of Defence Colony Garage open, when the keys were already available with Ms Vijaya Rajagopal, the assessee's manager, who was present at the relevant time at 2, Under Hill Road, Civil Lines, Delhi where the search and seizure operation was being carried out simultaneously. By the time, Ms. Vijaya Rajagopal reached Defence Colony premises, the search party had already bunched-up all the papers and made Vijaya to sign on the dotted lines. These irregularities, said counsel were committed deliberately so as to plant certain documents with impunity without any check and control either by the *panchas* or by Ashok Chawla's representatives.

24. Rule 112(6) of the Income Tax Rules requires the authorized officer to call upon two or more respectable persons to witness the search. The *Panchnama* drawn at C-517, Defence Colony, shows two witnesses: Mr. Ravi Kumar and Mr. D.S. Mann. Mr. Ravi Kumar reached at the venue after three hrs of commencing the search. Moreover, D.S. Mann was allowed to go to sleep and was called only in the morning when the search was going to

be wound-up. It is argued that this renders the search illegal and also *prima facie* provided opportunities to the search party to plant documents handed over by Shri Rakesh Gupta to ADI Shri D R Chaudhary.

25. Counsel stated that it is evident from the *panchnama* at Defence Colony Garage that the raiding party had not offered themselves for personal search nor was it declined, obviously because no one was present to do so, on behalf of the assessee. This again is a circumstance, suggestive that the raiding party enjoyed complete freedom in the matter of planting of the documents.

26. It was urged that due to harassment at the instance and motivation of Rakesh Gupta, Petitioner lodged complaint against him before IB, CBI and Police Dept. He also filed civil & criminal case against him i.e. Civil case for recovery of money introduced in 'Mals' & 'United' & criminal case for cheating him. Facing with these trials, Sh. Rakesh Gupta offered compromise through Court, according to which he offered demand draft of ₹1 lakh & two post dated cheque for ₹45 lakhs. During the period Rakesh Gupta also filed an affidavit to the effect that he handed over a slip of hand written papers about a Discount Bank with Account number and its address to the revenue officials. This slip was planted in the seized documents during search. It is not identified -either by witnesses or by the authorized officer or Chawla's representative.

27. It was also urged that no one was present at E-6, Anand Niketan, New Delhi, except one employee - Bhagirathi Sibbal, the receptionist. The search commenced on her arrival at 9 AM; however, the *Panchnama* stated that the search commenced at 8 AM. Kishan Lal and Hayat Singh, peons were the

witnesses. Mrs. Sibbal and Kishan Lal deposed in affidavits that the search party did not offer themselves for search.

28. These irregularities, said counsel, were intentionally committed so as to plant certain documents. The affidavit of Sh. Rakesh Gupta; Mukul Sarin tape recorded conversation between the assessee, Sh. Rakesh Gupta and Sh. Anil Kapur S.I. of crime branch, prove the planting of documents. The respondent denied even the assessee's request for inspection of file and connected material on the basis of which the search was authorized. Thus, the petitioners are unable to make an effective, meaningful presentation of the case.

29. At the outset, this court notices that the primary evidence of tape-recorded conversation, i.e., the tapes, were not produced before the ITAT during the hearing. The ITAT concluded therefore that such taped conversation could not be taken as reliable evidence. The "planted material" contained Swiss bank account particulars and other related documents. The assessee had relied upon an affidavit of Rakesh Gupta and one Sh. Mukul to argue that this material had been handed over later. Significantly these affidavits were of much later vintage. In fact during the course of appellate proceedings, Ashok Chawla had relied upon an affidavit of Sh. Rajiv Gupta dated 06.07.2000 which affirmed the contentions of a previous affidavit dated 10.3.1997. A copy of another affidavit has also been placed on the record, which too is dated 06.07.2007 in which Rakesh Gupta states, *"I have settled off important disputes/differences with Sh. Ashok Chawla amicably with the help and intervention of common friends."*

30. Now these documents bespeak of a post-search settlement, between Ashok Chawla and Rakesh Gupta, which appears to have motivated Sh.

Rakesh Gupta to have alleged with respect to the planting the material. No attempt was made during the course of hearing, before the AO or the ITAT to suggest that the material allegedly planted had not been included in the inventory or list of items recovered. Furthermore, none of the letters contemporaneously written by Ashok Chawla, in fact alleged such conduct. As a result, this Court holds that these allegations like in the case of *mala fides* have not been proved. The record also shows that after Chawla lodged a criminal complaint for cheating, the parties reached a settlement, involving payment of amounts by Rakesh Gupta. The credibility of the affidavits relied upon, by Ashok Chawla, in these circumstances is suspect, to put it mildly.

31. As far as the alleged illegalities in the timing of the search, or that it was improbable that searches took place at two places - argued with certain vehemence by learned senior counsel, this court is of the opinion that nothing much turns on these so called infirmities. For one, the factual nature of these allegations, i.e., as to timing, as to presence of certain *pancha* or recovery witnesses, renders it somewhat difficult to substantiate. From a broader angle, whether the search occurred at 08:00 AM or an hour later, is left for verification by affidavits signed by the witnesses much after the event. Their signatures on the *panchnamas* at the time of the search belie the affidavits. These arguments at best could establish some irregularities, for which the Revenue might have had a perfect or plausible explanation, if made in time. However, even if accepted at face value, such facts cannot undermine the search, the recoveries effected or in any case and the validity of the block assessments. The assessee/Ashok Chawla's submissions in this regard are therefore, rejected.

Second question: Did the ITAT fall into error in concluding that there was no infirmity in the framing of the assessment by an officer who was involved in the search and seizure operations

32. The assessee's argument on this aspect is that Mr. D. Roychowdhary, who was a party to the search and seizure proceeding, was also tasked or authorized to complete the assessment. This, in the assessee's submission, displayed a conflict and also resulted in a bias which vitiated the assessment order itself. The Revenue resisted this argument, successfully, and placed reliance on the ruling of the Supreme Court in *Union of India v Vipin Kumar Jain* 260 ITR 1 (SC). In that case, an argument identical with the one advanced by the appellant/assessee here was accepted by the High Court. The Revenue's appeal was allowed by the Supreme Court, which observed, in its judgment as follows:

“6. In our view, this appeal must be allowed. The several sections which have been cited by the appellants would show that the Assessing Officer has, either directly or by virtue of his appointment or authorisation by a superior authority under the Act, been given the power of gathering information for the purposes of assessment. The mode of gathering such information may vary from the mere issuance of a notice under Section 142 to the more intrusive method of entry and search envisaged under Section 133A and 133B and seizure under Section 132. The appellants are also correct in their submission that in the absence of any challenge to any of these provisions, it was not open to the High Court to have disabled the Assessing Officer from discharging his statutory functions. What the High Court has done is to read limitations into the Act and to qualify the jurisdiction of the Assessing Officer and the powers of the authorities empowered to appoint the Assessing Officer as an authorised officer under Section 132 without any foundation for such conclusion being laid in any manner whatsoever by the writ petitioners.

7. Apart from the absence of any challenge to the provisions of the Act relating to the jurisdiction of the Assessing Officer to carry out the search under Section 132 subject to his being appointed as an authorised officer thereunder, we are of the view that there is no question of imputing or presuming a bias where action is followed under the section. The Assessing Officer is required to assess the income on the basis of facts as found. Such finding may be through any of the provisions referred to above. The only limitation on his drawing a conclusion from the facts as found is the requirement of allowing the assessee an opportunity of explaining the material. Even though it could be said that in a sense since the Assessing Officer was acting on behalf of the Revenue, in discharging the functions as an Assessing Officer, he was a party to the dispute, nevertheless there is no presumption of bias in such a situation. As said in *H.C. Narayanappa v State of Mysore*:

"It is also true that the Government on whom the duty to decide the dispute rests, is substantially a party to the dispute but if the Government or the authority to whom the power is delegated acts judicially in approving or modifying the scheme, the approval or modification is not open to challenge on a presumption of bias. The Minister or the officer of the Government who is invested with the power to hear objections to the scheme is acting in his official capacity and unless there is reliable evidence to show that he is biased, his decision will not be liable to be called in question, merely because he is a limb of the Government."

