The Asstt. Commr. Of Income-Tax vs Sachdeva And Sons on 7 September, 2005

Equivalent citations: (2005)97TTJ(ASR)1101

JUDGMENT

Joginder Pall, Accountant Member These are two appeals - one filed by the Revenue against the order of CIT(A), Ludhiana, dated 10.03.2003 for the assessment year 1988-89 and another filed by the assessee against order dated 20th March, 2003 CIT(A), Jammu with Hqrs. at Amritsar for the assessment year 1989-90. Since the issues in these appeals are common, these were heard together and are being disposed of by this consolidated order for the sake of convenience.

2. In the appeal filed by the Revenue for the assessment year 1988-89 the following two effective grounds of appeal have been taken :

> " 1 That the Ld. CIT(A)-1, Ludhiana has erred in quashing the re-assessment proceedings initiated vide notice Under Section 148 dated 24.3-1999 on the ground that earlier re-assessment proceedings were still pending as a result of order of Hon'ble ITAT, Amritsar dated 20.3.1998 which was restored to the file of the A.O. on a limited issue regarding admissibility of deductions Under Section 32AB & 80HHC.
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> 2. That the Ld. CIT(A)-1, Ludhiana has also erred in observing that the basis of re-assessment proceedings did not exist after the FERA proceedings were quashed by the Special Director (Enforcement) when there was independent evidence indicating under-invoicing of export by the Assessee apart from confessional statement of partner Shri Ashok Sachdeva when on the similar facts arid circumstances the Ld. CIT(A), Amritsar has upheld the order of the A.O. in the case of the assessee for the assessment year 1989-90 vide his Appellate order in Appeal No. A055/02-03 dated 203.2003."

3. In the appeal filed by the assessee, for the assessment year 1989-90, the following grounds have been taken:

> "1. That the order passed by the Worthy Commissioner of Income-tax (Appeals) is illegal and is perverse.
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> 2. That the Commissioner of Income tax (Appeals), Amritsar, has grossly erred in confirming the action of the learned Income-tax Officer, Ward V(4), amritsar in reopening the case of the assessee under Section 148 of the Income-tax Act, 1961 on the basis of alleged statement by Sh. Ashok Sachdeva, partner of the assessee firm before the Enforcement Directorate on 31.05.1997.

3. That the Commissioner of Income Tax (Appeals), amritsar has grossly erred in not appreciating that the statement given on 31.05.1997 was made by Sh. Ashok Sachdeva under duress and under pressure and that this statement had been retracted on 11.06.l997 and had no legal validity in the eyes of law.

4. That the Commissioner of Income-tax (Appeals) has grossly erred in not appreciating that the learned Assessing Officer has not lead any evidence against the assessee to independently show that the assessee has been indulging in 'under invoicing of its goods to Rice and Food Stuff Trading Co; Dubai, except the statement dated 31.05.1997 which had been retracted by Sh. Ashok Sachdeva himself.

5. That the learned Commissioner of Income-tax (Appeals), Amritsar, has grossly erred in not appreciating that vide order dated 28.02.2002 passed by Special Director of Enforcement Directorate all the charges leveled against the assessee in the show cause notices issued by Enforcement Directorate have been dropped and that the Enforcement Directorate has failed to lead any evidence to show under invoicing on the part of the assessee by any documentary proof.

6. That the Commissioner of Income Tax (Appeals), did hot appreciate that the rates at which the goods have been exported to Rice and Food Stuff Trading Co; Dubai were the prevalent market rates at the time were the goods was actually exported.

7. That the finding of the Worthy CIT(A), amritsar, are perverse as the observations made by him are totally out of context and evidence relied upon by him does not pertain to year under consideration and was collected after assessment order and was never properly confronted to the assessee,

8. That the Worthy Commissioner of Income-tax (Appeals) Amritsar, has grossly erred in ignoring the direct decision of the jurisdictional High Court reported in 257 JT& 614 (P&H) relevant to the issue at hand.

9. That the learned Assessing Officer has grossly erred in treating the entire exports of Rs. 21,49,91,037/- of the Assessee as exports made to Rice and Food Stuff Trading Co; Dubai for calculating alleged under invoicing at 30% whereas actual exports to this concerned were Rs. 21,15,84,893/- only.

10. That the learned Assessing Officer has grossly erred in not allowing deduction Under Section 80HHC and 80I on the alleged under invoicing of exports as per calculation filed with the Assessing Officer.

11. That the learned Assessing Officer has grossly erred in charging interest Under Section 234-A and 234-B at Rs. 10,44,195/- and Rs. 6,78,72,670/- respectively. That interest Under Section 234B(3) was chargeable w.e.f. 01.04.1990 and not w.e.f. 01.04.1989,"

4. The facts of the case for the assessment year 1988-89 are that the assessee filed a return of income on 5.8.1988 declaring therein income Of Rs. 1,48,675/-. The assessment was completed under Section 143(3) on 28.3.1989 determining income of Rs. 2,57,132/-. The assessee filed an appeal and the ld. CIT(A) decided the same on 31.5.1989 allowing partial relief. The order for giving effect to CIT(A)'s order was passed on 15.6.1989 reducing the income to Rs. 1,72,432/-. Thereafter, the C.I.T. Amritsar, passed order under Section 263 of the Income Tax Act, on 18.3.1991 setting aside the issue relating to deduction under Section 32AB by including rental income of Rs. 2,62,200/-. The AO also observed that the assessed had claimed deduction under Section 80HHC by including rental income as business profit. He, therefore, initiated reassessment proceedings by issue of notice on 3.11.1992 and subsequently completed reassessment on 2.2.1993 and disallowed the claim of deduction under Section 32AB and 80HHC by including rental income. The assessee filed an appeal against the assessment order and the ld. CIT(A) vide his order dated 28.2.1994 quashed the reassessment completed by the AO. The Revenue carried the matter in appeal before the Tribunal and the Tribunal vide its order dated 20.3.1998 reversed the findings of the CIT(A) for quashing reassessment and restored that of the AO. However, the issue whether rental income was to be taxed as income from house property or income from business was restored back to the file of the AO to determine the nature of income and then consider the allowability of deductions under Section 32AB and 80HHC of the Income-tax Act.

5. Subsequently, the AO initiated reassessment proceedings by issue of notice under Section 148 on 24.3.1999. The basis for initiating such action was that the assessee was carrying on the business of exporting rice to foreign countries. The FERA Authorities carried out search and seizure action at the premises of Sh. Ashok Kumar Sachdeva, partner, and several other places including the premises of the assessee and statement of Sh. Ashok Kumar Sachdeva was recorded on 31.5.1997 in which he admitted that the assessee was under invoicing the exports of the rice to foreign countries, In the reasons recorded the AO also observed that Sh. Ashok Kumar Sachdeva admitted in his statement that a new firm named as Wani International was floated at Dubai and Sh. Raj Sethia & Sh. Ramesh Sethia maternal uncle of Sh. Ashok Kumar Sachdeva were sent to Dubai. Later, name was changed from Wani International to Rice and Food Staff Trading Co. Dubai. Sh. Ashok Kumar Sachdeva admitted before FERA Authorities that invoices for the exports used to be raised @ 30% less than the agreed, price and the difference was received by Sethias in Dubai on behalf of the assessee. During the assessment year 1988-89, the export sales of the company were to the tune of Rs. 15,51,93,050/-. Since the under invoices @ 30%, the AO observed that income of Rs. 6,61,11,307/- had escaped assessment. The AO observed that since foreign exchange equivalent to under invoiced amount was not remitted to India, the assessee was also not entitled to deduction Under Section 80HHC in respect of the same. In response to notice issued Under Section 148, the assessee filed the return on 23.6.2000 disclosing therein income of Rs. 1,72,432/-. During the course of assessment I proceedings, the AO referred to the various statements of Sh. Ashok Kumar Sachdeva recorded by FERA Authorities on 30.5.97,3.1.5.97,9.6.97,4.7.97, 7.7.97,4.8.97,11.8.97,12.8.97 & 26.8.97. He also referred to the statements of Shri Kranti Arora recorded by the FERA Authorities on 30.5.97, 31.5.97, 5.8.97 and 22.8.97. By referring to such statements, the AO came to the conclusion that the assessee had under invoiced income from export of rice to the extent of Rs. 6,65,11,307/-. He further observed that since the assessee had not remitted foreign exchange equivalent to Rs. 6,65,11,307/-, it was not entitled to deduction Under

Section 80HHC. While passing this order, the AO also considered the claims of the assessee for deduction Under Section 32AB and 80HHC in respect of rental income from property for which the matter was restored to the AO vide Tribunal's: order dated 20.3.1998 and disallowed the same on the ground that such income was not income from business: Accordingly, the assessment was completed on total income of Rs. 6,70,94,900/- on 21.3.2001.

6. Being aggrieved, the assessee filed an appeal against the order of the AO before the CIT(A). It was argued before the CIT(A) that reassessment completed by the AO was illegal and bad in law. It was argued that earlier assessment completed by the AO by issue of notice Under Section 148 on 3.11.1992 was restored by the Tribunal to the file of AO vide its order dated 20.3.1998. The same was pending with the A.O., when he issued a notice Under Section 148 on 24.3.1999. It was argued that initiation of reassessment proceedings Under Section 148 when the earlier assessment was pending was illegal and bad in law. It was also argued that reassessment order dated 21.3.2001 was barred by limitation in view of the provisions of Section 153(2A). It was submitted before the CIT(A) that ITAT, Amritsar Bench passed an order on 20.3.98 i.e. in the financial year 1997-98 and served the same on CIT, Amritsar before 31.3.1998. Therefore, the assessment order should have been passed on or before 31.3.2000. However, the AO completed assessment on 21.3.2001 and, therefore, the same had become time barred. It was also argued that the assessment had been reopened purely on the basis of confessional statement of Sh. Ashok Kumar Sachdeva, recorded on 31.5.97. However, Sh. Ashok Kumar Sachdeva had retracted on 11.6.92 stating the earlier statement had been obtained by the FERA Authorities under duress and pressure. The ld. CIT(A) considered these submissions and quashed the reassessment on the ground that the same was illegal and bad in law because the same had been reopened when the earlier assessment was pending. The relevant findings recorded by the ld. CIT(A) in para 2.4 and 2.5. are as under:

> "2.4. I have considered the rival positions carefully in the matter, and I find force in the contentions of the Ld. AR discussed in Income Tax Law by Chaturvedi and Pithrsaria(Page 5252 of Vol.3), law is well settled that, "If a notice for reassessment is served on an assessee, the machinery for reassessment is set in motion and the Assessing Officer has to adopt the prescribed procedure for making the reassessment. A return was filed in compliance to such a notice, whether within the prescribed period or beyond it, cannot tie ignored and the reassessment has to be made in the same manner and under the same procedure as laid down in the Act for making an original assessment (see, Parimisetti Seetharamamma v. CIT, (1963) 50-ITR-450, 460 (AP), on appeal (1965) 57-ITR-574 (AP), on appeal).
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> It follows, therefore, that when a return has been filed in pursuance to a valid notice of reassessment, it will not be competent for the Assessing Officer to ignore the return and initiate fresh proceedings by issue of a, second notice (see, Adinarayana Murthy v. CIT, , on appeal . But also, see, Atmaram v. CIT (1960) 39 ITR 418 (PUNJ); CIT v. Surendra Kumar Bhadani,).
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> Where the reassessment proceedings initiated under Section 147 have not been concluded to a logical end, a fresh reassessment notice is invalid and cannot be

sustained. A reassessment order made in pursuance of such invalid notice is liable to be quashed (CIT v. Jaideo Jain & Co;) 2.5. Since the earlier 148 proceedings were still pending as a result of the order of the Hoh'ble ITAT, Amritsar Bench dated 20.3.1998, the issuance of another notice for reassessment dated 40.4.99 during the pendency of the earlier proceedings makes the very issue of the second reassessment notice dated 30.3.1999 bad in law. I am therefore, constrained to quash this reassessment notice in deference to the various judicial pronouncements and in view of the above discussion"

7. The ld. CIT(A) further considered the submissions of the assessee that assessment had become time barred and observed that there was force in the contentions of the ld. AR that the order of the Tribunal passed on 20.3.1998 was served on the CIT Amritsar before 20.3.1998 and, therefore, the time frame for giving effect to the said order expired on 31.3.2000. He did not consider the submissions made by the AO before him that the order was served on the CIT having jurisdiction over the case after 31.3.1998 and therefore, the same was within time by observing that he had already I quashed the assessment order for the reason that reassessment proceedings were initiated at a time when the earlier proceedings were pending. He, therefore, considered this issue as of an academic interest. The relevant findings recorded by the CIT(A) are as under:

"2.6. The Ld. Authorised Representative has also contended that the time limit provided as per Section 153(2A) for giving effect to the order of the Hon'ble ITAT dated 20.3.98 and expired on 31.3.2000, whereas the reassessment proceedings were completed on 21.3.2001 and hence, they were barred by limitation. There is force in the contentions of the Ld. A.R. that the order of the Hon'ble ITAT Amritsar Bench, Amjitsar, passed on 20.3.1998 was served on the CIT, Amritsar before 31.3.1998 and, therefore, the time frame for giving effect to the said order expired on 31.3.2000. The Assessing Officer 8 successor has vide his letter dated 4.2.2000 tried to defend his predecessor's action by stating that the time limit for completion has to be reckoned from end of the financial year in which the order of the Hon'ble ITAT was served on the Commissioner of Income Tax having jurisdiction over the case i.e. Commissioner of Income Tax (Central), Ludhiana. I have considered this matter carefully. To my mind, the objections raised by the successor ITO are frivolous as the Commissioner concerned for the Hon'ble ITAT was the CIT under whose jurisdiction the case was assessed. That the case came to centralized later on is an internal matter of the department, and is none of the concern of the Hon'ble ITAT. However, in view of my decision already delivered above quashing the reassessment proceedings, this question becomes infructuous and academic in nature. Therefore, I refrain from dilating upon it any further."

