IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH `B' : NEW DELHI

BEFORE SHRI R.P. TOLANI, JUDICIAL MEMBER AND
SHRI R. C SHARMA, ACCOUNTANT MEMBER

I.T.A.Nos.3088 to 3098 & 3107/Del/2005
Assessment Years : 1987-88 to 1993-94 &
1995-96 to 1999-2000.

Shri Hersh W. Chadha, (Legal heir of Late Sh. W.N. Chadha), Gyan Vatika, Bijwasan Road, Kapashera, New Delhi. PAN/GIR No.: AAB-PS-8397-H	Vs.	DDIT, Circle-1(1), International Taxation, New Delhi.
(Appellant)		(Respondent)

Appellant by : Shri Ajay Vohra, Sachit Jolly, Advocates.

Respondent by : Shri G.C. Srivastava, Advocate,
Special counsel

O R D E R

PER R.P. TOLANI, JUDICIAL MEMBER.

This is a group of appeals filed by the assessee. The issues involved being common and the assessee being the same, all the appeals are disposed of by this common order, for the sake of convenience. The main grounds raised in the appeals for AY 1987-88 & 88-89 pertain to receipt of commission from M/s Bofors, a Swedish company, dealing in arms and ammunition, to the extent not disclosed by the assessee and in subsequent years, income from interest on this undisclosed commission. In all these years there are other additions on account of House Property income and

disallowance of business expenses. The figures are given in the respective assessment orders. They can be summarized as under:

A: Common ground for AYs 1987-88 and 1988-89 – Addition on account of commission:

1. That the CIT (A) erred on facts and in law in confirming the additions at Rs. 52,60,34,469/- and 85,31,425/- respectively made by the Assessing Officer on account of alleged commission received by the appellant through M/s. Svenska Incorporated Panama, alleged to be a front company of the appellant.

1.1. That the CIT (A) erred on facts and in law in not appreciating that the aforesaid addition was made by the assessing officer without bringing on record any evidence to substantiate the allegation that the appellant had received any commission from AB Bofors.

1.2. That the CIT (A) erred on facts and in law in relying upon SNAB and the letter written by Mr. Sven Rabmkergar and not appreciating that the report of National Audit Bureau of Sweden "SNAB", on the basis of which the aforesaid addition was made, was only a press report and, therefore, had no evidentiary value.

1.3. That the CIT (A) erred on facts and in law in upholding the addition made by the AO merely on conjectures and surmises without bringing on record any evidence that the amount was received by the assessee (and that the interest had accrued on such commission).

1.4. Without prejudice, that the CIT(A) erred in not appreciating that as per the undertaking given by the Government of India, the evidence from Switzerland had to be used only in case in which the Letters Rogatory was issued and could not be used for the purpose of income-tax proceedings.

B Interest on above commission income : Common for 1988-89 to 1999-2000:

The CIT (A) erred on facts and in law in confirming these additions on account of notional interest in respect of the above commission allegedly received by the appellant from M/s Bofors through M/s Svenska Inc., Panama.

C. House Property additions Common for all assessment years:

That the CIT (A) erred on facts and in law in upholding the action of the assessing officer in computing the income from house property at a higher figure.

That the CIT (A) erred on facts and in law in upholding the action of the assessing officer in taking the annual value of the property located at E-1, Placimo, Bombay at Rs.2,59,800 as against actual rent of Rs.31,200 received by the appellant during the year."

D Business additions/ disallowances: (A.Y. 1987-88)**:-**

i) That the CIT (A) erred on facts and in law in confirming the disallowance of salary amounting to Rs.16,000 and staff welfare expenses of Rs.10,917 incurred in respect of Mrs. Nandini Chadha, daughter-in-law of the appellant, on the ground that nexus between the expenditure incurred and the exigencies of business could not be established.
ii) That the CIT (A) erred on facts and in law in confirming the disallowance of salary amounting to Rs.35,350 and Rs.39,250 paid to Mr.H.W.Chadha (son of the appellant) and Mrs. K.W. Chadha (wife of the appellant), respectively, on the ground that the same were incurred for non-business purposes.
iii) That the CIT (A) erred on facts and in law in confirming the disallowance of Rs.43,200, being reimbursement of rent to Mr. H W Chadha and Mrs. K. W. Chadha, holding that the premises in respect of which the rent was paid, was being used for non-business purposes.
iv) That the CIT (A) erred on facts and in law in sustaining the disallowance of motor car running expenses at $1/6^{th}$ of the expenditure by holding that element of personal user could not be ruled out.

