

Roger Enterprises Pvt. Ltd. vs Dcit, Spl. Range-5 on 8 May, 2003

Equivalent citations: [2004]88ITD95(DELHI), (2004)82TTJ(DELHI)881

ORDER

Y.K. Kapur, Member (J)

1. These three appeals filed by the assessee pertain to assessment year 1981-82, 82-83 and 83-84. In all these three years the assessee filed its return of income which was processed u/s. 143(3) of the IT Act. Needless to say that in these three years while filing the returns the assessee claimed payment of certain commissions to three companies, namely, M/s . Excavators India (PP Ltd. (EIP), M/s . Triveni International Products (P) Ltd. (TIP) and M/s Bahri & Co. (P) Ltd., (BCP). In all these three companies to whom the commission is claimed to have been paid by the assessee, one Mr. M.K. Meattle is the common Managing Director. After the assessments were complete u/s. 143(3) of the IT Act on 29.10.82, 28.9.83 and 24.5.83, some information was received by the Revenue that the commission claimed to have been paid to these concerns in the three years were bogus transactions. The complainant in the complaint is said to have informed the Deptt. that the payment paid to three companies was in fact withdrawn from their bank account and, thereafter paid back to the assessee. It this background it was informed that the payment of commission was not genuine. Consequent to the receipt of information, proceedings u/s 148 were initiated and the statement of one Mr M.K. Meattle who as stated above are the common MD of the three companies referred to above, was recorded.

2. Apart from the statement of Mr. Meattle, the statement of another person, namely, Mr. A.K. Jhunjhunwala who is stated to be the Chartered Account and claimed to be relative of Mr. M.K. Jajodia the MD of the assessee company was also recorded. The gist of the statement of these two persons were that the payment of commission to these three companies, namely EIP, TIP and BCP was not genuine and the basis as to how commission was not genuine was explained by these persons. In their statement recorded these persons explained that the amount of cheques for commission were deposited in the bank account(s) of the three companies and, thereafter, the amounts were withdrawn and paid back to Mr Jajodia. During the course of statement which we shall be referring to a little later it was stated by Mr. Meattle that he had agreed to carry out these transactions on the premise of a payment of one per cent charge on a business transaction of Rs 1 crore. Mr Meattle stated one per cent was the hawala charges for the transaction. Before the authorities at the time of recording of the statement Mr. Meattle explained that he was approached by Mr. A.K. Jhunjhunwala, whose statement was also recorded separately, for agreeing to act in the manner referred to above payment of Hawala charges @ 1%. Mr. Meattle informed the Revenue during his statement that the bank accounts were opened in the name of three companies in two banks at Delhi and the cheques received for the alleged payments of commission were deposited in these accounts. According to Mr. Meattle, Jhunjhunwala had taken blank signed cheques from him

and Mr Jhunjhunwala also deposited the cheques in these accounts. Mr. Meattle during his statement is stated to have informed the Revenue that the cheques were filled in by Mr Jhunjhunwala and the amounts were withdrawn after the cheques were cleared, by Mr. Jhunjhunwala. According to Mr. Meattle, Mr. Jhunjhunwala had obtained signatures on some correspondence. According to Mr. Meattle, the entire operation was managed and handled by Jhunjhunwala. That apart, according to the Mr. Meattle he was not paid any Hawala charges as according to Mr. Jajodia, the MD of the assessee company he could not achieve the turnover of commission of Rs 1 crore. The non-payment of commission to Mr. Meattle, according to him led him to file a complaint with DDI (Inv.), Bombay, but on the petition from the assessee the case was transferred to Delhi.

3. In these background the Revenue felt that in this case the income has escaped assessment. This opinion of the Revenue as stated above and in the light of facts mentioned led to the invocation of the provisions of Section 147 of the IT Act and the reassessment proceedings were completed on 29th March, 1990 by making an addition to the income of the assessee of all these commission charges claimed to have been paid by them to these three companies in the three relevant years.

4. The action of the AO in framing re-assessment u/s 147 of the IT Act were challenged in appeal before the CIT(A) where also the assessee lost.

5. Having lost at two places the assessee filed appeals before this Tribunal for the 3 assessment years separately which appeals of the assessee were disposed of by this Tribunal vide order dated 24th December, 1993 with the following observations :-

"We have carefully considered rival submissions of the parties. We have also gone through request of the assessee dated 13.3.90 filed before the AO seeking time to cross examine Shri Meattle. In our considered opinion, the AO on peculiar facts of the case should have granted some more time to assessee to gather material needed for proper cross-examination of Shri Meattle. The request made appears to be bonafide and should have been accepted. We further find from the record that assessee raised a grievance in its written submissions to the CIT(A) that reasonable opportunity was not provided by the AO and the same be now provided. The aforesaid request should have been accepted to meet the ends of justice; but as already noted, learned CIT(A) rejected the request and confirmed the disallowance. It is thus clear that disallowance of commission in the three years is mainly based on the statement of Shri meattle recorded by the AO at the back of the assessee. The said statement could only be relied upon and used against the assessee after providing the assessee a reasonable opportunity to cross-examine. In our considered opinion, the said reasonable opportunity was not provided. In these circumstances, we are unable to reject assessee's claim that principles of natural justice were not observed as required under the law. The procedural irregularities crept in the assessment can only be rectified by setting aside the assessments relating to disallowance of commission based on statements of Shri Meattle and Shri Jhunjhunwala. We order accordingly and restore the file to the AO. The AO is directed to afford reasonable

opportunity to the assessee to cross-examine the above two persons in accordance with law and then re-consider the claim of payment of commission. To the above extent impugned orders are set aside and matter restored to the file of AO in all the three years under appeal. On this point all the three appeals are allowed for statistical purposes."

6. A perusal of the aforesaid order of the Tribunal would reveal that the matter was restored to the file of the AO to enable the assessee to cross examine the two persons, namely M.K. Meattle and Shri A.K. Jhunjhunwala in accordance with the law and then re-consider the claim of payment of the commission.

7. After the matter was restored to the file of the AO for fresh assessment, the AO asked the assessee to be ready for cross examination of the two witnesses on 27th Feb., 1996. On 26th Feb, 1996 i.e., a day before the date fixed for the cross examination, the appellant filed a letter with the AO requesting him for supply of certain documents of the three companies. On the day fixed for cross examination which happened to be 27th Feb., 1996, Shri A.K. Jhunjhunwala, the CA was present in the office of the AO at 11 AM. Despite that fact that the time was mentioned in the letter on 27th February, 1996 for the cross examination of the witnesses at 11 AM neither the assessee nor any one on his behalf attended the office of the AO up till 3 PM. At 3 PM the MD of the assessee company Mr. M.K. Jadodia and one Mr. M.K. Jain attended. The record transpires that they were asked to cross examine Mr. Jhunjhunwala. On being asked by the AO to cross examine Mr. Jhunjhunwala, they categorically refused to cross examine on the ground that he was stranger to the transaction and without questioning Mr. Meattle there was, according to the assessee, no useful purpose is going to be served by cross examining Mr. Jhunjhunwala and in this background they declined to cross examine Mr. Jhunjhunwala. Mr. Meattle anyhow did not turn up till 4 PM. Before the AO, the counsel for the assessee stated that they cannot wait for long for Mr. Meattle to appear and in this background left the office of the AO at 4.05 PM. The facts on the record transpires that as far as Mr. Meattle was concerned, the summons sent to him at his last known address was received back unserved. As the summons were received back unserved the AO made a request to the DDI(Inv.) Bombay to trace these witnesses and ask them to attend before the AO for the purpose of cross-examination. Anyhow before the dates were fixed for cross-examination which was 27th Feb., '96 the ADDI(Inv.) Bombay informed the AO under the cover of his letter on 12th February, 1996 that Mr. Meattle could not be found. Another letter of the AO of 19th February, 1996 to the DDI (Inv.) Bombay was replied back by the ADDI(Inv.) and Mr. Meattle could not be found.