8. There is nothing inherently unconstitutional in permitting the Assessing Officer to gather the information and to assess the value of the information himself. The issue as to the constitutional validity of a provision which permitted an examining board not only to hold an inquiry but also to take action against doctors was raised before the Supreme Court of United States in *Harold Withrow v. Duane Larkin* (43 L. Ed. 2d 712). In negating the challenge the court said;

"The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional

risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individual poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."

9. It is true that there may be cases where the outcome of the assessment may be influenced by the fact that the raiding Assessing Officer had himself in the course of the raid been witness to any incriminating material against the assessee. The Assessing Officer's decision on the basis of such material is not the final word in the matter. The assessment order is appealable under the provisions of the statute itself and ultimately by way of judicial review.

10. Finally, the courts cannot read in limitations to the jurisdiction conferred by the statutes, in the absence of a challenge to the provision itself when the language of the Act clearly allows for an ostensible violation of the principles of natural justice including the principle that a person cannot be a judge in his own cause. In Union of India v Tulsiram Patel, in recognition of this principle this court held (page 1462 of AIR 1985 SC):

"Not only, therefore, can the principles of natural justice be modified but in exceptional cases they can even be excluded. There are well-defined exceptions to the nemo judex in causa sua rule as also to the audi alteram partem rule. The nemojudex in causa sua rule is subject to the doctrine of necessity and yields to it as pointed out by this court in J. Mohapatra & Co v State of Orissa ."

11. Learned counsel also drew our attention to the fact that the assessments on the basis of material recovered under Section 132 had to be completed within a period of limitation prescribed under Section 158 BE (1) (b). The last date for completion of the assessments in the present case was October

31, 2000. The prayer of the respondents for transfer of the case from the Assessing Officer on October 11, 2000, to a new Assessing Officer in the circumstances was unacceptable and the assessment by the said Harinder Kumar was unavoidable given the limited period left for completing the assessment proceedings. The High Court has observed that this plea had not been raised by the appellant. Perhaps the appellants are correct in submitting that the fact speaks for itself. However, it is not necessary for us to give any final view in the matter having held that the sections in the Act impose no limitation on the Assessing Officer on the authorised officer being the same person and that it could not be said that action taken pursuant to such statutory empowerment was coloured, only by reason thereof, by any bias.

12. Ultimately, the question of bias will have to be decided on the facts of each case. If the assessee is able to establish that the Assessing Officer was in fact biased in the sense that he was involved or interested in his personal capacity in the outcome of the assessment or the procedure for assessment, no doubt, it would be a good ground for setting aside the assessment order. But to hold, as the High Court has that bias is established only because the authorised officer under Section 132 and the Assessing Officer are the same person is, in our view, an incorrect approach.”

33. The assessee has, in addition to relying on the circumstance that the AO was a participant in the raiding party, not placed any other material to substantiate the allegation of bias. No personal bias or malice or past history with the said official was alleged, much less proved. In the circumstances, the *ratio* in *Vipin Kumar Jain* (supra) applies. The argument that the assessment was void on account of bias, therefore, fails and is rejected.

Third question- Whether the appellant, Ashok Chawla was given sufficient opportunity during the assessment proceedings

34. The appellant/assessee alleges that he was denied opportunity to make effective submissions, inasmuch as he was not given copies of documents despite repeated requests in that regard. He has placed on the record copies of four such letters written to Commissioners and even to the Minister of Finance, voicing his grievances in this regard. The Revenue argues that this ground was never taken at the earliest point of time, nor even urged before the ITAT. It claims that the submission with respect to denial of inspection and opportunity is an afterthought, because no serious ground is urged in the main appeal, ITA 495/2007. It is only urged in one inconspicuous ground in W.P.(C)4299/2007. Counsel also points out that in the first writ petition W.P.(C)1518/1997, the ground relating to denial of natural justice by denying inspection of seized material was never taken.

35. This court is of opinion that the allegations with respect to denial of opportunity which resulted in depriving proper defense to Ashok Chawla are unfounded. At the earliest point of time when he did approach the court, in 1997 (after the assessment order) there was no ground to this effect (in W.P.(C) 1518/1997). Furthermore, even more significantly no such complaint was made before the ITAT nor such ground urged. Even in the appeal before this court, i.e ITA 495/2007, the appellant has not made out a grievance that such a plea was taken but not considered by the ITAT. These aspects apart, the court notices that the assessee was aware as to the nature of the documents seized. If he did want a copy or had been unjustifiably denied inspection, he had the means and resources to approach this court at the earliest opportunity- he clearly did not. All these rule out the possibility of denial of meaningful opportunity. This plea is consequently rejected.

Fourth question: Whether the additions sustained by the ITAT are justified or are unreasonable or perverse.

36. The additions made by AO were sustained partly by the ITAT and partly set aside. The assessee, Ashok Chawla was granted some relief. In the present set of appeals and writ petitions, learned senior counsel for Ashok Chawla urged certain broad submissions, with respect to the additions made. This court proposes to deal with each one of them.

37. Learned senior counsel argued assailing additions made with respect to the Swiss Bank account in the Discount Bank, the purchase of helicopters, commission received in defense contracts and additions on account of substantial investments in immovable properties. Learned senior counsel argued that the authorities below, i.e. the AO and the Tribunal overlooked the materials placed on the record which amounted to reasonable explanation. First commenting upon the concurrent findings that Capitex was none other than the assessee's concern, counsel relied upon a letter of 18th January 1994 which disclosed that he was authorized by Capitex to carry out negotiations on its behalf. Learned counsel also relied upon the letter of 14th August 1995 in terms of which Capitex stated that payments were made by it, a stand endorsed by Schweitzer U.S.A. Furthermore senior counsel relied upon a letter of 24th November 1995 by Capitex addressed to the income tax department in this regard. Lastly, learned counsel relied upon a letter of 16th December 1996 written to the Commissioner which clarified all the aspects.

38. Ms. Bansal stressed that the significance of these documents was overlooked and instead the Revenue placed much emphasis on the letters and copy of the telex recovered and seized from the assessee Ashok Chawla from his premises. It was stated that the letters relied on by the Revenue were

more than adequately explained and the inference drawn was wholly unjustified.

39. The letter by Capitex was written to the Commissioner of Income tax, on 16.12.1996; it stated, *inter alia* that:

" M/s Capitex Limited Picton House, Wargrage Road, Twyford Berkshire RG10 9NY, UK is a subsidiary company of M/s Inter Agraria BV Holland which is a Dutch Company of International repute and holds 66.5% of Shares of M/s Capitex Limited. The balance shares (%) is held by Mr. Alan Saltmer. Mr. Ashok Chawla does not hold any shares of this company in his name or in the name of any member of his family or his associates. Mr. Ashok Chawla has been only our consultant and advisor.

We further state and affirm that the Swiss Bank Account No. 53745zv with Discount & Trust Company Ltd. Switzerland does not belong to Mr. Ashok Chawla and as already clarified and confirmed vide para 5 of our letter dated 24.11.95 referred to above the account belong to us.

We also affirm and state that no transfer of US\$ 40,000 from our aforesaid account or any other account to National Westminster Bank PLC, LondonUK took place at any time and similarly no transfer of US\$ 10,000 to Mr. Anuj Chawla took place at any time:

*Yours sincerely,
sd/-"*

It was also submitted that Capitex had clearly stated, in its letter to the Revenue, on 26th October 1995 (responding to the latter's letter dated 20th October 1995 that

"the payment for two Schweizer 300 C helicopters questioned in your letter were made by Capitex Ltd. and negotiations were carried out by Centaur Helicopter Services Pvt. Ltd., on behalf

of Capitek Ltd., Schweizer company was instructed to provide a certificate of payment received from Capitek Ltd., and they have confirmed issuing such certificate."

It was urged, therefore, that the addition made based on the finding that Capitek was none other than Ashok Chawla's concern and that it used undisclosed foreign exchange for conducting business, was not warranted.

40. It was argued that similarly, the same letter issued important clarifications about the Sokol helicopters and other transactions such as the one relating to bank guarantee. Counsel relied on the following extracts of the said letter:

"Para 4 : Negotiations for lease of a Sokol Helicopter from Poland has been carried out with A. Chawla for UJA on our behalf and payment accordingly made by us vide contract No. UIA 236.