v) That the CIT (A) erred on facts and in law in confirming the disallowance of expenditure of Rs.53,691 incurred by the appellant towards presents to delegates of foreign principals under section 37(2A) of the Act, holding the same to be entertainment expenditure.

vi) That the CIT(A) erred on facts and in law in upholding the action of the assessing officer in disallowing short term capital loss of Rs.67,062 on sale of shares, by holding that the transaction of the sale of shares made to the wife of appellant was a sham transaction.

E: Levy of Interest u/s 234

2. The brief facts of the case are –

2.1 In 1987, a scam in purchase of defense equipments, known as the Bofors Scam was unearthed, indicating that in respect of the gun deal between M/s. Bofors, a Swedish company dealing in arms and ammunition and the Govt. of India illegal commission / kickbacks were paid by Bofors violating specific defense policies on which the deal was signed by the Govt. of India. This expose resulted in an uproar across the whole of India and led to the setting up of a Joint Parliamentary Committee (JPC) and investigations by CBI, FERA etc., including the Income Tax department.

2.2 The assessee was representing Bofors as their agent in India since long. The evidence collected during investigation by the income tax Authorities and other agencies reflected that the assessee, Mr. W. N. Chadha had received income in this Bofors gun deal more than what was disclosed in his returns of income. The Assessing Officer (AO), during the course of assessment proceedings, collected a lot of evidence, recorded the assessee's statement and made these additions along with other additions under the head House Property Income and made disallowance of business expenditure and other disallowances. The assessments were appealed against by the assessee. The CIT(A) confirmed the orders of the AO. Aggrieved, the present assessee has filed these second appeals. It is pertinent to mention that the then assessee expired after the framing of the assessments and is represented by his son/legal heir Shri Hersh Chadha.

FACTS ABOUT BOFORS CONTROVERSY

2.3 The Indian defense purchase policy, till 1984, allowed foreign bidders to have their Indian agents. However, they were required to furnish details of their Indian agents, if any, to the Government in a prescribed proforma. Subsequently, the Govt. of India in consultation with the Defense Department, made a uniform policy, prescribing that “agents were not to be allowed in Indian defense purchases. If any bidder had maintained one, the amount so payable to agent by the supplier, was to be reduced from the quoted deal. The revised policy was to ensure that the deal was on a principal to principal basis, to avoid undesirable consequences which may arise out of such arrangement to save the cost to the defense budget and thus to the public exchequer.

2.4 In respect of the impugned Bofors gun deal, at the relevant time, there were four bidding firms involved in the bidding of the gun deal, namely, M/s. Sofma (France), M/s. Bofors (Sweden) , M/s. International Military Services(Britain) and M/s. Voest Alpine(Germany). These bidders had furnished the requisite information about their agents in India.

2.5. M/s. Bofors of Sweden also, in its declaration dated May 19, 1984, under the signature of Hans Ekblom, Vice President (Marketing), had informed that - W.N. Chadha of M/s. Anatronic General Corporation, C-4, Main Market, Vasant Vihar, New Delhi 110057, was their agent, and that, apart from W.N. Chadha, Hersh W. Chadha, Marketing Director of M/s. Anatronic General Corporation, Brig. B.B. Bhatnagar (retired) and Brig. A.L. Verma (retired) were designated:

(a) to liaise with the Government of India for the contract;

(b) to liaise with the Indian Authorities.

2.6 Consequent to the changed defense purchase policy, the Defense Department, asked M/s. Bofors on May 3, 1985, to dispense with the services of its declared agent and comply with such Indian Defense policy requirements. Bofors did not respond immediately and as late as on March 10, 1986 informed the Defense Secretary that, Bofors "do not have any Representative/Agent especially employed in India for this project". However, for administrative services, such as hotel bookings, transportation, forwarding of letters, telexes, etc., they were using a local firm, Anatronic General Corporation, C-4, Main Market, Vasant Vihar, New Delhi.