8. While deciding the appeal on merits, the ld. CIT(A) observed that the AO has purely relied on the confessional statement of the assessee. The same statement stood retracted. Moreover, such statement was recorded by the FERA Authorities for violation under FERA Act. But subsequently, Special Director (Enforcement), New Delhi vide his order dated 28.2.2000 dropped all the charges and no appeal to CEGAT was reported to have been filed. Thus, he observed that there was

absolutely no basis for making the impugned addition. The relevant findings recorded by the CIT(A) in paragraph 2.7. & 2.8. of the order are as under:

> "2.7. The above notwithstanding, the Special Director Enforcement, New Delhi, has dropped all the charges against Sh. Ashok Sachdeva vide his 58 page order dated 28.2.2002, and no appeal to CEGAT has already been filed against the said order of the Special Enforcement. In that respect, the order of the Special Director, Enforcement, becomes final. Since the bulwark of the reassessment proceedings by the AO based on the so-called confessional statement of Sh. Ashok Sachdeva has been quashed by the Enforcement Authorities, there is no material left with the department to pursue the case further. In case of CIT v. K.S. Bhatia 257-IT 614(P&H), the Hon'ble Punjab & Haryana High Court held, Where the relevant additions were made on the basis of the order of assessment passed by the assessing authority under the Sales Tax Act, it is still further admitted position that the appeal filed by the assessee against the order of the Assessing Officer before the Joint Excise and Taxation Commissioner was accepted. The order, which was the basis for additions, was set aside. It is on this basis that the Tribunal has found that the additions were not sustainable.
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> 2.8. In deference to the above judgment, and in view of discussions aforesaid, I find no justification in the colossal additions made in the reassessment proceedings. However, since I have quashed the reassessment proceedings themselves, this matter also becomes academic in nature."

The Revenue is aggrieved by the order of the CIT(A). Hence, this appeal before us.

9. As regards assessment year 1989-90, the facts of the case are that the notice Under Section 148 was issued on 29.03.2000. The basis for reopening the assessment was the same as for the A.Y. 1988-89. The reasons recorded for reopening the assessments are on pages 2 & 3 of the assessment order. Here also, the AO observed hat income liable to tax which had escaped assessment was Rs. 9,21,39,015/- i.e. equal to 30% of the total export turnover including the one disclosed in the books. In the reasons recorded, the AO also observed that the assessee was not entitled to deduction Under Section 80HHC in respect of income which had escaped assessment because the corresponding amount had not been remitted to India in convertible foreign exchange. Here also, the AO relied on the statement of Sh. Ashok Kumar Sachdeva recorded by the FERA Authorities. Ultimatley, the AO completed assessment Under Section 143(3) on 28.3.2002 by making an addition of Rs. 92l,39,015/-.

10. Being aggrieved, the assessee carried the matter in appeal before the CIT(A). It was argued before the CIT(A) that the AO had passed assessment order without placing any material on record that the assessee under invoiced exports for the assessment year under reference. It was also argued that the statement of Sh. Ashok Kumar Sachdeva recorded by FERA Authorities on 31.5.1997 was subsequently retracted. It was also argued that alternatively the statement made by Sh. Ashok Kumar Sachdeva was in respect of Rice & Food Stuff Trading Co; Dubai and not in respect of other

parties. The sales made by the assessee to Rice & Food Staff Trading Co. were to the tune of Rs. 21,15,84,893/- and sales to other parties were to the tune of Rs. 34,06,144/-. It was argued that the addition if sustained should be restricted only to transactions of Rs. 21,15784,893/-. It was also argued that the assessee should be allowed deduction under Section 80-I and 80-HHC in respect of enhanced income. Besides, the AO had also challenged the legality of reassessment proceedings initiated under Section 147. It was also argued that no addition was called for because the Special Director of Enforcement Directorate had dropped all the charges made under the FERA on the basis of under invoicing of the exports. The ld. CIT(A) considered these submissions and remanded the case to the AO vide his order dated 29.5.2002 for both the assessment years i.e. 1988-89 and 1989-90 directing the AO to confront the documents referred to in the remand order. On the basis of remand order, the AO. issued a show cause notice along with a chart of invoices on 30.07.2002. The assessee filed reply vide his letter dated 5.8.2002 and 14.8.2002 stating that it had no knowledge of File marked 'A' and copies of the documents were not supplied. It was also submitted that these documents have not been found from the premises of the assessee and were fabricated by one Sh. Kranti Arora. Thereafter, the assessee also filed detailed submissions before the CIT(A) vide its letter dated 14.08.2002. The ld. CIT(A) after taking into account the facts stated in the remand report, documents seized during course of search both from the premises of M/s. Sachdeva & Sons and Sh. Kranti Arora and written submissions of the assessee submitted before him upheld the order of the AO, both on the point of reopening the assessment and for the addition made. The reasoning given by the ld. CIT(A) on pages 21 to 40 of the impugned order is as under:

> (i) The documents seized during the search from the premises of Sh. Ashok Kumar Sachdeva and Sh. Kranti Arora were in the form of various letters/loose papers, copies of bank account, annual reports including auditors' report by the C.A. which are genuinenly original document in respect of which it cannot be said that these were forged/planted with a view to implicate the assessee. Even under the law, presumption arises that the contents of the documents seized during the search contained correct information and could be relied upon in the assessment/appellate proceedings. It was for the assessee to disapprove the contents of these documents by leading evidence to show by producing its books of account and other relevant material. However, in the present case, the assessee failed to produce the books of account either during the course of assessment proceedings and even during the course of remand report sent by the A.O. which was as per directions given by him and the remand order was duly served on the assessee. Thus, the assessee failed to discharge the onus to prove that the contents of these documents were either incorrect or did not relate to him.
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> (ii) Page 2 of File marked "B" contained quantities which tallied with 13 invoices referred to on page 6, para 12 of the remand report. This indicated that the invoices in respect of which under invoicing was alleged, are genuine and not forged or doubtful documents. This fact confirmed that the documents seized from the residence of Sh. Ashok Kumar Sachdeva and Sh.Kranti Arora represented true state of affairs.

(iii) The standard of proof required for the Income-tax proceedings is much less as compared to criminal proceedings. In the case of criminal proceedings, the prosecution is required to establish the offence beyond any shadow of doubt. However, in the case of Income-tax proceedings, the I.T. Authorities could look into the surrounding circumstances and also apply the test of human probability while deciding the various issues arising before them. In the present case, the confessional statement made by Sh. Ashok Kumar Sachdeva on 31.5.1997 before FERA Authorities wherein he admitted that his firm was Under invoicing the exports. This statement is further corroborated by large number of documents seized from his residential and business premises as well as from the residential premises of Sh. Kranti Arora. These documents further lend support to the fact that the assessee was under invoicing exports by 30%. This charge is further established by the fact that the assessee failed to produce the books of account during the course of assessment and remand proceedings even though such action was directed by the CIT(A) while remanding the case to the A.O.

(iv) On page 4 of the remand report, the AO had referred to loan raised by Sh. Vinod Sachdeva brother of Sh. Ashok Kumar Sachdeva amounting to Rs. 7.5. lacs US Dollars from Almaya Lal's groups of companies Dubai, for setting up of Rice Mill at Great Yeldham, in the year 1990-91 and the loan was being repaid through money obtained/generated by under invoicing. This charge is supported by a letter of Sh. Vinod Sachdeva to Sh. Paqrani wherein he mentioned an amount of $ 9,65,000/- already invested in the capital of the said mill indicated investment, made by the assessee through Sh. Vinod Sachdeva and $ 6,50,000/- mentioned to have been invested from limited resources. This fact clearly established large amount of investment made abroad and the money having been paid by under invoicing. This letter was seized by the FERA Authorities and is listed at page 231 file Marked 'B' which clearly repeal that on 30.11.1991 under invoicing amount aggregated to US $ 4,27,500/- being difference in the amount as per ivoice and actual amount for which 1140 MT of Rice had been sold was to be adjusted against the loan account. In the said letter, there is also promise to clear the loan before March. This evidence confirmed that the assessee was indeed under invoicing the exports.

(v) The ld. CIT(A) also referred to his confessional statement made on 31.5.1997 wherein he stated that total exports during the period from 1982 to 1987 were to the tune of Rs. 600/- to Rs. 650/- crores. But in the books of account, exports during this period aggregated to Rs. 300/- to Rs. 350/- crores.

(vi) On October, 1991, Sh. Ashok Kumar Sachdeva, partner and his brother had invested 8 lacs $ in a Company, Shri Ashok Kumar Sachdeva was also one of the Directors in M/s. Greenock Holding Ltd. Investments therein were also made by M/s. K.V.Trust and M/s. Amalaya Lal's. Even though, the letter refers to investment made upto Sept,. 1991, but the source therein must have been out of the income earned by way of under invoicing of exports of the earlier years. This also lends

support to the charge of under invoicing against the assessee.

(vii) He referred to page 230 of annexure-6 which is a copy of declaration from Black Brings and Co. CA. Babri House, 26-36, Old Street Landon dated 16.4.97 addressed to Sh. Kranti Arora stating that the funding of the company i.e. M/s. Greenocks holding Ltd was not done by Sh. Kranti Arora rather the funding had been done by Sachdeva Family of Amritsar. Neither during the course of remand proceedings nor in the appeal proceedings, the assessee placed any material or evidence to show that the investments in the said Company, were made out of the funds reflected in the books of account. Not only this, M/s. Greenocks Holdling Ltd; had also made further investment in the Companies, namely, M/s. Basmati Rice UK Ltd; (85%), M/s. Pari Rice Ltd (100%) and M/s. Rice & Food Stuff Trdg. Co. (100%). He also observed that all the papers, correspondence, Director's report, Bank statements and other loose papers were seized from the premises of Sh. Ashok Sachdeva/Sh.Kranti Arora connected with the under invoicing of rice and resultant profit earned therein was stashed/kept abroad and was utilised for the repayment of loans/making investments in various Companies abroad.

(viii) The Id.CIT(A) further observed that when the case was remanded to the AO, a copy of the remand order was also served on the assessee and the AO was directed to make necessary enquiries to ascertain the various issues raised in the remand order. However, the AO repeatedly asked the assessee by issue of notice under Section 143(2)/142(1) to produce books of account and to join investigation so that various issues raised in the remand report could be examined. But the assessee consistently refused to produce the books of account on the ground that the evidence collected during the search was not relevant to the assessee and that confessional statement Of Sh. Ashok Sachdeva had been retracted. He further observed that the perusal of the issues raised in the remand report based on the material seized from the residence of Sh. Ashok Sachdeva and Sh.Kranti Arora containing information sufficient to make out a prima facie case against the assessee and the onus was on the assessee to rebut the presumptions arising out of such documents seized during the search but the assessee failed to discharge such onus. He specifically referred to a letter from Sh. Ashok Sachdeva contained in the file marked 'B' at page 231 (This was found to be not correct) seized from the residence of Sh.Kranti Arora where a reference is made to 4,27,500 US Dollars earned as a differential through under invoicing of specific invoices Nos. 357, 358, 359, 360, 372. Further, Sh. Vinod Sachdeva also aditted at page 231 of filed marked 'B' seized from the residence of Sh. Kranti Arora during the course of search to be in his hand writing: and the same was communication with Sh. Paqrani regarding import and export prices. Thus, theses seized documents clearly highlighted the modus operandi adopted by the assessee for under invoicing the export of rice and the utilization of such money kept aborad.

(ix) The AO was asked to verify 13 invoices furnished by Sh, Ashok Sachdeva during the statement dated 11.8.97 recorded by the FERA authorities and AO after

verification reported that some of these invoices had tallied with those of the assessee and rest, of the invoices were not produced by the assessee during the remand proceedings. Thus, the learned CIT(A) observed that the assessee failed to discharge the onus arid not even availed of the oppportunity provided to him during the remand proceedings.

(x) The file marked 'A' consisted of pages 1 to 42 related to the business transaction of Sachdeva & Sons. This file contained documents, which showed clear cases of under invoicing, manipulation of exports and adjustments and transfer of funds from Dubai to other countries. These documents were confronted to the appellant during the remand proceedings and the assessee has not been able to demolish the veracity of those documents by producing books of account and other relevant documents. He also referred to page Nos. 127, 135, 144, 147 and 231 contained in file marked 'B' which was recovered from the residential premises of Sh.Kranti Arora and which are admittedly in the hand-writing of Vinod Sachdeva and the same contained clear cut evidence of under invoicing done by the assessee firm. These documents were confronted to the assessee during the remand proceedings, but the assessed failed to produce any evidence alongwith books of account except stating that these documents were not relevant. He also referred to file seized from the residence of Sh.Kranti Arora during the course of search by FERA authorities containing documents pertaining to the transactions with overseas concerns of Sachdeva's which gave details of invoices of commodities items in which total under invoiced value is worked out. Even in regard to the same, the assessee failed to respond to the queries raised and simply avoided the issue by saying that these were not relevant in the remand order. The A.O. was directed to specifically verify whether there were similar instances of under invoicing for the assessment years 1988-89 & 1989-90. However, during the course of remand proceedings the assessee failed to produce the books of account and other documents so as to enable the AO to carry out such verification. He further referred to the statement of Sh.Kranti Arora wherein he had admitted that all exports made by Sachdeva & Sons during 1980 to Sept, 1993 to M/s. Wani International were under invoiced and this fact was further corroborated by the evidence found during the course of search referred to above; He also observed that the failure on the part of the assessee to produce books of account including invoices lend further support to the fact that there was under invoicing for the assessment year under reference also.

(xi) He also referred to the provisions of Section 92 which refer to Income-tax Act, 1961 as per which if the business is carried on between a resident and non-resident and owing to close connection between them it appears to the AO that course of business is so arranged that such business produces less than the ordinary profit, the AO is required to determine the amount of reasonable profits and include such amount in total income of the resident. He observed that transactions of the assessee with M/s. Rice & Food Stuff Trading Company, Dubai and other concerns like M/s. Lal Trading Co. Dubai, M/s. Skkud Finance Ind. Dubai, M/s. Pari Rice UK Ltd; and

M/s. Great Yeldham (UK) made by assessee's brother Sh. Vinod Sachdeva, maternal uncles S/Sh. Raj Sethia and Ramesh Sethia and, their associates were closely connected and business amongst them was so arranged that it produced to the appellant less than ordinary profit as earned by: similar concerns in the same line of trade. He also referred to other cases engaged in the business of export of rice, namely M/s. Amar Singh Chawalwala, Amritsar and M/s. Deva Singh Sham Singh, where the G.P. shown was in the region 14 to 15%. But in the present case, the G.P. shown by the assessee was only 10 to 11 %. Thus, he held that the provisions of Section 92 were clearly applicable and coupled with the confessions of Sh. Ashok Kumar Sachdeva and Sh. Kranti arora showed that the assessee failed to disclose correct income from business during the year under consideration. He also rejected the alternative contention of the assessee that under invoicing should be considered only in respect of transactions with M/s. Rice and Food Stuff Trading Co. Dubai. He observed that as the assessee had exported rice to other concerns and the modus operandi adopted was the same the entire turnover was to be considered for the purpose of under invoicing. The assessee's submissions that the sales were made at a rate higher than fixed by the Govt. did not find favour with the ld. CIT(A) for the reason that the minimum price fixed by the Govt. was only for the purpose of ensuring minimum limit of price and was certainly not the maximum price which the assessee could earn on the export of rice.