Para 5 : Mr. A. Chawla was authorized only once to remit 1.5million USD for Mr. Rakesh Gupta of UIA from Ca. Am Bank of Canada for negotiations and advance payment of 3 Fokkere 50 to be carried by Mr. Kevin Hajha of Capitek Ltd. and money was never received. Subsequently all his requests for authorization of any bank guarantee including one for Mr. Inderjit Singh was denied.

Para 6 : Centaur Impex is the production unit of our subsidiary leather garment Unit Alderman and regular export shipments are made according to which payment is made in advance and on shipments. The details may be obtained from Mr. Patrick Kerr. Mr. Anuj Chawla, son of Mr. A. Chawla had deposited his earning with us while in USA for transfer to India which was done accordingly.

Para. 7 : Consultancy for remittance has been made to Canara Bank, New Delhi and no other remittance has been made

anywhere else. You may obtain the details from Canara Bank, New Delhi."

41. Learned counsel for the Revenue on the other hand argued that Para 7.10 of the ITAT's impugned order specifically deals with all these aspects. It was highlighted that the tribunal took note of all the letters relied upon by the assessee, in this appeal. It was submitted that even though Capitek wrote some letters to the Revenue, it did not disclose all the materials or other significant information as to the details of shareholders and the source of funds of the company but withheld them. Details as to whether the assessee was a shareholder or a functionary or an investor in Capitek was largely left unanswered.

42. On the other hand, submitted counsel for the Revenue, the letters recovered showed decisively that the assessee was in control; he placed orders. The letter by Rocky. G. Peters and the treasurer of Schweizer clearly show that the amounts were paid by Ashok Chawla. Besides, if indeed the deal or contract was between Schweizer the seller and Capitek, the purchaser, nothing prevented the assessee from securing copies of the contract, payment remittance details, etc as that would have supported his stand. Capitek could well have provided this information which would have proved decisive. It is pointed out that two letters: the first dated 3rd January, 1995 from Schweizer and the other by the assessee, clinch the matter beyond any controversy. Counsel for the Revenue relied on the extracts of the said two letters. The first- dated 3rd January 1995, from Schweizer to Ashok Chawla, reads *inter alia*, as follows:

"W sold you a Schweizer Aircraft Model 300C Helicopter on September 20, 1994, for \$196,166.10 pursuant to your purchase order. There have been no written amendments to that

purchase order, nor any oral understanding different from the purchase order. At your request we are holding the Schweizer 300C Helicopter at your risk on our premises and title has passed to you. You have asked us to delay shipment of the 300C Helicopter so that it may be shipped during 1995.

The product has been sold to you on our normal payment terms set forth in our invoice 9477928-AC dated September 2, 1994 and there have been no modifications of those terms. The above aircraft has been paid in full."

The other letter, by the assessee, a copy of which was seized, dated 30th August, 1994, reads as follows:

"Also please note that the balance of the money due to you for both Choppers will be sent between 5th to 9 September. The delay is purely administrative as import licence has not been sanctioned which is a customary red tapism, in the Indian Government channel. Therefore, we may have to change the invoice to UNITED AIRLINES INDIA PVT LTD. who have finally joined hands with me to run an 4 Taxi Service. You had met the gentleman who wanted complete first c/ass seating which now I have made it to 50% business and 50% economy. Also a provision will have to Be made to show the source of funds for these Helicopters, which I. am claiming that these Helicopters are being brought on lease and therefore quarterly payments have to be repaid to you through the lease charges till the full payment along with interest of 7% has been made."

43. The ITAT's findings in this regard are detailed and the relevant parts thereof are extracted below:

"The assessee has explained that the account number 53745eZV with Discount Bank, Switzerland, which was found written on a slip. of paper recovered from the premises of the assessee, belonged to MIs. Capitek of which the assessee was only a consultant. This plea is not supported by the nature of documents seized. The Swiss Bank accounts are highly confidential and no one will give the account number to a

consultant. Moreover, the assessee was found in regular touch with the Vice President of the Swiss Bank as was clear from the telephone bills seized. Visiting card of the Vice President was also found from the premises of the assessee. A written instruction signed by the assessee to the bank was also found asking the bank to issue bank guarantee in relation to the said account. A letter asking the bank to transfer funds from the said account to some other accounts was also found. These have been reproduced in paras 7.3 and 7.4 earlier. Such instructions can be issued only by an owner. The claim that the bank guarantee had been issued as per authorization by someone else is not convincing as seized material do not give any such indication. Further, why someone should authorize the assessee, who was not even an employee, to issue bank guarantee in relation to his account. The claim that these documents were planted by the search party, has already been rejected by us vide para 5.3.5 earlier. It is also pertinent to note that though several documents were found suggesting that the assessee was the owner of the account, no material or correspondence was found showing linkage of account with Capitek nor any document showing authorization from Capitek to issue bank guarantee, was found. In case, the account belonged to

someone else, the assessee could have easily established the same by producing bank documents or letters from the bank. But no such evidence has been produced. Further, a last 'will' dated 15.5.1995 signed by the assessee was also recovered during search in which the assessee clearly mentioned that 'any fixed/movable assets abroad should automatically be passed on to my son Anuj Chawla, the list of which is known only to my son'. The explanation of the assessee that this was only draft 'will' and the intention was that in case any fixed/movable asset is acquired by the assessee abroad in future, the list will be known to his son is not convincing as the 'will' was duly signed and language used in the 'will' clearly shows that on the day of signing the 'will', the assessee was definitely having some fixed/movable asset abroad which was known only to his son. A copy of this will has been reproduced

latter in para 20.7. 1 . Considering the entirety of facts and circumstances such as recovery of Swiss Bank account number, the manners in which written instructions were given to the bank to issue bank guarantee charging the said account, the Will mentioned above and other material on record mentioned earlier, it will be quite reasonable to conclude that the account either belonged to the assessee or the assessee was the beneficial owner of the account. An agent of the account holder could not deal with the account in the manner noted above.

7. 11 The assessee has also explained that two Schweizer helicopters had been purchased on behalf of Capitex who had made the payment of Rs. 11572668/- But the documents seized which have been mentioned in paras 7.6 to 7.8 earlier do not support the claim. The seized letter dated 31.8.94 written by Rocky G Peter of Schweizer USA mentioned in para 7.6 clearly shows that the helicopters had been sold to Centaur Helicopter Services, a group concern of the assessee. The letter dated 3.1.1995 from the treasurer of Schweizer Aircraft Corpn. mentioned in para 7.7 earlier also confirms this. In the said letter, it was clearly mentioned that the helicopters had been sold to the assessee. Further the letter dated 30.8. 1994 from the assessee addressed to Paul Schweizer/Rocky Peter of Schweizer Aircraft Corpn. mentioned in para 7.8 clearly mentioned that the payment will be made between 5-9 Sept 1994. It was also mentioned that invoice may have to be changed to United Airlines India Pvt. Ltd.

The assessee in the said letter further showed his concern as to how transaction of sale should be reflected as a lease to show the source of fund for these helicopters and wanted to show it as quarterly payments to be repaid through the lease charges till the full payment along with interest 7% had been made. The language of the aforesaid letters clearly shows that the helicopters had been ordered and purchased by the assessee for himself for his companies fully controlled by him.

It also shows that it was the assessee who had arranged the funds because one of the letters talks of changing the invoice

from' one name to another depending upon the convenience of the assessee. it also talks of provision to be made to show the source of funding as the assessee was claiming the helicopters to have been bought on lease. Such language can be written only by the buyer concerned: with the source of funds etc. and not the consultant. Further, in case, the helicopters: had been bought on behalf of someone else, how the assessee could write that the invoice had to be changed to the name of some other Indian company or that he was claiming that these helicopters were being bought on lease. The assessee thus was exercising complete control over the property."