2.7. Be that as it may, on March 24, 1986, a contract number 6(9)/84/D(GS.IV), was entered into between the Govt. of India and M/s. Bofors, after approval by the then Prime Minister, who was also the Defense Minister, for supplying four hundred FH 77-B gun systems along with vehicles, ammunition and other accessories, at a total cost of SEK 8,410,660,984 [equivalent approximately to Rs.1437.72 crores (as per the exchange rate on March 21, 1986, 1 SEK = 1.7094 Rs. Without reducing any agent representation]. The aforesaid contract was signed by S.K. Bhatnagar for and on behalf of the Govt. of India and by Martin Ardbo, President Bofors and also by Anders G. Cariberg, president and Chief Executive Officer of Nobel Industries, for and on behalf of M/s. Bofors.

2.8 As per the terms of payments stipulated in this contract, 20% of the total amount of the contract (with the exclusion of any amount related to services) was to be paid by the buyer, i.e., Govt. of India, in advance, within 30 days from presentation by the seller, i.e. M/s. Bofors, of an advance payment guarantee. On receipt of the advance payment guarantee from Bofors on April 7, 1986, the advance payment of SEK 1,682,132,196.80

(Rs.296.15 crore), equivalent to 20% of the contract value was paid to M/s. Bofors on May 2, 1986.

2.9 From here the events took a turn. On 16-4-1987, i.e., over a year after the said contract was executed, when the advance money had been paid by the Govt. of India as per the terms of the contact and after delivery of the gun systems had started, a Radio Broadcasting channel "Dagens Eko" of the Swedish Radio, came out with a sensitive news. It unfolded that Bofors had violated the Swedish Law by managing to obtain this Gun Supply contract from the Govt. of India, amongst other things, due to the fact that local agents had been paid large amounts in "bribes".

2.10. It further stated that the agents had helped Bofors in getting the contract by dubious means with the help of local contacts and support within the -Indian Military Authorities, the Bureaucracy and concerned politicians. The illicit payments to the agents and others were said to have been made by transactions in secret bank accounts in Switzerland.

2.11. This news became a center of media & political attention in India also and was intensely reported everywhere, raising very sensitive issues of Indian Defense Policies, corruption, manipulations etc. The Govt. of India acted on these disturbing events, and on 21-4-1987, made a formal request to the Government of Sweden for an investigation into the allegations.

2.12. The Swedish Government accepted the request of the Govt. of India and ordered an enquiry by its organization, the Swedish National Audit Bureau (SNAB). The SNAB submitted its report to the Swedish Government on June 01, 1987, which was forwarded on June 04, 1987 to the Govt. of India. SNAB report, inter alia, made the following disclosures:-

> "that an agreement exists between AB Bofors and --------- (omitted) concerning the settlement of commission subsequently to the FH-77 deal, and;
>
> that considerable amounts have been paid subsequently to, among others, AB Bofors' previous agent in India".

2.13. SNAB thus confirmed that these payments to the tune of SEK 170-250 million were indeed made by Bofors in connection with this Defense contract to its previous agent in India, but the names of the recipients were not mentioned.

2.14. Facts thus emerged from SNAB report that despite having full knowledge about the policy of the Govt. of India that there should not be any agent whatsoever in this deal, Bofors continued with its old agent. Further, the amount such commission instead of reducing from price was paid to agent and related parties. Bofors thus acted in violation of the Indian defense policies and rules and harmed the public exchequer, besides committing breach of propriety etc .