8. Despite efforts by the AO to serve Mr. Meattle with notice for appearance for his cross examination, Mr. Meattle could not be traced as he was not available at his last known address and thus could not in the circumstances be produced for his cross examination while the witness present before the AO was not cross-examined as according to the assessee he was stranger to the transaction. Caught in such a situation the AO felt that the assessee is not interested in the finalisation of the proceedings and, thus, in this background, completed the assessment.

9. Appeal filed against the order of the AO made second time before the CIT(A) also filed and that is how the matter has traveled before this Tribunal second time.

10. At the time of hearing of this appeal Mr Ganeshan, Id. AR drew our attention to the grounds of appeal raised before us and submitted that in this case the rules of natural justice have once again been violated. We have examined the grounds of appeal in all these three appeals and find that the sum and substance to the challenge to the order of the CIT(A) is with regard to the violation of the principles of natural justice. The order of the CIT(A) has been attacked from various possible angles, but all shots so made at the order of the CIT(A) revolve around that rules of natural justice have been violated with which we shall deal later.

11. At the time of hearing of the appeal Mr. Ganeshan drew our attention to the order of the Tribunal passed in the earlier innings and submitted that the matter was restored back to the AO to enable the assessee to cross examine the witnesses. The submission of Mr. Ganeshan, the Id. AR was that once a direction has been issued by this Tribunal to the AO to give an opportunity to the assessee to cross examine these witnesses it was incumbent duty of the AO to make these witnesses available for cross examination. The submission of Mr. Ganeshan was that as the directions of this Tribunal has not been complied with by the AO the entire proceedings emanating from the order of the AO by which he had made the re-assessment to the order of the CIT(A) and so on and so forth is a null and void ab initio. Mr. Ganeshan further contended that in this background the original assessment made u/s. 143 (3) needs to be confirmed. In support of his contentions Mr. Ganeshan relied upon various judgements : -

1. 40 ITR 618 (SC) Bhopal Sugar Mills v. ITO Bhopal.
2. 56 ITR 349 Dwarka Nath v. ITO Special Circle.
3. 45 ITR 206 (SC C. Vasantlal & Co. v. CIT.
4. 1955 SCR 941 (SC) Dhakeshwari Cotton Mills v. CIT.
5. 63 ITR 449 (SC) CIT v. East Coast Comm. Co. Ltd.
6. 172 ITR 250 (SC) Chuaharmal v. CIT (Helps the Revenue).
7. 134 ITR 119 (Raj) Vimal Chandra Golcha v. ITO.
8. 113 ITR 389 (Delhi) CIT v. Jay Engg. Works Ltd.
- 9 89 ITR 6 (SC) STO v. Utteshwari Rice Mills.
10. AIR 1963 (SC) 375 State of Mysore v. Shivbasappa Shivappa Makapur.
11. 40 STC 278 (Ker) M.K. Thomas v. State of Kerala.
12. 39 STC 478 (SC) State of Kerala v. K.T. Shaduli Yusuff.

13. 1977 Tax LR 1754 (Cal) Machined Nath Chatterjee v. The Collector of Central Excise

14. 50 ITR 20 (Mad) T. Devasahaya Nadar v. CIT (Mad.)

15. Section 137 AIR 1933 Lah 561 (567) Para Dewan Singh & Other v. Emperor.

12. The case so built up by Mr. Ganeshan revolved around the challenge to the order of the authorities below, who, according to him, have violated the directions of this Tribunal by not complying the directions issued, the rules of natural justice have been violated. According to the Id. AR the orders of assessment cannot stand the test of legality and, therefore, are liable to be quashed.

13. The submission of the Id. AR was that as Mr. Meattle has not been produced for cross examination despite specific direction by the Tribunal his evidence cannot be read in. Referring to the statement of Mr. Jhunjhunwala it was the submission of Mr. Ganeshan that the assessee rightly refused to cross examine because he was a stranger to the transaction.

14. To the arguments so raised by the Id. AR, the Id. DR submitted that in this case the authorities below have complied with the rules of natural justice and the assessee has been granted ample opportunity to cross examine witness available, but it is the assessee who has refused to avail the opportunity. The submission of the Id. DR was that there is a distinction between the non-compliance of rules of natural justice and refusal to obtain the opportunity granted. the Id. DR would contend that as it is a case of refusal to avail of opportunity it cannot be said that there was a denial of reasonable opportunity as claimed by the assessee. The Id. DR would contend that the assessee was not interested in finalisation of the proceedings before the AO as is evident from the fact that he refused to cross-examine the witness available under the garb that he is stranger, which is not correct as per Id. DR. The Id. Dr contended that when a witness who is present in the witness box and whose statement has been recorded if he is not cross examined despite an opportunity, then the statement so made in the examination in Chief has to be taken as correct or to say it otherwise according to Id. Dr his testimony has gone un-rebutted. The Id. DR would contend that Mr. Jhunjhunwala is not a stranger to the transaction, but a witness of fact and having made a statement it was incumbent duty on the assessee to dislodge the statement so made. The Id. DR submitted that whether a witness is a stranger or not is for the adjudicating authority to determine and not for the parties to decide. The Id. Dr submitted that whenever a witness is produced his testimony is either to be accepted or rejected. The submission of the Id. DR was that if the testimony is not dislodged by cross-examination it has to be taken as correct which is the case here. Having not done so, the Id. DR contended that it does not lie in the mouth of the assessee that a statement cannot be read in. The Id. DR pressed into services in support of his arguments the Provisions of Section 137 and 138 of the Evidence Act. The Id DR contended that though the provisions of Evidence Act are not applicable, but the principles so led in the Evidence At can be applied. The submission of the Id. DR was that the recording of the statement which is called Examination-in-Chief and an opportunity to cross-examine fall within the ambit of the Evidence Act. The assessee having not availed of the opportunity to cross examine the consequences so enunciated in the Act and the law laid down by various court that the statement will be read as a whole to be correct shall be attracted. Referring to

the non-availability of Mr. Meattle, the Id. DR would contend that the statement of Mr. Meattle was recorded on 8th March, 1990 as is apparent from the order of the CIT(A) on page 8. The assessee was granted time to cross examine the said witness and the matter was adjourned to 13th March, 1990. On 13th March, 1990 it was the submission of the Id. DR that the assessee filed a letter before the AO that the time allowed to cross examination of the witness was short which, according to the assessee, was two working days, the assessee wanted 6 week's time to cross examine. The submission of the Id. DR was that intentionally longer time was asked so that the 'assessment becomes barred'. The submission of the Id. DR was that this is a case where the opportunity to cross examine the witness has been given in earlier stages of these very proceedings, but the assessee refused to avail of the said opportunity when granted and the witness having not been available at the latter stages of the same proceedings, it is the assessee who will have to have the consequences of his failure to cross examine in the earlier stages. The submission of the Id. DR was that the statement made by Mr. Meattle in the earlier stages of these very proceedings has to be accepted and is capable of being read in proceedings as a material evidence. We may at this stage say that we enquired from the Id. DR while he was on his legs to demonstrate legally the effect on non-production of the witness the second inning. The Id. DR to a question raised by the Bench in this regard submitted that a need has arisen to know as to what would be the consequences if the witness whose statement recorded in the earlier stage of the proceedings is not available when required at the latter stages of the same proceedings stated that his evidence has to be read in, of whatever worth it may have. In support of his contention, the Id. DR drew our attention to Section 33 of the Evidence Act. After having drawn our attention to the provisions of Section 33 of the Evidence Act Id. DR submitted that evidence of Mr. Meattle in the facts and circumstances of the present case despite the efforts made by the AO could not be made available, his statement cannot be ignored and has to be read of whatsoever worth it may be. In support of his contention the Id. DR submitted that principles laid down in Section 33 of the Evidence Act covers these kind of situations and no others. After having drawn our attention to the Section 33 of the Evidence Act and also to the fact that the assessee had been granted an opportunity in the earlier stages of the proceedings to cross examine, having not availed of the same, it is the assessee who is to be blamed and suffer the consequences of the statement made. The Id. DR in support of his contention submitted that though the Evidence Act in turn does not apply but the principles enunciated therein apply. The Id. DR would contend that to cover up such like situations, the principles of the Evidence Act need to be adopted otherwise lot many goods cases shall fail because there are not provision in the Income Tax Act which covers such like situations.