44. This court is of the opinion that the ITAT's finding besides being factual and concurrent, are sound given the materials on record. The assessee had relied upon replies given to the Revenue on five points by Capitek, in its letter of 26th October 1995. The Revenue's letter addressed by the assessing officer (20.10.1995) sought details on firstly whether Centaur helicopters had purchased two helicopters on behalf of M/s. Capitek for which US\$ 401595/- was paid and if so who paid it. Documents such as auditors' certified copy, certified copy of bank statements giving details of the payments; and details of total payments made along with the relevant dates of payment were sought. The letter further sought information with regard to leasing of Sokol helicopters and the contract which had confirmed that Capitek had transferred US\$166,002 to Wisik regarding the lease of one Sokol helicopter. Certified copies from the auditors of Capitek of the balance sheet and the bank statements were also sought. The last information sought was with respect to the account concerning the Discount Bank and the request for bank guarantee issued to the tune of \$100,000. The remittances to Mr. Anuj Chawla and Centaur helicopters as well as Centaur Impex (P) Ltd were also sought. The reply given by Capitek on 26th of October 1995, no doubt

discloses some information. For instance it states that the payment for the two 300C helicopters were made by it and that negotiations were carried out by Centaur on its behalf. Significantly, however, in reply to the pointed query whether Capitex paid the amount, the letter stated that should Schweizer Company USA" *was instructed to provide a certificate of payment received from Capitex limited and they have confirmed issuing such certificate*".

45. This guarded clarification in fact begs the question. The pointed query was whether Capitex made the payment and if so the details of such payments. Capitex in its reply was forthright that the two Schweizer helicopters were purchased on its behalf. Yet inexplicably it refused to provide details of bank account statements and audited statements. These gaps in the opinion of the Court justified the Revenue to conclude- on the basis of the other letters which painted a contrary picture - that Capitex was controlled by Ashok Chawla. The other letters were written by Rocky.G. Peters of Schweizer and the treasurer of Schweizer USA stated that the helicopters were ordered or purchased by the assessee, Ashok Chawla. As far as the Sokol helicopter details are concerned, the letter dated 26th October 1995 states that negotiations were carried out with Ashok Chawla acting for United Airlines or on their behalf and payment was made by Capitex. The letter also went on to state that Mr. Chawla was authorized only once to remit US\$ 1.5 million *"for Mr. Rakesh Gupta of UIA from Ca. Am Bank of Canada for negotiations and advance payment of 3 Fokkere 50"* which was to be carried out by Capitex. The letter stated that the money was never received. An identical letter was given on 24.11.1995. In addition to the details previously provided, Capitex clarified that the consultancy fee paid

was GBP £2500 and no amount over and above that was ever paid on a quarterly basis. The other material was a letter addressed to the Commissioner of Income tax by Mr. Allen Saltman, on 16th December 1996. It stated that Capitek was the subsidiary of one Inter Agra BV Holland a Dutch company and held 66.5% shares in Capitek. Allen Saltman held the balance shares. The letter stated that Ashok Chawla did not have any shareholding and clarified that no transfer to the tune of US \$ 40,000 from Capitek from a Swiss account or any other account was made to National Westminster Bank PLC and that no transfer of US \$10,000 was made to Ankur Chawla.

46. During the hearings, the counsel for Ashok Chawla had relied on an order dated 31.12.2013 of the Joint Director, Enforcement, (pursuant to notice issued to him and Centaur, dated 24.4.2002). The notice issued was under Sections 49 (3) (4) and (5) (a) of the Foreign Exchange Management Act, 1999. The order discharged the notice. The relevant parts of the order are extracted below:

"3.1 The case was heard by the undersigned on 06.12.2013 when Sh. Pramod Shankar Tiwari, Advocate appeared on behalf of the notices. During the personal hearing, the Advocate submitted that written submissions which were filed on 06.06.2006 in response to the Memorandum, were again filed along with their letter dated 09.09.2013. He requested to drop the proceedings on the ground that no transfer of money to USA ever took place, neither any helicopter ever imported into India on behalf of the noticees.

3.2 On perusal of their reply dated 6.6.2006, submitted during personal hearing before me, it is found that the same appears to have been filed in response to Memorandum no.T-4/30-D/96/SCN-II dated 24.4.2002 & T-4/30-D/96/SCN dated

11.12.96 and not in the matter of present Memorandum, though, in the facts and circumstances of the case and after going through the copies of documents furnished along with the said reply, I find that these are also relevant to the proceedings in the present Memorandum.

3.3 It is inter-alia submitted that the noticees have been framed by conspiracy by the Income Tax Deptt. through one Mr. Rakesh Gupta, a front man; that the statements of the notice recorded by the Enforcement Directorate were forcibly taken by the Department under duress, threat and intimidation which were withdrawn through an application, moved within 3 days . With regard to allegations in the Memorandum, that two Schweizaer Helicopters were allegedly bought by Sh. Ashok Chawla, the noticee for USD 401596, it is contended that the said payment was made by M/s Capitex Ltd. for leasing to United India Airways Ltd.; that the helicopters never came to India and at no time payment was made by the notice, who had negotiated on behalf of M/s Capitex Ltd., for the two helicopters; that the notice had been acting as a consultant to M/s Capitex Ltd., UK and was authorized to carry out all the negotiations on behalf of M/s Capitex Ltd. for purchase of the said two Helicopters which were to be leased to United India Airways Ltd.

3.4 The copies of the following documents have been furnished along with the reply:

- i) Letter dated 18.01.1994 from Capitex, UK to M/s Schweizer Air Craft Corporation , USA authorizing Sh. Ashok Chawla to negotiate on behalf of Capitex for purchase of Helicopter,*
- ii) Letter dated 14.08.1995 from Capitex, UK to M/s Centaur Helicopter Services Pvt. Ltd. confirming purchase of Helicopters and regarding its shipment on lease to M/s Centaur Helicopter Services Pvt. Ltd.*

(iii) A confirmation dated 15.09.1995 from M/s Schweizer Air Craft Corporation, USA as Capitex, UK having purchased the two Helicopters from them for which Sh. Ashok Chawla of M/s Centaur Helicopter Services Pvt. Ltd., carried out all negotiations on behalf of M/s Capitex, UK and

(iv) Letter dated 02.11.95 from Capitex, UK to M/s Schweizer Air Craft Corporation, USA requesting them to sell of the helicopters to some buyer as the same were not likely to be leased to an Indian company.

4. Findings and order

4.1 I have carefully gone through the case material available on record and also the defence reply filed along with documents mentioned above. I find that the said documents furnished by the noticees, prima facie show that Sh. Ashok Chawla of M/s Centaur Helicopter Services Pvt. Ltd., acted as representative for and on behalf of M/s Capitex, UK, who carried out negotiations relating to purchase of two Schweizer helicopters from M/s Schweizer Air Craft Corporation, USA by M/s Capitex Ltd., UK, who made the payment for the purchase of the choppers. These documents further show that after purchase, the said helicopters were to be leased out to M/s Centaur Helicopter Services Pvt. Ltd. for their operations in India, which eventually didn't materialize and the import of the said choppers into India did not take place.

4.2 On the other hand, the documents relied upon in the Memorandum do not say that the helicopters in question were purchased by the noticees. The letter dated 10.10.95 from M/s Schweizer Air Craft Corporation, USA which is also relied in the Memorandum states that they had received the payment against two helicopters from M/s Capitex, UK. It does not mention anything about the noticees or that the above payment made to M/s Schweizer Air Craft Corporation, USA, was made on behalf of the Sh. Ashok Chawla or his company, the noticees in the present Memorandum.

4.3 In the light of the above facts, the allegations in the Memorandum that payment for purchase of the said choppers was made by M/s Capitex, UK on behalf of the noticees and that the noticees otherwise transferred foreign exchange to wit US\$ 4,01,985.90 to M/s Schweizer Air Craft Corporation, USA against the said purchases in contravention of section 8 (1) & 9 (1) (c) of FERA, 1973 (46) of 1973 is not established.

4.4 Accordingly, I drop the charges against both the noticees."

Learned counsel argued that the above order had the effect of exonerating Centaur and Ashok Chawla of any wrongdoing in respect of the helicopter deal. The order, said counsel is premised on the finding that Centaur had not indulged in unauthorized foreign exchange transactions.