2.15. It emerged further that despite the Indian Govt's. insistence not to appoint or pay any agent, Bofors entered into a fresh consultancy agreement with M/s. AE Services Limited of U.K. on November 15, 1985 at the behest of one Mr. Ottavio Quattrocchi, an Italian. According to this agreement, M/s. AE Services was appointed as a consultant to M/s. Bofors for getting the award of the contract for 155 mm gun systems from the Govt. of India, to perform the following services:

(a) to support Bofors in its bid for the contract according to instructions of Bofors;

(b) to keep Bofors informed of the up-do-date situation and progress of negotiations

2.16. Bofors was to pay a fee equivalent to 3% of the total value of the contract pro rata with the receipt of the payments. As per its terms, the Agreement was to cease automatically on April 1, 1986, if by this date, the contract was not awarded by the Govt. of India to Bofors. Thus, M/s. A.E. Services were to get the fees only if the contract was awarded to Bofors by March 31, 1986 and the contract was, in fact, awarded a week before that date. It thus emerged that Bofors deliberately suppressed the fact of their aforesaid Agreement dated 15-11-1985 with M/s. AE Services in their letter dated 10-3-86, addressed to the Ministry of Defense, in terms of disclosure and reducing the cost of the deal as stipulated.

2.17. Investigations revealed that the said Mr. Quattrochhi had contacted Myles Tweedale Scott, Director of M/s. AE Services Limited, sometime before 7-8-1985, for the purpose of the said agreement and was instrumental in bringing about the said agreement between M/s. AE Services Limited and M/s. Bofors. Mr. Quattrocchi remained in India from 28-2-1965 to 29-7-1993, except for a brief interval from 4-3-1966 to 12-6-1968. He was a Certified Chartered Accountant by profession, working with M/s. Snamprogetti, an Italian multinational company (MNC) providing the services of designing, engineering, management of construction and the training of personnel in the sector of oil refineries, gas processing, petrochemicals, fertilizers and pipelines. Neither Snamprogetti, nor Mr. Quattrocchi had any experience of guns, gun-systems or any related defense equipments.

2.18. It emerged that after payment of SEK 1,682,132,196.80 (Rs.29615.00 lakhs), equivalent to 20% of the contract value, to Bofors on May 2, 1986 by the Govt. of India, Bofors remitted a sum of SEK 50,463,966.00

(equivalent to US $ 7,343,941.98), on September 03, 1986, to A/c No. 18051-53 of M/s. A.E. Services Limited at Nordfinanz Bank, Zurich. This Account of M/s. A.E. Services Limited C/o Mayo Associates SA, Geneva, had been opened only a fortnight earlier, on August 20, 1986, by Myles Tweedale Stott as its Director. This amount of SEK. 50,463,966.00 works out to be exactly 3% of the amount of advance paid by the Govt. of India to Bofors and was, thus, perfectly in accordance with the terms set out in the A.E. Services Ltd. – Bofors Agreement dated November 15, 1985.

2.19. From this Account of M/s. A.E. Services, an amount totaling US $ 7,123,900 was transferred ($ 7,000,000 on September 16, 1986, and $ 123900 on September 29, 1986) to Account No.254.561.60W of M/s. Colbar Investments Limited Inc., Panama with the Union Bank of Switzerland, Geneva. An amount of US $ 7,943,000 was further transferred from the above said Account of M/s. Colbar Investments Limited Inc. on July 25, 1988, to Account No.488.320.60 X of M/s. Wetelsen Overseas, SA with the Union Bank of Switzerland, Geneva. Thereafter, on May 21, 1990 an amount of US $ 9,200,000 was transferred from the above said Account of M/s. Wetelsen Overseas, to Account No.123983 of International Investments Development Co., in Ansbacher (CI) Limited, St. Peter Port, Guernsey (Channel Islands). These Accounts of M/s. Colbar Investments Limited Inc., as well as M/s. Wetelsen Overseas, were being controlled by Ottavio Quattrocchi and his wife Maria Quattrocchi.

2.20. Enquiries further revealed that, while opening the Account of Colbar Investments Ltd. Inc. with the Union Bank of Switzerland, Geneva on March 30, 1984, Ottavio Quattrocchi had mentioned his address in India as "Colony East, New Delhi/ India", which was a fake and non-existent address.

2.21. Investigations in Guernsey (Channel Island) also revealed that the entire money, i.e. US $ 9.2 million, was further channeled to various Accounts in Switzerland and Austria, within a period of 10 days of its receipt in Guernsey. Letters Rogatory were issued by the Court of Special Judge, Delhi to the competent Authorities in Switzerland and Austria for judicial assistance in investigation in these countries.