14A. Mr. Ganeshan in rejoinder reiterated the submissions made earlier.

15. We have heard the parties and taken ourselves through the record. Though the issue in this case is very short, but it has taken 20 years already in the Corridors of tax authorities, without attaining any finality. We, therefore, feel that the issue must attain its finality. In this background when we examine the issues involved in these appeals, we find that they revolve around the payment of the commission which, according to the Revenue is not genuine and the assessee claims it to be genuine. The issue of genuineness or the non-genuineness of the commission has arisen on account of the complaint made by Mr. Meattle which led to the re-opening of the assessment. To appreciate the controversy involved we must examine in detail the statements made by Mr. Meattle and Mr.

Jhunjhunwala because it is these statements on which the entire dispute revolves around. The statement of Mr. Meattle was recorded on 8th March and we are reproducing herein the entire statement so recorded :-

"Statement of Shri M.K. Meattle, aged 52 s/o Shri R.D. Meattle R/o D-904, New Friends Colony, New Delhi, Managing Director & Chairman of M/s Excavators (I) Pvt. Ltd., M/s Triveni International Products Pvt. Ltd. and M/s bahri & Co. Pvt. Ltd. in compliance with summons u/s 131 of the IT Act, on 8.3.90.

I solemnly affirm and take oath and state as under :-

Qn. 1 In which capacity have you come.

Ans. I am the Managing Director & Chairman of M/s Excavators (I) Pvt. Ltd., M/s Triveni International Products Pvt. Ltd. and M/s Bahri & Co. Pvt. Ltd and I am authorized to speak for and on behalf of these companies.

Qn. 2 Where these companies are assessed. What is nature of business? Where are they registered?

Ans. M/s Excavators & M/s Triveni are registered and assessed in Delhi and M/s Bahri at Calcutta. I do not remember the exact Ward No. where these are assessed. However, the income tax number must have been affixed on the commission receipts issued to M/s Rogers enterprises which would be correct. Regarding nature of business excepting hawala business there is no business.

Qn. During calender year 1980 M/s Roger paid M/s Excavator certain amount of commission. Please give details and also have there been shown in the books of M/s Excavator. Also during calender year 1981 did M/s Triveni & M/s Bahri received any commission and through which bank? Please give all the details and also are they reflected in books of accounts? Also during calender year 1982 did M/s Triveni recieve any commission. Please give details.

Ans. I was contacted by C.A, named A.K. Jhunjhunwala who is related to Shri Jajodia of Rogers having office at 3rd florr, Ready Money Chambers, fort Bombay next to Akbar Ali's showroom. He said that M/s Rogers will give a business of Rs. 1 crore commission and my hawala charges of 1% shall be paid at the time of final check of Roger to any of my companies. He and myself used to come to Delhi by morning flight of 6 AM and used to go by evening flight together and these can be verified from the Indian Airlines records. Regarding bank accounts I opened a current A/c in PNB Barakhamba Road, New Delhi and SBI Kasturba Gandhi Marg, New Delhi of M/s Excavator & M/s Triveni and the A/c of M/s Bahri & Co was opened in Union bank of India, Church Gate Branch, Bombay. M/s Roger also had a/c in all these three banks named above. I do not remember the A/c No. because my records were

destroyed in the collapse of Akashdeep Buildings on 5th of august, 1983 when the entire building collapsed. In this premises all these three companies had branch offices. The exact amount of commission received by my companies can be obtained from my bank account which were specifically opened for the purpose of adjustment as stated above. The modus operandi was Mr. A.K. Jhunjhunwala used to take a blank signed cheque from me and fill up the figure by his own handwriting as well as on the pay in slips for depositing these cheques issued by rogeRs. Rogers used to issue cheque for commission and this was deposited by Mr. Jhunjhunwala by himself by filling the pay in slip himself. this cheque used to be deposited in the same bank so that in my companies A/c there was only a transfer entry and not clearing. Then Mr. Jhunjhunwala used to take blank cheques of my companies signed by me and he used to mostly fill up the amounts himself and withdraw the cash as these cheques were bearer. This cash was paid by him only to M/s Roger thereafter . At that moment I did not used to get any amount because the deal was that the 1% (one percent) commission was to be paid at the time of completion of Rupees one crore commission to my companies which was never completed. I have stated in my statement recorded on 19.5.87 that the hawala entries with Rogers are to the tune of about Eighty Lakh rupees in all the three companies.

Here I would like to add that when no commission was paid to me as Rogers stopped further dealing with my companies I lodged a complaint with Shri J.K. Gutpa DDI (Unit III) Bombay and he issued summons to shri A.K. Jhunjhunwala and M/r Rogers who had an office in M. Hal Court/Tower at Nariman Point, Bombay and to the Manager, SBI Kasturba Gandhi Marg, New Delhi in Jan-Feb, 1983. The Sardarji who was the then manager of the SBI appeared before the DDI and went by AIR. It is on the record of SBI Kasturba Gandhi Marg. M/s Roger sent one advocate challenging the jurisdiction of the DDI Bombay and he sent the case to Shri Rejinder Singh the then DDI, Delhi. I do not know what happened thereafter.

Regarding showing of these commission in books of accounts of the companies and declaring to IT Authorities, nothing was shown as nothing was paid. Commission cheques issued by Rogers in my companies where hawala entries and therefore I have not declared these commission in IT return of my companies as no 1% commission was paid to me by M/s RogeRs.

Qn. Now I am giving details of payment stated to have been made by M/s Roger to your companies :

1). M/s Excavator India (P) Ltd.

Ch. No. Date Bank Amount

376247

20.06.80

SBI New Delhi

6,59,130.81

90341	15.11.80	PNB, New Delhi	3,23,265.52
90340	15.11.80	PNB, New Delhi.	12,03,645.42

			21,86,041.75
			=====

2) M/s Triveni International Productions (P) Ltd.

Ch. No.	Date	Bank	Amount

508887	23.7.81	SBI New Delhi	17,10,894.80
508891	12.8.81	SBI New Delhi	16,19,268.40

			33,30,162.48
			=====
657160	16.3.82	SBI	11,45,982.90

3) M/s Bahri & Co (P) Ltd.

Ch. No.	Date	Bank	Amount

412054	19.10.81	UBI Bombay	7,00,000.00
412055	19.10.81	UBI Bombay	3,47,810.60

			10,47,810.60
			=====

So, a total of Rs. 77, 99, 997.75/- was paid as commission to your companies, as detailed above by M/s Rogers Enterprises Pvt. Ltd. Please explain at what rate these commissions were computed and what sort of services were supposed to have been rendered by your companies. Also do affirm that three cheques were issued to your companies and as stated above there were hawala entries.

Ans. As explained above Shri A.K. Jhunjunwala a CA and a relation of Shri M.K. Jajodia approached me in Bombay and settled the deal as stated above. All the above cheques although numbers and amount I do not remember can be verified from the A/cs in the banks as stated above of may companies. Only thing that I can say that these were transfer cheques of hawala only and no real commission was paid to these companies or the hawala commission paid to me. The correspondence used to be brought by Shri Jhunjunwala and he used to take my signature on them. As far as I remember the correspondence was relating to supply of some generator sets to Haryana electricity Board. Since the file is since destroyed I cannot give you the exact contents. Mr. A.K. Jhunjunwala used to travel with me by the first Flight from Bombay to Delhi and return by the evening flights and tickets were booked in our names. During calendar years 1980 to 1982 i.e. the

period purported payment of commission I had not met Shri M.K. Jajodia or seen him or seen his office either at Bombay or Delhi. All the correspondence and transaction was done by Jhunjhunwala.

Adj. For cross examination on 13.3.90 at 10.30 AM.