47. A careful reading of the Enforcement Directorate's order would show that the notice was premised on violation of Section 49. That provision preserved the authority of the competent officers to initiate action under the provisions of the old and repealed law, i.e the Foreign Exchange Regulation Act, 1974. Facially, the order of the Jt. Director does not disclose which provision of the previous law had been infringed. Besides, more importantly, the focus of inquiry in search assessment which the assessee was subjected to under block assessment, was based upon materials recovered during the search and seizure proceedings. Those materials, especially the letters addressed by Schweitzer Corporation USA and the tone and tenor of the letters issued by or written by Ashok Chawla had not been considered in the Enforcement proceedings before the Joint Director. Consequently, the order of the Enforcement Directorate is of little relevance in proceedings

terminating or arising out of search and seizure assessment under the Income Tax Act.

48. As discussed earlier the reasonableness of the findings by the ITAT is the main issue here. Both the AO and the tribunal had rejected the assessee's explanation that he was not the *de facto* owner or principal shareholder having control over Capitex. To dispel the suspicion that the assessee had entered into a contract for the purchase of two Schweizer helicopters and the Sokol helicopter and was also responsible for the account in the Discount Bank as well as the two remittances therefrom, and furthermore that he had sufficient amounts to secure for the issuance of a bank guarantee to the tune of US \$ 100,000, relied upon certain other letters.

49. Now the jurisdiction of this court is to examine whether in the given facts of the case, substantial questions of law arise and if so endeavor to answer them. Unless the tribunal's inferences drawn on the basis of the given facts, are so unreasonable or that the Tribunal overlooks material circumstances and facts and renders a finding contrary to the documents, the jurisdiction under Section 260A, does not arise. This court would have to keep these broad constraints that control its jurisdiction in mind while endeavoring to deal with the intensely factual nature of the issues urged.

50. Now as far as the explanation given through the letters said to have been initiated by Capitex are concerned, the Court notices that only one of them was directly received by the Revenue. The others were all furnished in the course of the assessment order and some even later during the appellate proceedings. Therefore, the origin of these letters is rather suspect. Secondly, and more importantly, these letters only clarify about past transactions. If indeed Capitex had entered into independent contracts for purchase or sale of

Schweitzer helicopters or the Sokol helicopters, nothing prevented that concern i.e. Capitex from furnishing copies of such contracts; nothing prevented it also from furnishing some details as to the remittances or payments made to the concerned banks, in order to purchase such equipment or in the case where such contracts were not actually performed, show how contracts were rescinded at and if any amounts were paid to the vendors etc. Besides the fact that the letters shown are post-search, the lack of any primary evidence, renders these clarifications suspect. They do not inspire confidence-at least, not enough to dispel the inference drawn by the Revenue, based primarily upon the material seized during the course of the search and seizure proceedings.

51. What is significant is that Shri Ashok Chawla knew the Discount Bank particulars; he even had several telephonic conversations with the Vice President of that Swiss bank. If indeed the assessee Ashok Chawla were only a consultant - not even an agent, the question as to his knowledge about his principal's accounts and his familiarity with the Bank of the principal, would never arise. Besides, how Ashok Chawla had the ability to operate the accounts is also a mystery. If this are kept in mind while reading the letters of Rocky. G. Peters and the later letter of 30th of August 1994 written by him to the treasurer of Schweitzer Corporation, (which had previously notified that the helicopters had been paid for and that the title had vested in him), the suspicion which the Revenue harbored initially, based upon probabilities, can be the basis for a finding that these transactions were at his behest and he was the controlling force or voice in Capitex. As a consequence, this court holds that there is no infirmity in the Tribunal's findings on these aspects.

52. Ashok Chawla was examined under Section 131 of the Income tax Act, 1961 by the investigation wing on 11.10.1995, and asked to give details of all the immovable properties owned by him in India and abroad either himself or in the name of wife, son or otherwise financed or in other capacity, money invested by him for the purchase of land and/or construction or renovation etc. In response he denied having made any investment in any construction or property abroad. He, however, gave details of properties owned by him in India as follows:

- i) B9, Saket, New Delhi.
- ii) 198, Sector 21 A, Faridabad
- iii) Agricultural land measuring about one acre in NOIDA UP
- iv) One SFS flat in Vasant Kunj, New Delhi
- v) D1/24, Vasant Vihar New Delhi
- vi) 40/98, Chitranjan Park, New Delhi.
- vii) 2 acres of land in Gopal Hari, near Gurgaon.

A last Will dated 15.05.1995 was found from Ashok Chawla's premises in which he had willed his fixed/movable assets to different persons. The will is extracted below:

*“This is to state that I ASHOK KUMAR CHAWLA, S/O SHRI PRITHJVI RAJ CHAWLA sound in mind and body, solemnly declare that this is my final and last will which may be followed up to the last word, in case something happens to me. .
The executor of my Will shall be Mr. ARUN ARORA of E-44; Panchseel Enclave, New Delhi.
All my movable and immovable properties is to be handed over my son ANUJ CHAWLA, sound in mind and body, solemnly along with my locker keys. However, out of my cash holdings and assets the distribution is to be made as mentioned below:*

The properties already in the name of my wife Mrs. ANU CHAWLA to continue, which have been totally paid up by me. These properties are namely :

- a) House -198 Sector 2-A, Faridabad*
- b) Flat No.4316, Pocket B4, Vasant Kunj, New Delhi*
- c) Farmland in NOIDA*

She may at her own discretion pass anything she likes to our daughter ANISHA CHAWLA

From the cash assets the following distribution to be made:

A .Miss VIJAYA RAJ GOPAL - Rs10,00,000/- (Rupees Ten Lakhs)

2 MRS. BHAGYATI SIBBAL- Rs. 700,000/- (Rupees Seven Lakhs) . .

3. MISS PRAJANA KAPOOR Rs.5,00,000/ (Rupees Five Lakhs)

All the Male Staff to be given Rs.25000 (Rupees Twenty Five Thousand) each, which are as under:

2 Drivers

5 Servants in the Office E-6, Anand Niketan, New Delhi..

1 Servant at Faridabad house

2 Servants at B-9, Saket New Delhi.

Any Fixed/Movable assets abroad should automatically be passed on to my son ANU CHAWLA, the list of which is known only to my son.

Any enquiry/objection from any member of my family shall be sorted out by the Executor of my will, MR. ARUN ARORA and his decision would be final.

sd/ ASHOK CHAWLA

Witness:

1. Vasant Kunj property to be given to Madhu Talwar, my sister,

2. Both children of Vijay to be given Rs. 5 lacs cash by ANUJ my son."

53. The Tribunal noted that Anuj Chawla owned the Saket, Faridabad and Vasant Vihar properties; that the property at E-34, Greater Kailash I was owned by Vijaya Rajagopal; that of E-6 Anand Niketan was owned by Mr.

Zal Akhtar; the farmland at Gwalpahari and 199/21A Faridabad was owned by Ms. Asha Jain and that Ashok Chawla owned 40/98 CR Park. Besides, it took into account the London property and said that it was in Ashok Chawla's possession. The tribunal thereafter found as follows:

"We have separately considered additions (i) to (v) above. But we are convinced that above additions alone will not be reasonable or sufficient to take stock of unaccounted commission etc. earned by the assessee and, therefore, further addition of Rs.4,58,11,000/- is required to be made to make the assessment realistic having regard to the scale on which the activities were carried on by the assessee in the block period. The objection of the Id AR in regard to the additions: were that it was made purely on estimate. The id AR has also pointed out that the A.O. had not considered the valuation made by the registered valuer which supported the investment declared in the various block returns. These arguments are not found convincing. The investments in these properties were detected only during the course of search and these properties were not accounted for. in the block assessment, addition can be made on the basis of material found during search. In this case, material found during search, clearly showed unaccounted investments in properties.

Therefore, addition in relation to these properties in the block assessment is quite justified and for quantifying the addition, the value of actual investment has to be found out for which valuation of the unaccounted properties is necessary. Therefore the addition on the basis of valuation report in the Facts of the case will be within the provisions of law. Registered valuer has only supported whatever the assessee disclosed in the block return. During the course of hearing, the id counsel for the assessee was unable to show that reports of registered valuer are based on relevant data; nor any specific defects were brought to our notice in the valuations made by the V.O. The valuation of the registered valuer therefore, cannot be taken as reliable considering the common practice of large

scale underinvestment in immovable properties. As for the name in which the excess investment found on valuation of immovable properties should be assessed, we have already held earlier that on the facts of the case such excess investment has been rightly considered in the name of the assessee. Further, we are not sustaining the above addition merely on the basis of valuation of V.. There are other circumstances discussed herein to justify the assessment of amount of commission earned by the assessee and invested in various properties."