(xii) As regards the quantum of addition, he referred to the letter written by Sh. Vinod Sachdeva to Sh. Paqrani at page 231 of file marked 'B' which indicated under invoicing of 30% supported by confessional statement of Sh. Kranti Arora and Sh. Ashok Kumar Sachdeva. He, therefore, held that the AO was justified in estimating the income by taking the amount of under invoicing at 30 % of the billed price.

(xiii) As regards the deduction under Section 80HHC of additional income, the ld. CIT(A) observed that the assessee had not brought sale proceeds from exports in convertible foreign exchange into India and further assessee was required to furnish audit report in the prescribed form 10CCA which has not been done and the foreign exchange earned through under invoicing was kept abroad. The ld. CIT(A) held that the assessee was not entitled to deduction Under Section 80HHC in respect of the additions made and sustained. As regards deduction under Section 80-I, the ld. CIT(A) referred to the requirement of law of filing audit report and further amount earned through under invoicing was not included in the books of the account, therefore, the AO held that the assessee was not entitled to such deduction.

The Revenue is aggrieved with the order of the CIT(A) for the A.Y. 1988-89 and the assessee is aggrieved by the order of CIT(A) for the A.Y.1989-90. Hence, these appeals before us.

11. The Ld. DR. filed written submissions vide two letter dated nil (copies placed at pages 29 to 34 of assessee's paper book containing pages 1 to 66 filed on 20.05.2005). It was submitted that the first notice Under Section 148 for the A.Y. 1988-89 was issued on 3.11.1992 only on a limited issue that

the assessee was not entitled to deduction Under Section 80HHC in respect of rental income and the assessment was completed on 2.2.1993. In addition the CIT(A) had passed order Under Section 263 for reconsidering the claim for deduction Under Section 32AB in respect of rental income. On appeal, the ld. CIT(A) annulled the assessment vide his order dated 28.2.1994. The Department filed an appeal against the order of the CIT (A) and the Tribunal vide its order dated 20.3.1998 upheld the action of the AO for initiating reassessment proceedings Under Section 147 and accordingly, the order of the CIT(A) was set aside. However, in regard to deduction Under Section 32AB and Under Section 80HHC in respect of rental income the matter was restored to the file of the AO for deciding the same afresh as to whether such income was part and parcel of the business income or not. The Ld. CIT(A) has quashed the order for reassessment for the assessment year 1988-89 on the ground that the assessment completed earlier on the basis of first notice issued Under Section 148 on 3.11.1992 was still pending and, therefore, the reassessment completed on the basis of second notice during the pendency of assessment proceeding was illegal and bad in law. However, he submitted that the matter which requires to be considered by this Bench is as to which proceedings were pending before the AO in the matter When the case was remanded by the Tribunal. It is to be considered whether the AO while completing the reopened assessment could cover other items of income which had escaped assessment and the same was not subject matter of earlier assessment or the powers of the AO are limited only to those issues which have been specifically remanded by the Tribunal. The Ld. DR submitted that it is settled position in law that the AO had no powers to consider any fresh items of income or issue in the set aside proceedings other than the issues remanded by the appellate authority. He relied on the following judgments:

(i) Sri Vindhya Vasini Prasad Gupta v. CIT .

(ii) Murlidhar Bhagwandas v. CIT 234 ITR 548 (Bom.)

(iii) Kartar Singh v. CIT, 111 ITR 184 (P&H)

He submitted that the A.O. initiated second reassessment proceedings by issue of notice Under Section 148 on the ground that the income chargeable to tax by way of under invoicing of exports to the extent of 30% had escaped assessment. It was submitted that the earlier assessment was not reopened on this issue. Therefore, there was no question of adjudicating this matter at the time of completing the set aside assessment remanded by the Tribunal. The Tribunal had set aside the assessment only for a limited purpose of deciding the issue as to whether the rental income formed part of the business income and hence entitled to deduction Under Section 32AB and 80HHC or not. He submitted that the issue on which assessment was reopened was never subject matter of assessment and adjudication by the CIT(A) or the Tribunal. The AO had no authority to cover the present addition in appeal while deciding the set aside assessment. Therefore, the AO had rightly reopened the assessment by issue of notice Under Section 148 on 243.1999. The reassessment completed was also within time allowed under the Act from the date of issue of the second notice. He, therefore, contended that no assessment was pending on the issue of bringing to tax income by way of under invoicing of exports. Relying on the judgment of Hon'ble Allahabad High Court in the

case of S.P. Kochhar v. ITO 145 ITR 255, the ld. DR submitted that when the order is set aside by the Tribunal, the powers of the ITO are confined to such matters only. He cannot take up the questions which were not subject matter of appeal before the Tribunal and the AO cannot travel beyond the directions given in the order. Thus, he submitted that the ld. CIT(A) was not justified in quashing the reassessment on the ground that the same had been reopened when the earlier assessment was pending and therefore, such action was illegal and bad in law.

11.1. The Ld. DR further argud that in para 2.6. of the impugned order for the A.Y.1988-89, the ld. CIT(A) has held that there was force in the contentions of the ld. AR that the order of the Tribunal dated 20.3.1998 was served on the CIT before 31.3.1998 and, therefore, the time frame for giving effect to the said order had expired on 31.3.2000. The ld. DR submitted that during the course of appeal proceedings, it was brought to the notice of ld. CIT(A) that the Tribunal had sent the order to CIT, Amritsar, where the assessee was earlier being assessed to tax. However, subsequently the case was assigned to Central Circle. Therefore, the ld. CIT Amritsar had returned the order to the Tribunal vide letter dated CIT/Asr/Judicial/24 dated 2.4.98 with the remarks that jurisdiction over the case rested with the CIT(Central) Ludhiana. Therefore, the Tribunal vide its letter in ITA No. 846(ASR)/93 dated 2.4.98 sent the order to CIT(Central), Ludhiana who had the jurisdiction over the case. This order was received by the CIT(Central) Ludhiana on 6.4.98. A copy of letter dated 2.4.98 addressed to CIT(Central), Ludhiana was also placed before us. A letter dated 25.05.2005 of the office of the C.I.T. Central, Ludhiana stating that the order of the ITAT Amritsar Bench for the A.Y.1988-89 was received by CIT(Central) on 6.4.98. He submitted that this fact is duly noted by the CIT(A) in para 2.6 and such plea was taken before him during the course of appeal proceedings. He submitted that the ld. CIT(A) was wrong in accepting the service of the order of the Tribunal before 31.3.98 though the same was served on the CIT(Central) Ludhiana on 6.4.98. He submitted that the ld. CIT(A) was not justified in accepting the date of service before 31.3.98 and then holding that the assessment completed by, the AO was time barred. He submitted that if the date of service was taken as 6.4.98, the present order is very much within time. He further argued by referring to para 2.6. of the impugned order that the ld. CIT(A) has not quashed the order on this point as he mentioned that since he had already quashed the reassessment proceedings for the reasons that when the second notice Under Section 148 was issued, the assessment was pending and, therefore, reassessment proceedings initiated by him were illegal and bad in law. He submitted that such remarks by the CIT(A) could only be considered as obiter dicta.

11.2. As regards the merits of the case, the ld. DR has submitted that the ld. CIT(A) has summarily deleted the same by recording that "I find no justification in colossal addition made in reassessment a proceedigs." He wrongly observed that the basis of reassessment proceedings did not exist after the FERA proceedings were quashed by the Special Director (Enforcement) when there was no independent evidence indicating under invoicing of exports by the assessee. He submitted that the ld. CIT(A) has summarily decided the appeal without applying his mind and considering the various aspects of the case including the confessional statement of Sh. Ashok Sachdeva and other evidence found during the course of search by FERA Authorities, He submitted that on the basis of same evidence and material found and seized during the course of search, the ld. CIT(A) for the subsequent asstt.year 1989-90 remanded the case to the AO and after obtaining remand report upheld the additions for the subsequent asstt. year. He strongly submitted that the order passed by

the CIT(A) could not be considered as judicious order as the ld. CIT(A) failed to record any finding on the merits of the additions. He submitted that the order is without any reasoning and deserves to be quashed.

11.3. As regards the assessment year 1989-90, the ld. DR filed written submissions which are at page 32 to 34 of the paper book. The Ld. DR submitted that the assessment was reopened on the basis of statement of Sh.Ashok Sachdeva, partner of the firm recorded by the Enforcement Directorate on 31.5.1997. He submitted that the AO has recorded detailed reasons on pages 2 & 3 of the asstt. order. In the reasons recorded, the AO has referred to the information on the basis of which he formed a 'reason to believe' that income chargeable to tax had escaped assessment. He submitted that in the statement recorded by the FERA Authorities, the assessee had explained the modus operandi by the assessee for under invoicing the exports and besides the Enforcement Directorate had also issued show cause notices for violation of the provisions of the FERA Act. The copies of the six show cause notices issued on 29th May, 1999 to six parties including the assessee were placed at pages 3 to 30 of the Departmental Paper book. Copies of these show cause notices were sent to the CIT, Amritsar vide Enforcement Directorate letter dated 29.5.98 (copy placed at page 1 of the paper book). Referring to page 2 of the Departmental paper book, the ld. DR submitted that this show cause notice alongwith file in original containing 207 pages were forwarded to the AO vide DCIT(Central) Amritsar, confidential letter dated 28th Sept, 1998. Thus, the ld. DR submitted that these assessment proceedings were initiated on the basis of such material and evidence and, therefore, the ld. CIT(A) had rightly upheld such action of the A.O. 11.4. As regards merits of the additions, the ld. DR submitted that during the course of appeal proceedings, the case was remanded to the AO on specific points listed in para 3.1. on pages 2 to 4 of the order of the CIT(A). He submitted that in the remand order, the AO was directed to submit its report on 15 points and a copy of the said order was also given to the assessee. However, during the course of remand proceedings, the assessee failed to produce the books of account, invoices and other material to substantiate its contention that there was no under invoicing for the A.Y. under reference and also to rebut the presumptions raised by the law that the contents of documents seized during the course of search should be accepted true and correct until proved otherwise. He submitted that the remand proceedings are as much part of the assessment proceedings as the ld. CIT(A) vested with full authority co-terminus with the AO and the appeal proceedings are in continuation of the assessment proceedings. He submitted that the AO submitted detailed remand report dated 1.10.2002, the copies placed at pages 170 to 187 of the paper book. He submitted that the ld. CIT(A) has taken into account the remand report, confessional statements of Sh. Ashok Sachdeva and Sh.Kranti Arora and the contents of the documents seized during the course of search by the FERA authorities which clearly spell out the modus operandi of the assessee for under invoicing the exports and keeping 30% of such amounts abroad and utilization thereof by the assessee and other family members. He submitted that such under invoicing was done through M/s. Wani International, Dubai, later changed to M/s. Rice & Food Stuff Trading Co. which was also supported by a letter written by Sh. Vinod Sachdeva to Sh. Paqrani at page 231 of the file marked 'B' seized from the residence of Sh.Kranti Arora. He submitted that all these relevant details have been discussed by the CIT(A) on pages 27 to 30 of the impugned order and the ld. CIT(A) has given detailed reasons for upholding the addition. The ld. DR heavily relied on the findings given by the CIT(A) in his order.

11.5. As regards ground Nos. 6 & 7 of assessee's appeal, the ld. DR submitted that the ld. CIT(A) has given detailed reasoning in para 7,8. On page 32 of the impugned order wherein he has referred to the fact that the standard of proof required for Income-tax proceedings is not the same as for criminal proceedings. He submitted that the ld. CIT(A) has rightly observed that while deciding the issue arising before the Income-tax Authorities, the matter can be decided by taking into account the surrounding circumstances and by applying the test of human probability. He also submitted that various cases relied upon by the assessee were distinguishable on the facts and were not applicable to the facts of the present case. Thus, he strongly supported the order of the CIT(A).

12. At the outset, the ld. counsel for the assessee, Sh.C.S.Aggarwal, drew our attention to the following paper books/documents filed before the Tribunal:

> (i) One Box file containing pages 1 to 390 about searches conducted by FERA Authorities, statements of Sh. Ashok Sachdeva recorded by the FERA Authorities on various dates, show cause notices issued by the, FERA Authorities and replies filed to the show cause notices.
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> (ii) Paper Book -1 containing pages 1 to 405 in two volumes, i.e. Ist volume contained pages 1 to 276 and the IInd volume contained pages 277 to 405. This paper book contained details of various assessment orders, copies of notices issued, appeals filed, orders of the authorities below and submissions of the assessee made before the authorities below.
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> (iii) Paper book-2 containing pages 406 to 440 with reference to notice Under Section 142(1) issued alongwith questionnaire calling for books of accounts for the purpose of remand report, copy of reply dated 9.9.2002 to the above notice and remand report dated 1.10.2002 submitted before the CIT(A) for the A.Ys.1988-89 and 1989-90.
>
> (iv) Paper book-3 containing pages 1 to 3 about the list of documents referred to by the CIT(A) in his order for the A.Y.89-90 and assessee's submission in regard to the same. (v) Paper book-4 containing pages 1 to 168, wherein the assessee has given brief facts of the case, written submissions before the Tribunal and copies of some of the judgments relied upon by the assessee.