I undertake come as above RO&C Recorded by me:

Sd/-

8.3.90 (S.K. GUPTA) ACIT (Asstt.) Spl. Cir.5(1)"

16. Certain important factors that emerge out of the statement of Mr. Meattle are that it reflects the nature of business of the companies owned by Mr. Meattle. Mr. Meattle stated that apart from Hawala he had no other business. That apart he states in his statement that he was contacted by A.K. Jhunjhunwala who claimed to be relative of Mr. Jajodia of M/s Rogers and who informed him that M/s Rogers will give a business of one crore and shall be paid as commission of 1% which shall be the hawala charge and the said amount shall be paid at the time of final settlement. Mr. Meattle also admits that the bank accounts in the three banks, i.e., PNB, Barakkhamba Road, SBI, KG Marg and UBI Church gate, Bombay of the three companies i.e. EIP, TIP and BIC were opened and in all these three bank branches M/s Roigers had its accounts. Mr. Meattle also in his statement had explained that the working arrangement which, according to him, was that Mr. Jhunjhunwala used to take blank signed cheque from him and fill up the figures by his own handwriting. Mr. Meattel admitted that the paying slip for depositing the cheque issued by Rogers used to be filled in by Mr. Jhunjhunwala. Mr. Meattle confirmed that the cheques issued by Rogers for commission were deposited by M. Jhunjhunwala himself. Mr. Meattle admits that the three bank accounts of his companies were opened in the same bank where Rogers had its account for the simple reason that there is no clearing, but only a transfer entry. Mr. Meattle explained that the blank signed cheques issued by him from his companies which were available with Mr. Jhunjhunwala were utilized and the amounts were withdrawn by cash and the cash was paid to the assessee. From the perusal of the above statement it is also clear that Mr. Meattle had admitted that he was not concerned with the withdrawal or deposit of the cash because he was to get only one percent commission on the completion of the business to the tune of 1 crore. Mr. Meattle also admits that he was not paid any commission because he could do business to the tune of 1 crore. Mr. Meattel also admits that he was not paid any commission because he could do business to the tune of Rs. 80 Lakhs. A perusal of the statement of Mr. Meattle reveals that he filed a complaint as the assessee did not make the amount agreed to. That apart, Mr. Meattle also admits that he has not shown any income from these transaction that nothing has paid and the commission cheques issued by rogers in the name of his companies were only Hawala entries. On the correspondence he says that my signatures was obtained on the letter head and beyond that he has not himself written any letter and says that everything was managed by Mr. Jhunjhunwala.

17. In the light of the statement made by Mr. Meattle, it is very clear that both he and Jhunjhunwala were involved in the transaction and it shall be unfair to hold especially in this background that

Jhunjhunwala was stranger to the transaction because whatever has been stated by Mr. Meattle is confirmed by Jhunjhunwala, who also admits specifically his involvement in the entire transaction.

18. To appreciate the controversy better, it would be proper to reproduce the statement of Mr. Jhunjhunwala also so recorded by the Revenue :-

"Oath Administered Sd/-

(A.K. Jhunjhunwala), 30.11.90 Qn. 1 Kindly identify yourself?

Ans. I am A.K. Jhunjhunwala, aged 43 years, resident of 202.....Coffee Parade, Bombay-5.

Qn. 2 Kindly give your sources of income?

Ans. I am partner in M/s A.K. Jhunjhunwala & Co., Chartered Accountants. I have got professional income apart from interest and dividend income on some investment, in my individual capacity.

Qn. 3 Do you know anything about a company called M/s Roger Enterprises Pvt. Ltd., Delhi?

Ans. Yes, I know there is the company called M/s Roger Enterprises Pvt. Ltd., Delhi.

Qn. 4 Are you in any way related to the directors of this company?

Ans. There is one director Mr. M.K. Jajodia who is related to me.

Qn. 5 Do you have any business relation with the above said company?

Ans. No. Qn. 6 Did you ever had any business relation with the Co., i.e., M/s Roger Enterprises Pvt. Ltd. Delhi?

Ans. No. Qn. 7. Have you ever helped M/s Rogers enterprises Pvt. Ltd., Delhi to do any business transaction here at Bombay?

Ans. No. Qn. 8 Have you even helped M/r Roger enterprises Pvt. Ltd., Delhi in doing any banking transactions such as deposit or withdrawal of cash/cheque at Bombay or in some bank branch in Bombay?

Ans. Yes, at the instruction of Shri M.K. Jajodia.

Qn. 9 How did Mr. M.K. Jajodia give instruction to you? Did he write to you in a letter form?

Ans. Mr. M.K. Jajodia gave instructions on phone.

Qn. 10 Did he talk to you on phone from Delhi or from Bombay?

Ans. Since it's very old therefore I don't remember.

Qn. 11 What did you do exact at the instruction of Shri Jajodia? Did you deposit or did you withdraw?

Ans. Some cheques were deposited and cash was withdrawn.

Qn. 12 The cheque was deposited and cash was withdrawn in which Account?

Ans. It was neither my account not Jajodia's account. It was some third account.

Qn. 13 How did you withdraw the cash smount from the third party's account? Did you have any authority to withdraw the same?

Ans. I was handed over a bearer cheque by one man of Shri M.K. Jajodia and I withdrew the cash amount and handed over to that man as per the telephonic instruction of Shri Jajodia. Since it was a bearer cheque duly signed by the drawer so there is no question of any authority.

Qn. 14 Who was the drawer? In other words whose signature was there on the bearer cheque?

Ans. I cannot remember and I was not interested in reading the signature, etc. as I was simply following instructions.

Qn. 15. If the cash was to be withdrawn and handed over to the man who had given you the cheque, logically speaking that man would have done the needful. There was no reason why you came in the picture. Could you please throw some light on this?

Ans. I don't know what was the reason for asking me to withdraw the money but the fact remains that the cash was handed over to his man.

Qn. 16 Who was "this man"?

Ans. I think it was one Mr. Lok Nath.

Qn. 17. Did you take any receipt from his man Shri Lok Nath?

Ans. No. I was just following the instruction.

Qn. 18 How much was the amount in cash handed over to Shri Lok Nath?

Ans. I don't remember.

Qn. 19 Was the amount in few thousand lakhs or tens of lakhs? Give me some idea.

An. It was in lakhs.

Qn. 20 Do you still know Mr Lok Nath? What's his present address?

Ans. I have no contact with him. I don't know where he is at present. At that time he was in Delhi.

Qn. 21 How did you hand over cash amount in lakhs to man whom your didn't even know properly? You didn't even take a receipt from him.

Ans. I never said I didn't recognize him. I can still recognize him if he comes before me. Since I only followed instructions of Shri Jajodia, So there was no problem.

Qn. 22 How did you recognize him? Was he ever introduced to you by Shri Jajodia?

Ans. Yes. He was introduced to me by Mr. Jajodia.

Qn. 23 Do you know one concern called M/s Bahri & Co. Pvt. Ltd?

Ans. No. Qn. 24 Do you remember the Bank branch from where you withdrew the cash as discussed earlier?

Ans. Yes. Union Bank of India at Churchgate Bombay.

Qn. 25 Did you fill in the bearer cheque through which you withdrew the cash?

Ans. I might have filled in.

Qn. 26 Have you ever operated A/c of M/c Rogers Enterprises Pvt. Lt. Maintained at Bomaby?

Ans. never.

Qn. 27 I am showing you the photocopies of two bearer cheques No. 419652, 419651 dated 2.11.81 and 2.10.81. Are these two cheques filled in by your personally or through somebody?

Ans. I have not filled in personally or got it filled in through any body the above two cheques.

Qn. 28 Did you yours use these two cheques for the withdrawal of cash or not> Ans. I can't say with certainty but if I am shown the back side of the cheque, I can confirm.

Qn. 29 Have you ever withdrawn any money from the A/c of M/s Roger Enterprises Pvt. Ltd. at Union Bank of India, Church Gate, Bombay?