54. Counsel for the appellant argued that the additions made and sustained by the tribunal cannot be upheld utterly without legal foundation. It was argued that the owners of the properties were different. In at least 3 cases the owners were not family members. Two of them, i.e. Zal Akhtar and Asha Jain had sent written confirmations about ownership; they were also non-residents living in the USA. Additions made on account of these three properties were therefore conjectural and entirely based upon the report of the DVO. Learned Senior counsel argued next that as far as the property owned by the appellant and his company, Centaur, are concerned, the tribunal ignored and overlooked the circumstance that the original acquisition cost had been declared in the previous returns. In the case of the C.R Park property, even the detailed record of expenditure incurred in constructing the building was available. All these were ignored and the valuer's report was preferred. Urging this court to overturn and set aside these findings, counsel stressed that the rationale for referring this issue to the valuer was the assumption that substantial amounts were earned but not declared during the block which had been invested in these properties.

55. Counsel for the Revenue argued that the findings with respect to valuation of properties and the additions made, should not be interfered with.

He relied upon the observations of the tribunal that Sh. Ashok Chawla was actively involved in major defense deals and was party to detailed procurement plans, under the heading "modernizing army" a document found from his premises. This document contained an assurance by the appellant guaranteeing payment of US \$120,000 in the event a particular contract did not materialize though the guarantee was given on the letterhead of a group company, such an assurance was clearly given in his personal capacity. This disclosed the scale at which he operated. Expenses relating to office maintenance at Moscow too were found. Moreover his ability to maintain a Swiss bank account and operate it also stood established. Although full details of such accounts could not be obtained on account of stringent secrecy laws in Switzerland, the assessee did not clarify this position nor clear the air. His statement made in the course of the proceedings admitted that he had invested substantial amounts to its acquisition of properties. This investment of unaccounted wealth was to the tune of ₹1.43 crores. The total value of these properties was assessed by the DVO at ₹6 crores.

56. This court has examined the orders of the AO and the ITAT. It is apparent that both these authorities disregarded the returns and the values disclosed in those returns by the owners, and rather presumptively added amounts towards what according to them were the true value of the properties, in line with the report of the DVO. This court is of opinion that such an approach defies logic and is manifestly erroneous. Notices were separately issued to Ms. Anu Chawla, Mr. Anuj Chawla and the other owners of the properties which were subjected to fresh valuation. Returns were filed by those parties. These returns disclosed the value (which in some

cases, like in the case of Anuj Chawla and Anu Chawla) were over and above the cost disclosed in the returns. The AO partly accepted the additional value declared by these third parties/ relatives, but also at the same time - entirely based on the DVO's valuation, added some more. This approach is erroneous, because on the one hand, the higher value of the owner is accepted, only to be loaded with a further amount. The entire additional value (i.e the extra value disclosed in the block returns by the owner plus the further additional value, determined by the DVO) was brought to tax in Ashok Chawla's hands. This approach can be demonstrated by illustration. D1/24, Vasant Vihar, New Delhi was valued by the DVO as ₹42,90,590/-. The property stood in the name of Anuj Chawla, the son of the assessee who had declared ₹18.83 lakhs as the total investment in his return of undisclosed income. The excess of the declared value i.e. ₹24,07,000/- along with brokerage of 2% i.e. ₹85,810/- totaling ₹24,92,810/- was added by the assessee as undisclosed income of the assessee on substantive basis and addition of ₹24,97,000/- was also added on protective basis in case of Anuj Chawla. Likewise, over ₹23 lakh was added to the assessee/Ashok Chawla, solely on the basis of the DVO's report.

57. This court is of the opinion that the findings of the ITAT in this regard are unsupportable in law. During the course of assessment proceedings, the assessee, Ashok Chawla, in answer to queries, had on 27th August, 1996 and 6th September, 1996 pointedly and clearly stated that the properties that were not in his name were not acquired by him. Yet, on the basis that the assessee must have earned substantial income which was not declared, both the AO and the ITAT embarked upon the venture of revaluation of the properties that did not belong to him and concluded that the difference between the

transaction value reflected in the documents and the higher value determined was the sum total of his undisclosed income. This clearly betrays a contradictory approach; worse, in some cases, additions were made and confirmed in the hands of the owner and the assessee, Ashok Chawla, was subjected to protective assessment; in cases of others, such as Asha Jain and Zal Akhtar, the additions were made to his returns. Furthermore, in respect of one property, i.e., the Anand Niketan premises, the documents showed that the assessee Ashok Chawla was only a power of attorney holder and had not paid the entire consideration. Yet, the AO concluded that he must have paid the entire consideration.

58. However, as far as the addition of ₹1.50 crores made in respect of the London property is concerned, stands on a different footing. The search and seizure had yielded documents pertaining to the London flat. The explanation given by the assessee Ashok Chawla cannot be accepted. The position taken by him was that the property was rented. If so, the question of paying maintenance, and the bills found in his possession, remained unexplained. Furthermore, the documents seized also showed that insurance amounts were being paid.

59. As the assessee did not disclose the true value of this property, the ad-hoc valuation at ₹ 1.5 crores cannot be faulted.

60. The court notices that the ITAT had also given relief to the extent of restoring the addition to the extent of ₹25 lakhs to the AO for further inquiry and findings. Also, it deleted an addition made by the AO to the tune of ₹4 lakhs. No fault can be found with these.

61. After the ITAT made the impugned order, the assessee, Ashok Chawla, moved an application for rectification. This was partly allowed and

limited relief was given by the order dated 17th September 1996 to the extent of ₹13 lakhs which was directed to be deleted. Though this order has been challenged in W.P.(C) 3517/2011 no separate arguments were addressed why it is erroneous. In any case, the court has dealt with the merits of the main appeal. So no relief can be granted in this writ petition.

62. As a result of the above findings, the addition sustained by the ITAT (₹7,37,30,266/-) has to undergo substantial change. The additions made on account of re-valuation of various properties (aggregating to ₹4,58,70,124/-) except ₹1,50,00,00/- have to be deleted. Therefore, the ITAT's order is modified; the assessee is entitled to further relief to the extent of ₹3,08,70,124/- which has to be deleted from the sum of ₹7,37,30,266/-. The appeal (ITA 495/2007) partly succeeds to that extent. The ITAT had given relief in rectification proceedings to the extent of ₹13 lakhs. All these are to be taken into consideration by the AO, while giving appeal effect. W.P.(C) 4299/2007 is, however, for reasons mentioned in the earlier part of the judgment relating to the validity of the search, without merit. It is therefore dismissed.

63. The assessee/appellant's grievance in W.P.(C) 7962/2009 is with respect to an order of the Commissioner of Income Tax under Section 220 of the Income Tax Act. Ashok Chawla had expressed, during the pendency of his appeals before the ITAT, inability and hardship to pay interest and sought its waiver. The CIT considered all the records and the facts pertaining to the stages of the proceedings, as well as the offer to liquidate some of the tax liability and held that exercise of discretion under Section 220 (2A) was not made out. The assessee argues that during the pendency of the present appeals and writ petitions, one of its properties has been sold and repeated

offers to settle tax liabilities were made and that this court should take all these into consideration.

64. This court has considered the submissions and materials on record. The materials and circumstances suggest that the assessee is in possession of adequate and substantial resources and could well have discharged his liabilities toward the Revenue. He chose not to do so; it is not as if in the event of his paying the tax liabilities and later succeeding, he would not have been restituted. Such restitution with interest is permissible; the law mandates it. In these circumstances, the discretion, exercised after considering all material facts, cannot be faulted as injudicious or arbitrary. For these reasons, the writ petition (W.P.(C) 7962/2009) fails and is dismissed.

ITA No. 817/2007: Revenue's appeal against the ITAT's order

65. The ITAT had sustained the addition made by the AO, to the extent of ₹ 7,37,30,266/- and deleted an equivalent amount. The Revenue is in appeal against this part of the impugned order, contending that the said deletion is unreasoned. In this regard, the deletion to the extent of ₹4.42 crores (on account of the 15% commission assessed in the hands of Capitex) and further sums of ₹27.31 lakhs and ₹57.60 lakhs made by the AO on account of “upfront” money for pursuing the defense deal to the extent of UK £ 120,000. Counsel for the Revenue argued that these amounts should be sustained, and that the reasons given by the ITAT are without basis.