12.1. The ld. counsel for the assessee, Sh. Aggarwal submitted that the basis for reopening the present assessments was a search carried out by the FERA Authorities at the residential and business premises of the assessee alongwith many others for which details have been given in annexure A to show cause notice issued to the assessee by the FERA authorities (copy placed at pages 44 to 51 of the box file). The charge made against the assessee was under invoicing of exports to the extent of 30% and the same was on the basis of statements of Sh. Ashok Sachdeva, one of the partners, recorded by the FERA Authorities on 31.5.1997 wherein he stated that there had been under invoicing of 30% of the rice exported by the assessee. He also stated that the exports made by the firm during the period 1986-87 to 95-96 were to the tune of 600 to 650 crores. He submitted

that his statement was very vague and nowhere Sh. Ashok Sachdeva had stated that he had under invoiced export for the asstt. years under reference. Subsequently, Sh. Sachdeva also retracted from the statement on 11.6.97. He submitted that subsequently Special Director of Enforcement vide his order dated 28.02.2002 dropped all the charges leveled against the assessee by FERA Authorities. He drew our attention to a copy of adjudication order passed by the Special Director of Enforcement at pages 320 to 377 of the paper book. He submitted that for the A.Y. 1988-89, the ld. CIT, Central, Ludhiana, quashed the reassessment on the ground that the initiation of reassessment proceedings, when the earlier proceedings initiated were pending, was illegal and bad in law, the assessment was barred by limitation and even on merits, the addition was deleted because the basis on which assessment had been reopened and additions were made ceased to exist after the Special Director of Enforcement Directorate dropped the charges levelled against the assessee. He emphatically submitted that no appeal can be filed against the order of the Special Director of Enforcement Directorate and the order has been accepted by the Govt. He also submitted that even such order is binding on the Govt. Relying on the judgment of Hon'ble Punjab & Haryana High Court in the case of C.I.T. v. K.S. Bhatia 257 ITR 614, the ld. counsel for the assessee submitted that in case addition has been made oil the basis of order passed under Sales tax Act and such order has been set aside in appeal by the Sales-tax authorities, no addition under the Income-tax Act could be made (Copy placed at pages 116 to 121 of the paper book). He also relied on the judgment of Hon'ble Punjab & Haryana High Court in the case of Somani Pilkington's Ltd; reported in (2003) Taxman 133 page 717 where showcause notices issued by the Central Exicse, which contained annexures, which were made basis of show cause notice issued by the Income-tax Department to assessee for making an addition to Income had been set aside by the High Court, such annexures lost their validity. The High Court further held that when the very basis on which notice was issued to the assessee had already been quashed, nothing survived in the matter. He also submitted that similarly the very basis of initiating the reassessment against the assessee and for making addition was the order passed by the FERA Authorities and since charges levelled against the assessee for under invoicing of exports were dropped by the Special Director (Enforcement), no addition could be made in the income-tax Act. He submitted that for the A.Y.1988-89, the AO had first completed the assessment Under Section 143(3) on 28.3.89 on a total income of Rs. 2,57,132/-, which was reduced in appeal by the CIT(A) vide his order dated 31.05.1989 to Rs. 1,72,432/-. Thereafter, the ld. CIT passed order Under Section 263 on 18.3.1991 setting aside the assessment on the ground that the issue regarding allowing of deduction Under Section 32AB by including the rental income required examination. In pursuance of such order, the Tribunal vide its order dated 27.11.1997 set aside the assessment and restored the issue to the file of the AO for deciding the matter as to whether the rental income formed part of business income or not. The AO initiated reassessment proceedings on 3.11.92 by issue of notice Under Section 148 for the reason that the assessee was not entitled to deduction Under Section 80HHC in respect of rental income. The assessment was completed on 2.2.93. On appeal, the ld. CIT(A) quashed the assessment vide order dated 28.2.1994 (copy placed at pages 24 to 26 of the paper book). On appeal filed by the Department, the Tribunal set aside the order of the CIT(A) and upheld the action of the AO for initiating reassessment proceedings under Section 148. However, the issue whether the rental income formed part of business profit or not for the purpose of computing deduction Under Section 80HHC was restored by the Tribunal to the file of the A.O. vide Tribunal's order dated 203.98 (copy placed at pages 32 to 34 of the paper book). Thus, the assessment reopened by issue of notice Under Section 148 on 31.11.92 was still pendihg with the AO

as a result of the order of the Tribunal dated 20.3.08 for restoring the limited issues of deduction Under Section 80HHC and Under Section 32AB to the file of the AO. He submitted that the AO initiated second reassessment , proceedings by issue of notice Under Section 148 on 24.3.1999 i.e. when the earlier assessment was still pending. Such action of the AO for initiating reassessment proceedings when the earlier assessment was pending is bad in law and void ab initio, He relied on the following judgments:

(1) S.P. Kochhar v. IT0 145 ITR 255 (All.)

(2) Ghanshyam Das v. Regional ACST, 51 ITR 557 (SC)

(3) Commercial Art Press v. CIT 115 ITR 876 (AP)

(4) Trustees of H.E.H. The Nizam's Supplement Family Trust v. C.I.T. 242 ITR 38

(5) Chander Bhan v. ITO 137 ITR 338 (P&H)

He further submitted that the provisions of Section 147 have been amended w.e.f. 1.4.1989. Once the assessment has been reopened, the scope of reassessment is not only confined to income that had escaped assessment but also extends to any other income chargeable to tax which had escaped assessment. Thus, the ld. AR contended that while completing the first reopened assessment which was restored to the file of AO by the ITAT, the AO could have also considered the present addition and there was no need for initiating reassessment proceedings. Thus, he contended that the ld. CIT(A) was justified in quashing the reassessment proceedings initiated by the AO while earlier assessment was pending. He submitted that the order of the CIT(A) does not warrant any interference on this account.

12.2. He further argued that the ld. CIT(A) has quashed the assessment because it had become time batted. He drew our attention to para 2,6} of the order of the CIT(A). He submitted that the Revenue has not challenged the findings of the CIT(A) recorded in para 2.6.. No specific ground has been taken before the Tribunal. He submitted that until such findings are challenged by way of specific grounds of appeal, the Revenue cannot argue mis point in appeal. Such course of action is not permissible.

12.3. He further submitted that the ld. CIT(A) has also decided the appeal for the A.Y.1988-89 on merits. He referred to the findings recorded by the CIT(A) in para 2.7. While deleting the addition, the CIT(A) has referred to the order dated 28.02.2002 of the Special Director (Enforcement), Enforcement Directorate against which no appeal to CEGAT was filed. He submitted that relying on the judgment of Hon'ble Punjab & Haryana High Court in the case of CIT v. K.S. Bhatia, 257 ITR 614, the ld. CIT(A) held that if the very basis of making the addition by relying on the show cause notices issued by the FERA authorities ceased to exist, no addition could be made under the

Income-tax Act. Thus, he submitted that it was incorrect on the part of the Revenue to contend that the ld. CIT(A) has not decided the appeal on merits.

12.4. The ld. Counsel further submitted that the confessional statement could only be recorded by the Magistrate under the Criminal Law. In this cases, confessional statement was not recorded by the Magistrate. He further submitted that the confessional statement can also be retracted if the same is based on wrong facts and misconception of the law. For this proposition, he relied on the following two judgements:

(i) Pullangode Rubber Produce Co. Ltd v. State of Kerala and Anr. 91 ITR 18(SC)

(ii) Krishan Lal Shiv Chand Rai v. CIT 88 ITR 293 (P&H) Now the issue whether for the relevant assessment year, there has been under invoicing of exports or not and whether the same is corroborated by evidence is to be seen in the light of facts placed on record. Since the Department has not been able to establish under invoicing of exports for the asstt. years under reference, the assessee had rightly retracted from the statement and in the absence of any supportive evidence, no addition could be made merely by relying on such statement.

12.5. He further referred to a copy of order dated 28.02.2002 of the Special director of Enforcement Directorate (copy placed at pages 102 to 157 of the paper book-1). Drawing our attention to to pages 101 to 105 of the paper book, the ld. counsel for the assessee submitted that basis for initiating action under the FERA Act was the same i.e. charge of under invoicing of exports and keeping part of the income abroad. He submitted that all these details which have been referred to by the ld. CIT(A) and the documents seized during the course of search at the various premises i.e. from the residence of Sh.Kranti Arora and Sh. Ashok Sachdeva have been referred to in the said order. Various statements recorded by the FERA Authorities have also been referred to in the said order. Drawing our attention to page 119 of the paper book which deal with the show cause notice-1 issued to the assessee, the ld. counsel submitted that specific charge levelled against the assessee was that the amount of Rs. l44.3 crores of foreign exchange was kept abroad without any previous order or general permission of the Reserve Bank of India. Similarly, all the other show cause notices issued, have also been referred to. In the reply submitted by the assessee and referred to on pages 124 & 125 of the paper book, the assessee had clearly stated that the statement was not voluntary and was recorded under duress. The charge of under invoicing was denied. On page 128 of the paper book, the Special Director referred to the ingredients required for proving under invoicing which inter-alia included whether the invoiced price was in conformity in the normal or minimum flooring price and proof of parking of the differential amount in the foreign exchange arising out of under invoicing. The findings have been recorded on pages 143 to 157 of the paper book. He submitted that due cognizance was taken of the statement of Sh.Ashok Sachdeva retracted on 11.6.97. Referring to page 146 of the paper book, the ld. counsel submitted that the Special Director also took note of the facts about the minimum export price fixed by the Govt. of India and the price at which the assessee had exported rice during the period 1986-87 to 1995-96. He also observed that the rate at which the assessee had exported the rice was much higher than the minimum price fixed by the Govt. Thus, Special Director observed that the charge of under invoicing of rice has not been established and the

charge was dropped against the assessee. He further submitted that once the charges have been dropped by the Enforcement Directorate, there is no basis for making any addition in the hands of the assessee. He relied on the following judgements:

(i) C.I.T. v. K.S. Bhatia 257 ITR 614 (P&H)

(ii) CIT v. Somani Pilkington's Ltd. (2003) 133 Taxman 717 (P&H).

He further submitted that the charge of the Department is that the assessee had directly exported the rice to the parties abroad. However, invoices were made in the name of M/s. Wani International, which was sister concern of the assessee and managed by the relations of the assessee. The payments were routed through M/s.Wani International. While the buyers made full payment of the price at which they purchased the goods to M/s. Wani International, but M/s. Wani International remitted only 70% of such receipts and remaining 30% of funds were retained in Dubai for being utilized for making investments abroad. However, he submitted that the Department has not held that M/S. Wani & International was benamidar concern of the assessee. No income earned by M/s. Wani International has been included. Therefore, the ld. counsel submitted that no addition could be made in the hands of the assessee.

12.6. The ld. counsel for the assessee further argued that the evidence if any, available with the Department and seized from the premises of Sh.Kranti Arora related to the subsequent asstt. years i.e. 1990-91, 91-92, 92-93; 93-94 & 94-95. He submitted that the Revenue had issued notices under Section 148 on 24.01.2001 and initiated reassessment proceedings for the assessment years 1990-91,91-92,92-93,93-94 & 94-95. Copies of such notices were also placed on our file. However, the Department has not made any additions for these assessment years and no assessment orders were passed. He submitted that all the evidence referred to by the CIT(A) in the impugned order for the assessment year 1989-90 relate to subsequent assessment years for which proceedings have already been dropped by the Department. If no additions have been made for those assessment years to which the evidence referred to by the CIT(A) related to, no addition could be made for the assessment years under reference for which not even a single document is available with the Department.

12.7. He further argued that the assessee was not confronted with any material or basis other than copy of statement recorded in respect of Sh. Ashok Sachdeva. Even during the course of remand proceedings, the AO confronted the assessee only with a chart of invoices where allegation of under invoicing was made and these are placed at pages 184 to 190 of the paper book. Further, the assessee was confronted with the copies of purported correspondence between M/s. Basmati Rice and some other concerns; The assessee had clearly explained that it had no relation with the purported correspondence and these documents were not seized from the residence of assessee. The said correspondence was seized from the residence of Sh.Kranti Arora. The statement of Sh.Kranti Arora has never been confronted to the assessee nor any opportunity to cross examine Sh. Kranti Arora was allowed. The statement was recorded by the FERA Authorities and not by the Income-tax

Authorities during the course of assessment proceedings. No enquiry was made by the AO with Sh. Kranti Arora or any other concerned person. He, therefore, submitted that such evidence, which has not been confronted to the assessee is no evidence and cannot be acted upon. He relied on the following judgements:

(i) Kishinchand Chelllaram v. CIT 125 ITR-730(SC)

(ii) CIT v. Rao Raja Hanut Singh, 252 ITR 528(Raj)

(iii) R.B. Shreeram Durga Prasad and Fatechand Nursing Das 176 ITR 169 (SC).

where it was held that the. order passed in violation of principles of natural justice was nullity. He also relied on the judgement reported in AIR 1981 SC Page 205 and and Ghiranji Lal v. CIT, reported in 84 ITR 222.

12.8. The learned AR further argued that once the statement is retracted and the AO has neither made independent enquiry nor even cared to record the statement of the assessee or even the statement of Sh.Kranti Arora was not recorded during the course of assessment proceedings by the AO and simply relied on the confessional statement of Sh. Ashok Sachdeva and the statement of Sh. Kranti Arora, for making additions. Such course of action would not justify; any addition merely on the basis of relying on the confessional statement. He relied on the following judgments/decisions:

(1) CIT v. Somani Pilkingston's Ltd; (2003) 133 Taxman 717 (P&H).

(2) Abdulla Gani v. ACIT, 43 ITD 180(Bombay).

He further submitted that the ld. CIT(A) has brought on records certain documents which were not in accordance with the provisions of law. He relied on the judgement of Hon'ble Supreme Court in the case of Mahavir Singh v. Naresh Chandra and Anr. reported in (2001) SCC page 309.

12.9. The ld. counsel for the assessee submitted that the action of the AO for initiating reassessment proceedings was without any basis and arbitrary. He referred to the reasons recorded by the AO in the assessment order where he has based his action merely on the basis of confessional statement recorded by the FERA Authorities on 31.5.97. This statement was subsequently retracted on 11.6.97. Relying on the judgment of Delhi High Court in the case of United Electrical Co. Pvt. Ltd v. CIT 258 ITR 317, the learned counsel for the assessee submitted that the expression used in Section 147 i.e. 'reason to believe' means facts must exist on the basis of which such belief is entertained. There should be rational nexus or relevant bearing to the formation of such belief and must not be extraneous or irrelevant. He referred to the confessional statement of Sh. Ashok Sachdeva (copy placed at pages 1 to 3 of the Box file) and drew our attention to answer to question No. 5 where he stated that invoices raised for the goods exported sometime used to differ from the actual price, but not always. He stated that nowhere, the Sh. Ashok Sachdeva has stated that under invoicing was also for the asstt. years under reference. Relying on the judgment of Hon'ble Supreme Court in the case of Indian Oil Corporation v. ITO 159 ITR 956, the ld. counsel submitted that the 'reason to believe' is

not reason to suspect' He further referred to the judgment of Hon'ble Delhi High Court (Full Bench) in the case of CIT v. Kelvinator of India Ltd; 256 ITR 1 where it was held that mere change of opinion could not be a ground for reassessment and amendment to Section 147 w.e.f. 1.4.1989 has not altered the position. Relying on the judgement of Hon'ble Madras High Court in the case of CIT v. Khateeb Mahmood 109 ITR 408, he submitted that mere fact there was under invoicing does not mean that the assessee has earned such income. He also referred to the affidavit of Sh. Kranti Arora made before the London Court, copy placed at the paper book, also referred, to by the Special Director of Enforcement Directorate in his order, where he submitted that exports made by the assessee were at a price higher than the price fixed by the Govt. Thus, how could there be under invoicing by the assessee. Therefore, he submitted that the action of the AO for initiating reassessment proceeding was illegal and bad in law. He also submitted that no addition could be made by relying on so called confessional statement which was subsequently retracted and in the absence of any document whatsoever relating to assessment year under reference.