Ans. I don't think So. But there was one loan transaction through cheque with A.K. Jhunjhunwala HUF.

Qn. 30 A.K. Jhunjhunwala HUF had taken loan or given loan from/to/M/s Roger Enterprises Pvt. Ltd. ?

Ans. I can verify and I shall let you know.

Qn. 31 Do you know one Shri M.K. Meattle Ans. Yes.

Qn. 32 What is your relation with him? How do you know him?

Ans. No relative. I met him in some party.

Qn. 33 Was he involved in any way with the accounts from which you withdrawn cash?

Ans. Yes. The account must be him account.

Whatever has been stated above is true to the best of my knowledge and belief. I have given the statement without any threat, coercion or force.

Sd/-XX 30.11.90 (A.K.JHUNJHUNWALA) Before Me.

Sd/-XX 30.11.90 (ABHAY K. SINHA) ADIT (Inv.) HQ-II, Aayakar Bhawan, Bombay"

Statement u/s 131 "Statement of oath/solemn affirmation recorded from Shri A.K. Jhunjhunwala son of Late Shri M.P. Jhunjhunwala on 15.3.95 at 11 AM during the course of search proceedings at 408, Ayakar Bhawan.

Oath Administered Sd/-XX 15.3.91 (A.K. JHUNJHUNWALA) Qn. 1 Do you know the companies in the names M/s Excavator India Pvt. Ltd. & M/s Triveni International Production Pvt. Ltd. ?

Ans. No. Qn2 Do you know Mr. M.K. Meattle?

Ans. Yes.

Qn. 3 Did he give you any blank cheques duly signed by him as director of M/s . Excavator India Pvt. Ltd., M/s Triveni International Production Pvt. Ltd. or M/s Bahri & Co. (P) Ltd. ?

Ans. No, I was handed over such cheques by Mr. Loknath Saraff of M/s Roger Enterprises Pvt. Ltd.

Qn. 4 What did you do with these cheques, which were blank and signed by Shri M.K. Meattle?

Ans. As per the instruction of Shri Loknath Saraff, I filled in the amounts and withdrew cash amounts and handed over the cash amount to Shri Loknath.

Qn. 5 For which banks, did you receive the cheques?

Ans. In Bombay Union Bank of India, Church Gate Branch, But I don't remember the Bank's name of Delhi.

Qn. 6 Did you yourself go to bank to take cash or withdrew cash or did you send some body for the same?

Ans. No I had gone to the Bank with Mr. Loknath Saraff.

Qn. 7 When Mr. Loknath Sariff himself went to the bank, why did you withdraw the cash or why did you fill up the cheque amounts, etc.?

Ans. That was the instruction of Shri Loknath Saraff. He wanted me to fill in the blank signed cheques given by him.

Qn. 8 So you should have understood as to why he wanted you to fill in the cheque. Today Shri Loknath may say that he did not given any instruction and it is you who took away the cash. Then how will you defend yourself?

Ans. Earlier also, I had stated that Shri Mahendra Kumar Jajodia, Director of M/s Rogers Enterprises Pvt. Ltd. is my relative who had asked me to carry out the above instructions i.e. filling in the duly signed cheques and withdrawing the cash from the various accounts. But I make it very clear that I never had any vested interest or financial gain in the transaction. I used to hand over the cash immediately to shri Loknath Saraff or to Shri Mahendra Kumar Jajodia as per their instructions.

Qn. 9 Now I show you photocopy of C/A pay-in-slip dated 12.8.81 through which a cheque of Rs. 16, 17, 268/40 has been deposited into the A/c of M/s Triveni International Productions Pvt. Ltd. on the backside, the cheque No. 305899 of SBI Kasturba Gandhi is written. Can you identify the handwriting used here?

Ans. This is in my handwriting. I have filled in this pay-in-slip.

Qn. 10 This pay in slip is for depositing cheque in the A/c of M/s Triveni International Products Pvt. Ltd. whose A/c is this? How did you fill in this name?

Ans. I don't know whose about M/s Triveni International Products Pvt. Ltd., but since I was given a bearer cheque by Shri M.K. Jajodia or by Shri Loknath (of M/s Rogers Enterprises Pvt. Ltd.) which was blank and signed by signatory of M/s Triveni International Products Pvt. Ltd. I was asked to fill in the same name for depositing a cheque (A/c payee) issued by M/s Rogers enterprises Pvt. Ltd. into the A/c of M/s Triveni International Products Pvt. Ltd. and then using the blank signed cheque to withdraw the cash from the same a/c. And as I have already stated earlier, I was instructed by Shri Jajodia to withdraw the cash and handover to him, which I did.

Qn. 11 I show you the photocopies of following.

- i) Cheque No. B/A06/50 399452, SBI Kasturba Gandhi Road dated 23.7.81, Amt. Rs. 7 lakhs.
- ii) Cheque No. B/A06/50 399451, SBI Kasturba Gandhi Road dated 23.7.81, Amt. Rs. 8.50 lakhs.
- iii) Cheque No. B/A06/50 399453, SBI Kasturba Gandhi Road dated 24.7.81, Rs. 1, 50, 000/-
- iv) Cheque No. B/A06/50 399453, SBI Kasturba Gandhi Road Bombay dated 12.8.81, Amt. Rs. 5, 50, 000/-.
- v) Cheque No. B/A06/50 399456, SBI Kasturba Gandhi Road Bombay dated 12.8.81, Rs. 10, 00, 000/-
- vi) Cheque No. B/A06/50 399454, SBI, Kasturba Gandhi Road, dated 12.8.81, Rs. 69, 061/40.

Now you please state whether any of these is written in our handwriting? Secondly, if these are not filled in our handwriting, in whose handwriting the same has been filled in?

Ans. Cheques appearing in item Nos.i), ii), iv) and v) are filled in by me and in my handwriting. About iii) iv), I can't say.

Qn. 12 The total withdrawal as per cheques at item No. i), ii), iv) & v) comes to Rs. 31 lakhs. What did you do with the cash withdrawn on self cheques.

Ans. Handed over to Mr. M.K. Jajodia or Mr. Loknath as per their instruction. I did not keep any amount with me.

Qn. 13 Today, once again I put before you one hypothetical question, suppose Shri M.K. Jajodia or Shri Loknath Sarraf of M/s rogers enterprises Pvt. Ltd is asked on the basis of your statement and on the basis of statement given by Shri M.K. Meattle that they have evaded taxes only through hawala entire's, he may say that they have evaded taxes only through hawala entries, he may say that you have withdrawn the cash and you have taken away all the cash amounts. So how will you defend yourself?

Ans. You can see that I was handed over cheques of different dates and of different banks to withdraw the cash and hand over the same back to them immediately. Accordingly, I withdrew cash amounts on different dates from different banks and handed over the cash to Mr. Jajodia or Mr. Loknath. If I had retained the cash amounts even once, they would not have given the work to withdraw the cash again. This proves that I never had any financial gains and all the amounts so withdrawn have been handed over to them.

Qn. 14 Do you want to add or delete to anything stated so far?

Ans. No. Whatever stated above is true and only true I have stated without any pressure, coercion or force. I have given the statement to best of my mental and physical health.

Sd/-XX 15.3.91 (A.K. JHUNJHUNWALA)"

19. A perusal of the aforesaid statement reveals that Mr. Jhunjhunwala knows the existence of M/s Roger Enterprises Pvt. Ltd., its director Mr. M.K. Jajodia with whom he claim to be having a relationship. Mr. Jhunjhunwala admits as is evident from the aforesaid statement that he has helped Mr. Jajodia in depositing/Withdrawing cash/cheque from some bank branches in Bombay. That apart, Jhunjhunwala admits of having acted at the instructions of Mr. Jajodia and has deposited cheques in the bank and withdrawn the cash and the amount was withdrawn from the bank accounts not belonging to either Jajodia or Jhunjhunwala. From the above statement it gets revealed the Jhunjhunwala has admitted of having been handed over bearer cheques by Mr. M.K. Jajodia drawn on companies of Mr. Meattle and he used to withdraw the amount and handed over the same to one Mr. Jajodia whose name is Lok Nath who was introduced to him by Mr. Jajodia. Mr. Jhunjhunwala gives the name of the Branches from where he had withdrawn the amounts and also admits having given Jajodia.