66. This court is of opinion that the main reason that impelled the ITAT to direct deletion of the substantial amount of ₹4.42 crores is found in Para

20.7.7. It cannot be said that these reasons are untenable. The amount was in fact on account of 15% commission, which the according to the AO was received by him. Likewise, the deletion of the two other amounts cannot be said to be unreasonable. For these reasons the court holds that the Revenue's appeal, ITA 817/2007 is without merit. It is accordingly dismissed.

67. In IA 356/2017, the applicants, Lakhan Singh and Bhagat Singh, seek impleadment in W.P.(C) 4299/2007, filed by Ashok Chawla, contending that the attachment of properties, i.e farmlands should be vacated. They claim to be decree holders entitled to the said property and seek directions for release of the property in issue i.e. property No.7 being Farm Land at Village Gawal Pahari, Tehsil Sohna, Khewat No.109, Khata No.111, Rect. No. 39, Killa No.16/1(5-16) and V2 share in khewat No. 294, Khata No.308, Rect. No.39, Killa No. 16/2(2-4) share bearing 1 kanal 2 marla and khewat No. 295, Khata No. 309, Rect. No.39, Killa No. 25(8-0) measuring 14 kanals 18 marlas, total admeasuring 16 Kanal (2 acres) from attachment made by Income Tax Department. For this purpose, reliance is placed on the decree in suit filed by them for possession, passed by the Civil Judge, Gurgaon on 26.09.2016. The parties, i.e., Ashok Chawla and Revenue's counsel as well as counsel for the applicant were heard.

68. This court is of opinion that the issue as to entitlement of one or the other party to possession, *per se* does not conclusively decide the question of title. Furthermore, and more importantly, the concerned officials of the Revenue made the attachment of the properties. Further, by virtue of Section 293 of the Income Tax Act, the subject matter of income tax proceedings cannot be also the subject matter of civil proceedings. This issue was considered by the Supreme Court in *Commissioner of Income Tax*,

Bhubaneswar and Anr. v. Parmeshwari Devi Sultania, (1998) 3 SCC 481.

The Court was concerned with was partition of certain gold ornaments that had been the subject of search and seizure under Section 132. In deciding that the suit – in so far as it concerned the ownership of the gold ornaments – was barred, the Court noted at paragraph 9 as follows:

“9. It (the High Court) failed to consider the effect of the decree if passed in the suit on the order under Section 132(5) of the Act or other proceedings under Section 132B of the Act. When Section 293 originally stood, it (sic) provided that "no suit shall be brought in any Civil Court to set aside or modify any assessment or order made under this Act". The word "assessment" was omitted and the words "proceeding taken" were inserted in its place. This made the section more comprehensive in nature. Direct effect of the decree in the suit would be that the gold ornaments, subject matter of this suit, would be taken out of the order of the Income Tax Officer under Section 132(5) of the Act and would not be available to be applied in proceedings under Section 132B of the Act...”

It is therefore, held that this court cannot decide this issue in the assessee's appeal and writ petitions. If the applicants claim to have any interest, they have to approach the concerned income tax authorities. IA 356/2017 and connected applications (IA 449/2017) are consequently dismissed.

69. In the light of the conclusions recorded above, ITA 495/2007 succeeds in part; ITA 817/2007, along with W.P.(C) 4299/2007, W.P.(C) 7962/2009 and W.P.(C) 3517/2011 have to fail. IA 356 & 449 of 2017 are also dismissed.

Appeals in relation to Centaur Impex: ITA 479/2007 (assessee) & ITA 1246/2007 (revenue)

70. In relation to Centaur Impex, the assessee, pursuant to notice under Section 158BC, the AO made additions to the extent of ₹92,50,878/- as undisclosed income. This was based on the AO's determination of undisclosed income assessed on substantive basis due to unexplained credit in bank account for AY 1995-96 (₹40,65,086/-) and unexplained credit entry in the Discount Bank & Trust Co, Zurich, assessed on substantive basis for AY 1995-95 @ ₹51,12,392/-. Upon the assessee's appeal, the ITAT gave substantial relief, by deleting ₹40,65,086/-. The assessee is in appeal, complaining that the balance amount should have been deleted; the Revenue's appeal is that the amount of ₹40,65,086/- should not have been deleted.

71. This court notices that the ITAT granted relief and deleted the sum of ₹40,65,086/- after analyzing the factual material to hold that there was documentary evidence in support of its contention that the amount was toward exports made (in relation to contract No.7613). The ITAT took into consideration fax messages and other communications to infer these circumstances. The Revenue argues that such material was insufficient to warrant the relief given. This court is of opinion that the ITAT applied its mind and considered the objective facts. There is no unreasonableness in its approach warranting an appellate review. Consequently, the Revenue's appeal has to fail.

72. The assessee argues, in its appeal ITA 479/2007 that the amount of ₹51,12,392/-, a foreign remittance from the Discount Bank account, was **mistakenly to its account and that it should have been paid** into the account of Centaur Helicopter. Since the assessee did not have an RBI and IE code, it transferred the order to M/s. Kerr Enterprises, a concern of Mr.

Patrick Kerr, who was also its director. The exports were actually made during the next year. The Revenue, however, points out that the amount came from the account of Capitex and the explanation given by the assessee is unconvincing, as the said company had no concern with the transaction.

73. This court has considered the rival submissions. The ITAT's findings are as follows:

“ The export had been made to ATTL Uk and therefore, the payments were required to be made by ATTL. Merely because Mr. Allen Saltmer was Director of both ATTL and Capitex and was interested in becoming director of Centaur Impex, is no ground for Capitex to make payment on behalf of ATTL. Moreover, no further evidence in the form of a certificate from auditors in case of ATTL or any other reliable evidence has been produced to show that in the books of ATTL, the said amount had been shown as a loan from Capitex. The plea that some export against the advance had been made in the subsequent year, is also not acceptable.”

It is evident that the tribunal considered the facts and circumstances relied upon by the assessee. The inferences drawn by it, whilst independently evaluating the submissions, cannot be termed unreasonable as to warrant interference under Section 260A of the Act. The assessee's appeal, therefore, has to fail.

74. As a result of the above discussion, both appeals, ITA 479/2007 and ITA 1246/2007 have to fail.

ITA 988/2007: Block assessment appeal by Centaur Helicopter Ltd

75. Centaur Helicopter is aggrieved by the order of ITAT dated 31.05.2007, which substantially upheld the AO's order in the block

assessment pursuant to Section 158BC of the Act. The AO had made additions under Section 158BC to the extent of ₹27,35,831/- for the block period added further sums of ₹12,00,000 (as undisclosed payments to BK Menon); additions towards commission and consultancy income not disclosed during the period to the extent of ₹1,71,05,675 and added unexplained expenditure under Section 69C to the tune of ₹23,73,590/-. The total amount thus brought to tax was ₹2,34,15,096/-. The assessee's appeal to ITAT was partly allowed; the last amount of ₹23,73,590/- towards unexplained expenditure was deleted.

76. The assessee argues in its appeal, under Section 260A that the tribunal failed to consider important evidence, which pointed to the fact that it had not received any amounts apart from what, was given as a quarterly fee or retainer, i.e., GBP £ 2500 per quarter. The AO added amounts based purely on surmises drawn by him from the seizure of some loose papers which contained figures; amounts were also added, based on the UK Revenue intelligence report to which the assessee was not privy. It was argued that consequently, the inclusion of the sum of ₹1,71,05,675/- was not on any sound logic or reasoning, but an arbitrary exercise. The Revenue, on the other hand, argues that the ITAT's decision is sound and should not be interfered with as they are pure findings of fact.

77. The AO - and later, the ITAT, had carried out an elaborate, year by year analysis of the amounts that the assessee received - reflected in the books and documents seized, but not declared by it, in the returns or even block returns. These documents, which formed the basis of the block assessment, were A-9, A-10, A-11 and A-12. Details for every year were

discussed and a comparison made with respect to what was actually declared and what amounts had been received; the differential amount was brought to tax. This court is unpersuaded with the assessee's arguments on this aspect. The ITAT has considered all the materials and the UK Revenue service's communications, corroborating that the receipts were in facts GBP £233,991/- more than the sum declared for the given year (1993-94), i.e., GBP £6000/-. This was, according to the currency conversion at that time, ₹1,16,05,797/-. There is no infirmity amounting to a substantial error calling for interference by this court. ITA 988/2007 therefore, has to fail.