12.10. The ld. DR stated in rebuttal that the AO had recorded the reasons for initiating reassessment proceedings in both the assessment years. Relying on the judgment of Hon'ble Delhi High Court in the case of CIT v. Income-tax Appellate Tribunal and Anr., 245 ITR 659, the ld. DR submitted that the period of limitation for filing a reference under Section 256 of the Income-tax Act, 1961 start from the date of service of the order of the Tribunal on the C.I.T. concerned having jurisdiction over the case of the assessee. In the present case also, the order of the Tribunal dated 20.3.1998 Was sent to C.I.T. Amritsar who did hot have jurisdiction over the case of the assessee. Therefore, the said order was returned to the Tribunal and the Tribunal sent the order of CIT, Central, Ludhiana having jurisdiction over the case and which was served on the CIT, Central, Ludhiana on 6.4.1998. Thus, the ld. CIT(A) was not justified in holding that the assessment completed by the AO was time barred. He further submitted that since the Tribunal had set aside the order on limited issue, the AO could have not covered the present case while completing the set aside assessment. Therefore, it cannot be said that assessment was pending with the AO on the date when he issued second notice. The ld. CIT(A) wrongly quashed the assessment for the A.Y. 1988-89. He further relied on the judgement of Hon'ble Punjab & Haryana High Court in the case of Bhajan Lal v. C.I.T. 250 ITR 399, where it was held that acquittal of the assessee from criminal proceedings does not mean that the assessee is absolved of its liability to explain the source of such amounts. He, therefore, submitted that the mere claim that the assessee exonerated by the FERA Authorities does not justify dropping of such action under the Income-tax proceedings. He further submitted that the ld. CIT(A) was within his powers in remanding the case to the AO and directed the AO to confront the assessee with the material seized during the course of search. However, assessee chose not to produce the books of account and furnished the copies of invoices. The ld. CIT(A) has, therefore, rightly sustained the addition for the subsequent assessment year 1989-90. By relying on various documents seized during the course of search for which the assessee failed to rebut the presumption raised under the law that contents of the documents seized were "correct; He further referred to the provisions of Section 92 of the Income-tax Act which was rightly invoked in the present case because of assessee's close connections with the foreign countries through whom transactions of under invoicing were routed. Thus, he contended that the order of the CIT(A) for the A.T. 1988-89 requires to be set aside and that of the CIT(A) for the A.Y. 1989-90 requires to be confirmed 12.11. The learned AR joined the issue and stated that the Department has not been able to place any document on record to show

that there was under invoicing for the assessment year under reference. Therefore, the action of the AO for reopening the assessment was illegal and bad in law.

13. We have heard both the parties at length and given our serious considerations to the rival contentions, examined the facts, evidence and material placed on record, gone through the orders of the authorities below, referred to the relevant pages of the paper book to which our attention was drawn by both the parties and also the judgments cited before us by both the parties, We have also taken into account the written submissions filed before us by both the parties. Now the first issue that requires to be decided by this Bench is whether the ld. CIT(A) Ludhiana, was justified in quashing the reassessment for the assessment year 1988-89 on the ground that the reassessment proceedings, initiated by issue of notice Under Section 148 on 3.11.1992 were still pending in view of order of the Tribunal dated 20.3.1998. The claim of the assessee is that since the assessment was set aside by the Tribunal and the same was pending with the AO, the AO could have not initiated reassessment proceedings by issue of second notice Under Section 148 on 24.3.1999. There is no dispute about the fact that the assessment proceedings initiated by issue of notice Under Section 148 on 3.11.1992 was only in respect of deduction Under Section 80HHC claimed by the assessee in respect of rental income which according to the AO was not part of business income. The present issue regarding under invoicing of exports was not the subject matter of earlier reassessment. There is also no dispute about the fact that the Tribunal had set aside the assessment vide its order dated 20.03.1998 only for a limited point of examination whether the rental income formed part and parcel of business income and the assessee was entitled to deduction Under Section 80 HHG and 32AB (which was also set aside by the Tribunal vide its earlier order dated 27.11.1997). The provisions of Section 147 have been amended by the Direct Tax Laws (amendment) Act, 1987 w.e.f. 1.4.1989. The amended provisions of Section 147 confers wide powers on the AO for reopening the assessment and also enlarges the scope of reassessment. In this connection, it would be relevant to refer to the amended provisions of Section 147 which read as under :

> "147. If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of Sections 148 & 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of proceedings under this section or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in Sections 148 & 153 referred to as the relevant assessment year).
>
> Provided that where an assessment under-sub-section (3) of Section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry, of four years from the end of the relevant assessment-year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under Section 139 or in response to a notice issued under Sub-section (1) of Section 142 or Section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year."

A bare reading of the amended provisions would show that, when the assessment is reopened on a specific point of escapement of income, the AO can assess such income and also any other income chargeable to tax which had escaped assessment. Thus, his powers are not confined only to the point on which the assessment has been reopened. While completing such reopened assessment, the AO could also cover any other income which had escaped assessment. However, the AO has no powers to consider those issues which were subject matter of original assessment. In other words, the assessment cannot be reopened merely on the basis of change of opinion even under the amended provisions of the Act. Reliance in this regard is placed on the judgment of Hon'ble Delhi High Court (Full Bench) in the case of CIT v. Kelvinator of India Ltd; 256 ITR 1 and also the judgment of Hon'ble Apex Court in the case of CIT v. Foramer France 264 ITR 566. But in the present case, the issue on which assessment had been reopened was never a subject matter of original assessment and even reassessment. This was also not subject matter of action Under Section 263 by the CIT. Therefore, as per amended provisions the same issue could have been covered at the time of completing the reassessment, reopened earlier by issue of notice subject to the compliance with other provisions of the Act provided the Tribunal had not set aside the assessment only for a limited issue as to whether the rental income was business income or not for the purpose of deduction Under Section 32AB and Under Section 80HHC.

13.1. It is trite law, when the assessment has been set aside on specific issues by the appellate authority, the scope of powers of the authorities concerned to whom the matter has been restored is limited only to issues on which the assessment was set aside by the Tribunal. This view finds support from the judgment of Hon'ble Allahabad High Court in the case of Sri Vindhya Vasini Prasad Gupta v. CIT 186 ITR 253, where it was held that in a case where matter is remanded by the Tribunal on a limited issue, the ITO's jurisdiction is confined to such issue alone. The ITO cannot enlarge the scope of proceedings. Even the jurisdictional High Court of Punjab & Haryana in the case of Kartar Singh v. CIT 111 ITR 184 has expressed the same view that when an assessment is set aside by the Appellate Tribunal and the case remanded to the ITO, it is not open to him to introduce into the "assessment new sources of income so as to enhance the assessment. The court further observed that any power to enhance is confined to the old sources of income which were the subject matter of appeal to the Appellate Tribunal. This was also the view of the Hon'ble Calcutta High Court in the case of Kathiar Jute Mills (P) Ltd; v. CIT reported in 120 ITR 861, where it was also held that once an assessment is set aside by AAC and case remanded to ITO, entire assessment does not. become open. The power of the ITO is confined to the point on which the case was remanded. Neither the ITO can deal with such point nor the AAC on appeal can consider such point on remand. Even the Apex Court in the case of Pulipati Subbarai And co. v. AAC of Income Tax, reported in 35 ITR 673, has held that the scope of powers of the ITO in a case where the matter is remanded by the appellate authority is confined only to consider only that issue which has been referred to him. In case, the AO covers some other issues not remanded to him he would certainly be transgressing the limits set down by the law. In the case of CIT v. Hope Textiles Ltd. reported in 225 ITR 993, the Hon'ble Madhya Pradesh High Court has also held that when the matter is set aside by the Appellate Authority on a specific issue, the AO cannot make further additions on points which have not been restored to his file by the appellate authority. This issue also arose before the Hon 'ble Allahabad High Court in the case of S.P. Kotcher v. ITO 145 ITR 225, where two questions were considered i.e. whether, after remand of the case by the Tribunal, ITO could have gone beyond the directions given

in the remand order and look into the matters which were not subject matter of appeal before the Tribunal and second whether, a notice Under Section 148 could be issued when the assessment proceedings were still pending. The Hon'ble High Court held that where an assessment is set aside by the Appellate Tribunal and remanded to the ITO, it is not open to him to introduce into the assessment new sources of income so as to enhance the assessment. Any power to enhance is confined to the old sources of income which were the subject-matter of appeal of the Appellate Tribunal: As regards the second issue, the High Court held that so long the assessment is pending, the assessing authority cannot have any such 'reason to believe' that income for the year has escaped the assessment. Thus, the picture that emerges from the above discussion is that once the assessment is set aside by the Tribunal, the scope of powers of the ITO was confined only to issues which were remanded to him. When we apply the ratio of these judgments to the present case, it is clear that while completing the set aside assessment, the AO could have not covered the present addition made by the AO by initiating the reassessment proceedings by issue of notice on 24.3.1999 as such course of action on the part of the AO would have been illegal and beyond the scope of powers conferred under the Act.

13.2. Now, the next question that requires to be considered by this Bench is whether, it could be said that assessment was still pending with the AO on the issue of under invoicing of exports which was neither the subject matter of earlier assessments nor considered and decided by the appellate authorities. All the judgments which have been relied upon by, the Id counsel are in the cases where the assessments had not been set aside by the Tribunal. In other words, the powers of the AO were not circumscribed to those issues alone because the orders in those cases had not been set aside by the appellate authority. Therefore, the rationale for the ratio laid down in those cases was that so long as the earlier assessment was pending, it cannot be said that any income had escaped assessment. But this is not the case here. In the present case, the issues under consideration were not subject matter of the earlier assessments/appeals and the Tribunal had set aside the assessments on limited issues. Therefore, it cannot be said that the assessment in regard to under invoicing of export was pending on the date when the AO had issued second notice under Section 148, because the AO could have not covered the same at the time of completing the set aside assessment by the Tribunal.

13.3. As already stated above, in none of the cases, relied upon by the ld. counsel, the issue involved related to set aside assessment. However, the judgment of Hon'ble Allahabad High Court in the case of S.P. Kochar v. no (supra) relates to a case where the assessment was set aside. This deserves a special mention. The facts of this case were that the assessee was a coloniser and a dealer in real estate. The assessee purchased one property for Rs. 1,40,000/-. After the purchase, the assessee started repair and improvement of the property by levelling uneven ground and undertaking other development activities. During the accounting year relevant to the assessment year 1970-71, the assessee affected sales to certain persons i.e. one was to Mrs. Sandhu for s. 40,000/-, second to assessee's wife for Rs. 732/- and the third to Smt. Bawa for Rs. 31000/-. The assessee filed return declaring therein loss of Rs. 28672/- after claiming development expenses of Rs. 1,03,785/- incurred right from the date of purchase. The AO held that in regard to sale made to assessee's wife, agreed price was Rs. 15000/- and, therefore, difference in purchase shown and cost amounting to Rs. 2268 was profit in the hands of the assessee. As regards the sale to Smt. Bawa, the assessee had shown

profit of Rs. 900, but the AO worked out at Rs. 2420/-. As regards the sale made to Smt. Sandhu, the ld. AAC observed that this transaction had been entered into by the petitioner with a view to acquire residence for himself and there was no element of profit involved therein. Thus, he also deleted the third addition of Rs. 85,625/-. The Revenue earned the matter in appeal before the Tribunal. The Tribunal observed that the assessee was carrying on business in purchasing the land and sale thereof after dividing into plots to his nominees. However, the Tribunal upheld the findings of the AAC in regard to deletion of additions in respect of sale to assessee's wife and Smt. Bawa. As regards, third transaction of sale to Smt. Sandhu, the Tribunal observed that this transaction alone required to be considered because it took place in the accounting year under reference. For this purpose, the quantum of profit required to be examined by estimating the cost price of the plot by excluding the cost of the building and the plot retained by the assessee and rate at which the sale had been made. The Tribunal, therefore, restored the matter to the file of the AO for determination of profit only in regard to transaction of sale with Mrs. Sandhu. However, the AO while giving effect to the order of the Tribunal issued notices Under Section 142(1) and 143(2) requiring the assessee to produce the books of account and even details regarding sale of green park plots, relevant to the financial years 1968-69 and 1969-70 and also issued summons under Section 131 of the Act. The assessee complied with the notices and also appeared before the ITO, where his statement was recorded. However, the assessee filed a writ petition before the High Court and sought directions to the ITO to confine himself to the directions issued by the Tribunal and to restrain from holding enquiries in respect of matters other than profit earned on sale of properties of Mrs. Sandhu. The assessee was granted interim stay order though the ITO was allowed to proceed With the assessment proceedings. He was also directed not to communicate the same to the petitioner till further order of this court. Pending these proceedings, the ITO issued a notice under Section 148 of the Act on March 26,1979 for the assessment year 1970-71 in respect of the same income for which assessment on a limited issue was restored by the Tribunal. The assessee challenged the action of the AO by way of writ petition. The Hon'ble High Court considered two issues, whether, after remand of the case by the Tribunal, ITO could have gone beyond the directions given in the remand order and look into the matters which were not the subject matter of appeal before the Tribunal. The second question was as to whether a notice Under Section 148 could be issued when the assessment proceedings were still pending. The Hon'ble High Court considered the first question and referring to various judgments including those relied upon by the ld. counsel held that once the case was set aside by the Tribunal and remanded to the ITO, it is not open to him to introduce into the assessment new sources of income so as to enhance the assessment. Any power to enhance is confined to the old sources of income which were the subject matter of appeal to the appellate Tribunal. As regards the second issue, the High Court observed that expression used in section 'reason to believe' has to be with reference to the income that has escaped assessment. So long as the assessment is pending, the assessing authority could not have any such 'reason to believe' that income for that year has escaped assessment. It was held that income cannot be said to have escaped assessment within meaning of this section if the assessment proceedings of that income are still pending and have not yet terminated in a final order. Thus, from the above discussion, it is clear that in the aforesaid case, the AO traveled beyond the scope of directions given by the Tribunal for remanding the case to the ITO and also initiated reassessment proceedings in respect of the same income for which the matter was remanded to the ITO. The facts of the present case are clearly distinguishable from the above case. In this case, the issue of under invoicing of export was never the subject matter of appeal before the