20. A perusal of the statement of two witnesses reproduced above and the gist of which has been taken reveals that these two witnesses are the witnesses of the transaction and are witnesses of fact. Both these two witnesses say that they have participated in the transaction in one way or the other. We can say that it is not that one witness tries to draw support from the other, but both have their independent roles to perform and have performed the same to achieve one goal i.e. to help the assessee company to justify its claim before the Revenue authorities with respect to the payment of commission which was never, according to these two witnesses, paid.

When we examine the evidence, we feel that as far as Mr. Meattle is concerned, the assessee claims to have paid commission to its companies which Meattle denies. How he denies to have received payment is evident that according to him he has neither deposited the cheques nor withdrawn the amount. According to him, he used to sign letters brought to him by Jhunjhunwala on which reliance was placed that there was a correspondence exchanged. Jhunjhunwala says that he has withdrawn the money from the banks and given it to the assessee.

21. The question that arises is can in this background would it lie in the mouth of the assessee to say that Jhunjhunwala is a stranger to the transaction. The obvious answer would be 'No'. Why we say so, we have an obvious reason for saying so and the reason is that Jhunjhunwala has stated facts which are in his personal knowledge. Not only that he has stated facts from his personal knowledge, but he is one of the most important chains directly involved in helping the assessee to achieve a target which target is to show payment of commission which was in fact never paid. He is not one limb of the chain of the assessee but he is half of the chain who has made his best to help the assessee reduce his tax liability. He by no means can be said to be a stranger to transaction but is safely a witness of fact who despite opportunity has not been cross-examined.

22. If Jhunjhunwala is not a stranger to the transaction and is a witness of fact having not cross examined and he having been not cross examined then what is the effect of the statement of Mr. Jhunjhunwala. For this, we may refer to the observations of the jurisdiction al High court in case Balkishan v. State reported in 1977, Criminal Law Journal 401 wherein it has been held as under :-

"1977 Cr. L.J. 401 (Delhi) Balkishan v. State.

Section 138 in the Evidence Act permits cross examination. It has been held by the courts that where a particular material assertion is made in examination in-chief and the witness is cross examined in this respect of that assertion then it will be taken that the party affected admits the truth of that assertion. The provisions of Section 138 came in for interpretation before the Patna High Court in Karnidan Sarda v. Sailaja Kanta Mitra. AIR 1940 Pat 683, and the Punjab high Court in Ganpat Ram Khosla v. Kishan Lal 1958 (60) Punjab LR 349. Considering the law laid down in those cases I am of the view that where cross examination is not directed against the positive material assertion effecting the opposite party, it would amount to the effected party accepting the truthfulness of that assertion unless there is some exception proof to the contrary."

Another judgement on this issue which we may with respect refer to is the one reported in AIR 1961 Cal 1359 at page 362 AEG Carapiet v. A.Y. Derderian The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in CE, it must follow that he believed that the testimony given could not be disputed at all. It is wrong

to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the CE is being made comes to give and lead evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much a Counsel is bound to do when CE that he must put to each of his opponent's witnesses in turn so much of his own case as concern that particular witness or in which that witness had any share. If he asks no question with regard to this, then he must be taken to accept the plaintiff's account in its entry.

23. Keeping in view the legal precedents and the fact that the assessee has refused to cross examine his witness, we feel that the assessee admitted the statement made by Mr. Jhunjhunwala to be correct and, therefore, chose not to cross examine him. Whether a witness is stranger or a witness of fact is for the courts to decide, but one party relies upon witness and gets his statement recorded, it is the bounden duty of other party against whom the statement is made to cross examine him and if the opportunity to cross examine is given and not availed of, in view of the ratio of the law referred to above, we feel that the statement has to be read as a whole and, therefore, we have no hesitation in saying that what Mr. Jhunjhunwala stated were facts and since the assessee had nothing with him which could contradict the statement of Jhunjhunwala, he in these circumstances chose not to cross examine him and, therefore, the entire statement shall be read against the assessee.

24. This brings us to the other issue of Meattle having not been produced for cross-examination. The assessee wanted his witness to be produced. The record depicts that the Revenue made efforts to trace him, but could not as is evident from the order of the CIT(A) on page 7. If the witness is not available, then whether his evidence is to be retained or rejected. That apart, another question that arises for consideration is when the Evidence Act is not applicable to the tap proceedings what would be done with the statement of Mr. Meattle? The law on this issue is well settled and the law is that though the provisions of Evidence Act are not applicable, but in a given situation the help of the principles of Evidence Act in the proceedings before the assessing authorities can be taken. For this, we may refer to the judgement of the apex court in 172 ITR 250 in case Chuharmal v. CIT wherein the Apex Court has held that in case the Income Tax Authorities are desirous of invoking the principles of Evidence act in proceedings before them, they can do so.

25. In the light of the judgement of the Apex Court and in the circumstances in which these proceedings are placed, we feel that to decide as to whether the evidence of Mr. Meattle can be read in or no help can be taken from Section 33 of the Indian Evidence Act on which Id. DR has placed reliance which Section reads as under:-

Section 33:-

"where the evidence of a witness is recorded before an authority authorized to record the evidence and that statement so recorded is so relevant in subsequent judicial proceeding or into the same judicial proceedings, but the witness who has made this statement is not available or cannot be found or is dead, then the true fact which it states can be relied upon provided the following conditions are fulfilled:-

i) Proceedings are between the same parties ii) That the adverse party in the first proceedings had the right and opportunity to cross examine

iii) The question in issue was substantially the same in the first as in the second proceedings."

26. A close reading of the provisions of Section 33 leaves no room to doubt that the statement of a witness who is not available or cannot be found out can still be relied upon provided the conditions laid down in Section 33 are fulfilled and the conditions are that the statement is to be read in, in proceedings between the same parties, the adverse party in the first proceedings had the right and opportunity to cross examine and the question in issue was substantially the same in the first as in the second proceedings 26A. Examining the statements of Mr. Meattle in the light of the provisions of Section 33 of the Evidence Act, we may say that Mr. Meattle made a statement on 17th March, 1990 the AO granted opportunity to cross examine and the assessee did not cross examine the witness. The evidence of Mr. Meattle which is now being referred to by the Revenue arises out of the same proceedings and is in between the same parties. The statement of Mr. Meattle was recorded into the earlier stage of the same but between the same parties. In this background, we may say that the statement made by Mr. Meattle in the earlier stages of the same proceedings though he could not be produced at a later stage of the same proceedings for cross examination can not only be relied upon by the Revenue but also referred to as well. For what we have said here we may for this draw support from the judgement of the Lahore High Court reported in AIR 193 (Lahore) 561 in the case of Dewan Singh & Others v. Emperors which dealt with the proposition similar to the one which we are not concerned. The issue before High court was as to what should be done with the unfinished testimony of a witness whether it is admissible or not and the Hon'ble Lahore High Court while dealing with this issue made the following observations:-

"No general rule can be laid down in respect of unfinished testimony. If it is substantially complete and the witness is prevented by sickness or death or other cases (mentioned in Section 33) from finishing his testimony where viva voce or deposition are not to be rejected entirely. But, if any order advanced has to be substantially complete it must be rejected."

27. In the light of what has been laid down by Hon'ble Lahore High Court, we may say that evidence of Mr. Meattle was recorded Mr. Meattle was a witness to the fact. Mr. Meattle says that the amount of commission was deposited in his companies. He had signed blank cheques and given it to Jhunjhunwala. Neither he deposited the cheque nor he withdrew the cash. The amount has ultimately rolled back to the assessee. The only interest he had was he was to get one percent commission on a business of one crore. The business was never complete and the assessee did not make him the payment. Mr. Meattle also says that as the assessee did not make him the payment he neither disclosed it in the books of account nor in the return. But being aggrieved by the breach of promise by the assessee he made a complaint to the authorities. As far as the statement of Mr. Meattle is concerned, we may say that his statement is substantially complete.