ITA 478/2007: Anuj Chawla's appeal

78. Search under Section 132 of Income Tax Act 1961 was conducted on 31.08.1995 in case of the assessee the son of Shri Ashok Chawla as well as in cases of connected group companies and their employees. The Revenue discovered that the assessee was owner of certain immovable properties, lockers and bank accounts. A sum of ₹4 lacs was seized from the locker. The assessee, in his block return of income declared an undisclosed income of ₹37,58,388/-. In the assessment, the AO determined the undisclosed income from the block period at ₹1,84,35,244/- after making additions on several counts. Aggrieved with the said decision of the AO the assessee is in appeal before the Tribunal.

79. The addition of ₹53,84,258/- on account of deposit of money in the bank account of the assessee in India in AY 1993-94 and 1994-95 were upheld. These amounts were alleged to have been transferred from Discount Bank & Trust Co. Switzerland. The assessee explained that the money transferred was out of the income earned by him in USA as flight and ground

instructor. He also said that the money had been transferred through Shri Allen Saltmer, a family friend to whom the payment had been made in the form of traveler's cheque/cash from time to time. Mr. Saltmer's confirmation was obtained and placed on the record. The assessee also relied on certificates from his clients in USA regarding receipt of money for training obtained from him as instructor. The A.O. did not accept the genuineness of the assessee's income earned in USA as there were no corresponding deposits in bank accounts did not support the receipts nor any evidence was produced for payment of any tax in USA. The ITAT also noticed that the assessee was only about 18 when he left India for USA in early 1990. Certificates dated 01.05.1990 and 01.10.1990 regarding successful completion of commercial ground school course and Instrument Ground School course by the assessee were produced. He was issued Commercial Pilot License dated 25.03.1991 and Ground Instructor License dated 04.04.1991 from the Department of Transportation, USA. The assessee had also been issued a J-1 visa which entitled him to work in USA. It was held that mere possession of qualification and permission to work does not prove that the assessee had really worked as an instructor had earned substantial money in USA. It was also held that no evidence was produced to substantiate that the assessee had sufficient experience in flying so as to take up a successful career as an instructor, nor that he had really worked as a Flight and Ground Instructor. The certificate procured from the foreign clients is on a plain piece of paper and these certificates were not authenticated and could not be treated as reliable.

80. This court is of opinion that the ITAT's reasoning is sound. The failure of the assessee to produce credible or sound evidence supporting his

claim that the amount in question was his savings from earnings in the US for about 3 years. The probability of someone barely out of his teens, securing substantial earnings and to cap it, not possessing any bank account in the USA, is remote, to put it mildly.

81. The second head on which the AO had added amounts and brought them to tax, was the re-valuation of property. The assessee had declared the value of his properties; these were sent for fresh valuation by the AO. The relative particulars of the value declared in the block assessment and the revaluation together with the differential value, are reproduced in the following chart:

S.No.	Description of Property	Cost of investment determined by AO	Value as declared by assessee in return under Section 158BC	Differential value
1.	D-1/24, Vasant Vihar	₹42,90,000	₹18,83,000	₹24,07,000
2.	B-9, Saket	₹80,52,400	₹13,25,000	₹67,27,400

82. The ITAT was of opinion that the protective assessment made in the hands of the assessee, because of the substantive assessment in the hands of Ashok Chawla, was justified. It held that:

“7.3 We have perused the records and considered the matter carefully. The addition under dispute is on account of undisclosed investments in the two properties under reference which stand in the name of the assessee. The investment in these properties came to light only from the documents found during search and, therefore, addition on account of under investment in these properties is justified in the block

assessment because the addition was being made only on the basis of material found during search. Though these properties are registered in the name of the assessee, the investment in these properties had been owned by Shri Ashok Chawla, the father of the assessee. During his examination u/s 131 by the Investigation Wing on 11.10.1995, Shri Ashok Chawla had been asked to give details of all the immovable properties owned by him in India or abroad either himself or in the name of wife, son or otherwise financed or in other capacity, money invested by him for purchase of land and/or construction/renovation etc. In response to the said question, he gave details of the several properties owned by him which also included B-9, Saket, and D-1/24, Vasant Vihar which stand in the name of the assessee. In view of this position, any addition on account of excess investment found on account of valuation report has to be added in case of Shri Ashok Chawla, the father of the assessee. The issue regarding the legal validity of the addition made on the basis of valuation report has been examined in detail in case of Shri Ashok Chawla where the addition has been made on substantive basis. As we have held that the addition has rightly been made on substantive basis in case of Shri Ashok Chawla, the protective addition in case of the assessee made by the A.O. is, therefore, deleted.”

83. As noticed in the relevant discussion while deciding ITA 495/2007, there was nothing seized during the search under Section 132 which could have led the Revenue authorities to re-value the properties. The entire basis for the fresh exercise was that Ashok Chawla would have earned greater income having regard to the nature of his business transactions, which he must have kept away from the gaze of the taxman. No document, pointing to extra payment of the amounts (that constituted the differential between the transaction value and the finally determined value or some other value) was recovered or seized. In these circumstances, it is held that the assessment

order, including these amounts on protective basis cannot be upheld. ITA 478/2007 is therefore, partly allowed to the above extent.

ITA 822/2008: Appeal of Vijaya Rajagopal

84. This assessee is aggrieved by the ITAT's order dated 26th December 2006, which had rejected her plea. The AO had added ₹13 lakhs to her income during the block period, on the basis of a document found and seized during the search. The assessee, upon notice had filed a block return, declaring ₹21 lakhs as undisclosed income. The returns and documents filed revealed that the acquisition cost of the flat was ₹9 lakhs. The AO was of opinion that the documents seized showed that Ashok Chawla acquired the flat through funding. He relied on two documents, A-9 and A-32 and rejected the assessee's plea that the flat was a gift- which was later altered to payment through an interest free loan from Ashok Chawla.

85. It is argued that the value finally attributed for the flat is fanciful and arbitrary. Learned counsel submitted that the valuer's report determined the property value at ₹18 lakhs. The AO, however, adopted an entirely different value of ₹22 lakhs. The Revenue, on the other hand, justifies the addition on the ground that it is primarily based on the materials recovered.

86. This court has considered the submissions and the relevant materials. The document seized and relevant for this purpose is a loose sheet of paper, containing figures. Against "E-6", the figure "22" is shown. Next to it "N-8" against which the figure "5" has been scribbled. Three other figures too have been shown. *Ipsa facto* these mean nothing. The AO deduced that these reflected the true value of the property and went ahead to refer the matter to the valuation officer. The latter, in his report, after considering the then prevailing prices and looking at a transaction of 1996, felt that the value of

the property was ₹18.36 lakhs. In the absence of any credible material pointing at undervaluation, the exercise was unwarranted. Worse, after having secured the valuation report, the AO proceeded in an unprincipled manner, and decided that the true value of the property was ₹22 lakhs, bringing the balance ₹13 lakhs to tax. This court is of the opinion that the material found was sketchy and insufficient to warrant a fresh valuation. In any case, the AO's order did not even go by the valuation report, but on an entirely different footing- not based on any principle at all. Therefore, the addition has to be set as and is accordingly set aside. The ITAT had remitted the issue of ₹ 3 lakhs added by the AO for fresh consideration. In the light of the above discussion, ITA 822/2008 has to succeed.

Conclusions

87. ITA 822/2008 is allowed. ITA 495/2007 and ITA 478/2007 succeed in part and are allowed. ITA 817/2007, ITA 479/2007, ITA 988/2007 and ITA 1246/2007 along with W.P.(C) 4299/2007 (including IA 356 & 449 of 2017), W.P.(C) 7962/2009 and W.P.(C) 3517/2011 are dismissed. There shall be no order on costs.

S. RAVINDRA BHAT
(JUDGE)

R.K. GAUBA
(JUDGE)

APRIL 11, 2017