Tribunal and the same has not been covered while completing the original or reopened assessment as the information for the same has been received subsequently. We have already discussed that the Tribunal had set aside the assessment only for a limited issue. Even as per order of the Hon'ble Allahabad High Court, in the case of S.P. Kochar v. CIT(supra), the AO could not have considered the issue for under invoicing of exports while completing the set aside" assessment as it would have meant travelling beyond the scope of powers conferred on the AO. Therefore, it cannot be said that the assessment in respect of this issue was pending on the date when the AO had initiated reassessment proceedings by issue of second notice on 24.3.999. In fact, during the course of hearing, the ld. counsel was specifically asked if he could site single authority on the issue where the assessment was set aside by the first appellate authority on a limited issue and the AO had initiated reassessment proceedings in respect of new source of income and before completing the set aside assessment, the ld. counsel conceded before us that this issue has not come up before the Courts earlier. Thus, in the light of these facts and circumstances of the case and the detailed discussions in the preceding paragraphs, we hold that the assessment was not pending in respect of item of income covered by the second reassessment at the time when the AO had issued notice Under Section 148 on 24.3.1999 and, therefore, his action was in accordance with the provisions of the Act. The learned CIT(A) was not justified in quashing the assessment on this ground. Accordingly, we set aside the order of the CIT(A) and restore that of the AO. The first ground of the Revenue's appeal is allowed.

14. The second aspect on which the ld. CIT(A) has quashed the assessment is that the same had been barred by limitation. The Ld. DR submitted before us that the assessment was not quashed on this ground. It was only a obiter dicta. He drew our attention to para 2.6. of the order of the CIT(A) where he has mentioned that since he has already quashed the reassessment proceedings for the reason that the issue of second notice Under Section 148 was illegal and bad in law because the earlier assessment was pending. He, therefore, submitted had he did not quash the reassessment on this point. Now it is not in dispute that if the reopening of the assessment is held to be valid, reassessment would be in time. Even otherwise, the ld. DR drew our attention to the fact that the Tribunal has sent the order of the CIT, Amritsar, who had no jurisdiction over the case. Therefore, the same was returned to the Tribunal and the Tribunal vide its letter dated 2.4.1998 sent the order to CIT, Central, Ludhiana on 2.4.98 and the same was received by the CIT, Central, Ludhiana on 6.4.98. In this regard, he placed a copy of Tribunal's letter dated 2.4.98 and CIT, Central, Ludhiana's letter dated 25.05.2005 stating that the order of the Tribunal was served on 6.4.1998. If the date of service is accepted as 6.4.98, the present assessment order would be within time and the judgment of Hon'ble Delhi High Court in the case of CIT v. Income Tax Appellate Tribunal and Anr., 245 ITR 659 supports the case of the Revenue, where it was held that the date of service of the order of the Tribunal is the date on which the order was served on the CIT concerned having jurisdiction over the case, who alone has the jurisdiction to file the reference application. In this case, the jurisdiction over the case at the relevant time was with the CIT, (Central). Therefore, the date of service for this purpose is to be reckoned from the date of service to CIT (Central) which was 6.4.98 and the same falls within time. However, there is no challenge to such finding of the CIT(A). In fact, this appeal was heard by the earlier Bench on 2.4.2004 and subsequently by this Bench on 20.5.2005 and 27.05.2005. Thereafter, the case was heard for two days i.e. on 20.07.2005 & 21.07.2005. But the Department never considered it appropriate to move an application for admission of additional ground on this issue though this matter was within their knowledge. Since there is no challenge to

the findings of the CIT(A) on this point by way of any additional ground, we decline to interfere in the matter, This plea of the Revenue is rejected.

14.1. The next aspect of the case that requires to be considered by this Bench is the deletion of addition by the CIT(A) in respect of under invoicing of exports for the A.Y. 1988-89. A bare reading of para 2.7. of the CIT(A)'s order shows that he has deleted the addition by relying on the order of Special Director (Enforcement). New Delhi, where all the charges made against the assessee were dropped. Since the same issue is involved in appeal for the assessment year 1989-90, this aspect will be discussed in detail in the subsequent paragraphs. For the present we would like to mention that the ld. CIT(A) decided the appeal in a summary manner without taking into account the fact that the ld. CIT(A), Jammu with Hqrs. at Amritsar, had passed a remand order on 29.05.2002 for both the assessment years 1988-89 & 89-90. The learned CIT(A), Ludhiana, did not even wait for the remand report which was ordered by the ld. CIT(A), Amritsar. In the said remand order, the learned CIT(A) had directed the AO to. examine the case on 15 points arising from the issues which were common to both the assessment years. This remand report was submitted by the AO before the CIT(A), Jammu, with Hqrs. at Amritsar vide letter dated 1.1.2002 alongwith the relevant documents. In fact, for the assessment year under reference, the AO was not even present before the CIT(A). Besides, the assessee had submitted the detailed submissions before the CIT(A), Ludhiana, vide two letters (copies of the same are placed at pages 90 to 99 of the paper book). However, while deciding the appeal for the A.Y. 1988-89, the Ld. CIT(A) has neither taken into account remand report nor detailed submissions submitted before him except relying on the order of the Special Director (Enforcement). Considering the fact that various issues were raised before him, the ld. CIT(A) ought to have passed order dated 10.03.2003 dealing with various aspects of the case and after taking into account the facts stated in the remand report for which the remand order had already been passed and issued. Be that as it may, the ld. CIT(A) has decided the appeal by relying on the order of Special Director Enforcement and the same is common to both the assessment years i.e. 1988-89 & 89-90. Therefore, the merits of the additions dealt by the CIT(A) would be discussed alongwith the findings for the subsequent assessment year.

14.2 Now the next aspect of the case that requires to be considered by this Bench relates to initiation or reassessment proceedings Under Section 147 for the A.Y.1989-90 by issue of notice Under Section 148 on 29.3.2000. Since the assessment year involved is 1989-90 and notice under Section 148 was issued after a period of four years from the end of the relevant assessment, year, the case of the assessee is covered under proviso to Section 147 of the Income-tax Act. The amended provisions of Section 147 and proviso thereunder have already been reproduced in the preceding paragraphs.

A bare reading of the Section 147 and proviso thereto shows that for the purpose of initiating an reassessment proceedings Under Section 147 for the A.Y. 1989-90, the AO was required to establish that income chargeable to tax had escaped assessment for the asstt. year under reference by reason of the failure on the part of the assessee to make a return Under Section 139 or in response to a notice issued under sub Section (1) of Section 142 or Section 148 or to disclose fully and truly all material facts necessary for assessment for the A.Y.1989-90. The reasons recorded by the AO for initiating such action are reproduced on page 2 & 3 of the assessment order. In the reasons recorded, the AO has referred to the following facts:

(i) The FERA Authorities had carried out searches at the residential as well as business premises of the assessee at Amritsar, Shamgarh, Delhi relating to the violation of Foreign Exchange Regulation Act.

(ii) The statement of Sh. Ashok Kumar Sachdeva, partner in the firm was admitted that the firm was under invoicing exports of rice to foreign countries.

(iii) Enforcement Directorate, New Delhi, had sent photocopies of show cause notices and other statements which have been thoroughly studied Statement of Sh. Ashok Sachdeva, partner, recorded on 31.5.97 shows that the assessee had sent Sh. Raj Sethia, Ramesh Sethia, maternal uncles of Sh. Ashok Sachdeva to Dubai and new firm of M/s. Wani International was floated at Dubai. A loan of one million US Dollars was raised from Sh. T.R.Gambhir who was residing at Bangkok and amount was sent from Bangkok to Dubai under instructions from Sh. Ashok Sachdeva, parter of the firm. Later on, the name of M/s. Wani International was changed to M/s. Rice & Food Stuff Trading Co; Dubai. The main purpose to float this company was to use these names for making transactions with overseas parties.

(v) All the export invoices were being raised on these parties and the goods were exported to the actual buyers. Sh. Ashok Sachdeva admitted that all exports invoices were being raised on these companies and the goods were actually being exported to actual buyers. Export used to be invoiced @ 30% than the actual agreed price and the difference was received by Mr. Sethia in Dubai on behalf of the assessee.

14.3 In the accounting year relevant to the assessment year 1989-90, the assessee had shown export turnover amounting to Rs. 21,49,91,037/- and as per the statement of Sh. Ashok Sachdeva admitting under invoicing to the extent of 30% i.e. Rs. 9,21,39,015/- income chargeable to tax had escaped assessment.

14.4. Since the equivalent foreign exchange was not brought into India, the assessee was not entitled to deduction under Section 80-HHC in respect of the said amount. Thus, notice Under Section 148 was issued by the AO after obtaining approval by the CIT concerned. Briefly stated, the AO had relied on the show cause notices issued by the FERA Authorities, confessional statement of Sh. Ashok Sachdeva statement of Sh.Kranti Arora and other statements recorded by the FERA Authorities for the purpose of initiating action under Section 147 of the I.T. Act.

15. Now the issue that requires to be considered by this Bench is whether such material was sufficient for the AO for initiation action of Under Section 148; The paper placed before us do confirm that the Enforcement Directorate had forwarded to the CIT, copies of six show cause notices issued by FERA Authorities including one to the assessee vide letter dated 29.05.1998. A letter dated 28th Sept., 1998 of DCIT addressed to Sh. Sham Lal Sabharwal, ACIT, C.C.I. Jalandhar (copy placed before us by the Revenue) further confirms that copies of these show cause notices alongwith the said document in original containing 207 pages relied upon by the FERA Authorities for the purpose of issuing show cause notices were also forwarded to the AO. In fact, during the course of

hearing before the Bench, the ld. DR produced before us the file containing 214 pages stating that the same had been received by the AO alongwith copies of show cause notices, before issue of notice Under Section 148 for the assessment year under reference. Copies of show cause notices issued by FERA Authorities including the first show cause notice issue to M/s. Sachdeva & Sons alongwith copies of statements of Sh. Ashok Sachdeva on various dates are at pages 1 to 82 of the paper book (PB-1). In fact a copy of first show cause notice issued by the FERA Authorities is at page 44 to 51 of the paper book. A perusal of the same shows that in para 2 of the said show cause notice, FERA Authorities have referred to various documents seized and statements of various persons recorded under Section 38 & 49 of the Foreign Exchange Regulations Act, 1973 on various dates. It has further been mentioned that on the basis of these documents and statements, the assessee had exported rice aggregating to Rs. 481 crores to various parties abroad and under invoicing these exports by 30% of the actual agreed price and parked these funds aggregating to Rs. 144.3 crores with persons outside India. The show cause notice specifically refers to the period when under invoicing was resorted to during the period from 1980 to 1993, which also covers the assessment year under reference. It has also been stated that foreign exchange equivalent to Rs. 144.3 crores was not brought into India and thereby the assessee had violated the various provisions of the Foreign Exhchage Regulations Act, 1973. Show cause notice also referred to the fact that Sh. Vinod Sachdeva brother of the assessee also abetted of the offence. Thereafter, on internal page 3, it has been mentioned that failure of the assessee to bring into India foreign exchange of Rs. 144.3 crores without any previous or general permission of the Reserve Bank of India amounted to contravention of provisions of Section 14 and Section 8(1) of the FERA Authorities. Annexure A of the show cause notice refers to the various premises of the assessee and other persons covered under the search. Annexure-B to the show cause notice refers to the statements of Sh. Kranti Arora and Sh. Ashok Sachdeva recorded on various dates, statements of Sh. Vinod Sachdeva, recorded on various dates, statements, statements of Sh. Ashok Sachdeva recorded on various dates and statements of Sh. Tilak Raj Gambhir recorded on various dates. Annexure-G to the show cause notice refers to the various documents relied upon by the FERA Authorities which includes documents seized from the business premises of M/s. Sachdeva & Sons, New Delhi, Shahabad, residential premises of Sh. Ashok Sachdeva at Amritsar, business premises of M/s. Sachdeva & Sons, at Kamal, factory of M/s. Sachdeva & sons, Tarn Taran Road, Anmritsar, Bombay and others.

15.1. In addition to the same, the statement of Sh. Ashok Sachdeva recorded by the FERA Authorities on 31.5.1997 is at page 1 to 3 of the box file. In the statement, Sh. Sachdeva admitted that the business for exporting rice started from 1980. He admitted that the export turn over from 1980 to March, 1997 was about 600 to 650 crores. He has given specific details for the years from 1991-92 to 1997-98. He was specifically asked about the documents seized from the premises of Sh. Kranti Ariora to which he replied that he had seen the specific pages to which his attention was drawn, the signatures placed there were his. These documents were in hand writing of his brother Sh. Vinod Sachdeva and concerned with the business matters relating to their business export of rice. He further confirmed contents of file marked "B" recovered from the residential premises of Sh.Kranti Arora on 30.5.97 and also the files marked A, B, C, D & E seized from Sh.Kranti Arora. Thereafter, he was specificially show file marked "A" of the documents seized from the premises of M/s. Sachdeva & Sons, Amritsar on 28.5.1997 and he was asked to go through these documents and state to whom these related. To this he specifically replied as under:

> "I have gone through file pages. I have put my signatures on it. They relate to our business transactions. Certain documents also confirmed our invoice manipulation, under invoicing of exports and adjustments and transfers of funds from Dubai to other concerns. I further stated that the statement of Sh. Vinod Sachdeva and Sh. Kranti Arora both dated 30.5.97 disclosed the activities of our business in and outside India. I further stated that day to day affairs of business abroad is being dealt by me and my brother etc. These submissions are true and correct."