28. What more can be expected from a witness who is also a party to the transaction in which the assessee is involved. He has narrated the entire facts on which facts the assessee refused to cross-examine when opportunity was granted earlier. Therefore, we have no hesitation in saying that the evidence of Mr. Meattle was complete and applying the ratio of Lahore High Court in the case of Dewan Singh (Supra) we feel that the evidence given by Mr. Meattle can be read in and we find no force in the arguments of the counsel for the assessee that the statement of Mr. Meattle need to be rejected.

29. In view of the above discussion we may say that as far as the statement of Mr. Jhunjhunwala is concerned he having not been cross examined despite being put in the witness box. the statement made in Examination-in-Chief has to be accepted and we fail to appreciate as to how does it lie in the mouth of the assessee to come out and say that he is a stranger to the transaction. Regarding Mr. Meattle, we have already said that in the light of the provisions of Section 33 of the Evidence Act, his evidence is complete and can be read in.

30. After having held that the evidence of Mr. Meattle and Jhunjhunwala is acceptable, the question that arises is as to whether the rules of natural justice have been complied with in this case or not. The Id. AR for the assessee has relied upon various judgements referred to above. We may not like to be lost into the maze of the authorities placed before us, but shall be dealing with the most of them. The judgement which the Id. AR for the assessee relied upon is 40 ITR 618 (SC) in case Bhopal Sugar Mills v. ITO. In this case certain directions were given by the tribunal which according to the assessee were not given effect to by the AO and when the matter reached the Apex Court, the Apex Court held that the refusal to carry out the directions of the Tribunal now amount to denial of natural justice. The Apex Court held in this case that the writ can be issued to compel the officer to carry out the directions of the Tribunal.

31. When we apply the ratio of this case to the facts of the present case, we feel that the assessee cannot draw any strength from the judgement of the apex court for the reason that Jhunjhunwala has been put into a witness box for the cross examination which the assessee for the reasons referred to above and which reasons have been held to be not proper have refused to cross examine him and while Mr. Meattle could not be produced because he was not available at the address. In this background we feel that the AO has complied with the directions of the Tribunal, but it is the assessee who in legal wrangles want to exploit a situation and want to take advantage of his own wrong. We, therefore, feel that this judgment so relied upon by the assessee does not advance the case of the assessee.

32. The next judgement on which the reliance has been placed by the assessee is the one reported in 56 ITR 349 in the case of Dwarka Nath v. ITO. This judgement is cited for the proposition that a writ of Mandamus can be issued if the Revenue authorities below do not carry out the directions of this Tribunal. We feel that there cannot be a quarrel on the proposition that if an authority which is expected to discharge certain function fails to discharge the same, then a writ of mandamus can be issued. But, in this case the directions of the Tribunal have been implemented by the authority and it is the assessee who is not cooperated with the authorities below. In this background we may say that this judgement also does not advances the case of the assessee.

33. The next judgement relied upon by the assessee is the one reported in 45 ITR 206 in C. Vasant Lal & Others v. CIT. The ratio of this judgement is that the ITO is not bound by the rules of evidence. It is open to him to collect the material to facilitate assessment by private inquiry. But if he desires to use the matter so collected, the assessee must be informed of the material and must be given adequate opportunity for explaining it.

34. We do not know in what context this judgement has been filed. In the case in hand, the statement of two witnesses were recorded. The statements were supplied. The opportunity was given to cross-examine the witnesses whom the assessee failed to cross-examine for whatever reasons. The matter traveled to the Tribunal and the Tribunal directed the AO to give an opportunity of cross examination to the assessee. As stated above, this is a case of two witnesses. One witness is not found, the other is not available. The witness who was available is refused to the cross-examined. The other witness is not available. In these circumstances, we fail to understand as to how the material collected by the AO has not been brought to the notice of the assessee. We feel that this judgement instead of helping the assessee advanced the case of the Revenue which has placed at at the disposal of the assessee all that material within it has collected from the person concerned and also placed person concerned at the disposal of the assessee for cross examination which he did not do.

35. This brings us to another next judgement relied upon by the Id. AR. This judgement reported in 1955 SCR 941 (SC) in the case of Utteshwari Cotton Mills. In this case the Apex Court held that an assessment cannot be made on suspicion. An assessment made without disclosing to the assessee the information supplied and without giving an opportunity to the assessee rebut the information so supplied and declining to take him to consideration all materials which the assessee wanted to produce in support of his case constitute violation of fundamental justice. When we examine the judgement of the Apex Court in the light of the facts available on record, we find that in this case the only material collected by the Revenue was the statement of the two witnesses who were put to cross examination but which opportunity was not availed of. Later on one witness could not be produced as explained above and the other refused to be cross-examined for the reasons best known to the assessee which we hold were not genuine. We fail to understand as to how this judgement advance the case of the assessee and how can it be said that the assessment has been made on suspicion. To the contrary we shall be wrong in saying, if we say that the rules of natural justice have not been followed or that the assessment is based on suspicion.

36. Another judgement of the apex court reported in 63 ITR 449 in the case of CIT v. the East Cost Commercial Company Ltd was also relied upon by assessee. This judgement was relied upon by the assessee apparently for the proposition that the IT authorities are not bound by the rules of evidence, but in case they intend to rely on a particular evidence the assessee must be confronted with the same and should be given an opportunity to meet the same. Facts available on the record depict that full opportunity has been given to the assessee to rebut the material found against him, but the assessee has avoided to make use of the opportunity and we may with respect say that it is a case of refusal to avail the opportunity and not a case of denial of opportunity and, therefore, this judgement also does not help the assessee and cited out of the context.

37. The next judgement on which the assessee placed reliance was the one reported in 172 ITR 250 in the case of Chuharmal v. CIT, Before advertng to the judgement we may refer to the relevant paragraphs in the said judgement which is in the following words:-

"Held dismissing the petition and confirming the position of the High Court (i) that assessee meant by saying that the Evidence Act did not apply to the proceedings under the IT Act, 1961 say that the record of the rules of Evidence contained in the Evidence Act was not applicable, but that did not mean that when the taxing authorities were desirous of invoking the principles of Evidence Act in the proceedings before them they were prevented from doing so."

38. When we examine this judgement in the light of the observations of the Apex Court in the para reproduced above, we feel that this judgement help the Revenue and not the assessee. We say so for the reasons that in this case the provisions of Section 33 of the Evidence Act has been invoked to justify the reading of the evidence of Mr. Mittal and we say that following this judgement no fault can be found out when the provisions of Section 33 of the Evidence Act has been invoked.

39. The other judgement on the issue which was relied upon by the counsel for the assessee was the one reported in 134 ITR 119 (Rajasthan) in the case of Vimal Chandra Golcha v. ITO and the relevant paragraph of the report we may reproduce with respect :-

"In making an assessment the ITO does not act merely on what is described as evidence in the Indian Evidence Act. U/s 142 and 143 of the IT Act, 1961 the ITO may also act on "the material gathered" by him. The word 'material' shows that the ITO is not fettered by the technical rules of evidence and the like and that he may act on a material which may not strictly speaking be accepted as evidence in a court of law. evidence and the like and that he may act on a material which may not strictly speaking be accepted as evidence in a court of law.'

40. When we examine the aforesaid paragraph in the light of the facts available on the record, we feel that even this judgement does not advance the case of the assessee because whatever material the AO has gathered has not only been made available to the assessee, but he assessee has been given opportunity to rebut the same.

41. The next judgement in line relied upon by the Id. AR is the one repoted in 113 ITR 389 of the jurisdiction of the High Court in the case of Addl. CIT v. Jaya Engineering Works:-

"While the word "evidence" may recall the oral and documentary evidence as may be admissible under the Indian Evidence Act, 1872, the use of the word "material" in section 143(3) of the Income-tax Act, 1961, shows that the Income-tax Officer, not being a court, can rely upon material which may not be strictly evidence admissible under the evidence Act for the purpose of making an order of assessment. Court often take judicial notice of certain facts, which need not be proved, while administrative and quesijudicial authorities can take "official notice" of wider varieties of facts,

which need not be proved before them. thus, not only in respect of the relevancy but also in respect of proof, the material which can be taken into consideration by the Income-tax Officer and other authorities under the Act is far wider than the evidence which is strictly relevant and admissible under the Evidence Act. Income-tax Officers have to deal with such numerous cases of assessment that they can accept as correct books of account maintained in regular course of business without such a formal proof."

42. A perusal of the aforesaid para leaves no room to doubt that even this judgement does not advance the case of the assessee.

43. Another judgement relied upon by the Id. AR is the one reported in 89 ITR 6 (SC) in the case of STO v. Utteshwari Rice Mills for the proposition that the material gathered by the assessing authority against an assessee for re-assessment proceedings must be brought to the notice of the person concerned and the person concerned must be given an opportunity to answer the same. This judgement also we feel does not advances the case of the assessee as every material available with the AO in the form of statement was made available to the assessee.

44. Another judgement on which the assessee placed reliance was the one reported in AIR 1963 (SC) 375 in the case of State of Mysore and others v. Shiva Basappa Shivappa Markapur. This was a case of an inquiry before a domestic tribunal where in a domestic inquiry statement of certain witnesses were recorded in the absence of the defaulter. The statement of the witnesses was read out to the defaulter and they were given an opportunity to cross examine the witnesses. It was held in this case that the rules of natural justice in this background can not be said to be violated. We feel that this judgement also supports the Revenue. The counsel then relied upon another judgement of the Kerala High Court reported in 40 ITC 278 in the case of N.K. Thomas v. State of Kerala. Before the Kerala High Court the provisions of Section 17(3) of the Kerala general Sales Tax Act came up for interpretation and the Kerala High Court while interpreting the said Section observed that in the assessment proceedings u/s 17(3) of the Karala General Sales Tax Act 1963 it could not be said that the assessee has a right to insist on any party or witness for cross examination whose statement of record is relied on by the Assessing authority. This judgement was in particular reference to the provisions of Section 17(3) of the Kerala General Sales Tax Act.

45. In this Kerala High Court held that the assessee was not entitled to demand a right of cross-examination of a particular person as part of reasonable opportunity u/s 17(3) of the Act on the rules of natural justice. We do not know as for what proposition this judgment been relied upon or as to how this judgement advances the case of the assessee when applied to the facts and circumstances of the present case.

46. The next judgement relied upon by the assessee is the one reported in 39 STC 478 (SC) State of Kerala v. K.T. Shaduli Yusuff which also defines rules of natural justice which we say have been violated.

47. Another judgement on which the Id. AR placed reliance was the one reported in 1977 Apex Law Reporter 1754 wherein it has been held "the right to cross examine is not necessarily apart of reasonable opportunity". It was further observed in the said report that whether in a particular case a particular party should have the right to cross examine or not depends upon the facts and circumstances of the case and it very largely depend upon the adjudicating authority who is not guided by the rules of evidence as such. He must however afford such opportunity as would ensure to the party concerned appropriate opportunity to defend himself. It is well know that in these matters the Revenue or the Excise authorities are entitled to make their independent inquiries and also rely upon such inquiries provided the result of such inquiries are indicated to the person concerned against whom such inquiry sought to be relied upon and he is given an opportunity to contradict any evidence adduced in such inquiry. Even this judgement in the facts and circumstances of the present case does not help the assessee.

48. Another judgement on which the assessee placed reliance is the one reported in 51 ITR 20(Madras) in the case of T. Devasahaya Nadar v. CIT Madras. We may say that this judgement was also relied upon by the Revenue. The ratio of this judgement as culled out in the head note which we may reproduce :-

"An Income-tax Officer occupies the position of a quasi-judicial Tribunal and is not bound by the rules of the Evidence act, but he must act in consonance with natural justice, and one such rule is that he should not use any material against an assessee without giving the assessee an opportunity to meet it. He is not bound to divulge the source of this information . There is no denial of natural justice if the Income-tax Officer refuses to produce an informant for cross-examination though if a witness is examined in the presence of the assessee, the assessee must be allowed to cross-examine him. The range of natural justice is wide and whether or not there has been violation of natural justice would depend on the facts and circumstances of the case."

49. A perusal of the aforesaid ratio of the judgement reveals that this judgement in all force helps the case of the Revenue. Apart from the judgements referred to above, the assessee relied upon some other judgements copies of which were placed in paper book No. 3. We have also examined those judgments and say that they are on the issues already discussed above and do not advance the case of the assessee

50. In view of the discussion above, we say that by no stretch of imagination can it be said that the authorities below have not given proper opportunity to the assessee to prove his case. We, therefore, feel that the problem lies at the hands of the assessee who has not availed of the opportunity given to him and having not availed of the opportunity, is unnecessarily trying to blame the Revenue.

51. Examining this matter from another angle, we feel that the onus of proof that the commission paid was genuine was on the assessee. The question that further arises is as to whether the assessee has discharged the onus and if yes then how. According to the assessee he has discharged the onus by proving that the payment has been made by cheque. Not only this, the name of the person to

whom the payment by cheque is made is disclosed and therefore the payment is genuine.

52. This argument so raised by the assessee sounded well at the threshold but when we examined it further we found that it cannot hold water. Merely because payment is made by cheque may in some cases may persuade the authorities to hold the payment to be genuine but in this case the situation is totally reverse as the person/party to whom the payment by cheque is alleged to have been made has his own story to tell and which story is believed by us. There is complete lack out on the nature of services rendered. there is no material placed on record nor has our attention been drawn to any material which would demonstrate without doubt the nature of services rendered by these three companies. Keeping in mind these facts, we feel that the assessee has miserably failed to demonstrate the services rendered and has thus failed to discharge the onus.

53. As the assessee has failed to discharge the onus, he is not entitled to the claim of commission paid.

54. On this account also we are not prepared to disturb the findings of the authorities below.

55. In view of the discussion above, we feel that the claim of the commission was rightly disallowed by the authorities below and have, therefore, no hesitation in dismissing the appeals filed by the assessee.

56. After the matter was heard and the parties were heard for two days, an application has been moved by the assessee for rehearing of the matter. The application was forwarded to the Id. DR whose comments have also been obtained. We have examined the contents of the application, the comments of the Id. DR and also given her anxious thoughts as to whether application so filed by the assessee needs to be allowed or not. After considering the matter, we feel that the assessee was heard for quite sufficient time and all aspects of the matter were touched during the hearing. Apart from this there is no procedure which allows the assessee to make his submissions again after the conclusion of hearing. In this view of the matter the application so filed by the assessee is dismissed.

57. Before we part with we must point out that for a period of twenty long year, the assessee has intentionally and deliberately withheld from the tax authorities its liability of tax as a result of legal juggleries. Twenty years, , we must say is by no means a small period to involve some one in litigation like this. The consequences of litigation of this nature and magnitude is that lot of public time and money is wasted in this. This is an additional loss caused by assessee to the State, which we may say takes up various welfare activities in various ways. Whenever any welfare activity is undertaken or is conceived by the State, the involvement of finance comes into picture. The funds finance is generated by State through the process of taxation and if persons like the present assessee avoid payment of tax there is every likelihood of welfare activities being put on the back seat. Such an attitude on that part of any assessee has to be not only discouraged but must be dealt with a very heavy hand. We, therefore, feel that this is a fit case where the provisions of Section 254(2B) needs to be invoked and appeals filed by assessee need to be dismissed with costs.

58. In view of the discussion above, and in peculiar facts and circumstances of the present case the appeals filed by the assessee are dismissed with cost, which is quantified at Rs. 5000/- for each appeal. The Revenue is at liberty to recover the cost in accordance with the law.