Thereafter, his attention was drawn to Section 40 of the FERA, which provides that the statement recorded under this section could be used against the assessee or anybody else or in any court of law. Thereafter, he refers to floating of company in Dubai through his maternal uncles Sh. Raj Sethia and Ramesh Sethia by obtaining loan of 1 million US Dollars from Sh. T.R.Gambhir of Bangkok. The name of the said company was M/s. Wani International which was later changed to M/s. Rice & Food Stuff Trading Co. Dubai. He also admitted that the purpose of floating these companies was to use these names for making transactions with overseas buyers. All export invoices were being raised on these companies. The goods exported swere actually sent to actual buyers and invoice for the export used to be raised 30% less than actual agreed price.

15.2. The action of the AO for reopening the assessment for the assessment year has to be seen in the light of these facts. The expression used in Section 147 is 'reason to believe' that income chargeable to tax had escaped assessment by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year. The expression used is not 'reason to suspect'. This obviously implies that the material or the information that comes into the possession of the AO must have direct nexus with the escapement of income due to failure on the part of the assessee to disclose all material facts necessary for the assessment. It is trite law that the assessment cannot be reopened merely on the basis of suspicion because the expression used in Section 147 is 'reason to believe' and not 'reason to suspect'. In the case of ITO v. Lakhmani Mewal Dass, 103 ITR 437, the Hon'ble Supreme Court has observed that the reasons for the formation of the belief contemplated by Section 147(a) of the Act, for the reopening of an assessment mast have a rational connection or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the ITO and the formation of his belief that there has been escapement of the income of the assessee from assessment in the particular year because of his failure to disclose fully and truly all material facts. The court further observed that it was no doubt true that the court cannot go into sufficiency and adequacy of the material and substitute its own opinion or for that of the ITO on the point as to whether the action should be initiated for reopening the assessment. But at the same time, one has to bear in mind that it is not any and every material, howsoever vague and indefinite or distant, remote and far-fetched, which would warrant the formation of the belief relating to escapement of the income of the assessee from assessment. The reasons for the formation of the belief must be held in good faith and should not be mere pretence. In the case of United Electrical Co.(P) Ltd; v. CIT, 257 ITR 317, Delhi High Court has held that 'Reason to believe' should be on the facts on the basis of which such belief is entertained. There should be rational nexus or relevant bearing. Thus, it is clear that the assessment cannot be reopened merely on the basis of vague and unspecific information. In the case of Chhugamal Rajpal s. S.P.Chaliha And others reported in 79 ITR 603 (SC), the facts were

that the AO had initiated reassessment proceedings on the basis of vague feeling that there might be bogus transactions. The Hon'ble Supreme Court observed that the ITO had even not come to prima facie conclusion that loan transactions to which he referred were not genuine transactions. He appeared to have only a vague feeling that they might be bogus transactions. The Hon'ble Supreme Court observed that the AO should have some prima fracie grounds before him for taking action Under Section 147. His conclusion that there was a case for investigating the truth of the alleged transactions was not the same thing as saying that there were reasons for the issue of the notice. The Ld. CIT also accorded approval in a mechanical manner without applying his mind. Thus, notice Under Section 148 was held to be invalid.

15.3. In the case of Sheo Nath Singh v. Appellate Assistant Commissioner of Income-tax reported in 82 ITR 147, the Hon'ble Supreme Court held that the expression 'reason to believe' means that the belief must be that of an honest and reasonable person based upon reasonable grounds and that the Income-tax Officer may Act on direct or circumstantial evidence but not on mere suspicion, gossip or rumour. The Income-tax Officer would be acting without jurisdiction if the reason for his belief that the conditions are satisfied does not exist or is not material or relevant to the belief required by the section. The court can always examine this aspect though the declaration or sufficiency of the reasons for the belief cannot be investigated by the court.

15.4 In the present case, when seen in the light of various judgments referred to above, we find that in the show cause notice issued by the FERA Authorities the charge of under invoicing the exports was made right from the years 1980 to 1997. The basis of FERA Authorities for entertaining such belief was the documents seized during the course of search and the various statements recorded by the FERA Authorities. The statements recorded of Sh. Ashok Sachdeva which have been referred to by the AO in the reasons recorded also was with reference to documents found during the course of search at the premises of the assessee and his residential premises. He also admitted that these transactions relate to the business of the firm. Besides, file Marked 'B' containing pages 1 to 231 seized from the premises of Sh.Kranti Arora contained a letter in the hand-writing of Sh, Vinod Sachdeva brother of the assessee to Paqrani indicating under invoicing of exports by the assessee. There is nothing in the statement of Sh. Ashok Sachdeva which could suggest that such under invoicing was resorted to only in the subsequent asstt. years. Even when Sh. Ashok Sachdeva was asked about the papers found from the premises of Sh.Kranti Arora, he never denied that these documents did not relate to assessee's business and the contents thereof were not correct. In fact, he clearly admitted that such documents relate to his business and some of these were in hand-writing of his brother Sh. Vinod Sachdeva. It is true that subsequently even in the statement of Sh.Kranti Arora, he stated under invoicing of export right from 1980 to 1993 and this fact was duly recorded in the show cause notice issued by the FERA Authorities. Even if, it is a fact that subsequently Sh. Ashok Sachdeva retracted from the statement yet the fact remains that he was asked questions with reference to specific documents seized during the course of search including those related to the premises of the assesses in respect of which he admitted that this shows manipulations and under invoicing of exports. At the time of initiating reassessment proceedings, the AO has to apply his mind to the material that comes in his possession to see whether there was direct nexus between the material and 'reason to believe' that income chargeable to tax had escaped assessment. At the time of initiating proceedings, what is required to be seen is the prima facie evidence and material which

enables the AO to come to a conclusion that there has been escapement of income. Such belief is of reasonable person based upon reasonable grounds on the basis of direct or circumstantial evidence but should not be on the basis of mere suspicion, gossip or rumour. We may further add that at the time of initiating reassessment proceedings, it is not necessary that the AO must establish at that stage itself that the income has escaped assessment/After all the assessment cannot be made at the stage of reopening the assessment itself. Further process of assessment and allowing an opportunity to the assessee has to be allowed during the reassessment proceedings. If the AO is satisfied during the reassessment proceedings that there is no income that has escaped assessment, proceedings initiated Under Section 147 can be dropped. The facts discussed in detail in the preceding paragraphs do show that the formation of 'reason to believe' by the AO was not based on gossips or rumours or hearsay, rather the same was based on objective assessment of the material that came into his possession as a result of search by the FERA Authorities and show cause notices issued, documents seized and statments recorded. Now under invoicing of exports and parking the funds abroad has direct nexus with the escapement of income as to this extent, it can be said that income had escaped assessment due to failure on the part of the assessee to disclose truly and fully all material facts necessary for assessment. It is not the claim of the assessee that these facts were available with the AO at the time of completing the first assessment, Therefore, it cannot be said that action taken by the AO was based merely on change of opinion. Further the order passed by the FERA dropping the charges against the assessee was passed on a later date. In the case of Bhajan Lal v. CIT 250 ITR 389, the Hon'ble Punjab & Haryana High Court has held that the acquittal against the criminal charges and under prevention of corruption Act, does not absolve the assessee to explain source of payment. Thus, action of the AO for reopening the assessment was upheld. In the light of these facts and circumstances of the case and the legal position discussed above, we are of the considered opinion that the AO was justified in initiating action Under Section 147 as on the basis of overwhelming evidence and material on which he fanned a reason to believe that income chargeable to tax had escaped assessment. Accordingly, we confirm the order of CIT(A). This ground of appeal is accordingly rejected.

16. The next aspect of the case which requires consideration is the action of the ld. CIT(A) in remanding the case to the AO. As mentioned, during the course of appeal proceedings before CIT(A), reliance was placed on the order of the Special Director, Enforcement Directorate whereby all the charges levelled against the assessee in the show cause notice more particularly relating to under invoicing of exports were dropped. In fact, this order was specifically referred to in ground No. 4 taken before the CIT(A). The Ld. CIT(A) by referring to various documents seized during the course of search and the other issues arising from the assessment, remanded the case to the AO for carrying out factual verification in respect of 15 points with a direction to obtain such material from FERA, confront such material to the assessee and submit remand report after verifying these transactions from the books of account. All the papers and documents referred to in the remand order were seized during the course of search by the FERA Authorities. In the remand order, the ld. CIT(A) also directed the AO that the assessee should be given proper opportunity to produce all evidence, documents, material etc.

17. Section 251 of the Act confers on the Commissioner wide powers for deciding the appeals. It would be relevant to reproduce herein the provisions of Sub-section (1) to Section 251 of the

Income-tax Act, which read as under:

> "(1) In disposing of an appeal, Commissioner (Appeals) shall " have the following powers:
>
> (a) in an appeal against an order of assessment, he may confirm, reduce, enhance or annul the reassessment; or he may set aside the assessment and refer the case back to the Assessing Officer for making a fresh assessment in accordance with the directions given by the Commissioner (Appeals) and after making such further inquiry as may be necessary, and the Assessing Officer shall thereupon proceed to make such fresh assessment and determine, where necessary, the amount of tax payable on the basis of such fresh assessment;
>
> (b) in an appeal against an order imposing a penalty, he may confirm or cancel such order or vary it so as either to enhance or to reduce the penalty;
>
> (c) in any other case, he may pass such orders in the appeal as he thinks fit."

Thus, it is clear that CIT(A) is vested with wide powers while deciding the appeal. The only restriction imposed on his powers in Sub-section (2) of Section 251 is that the Commissioner (Appeals) shall not enhance an assessment or a penalty or reduce the amount of refund unless the assessee has been allowed a reasonable opportunity of being heard. Explanation to Section 251 also empowers the CIT(A) to consider and decide any matter arising out of the proceedings in which the order appealed against was passed, notwithstanding that such matter was not raised before the CIT(A) by the assessee. In the case of CIT v. Kanpur Coal Syndicate reported in 53 ITR 225(SC), the Hon'ble Supreme Court has held that the first appellate authority has plenary powers in disposing of an appeal. The scope of his powers is conterminous with that of the Income-tax Officer. He can do what the Income-tax Officer can do and can also direct him to do what he has failed to do. If the ITO has the option to assess one or other of the entities in the alternative, the AAC can direct him to do what the ITO should have done under the circumstances of the case. In the case of Keshav Mills Co. Ltd; v. C.I.T. reported in 56 ITR 365, the Hon'ble Supreme Court further held that at the appellate stage additional evidence may be taken and further enquiries may be made at the discretion of the first appellate authority. However, before admitting fresh evidence the AO must have allowed fresh opportunity. In the case of CIT v. Ahmedabad Crucible Company, reported in 206 ITR 574, the Hon'ble Gujarat High Court has held that powers of the AAC are not confined to the subject matter of the appeal , but extend to the subject matter of the assessment. Now the action of the CIT(A) in remanding the case to the AO in respect of the issues directly relating to the assessment was within powers conferred under the Income-tax Act.

18. The CIT(A) has also powers to admit fresh evidence subject to the provisions of Rule 46A. The provisions of Rule 46A read as under :

> (a) Where the Assessing Officer has refused to admit evidence which ought to have been admitted;

(b) Where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by the Assessing Officer; or

(c) Where the appellant was prevented by sufficient cause from producing the evidence before the Assessing Officer any evidence which is relevant to any ground of appeal; or

(d) Where the Assessing Officer has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal.

However, Sub-rule (2) and (3) of Rule 46A provide that such fresh evidence shall, be admitted by recording in writing reasons for its admission and further AO should be allowed a reasonable opportunity to examine evidence or documents or cross-examine, witness produced by the appellant or to produce any evidence or document or any witness in rebuttal. Sub-rule (4) of Rule 46A further confers inherent powers of the CIT(A) for directing the production of any document, examination of any witness, to enable him to dispose of the appeal, or for any other substantial cause including the enhancement of the assessment. In the present case also, the learned CIT(A) has directed the AO to obtain these documents which were seized during the course of search and confront the same to the assessee. The AO was also directed to allow reasonable opportunity for producing any documents, evidence or material etc. during the remand proceedings. The learned CIT(A) had not directed the AO to make some fishing or roving enquiries outside the scope of assessment. As mentioned earlier, it was on the basis of those documents seized from the various premises including from the premises of the assessee that Sh. Ashok Sachdeva admitted the fact of under invoicing of exports. It may further be mentioned that aims and objectives of the FERA are different from the Income-tax Act. The object of the FERA is to ensure that foreign exchange belonging to Indian party is brought back into India. If such compliance is made by the party concerned, even though the same is not accounted for in the books of account, it may not amount to violation of the FERA. However, in case the assessee brings into India the foreign exchange, but does not reflect in the books of account as part of the sale, it would result in addition to the Income. Thus, the very fact that FERA Authorities had dropped the charges against the assessee was not itself enough for deleting the impugned additions. If the FERA Authorities for that matter or any court drops charges made against the assessee under the FERA Act due to some technical reasons on the ground that search was illegal, yet the material seized during the course of illegal search can be made use of during the assessment proceedings. Considering the facts that AO had completed the assessment without making. proper enquiry, the learned CIT(A) thought it proper to exercise powers conferred under the Income-tax Act and to confront the seized material to the assessee and then refer to the books of account as to whether the assessee had properly accounted for its income or not. The action of the ld. CIT(A) in remanding the case to the AO is in conformity with the letter" and spirit of the income-tax Act and Income-tax Rules and, therefore, we are unable to accept the plea of the assessee that the learned CIT(A) exceeded its jurisdiction in directing the AO to admit such evidence.

19. Before parting with this issue, we would like to mention that the ld. counsel for the assessee has relied" on the judgment of Hon'ble Rajasthan High Court in the case of CIT v. Rao Raja Hanut

Singh, 252 ITR 528, where it was held that power of the. Tribunal for admission of fresh evidence is circumscribed by Rule 29 of the Income Tax (Appellate Tribunal) Rules, 1963 and the same can not be admitted as a matter of right of litigating party. This case deals with the powers of the Tribunal. In the case before us the issue relates to powers of the CIT(A) and that too with reference to documents seized during the course of search. The Ld. counsel further relied on the judgment of Hon'ble Supreme Court in the case of Mahavir Singh and Ors. v. Naresh Chandra and Anr. (2001) SCC 309. In this case, the issue does not relate to provisions of Rule 46A and the powers of the CIT(A) for dealing with the matters arising from the assessment. In this case, the issue in question related to powers of the appellate court conferred Under Section 107 of C.P.C. relating to permission of additional evidence. As held above the issue involved in the case is in conformity with the powers conferred on the CIT(A) under the Act and therefore, this decision is not applicable to the facts of the present case.

20. Thus, in the light of detailed discussions in the preceding paragraphs, we hold that the action of the CIT(A) in remanding the case and directing the AO to submit remand report after confronting the documents to the assessee and after allowing a reasonable opportunity was in order and in conformity with the Act and Rules and, therefore, this plea is rejected.

21. The last aspect of the case which requires to be considered by this Bench is about the merits of the addition: made by the A.O. The learned CIT(A) has observed that while deciding the matters, the assessing authority can take into account the surrounding circumstances as strict rules of evidence applicable to criminal prosecution/proceedings are not applicable to the Income-tax proceedings. We agree with such proposition. In the case of CIT v. Durga Prasad More, reported in 82 ITR 540, the Hon'ble Supreme Court has observed that though apparent must be considered real until it was shown that there were reasons to believe that apparent was not real, in a case where the party relied on self-serving recitals in documents, it was for that party to establish in the truth of those recitals, the taxing authorities were entitled to look into the surrounding circumstances to find out the reality of such recitals. In the case of Sumati Dayal v. C.I.T. , the Hon'ble Apex Court has held that the authorities concerned under the Income-tax Act can take into account surrounding circumstances and decide the matter by applying the test of human probability. But at the same, it is a fact that the additions cannot be made merely on the basis of suspicion, surmises and conjectures and equally the finding recorded by the Special Director in the adjudication order cannot be totally over-looked. It is settled law that suspicion howsoever strong it may be, cannot form basis of additions. Since the ld. CIT(A) had referred to certain documents while confirming the additions for the assessment year 1989-90, we tried to look into these documents as to whether there was any evidence to show that the assessee had resorted to under invoicing of exports for the assessment years under reference. In fact, during the course of appeal proceedings before the Bench, clarifications were not given by either side in respect of some of the documents referred to by the CIT(A) for sustaining the additions. Therefore, the case was refixed on 23.08.2005 and the parties were asked to produce those documents in order to satisfy ourselves whether there was any evidence to show that the assessee had under invoiced the exports for the assessment years under reference. The position that emerged after making such verification has been discussed in the succeeding paragraphs. 21.1. In the remand order, the ld. CIT(A) has referred to file marked 'B' containing pages 1 to 231 seized from the residence of Sh.Kranti Arora which he mentioned contained a letter from Sh. Ashok Kumar

Sachdeva, where a reference was made to US Dollars 4,27,500/- being differential amount of under invoicing relating to invoice Nos. 357, 358, 366 & 372.

The Revenue was asked to produce a copy of this letter. But Revenue has replied in writing on 22.8.2005 that there was no letter from Sh. Ashok Kumar Sachdeva, partner of the assessee firm. There was a letter of Sh. Vinod Sachdeva. The Revenue has mentioned that the CIT(A) seems to have wrongly mentioned the name as Ashok Kumar Sachdeva. However, a letter of Sh.Vinod Sachdeva on page 231 was sent to the CIT(A) alongwith remand report. Thus, no letter of Sh.Ashok Kumar Sachdeva, partner of the firm was admitted to, have been found from the place of Sri. Kranti Arora. 21.2. Item No. 9 of the remand report on page 3 of the impugned order refers to file marked. "A" containing pages 1 to 42 relating to business transactions of M/s. Sachdeva & Sons, wherein certain documents indicating under invoicing/manipulation of exports, adjustment and transfers of funds from Dubai to other countries was mentioned in the adjudication order of the Special Director. The ld. CIT(A) had directed the AO to obtain these documents, from FERA Authorities, confront the same to the assessee and submit remand report on the same. These documents were also confronted to Sh.Ashok Kumar Sachdeva while recording confessional statement by the FERA Authorities, Copy placed on pages 1 to 3 of box file wherein he admitted that these related to business transactions of assessee and show manipulation and under invoicing. The Revenue was asked to produce these documents. The Ld. DR vide his letter dated 19.08.2005 submitted paper book containing only 3 to 18 pages. However, the ld. DR was asked to submit all the pages of the file; Accordingly, these were submitted and we found that these are financial statements of M/s Greenock Holdings Ltd (Registered at Channel Island) for 16 months ended 30th Sept., 1991. It also contained auditors report dated 23rd March, 1992. There is report of the Directors for the period ended 31st Dec,1992. Thus, all these documents relate to the subsequent period and not to the accounting period under reference.

21.3. Item 4 on page 2 of the remand order refers to file marked 'B'. Page 2 contained details of invoices, commodities and items exported through M/s. Lal Trading Co. Dubai. The aggregate amount mentioned therein is US Dollars 34,31,942/-. The photocopies of these documents/invoices are placed at pages 385 to 392 of the paper book. All these invoices relate to the period 1991 and thereafter. Similarly, itemwise details of commodities exported and rates mentioned at. Sl. No. 4 aggregating to US Dollars 34,31,942/- appear at page 383 & 384 of the paper book. These relate to the period from 30th Sept. 1991 to 30th Sept, 1993. None of these documents relate to the assessment year under reference. We have also referred to various other documents referred to by the CIT(A) in the impugned order and none relates to assessment year under reference.

21.4. In fact, the assessee has also filed a small paper book containing documents referred to by the CIT(A) and its comments thereon. Besides, these have also been referred to at pages 42 to 96 of the paper book No. 4 submitted on 20.5.2005. None of these documents relate to the assessment year under reference. In fact, during the course of hearing of the appeal, the ld. DRs were specifically asked to separately furnish documents relating to assessment years under reference. The Ld. DRs failed to furnish the same. Even, the ld. CIT(A) in the impugned order for the A.Y. 1991-92 has admitted that the seized documents do not relate to the asstt. year under reference. However, he has taken into account the fact that the assessee failed to produce the books of account and referred to

the seized documents, some of which include audited accounts of the company abroad indicating substantial investments of the Sachdeva's abroad. The CIT(A) has observed that the circumstantial evidence show that the assessee must have made these investments out of the earnings of the earlier period. Besides, he has referred to the statement of Sh.Kranti Arora, wherein he stated that the assessee had resorted to under invoicing of exports right from the year 1980 to 1993. Thus, it is clear that none of the documents seized during search by the FERA Authorities relates to the assessment year under consideration. In the absence of any such direct evidence available on record, the addition cannot be made only on the basis of assumption that the assessee must have under invoiced exports for the assessment years under reference as well. 21.5. Apart from the above, it is a fact that the search action was carried out by the FERA Authorities. As per show cause notice issued to the assessee, the case made out against the assessee was that during the period from 1980 to 1993, the assessee made exports aggregating to Rs. 481 crores to various parties abroad and under invoiced these exports by 30% of the actual agreed price and parked foreign exchange earnings aggregating to Rs. 144.3 crores abroad. However, as per adjudication order dated 28.02.2002 of the Special Director, Enforcement Directorate (copy placed at pages 100 to 57 of paper book-I,) all the charges leveled against the assessed were dropped on the ground that the charge of under invoicing of exports has not been established. While deciding the matter, the adjudicating authority has referred to all those documents which have been referred to by the CIT(A) in the impugned order for the assessment year 1989-90. However, even after taking into account all those documents, the adjudicating authority has come to the conclusion that the charge of under invoicing has not been established against the assessee. The Income-tax authorities had purely relied on those very documents which were seized by the FERA Authorities. Apart from the enquiries made by the FERA authorities, no further enquiries were made by Income-tax Department. Even the statements of Sh.Ashok Kumar Sachdeva, Sh. Kranti Arora and Sh.Vinod Sachdeva and others were recorded by the FERA Authorities. No such statements were recorded by the AO either during the course of assessment proceedings or even during the course of remand proceedings. Thus, by referring to the same evidence and material the Special Director had found that charge of under invoicing has not been established against the assessee. It may, however, be added that at the time of hearing of the appeal, the learned DR submitted a letter stating that Enforcement Directorate has filed a revision petition against the order of the Special Director and the same was pending with the Appellate Tribunal for foreign exchange. A copy of the same was also placed before us. But neither date on which such revision petition was filed mentioned nor the outcome of the same has been mentioned. In any case, the impugned order is based on the investigation made by the FERA Authorities alone and the competent authority has already recorded his finding that the charge of under invoicing has not been established. In the case of CIT v. K.S. Bhatia, 257 ITR 614, the Hon'ble Punjab & Haryana High Court has held that where the relevant addition was made on the basis of assessment order passed the Sales-tax Authorities and on appeal the said order has been set aside, the very basis of the addition made for the Income-tax assessment disappears and such addition cannot be sustained. The same view was taken by the Hon'ble Punjab & Haryana High Court in the case of CIT v. Swani Pilkington Ltd (2003) 133 Taxman 717, where it was held that in a case where the show cause notice issued by the Central Excise Authorities which contained annexures which were made basis of show cause notice issued by the Income-tax Department to assessee for making addition to income of assessee's company, had been set aside by the Hon'ble High Court, Annexures to the show cause notice had lost their relevance and validity and, therefore, addition could not be made in the hands

of the assessee by relying on such show cause notice. This is also relevant for the present case because here also, the AO has relied on only documents and statements recorded by the FERA Authorities which have not been accepted by the Special Director, Enforcement Directorate. Thus, the very basis of addition made by the AO and sustained by the CIT(A) disappears in this case.

21.6. The other important aspect which goes in favour of the assessee is that the documents found during the course of search by FERA Authorities relate to the subsequent assessment years 1990-91, 1992-92,1992-93, 1993-94 & 1994-95. The AO initiated reassessment proceedings for all these assessment years and issued notices Under Section 148 on 24.1.2001. Copies of the same had been placed on our file. The Ld. counsel for the assessee submitted that the Department had not made any reassessments for these assessment years. In fact, on enquiry it was learnt that these assessment had become time barred. When the Department has not made additions for the assessment years when there was direct evidence in the form of seized documents indicating under invoicing for those assessment years, there is no justification for making such additions when there are no documents relating to these assessment years indicating under invoicing of exports.

21.7 In the remand order, the ld. CIT(A) had given clear directions to the AO that the documents seized by the FERA Authorities referred to in the show cause notices issued to the assessee and mentioned by the ld. CIT(A) in the remand order should be obtained from the FERA Authorities and confronted to the assessee. In fact, the ld. counsel for the assessee drew our attention to repeated requests made to the AO for furnishing copies of such documents so as to enable the assessee to rebut such contentions. However, in the remand report, the AO submitted that the assessee was not giving proper reply as such documents received from the FERA could not be confronted rather the assessee does not want that it should be confronted with the documents. This is referred to in page 7 of the impugned order where the remand report has been reproduced by the CIT(A). The Ld. CIT(A) has also mentioned on page 23 of the impugned order that the documents seized by the FERA Authorities were already in possession of the appellant and assessee's counsel had admitted this fact. The Ld. counsel for the assessee vehemently contested such observations made by the CIT(A) in the impugned order. He submitted that repeated requests were made to the AO for furnishing copies of the documents so as to enable the assessee to make effective representations on the same. He submitted that such request was never acceded to. It is settled position that if the Department wants to rely upon certain documents for making additions against the assessee, the AO must confront the same to the assessee, failing which such evidence cannot be used against the assessee. Assuming for a while that even if such documents were available, it was the duty of the AO to furnish copy of the same before relying on such documents. In case of Kisen Chand Chula Ram v. CIT reported in 125 ITR 713, (SC), it was held that before the Income-tax authorities could rely upon certain documents, it was incumbent upon them to confront the assessee with such documents. Besides, the Hon'ble Supreme Court further held that before relying on any statement, the AO was bound to confront such statements to the assessee and allow an opportunity to cross-examine the person whose statement was recorded and being relied upon, if t was also an evidence to be used against the assessee. If not confronted, the same was not admissible evidence. Similar view was taken by the Hon'ble Supreme Court in the case of RIB. Sherri Durga Prasad And Fatechand Nursing Das v. Settlement Commission, reported in 176 ITR 169. Thus, any reliance on the documents seized by the FERA Authorities which were not confronted to the assessee violated the principles of natural

justice and hence not admissible evidence.

22. The only evidence for making the addition for the assessment years under reference is the confessional statement of Sh. Ashok Kumar Sachdeva recorded by the FERA Authorities which was subsequently retracted. Once the statement was retracted by Sh. Ashok Kumar Sachdeva, the AO should have recorded his statement under the Income-tax Act. No such enquiry was made and statement of Sh. Ashok Kumar Sachdeva or any other person was never recorded by the AO. The other statement which is against the assessee is of Sh.Kranti Arora where he stated that under invoicing was resorted to by the assessee right form the year 1980 to 1993. But here also, the assessee was never confronted with the said statement and was not allowed an opportunity to cross-examine Sh. Kranti Arora, Therefore, the same could also not be made use of against the assessee, mores when there is no independent evidence relating to the assessment years under reference, to establish that the assessee had resorted to tinder invoicing of exports for the assessment years under reference. Thus, the CIT(A) was not Justified in sustaining the impugned additions for the assessment years only by relying on the statement of Sh. Ashok Kumar Sachdeva which also stood retracted and statement of Sh. Kranti Arora which was not supported by independent corroborative evidence relating to the assessment years under reference and was neither confronted to the assessee nor assessee was allowed an opportunity of cross examination. Thus, in the light of these facts and circumstances of the case and the detailed discussions in the preceding paragraphs and the legal position discussed above, we are of the considered opinion that the learned CIT(A) was not justified in sustaining the additions for the assessment year 1989-90. Accordingly, we set aside the order of the ld. CIT(A) and delete the impugned additions.

23. The order of the CIT(A) for the assessment year 1988-89, deleting addition on merits is upheld for the detailed reasoning given above. Accordingly, the ground No. 2, of appeal of the Revenue for the assessment year 1988-89 is dismissed. The grounds of appeal of the assessee for the assessment year 1989-90 relating to merits of the additions are allowed.

24. As regards other grounds relating to deductions Under Section 80-HHC and 80-I and charging of interest under Section 234A and 234B, these are consequential only. Since the addition made for the assessment year 1989-90 has been deleted, these grounds are only of academic interest. Therefore, these grounds are disposed of in these terms.

25. In the result, the appeal filed by the Revenue for the assessment year 1988-89 is partly allowed and the appeal filed by the assessee for the assessment year 1989-90 is also partly allowed.