2.22. More investigative revelations demonstrated that Bofors also had another consultancy agreement with an entity incorporated in Panama, namely, "M/s. Svenska Inc." since the year 1978. Despite the Govt. of India's initial policy requiring foreign bidders to declare the agent in a prescribed proforma and its subsequent policy requiring foreign bidders to remove their agents and to reduce the commission amount from the deal price, Bofors yet again was found to be violating Indian national policies. By this so called agreement Bofors committed to pay a commission to M/s. Svenska Inc. out of any contract signed by Bofors in India, Sri Lanka, Nepal etc. This agreement was modified from time to time and it was agreed in January 1986 that commission to the extent of 3.2% of the ex-works value would be paid to M/s. Svenska Inc. Out of this, 2.24% (two point two four per cent) of the total ex-works value was to be paid without delay when the advance payment had been received by Bofors. The remaining 0.96% (point nine six per cent) of the ex-works value was to be paid pro rata without delay when the payments for deliveries had been received by Bofors.

2.23. Letters Rogatory were issued by the Court of Special Judge, Delhi to Switzerland, Sweden, Panama, Luxembourg, Bahamas, Jordan,

Liechtenstein and Austria, with a view to finding out other beneficiaries of the commission amounts.

2.24. The documents received from the Swiss Authorities, in response to the letter by Rogatory, revealed that the following payments were made by Bofors to Svenska from their Account with Skandinaviska Enskilda Banken, Stockholm, on May 6, 1986.

	SEK 113039283.64	equivalent to	US$ 16,070,412.80
	SEK 28259820.64		FFR 27,957,875.84
	SEK 28259820.92		CHF 7,346,128.29
	SEK 18839879.98		XEU 2,720,363.87
Total	SEK 188,398,805.18		

A calculation will show that this is almost 2.24% of the total value of the contract i.e., SEK 8410660984, exactly as per the terms of the aforesaid Agreement.

2.25. The following additional payments made by Bofors revealed that each additional payment works out to be exactly .96% of a particular invoice of Bofors and the date of payment also matches with the date of payment by the Govt. of India.

Invoice No., its date & date of payment	Gross amount of Invoice (in SEK)	Commission @ 0.96% (in SEK0
1014271 dated 29.7.86 paid on 8.8.86	67,166,028	644,793.87
2010043 dated 20.2.87 paid on 2.3.87	66,657,160	639,908.75
102008 dated 19.2.98 paid on 9.3.87	13,981,805.92	134,225.34
2010136 dated 16.3.87 paid on 7.4.87	71,468,308	686,095.76
1010496 dated 23.3.87 paid on 2.4.87 and 1010488 dated 20.3.87 paid on 3.4.87	27,195,139 352,380	264,456.18

2.26. Inquiries further revealed that, including the above payments, M/s. Bofors had paid an amount equivalent to SEK 192156200.05 during the period from April 24, 1986 to March 30, 1987 in the name of M/s. Svenska Inc. Panama, for the said deal with the Government of India, which were credited to Account No.99921-TU of Mr. W.N. Chadha then resident of C-5/7, Vasant Vihar, New Delhi (India) with Swiss Bank Corporation, Geneva. The said Account was opened on August 9, 1983 with initial deposit of US $ 160,000. For the said Account, Mr. W.N.Chadha had given a Powers of Attorney in favour of his wife Ms. Kanta W. Chadha and his son Hersh W. Chadha. It also emerged that the Board of Directors of M/s. Svenska Inc., Panama, in its meeting held on 30-4-1980, had authorized W.N. Chadha, then resident of C-5/7 Vasant Vihar, New Delhi, to open and operate bank accounts of any type at any banking institution by a Power of Attorney, with the fullest rights and powers to substitute any one else's name in place of his own for the said purpose.

2.27 Investigations revealed that Mr. W.N. Chadha and Mr. Quattrocchi had been transferring the funds received from Bofors frequently from one account to another and from one jurisdiction to another to avoid detection and to obliterate the trial of the money.

2.28 The advance payment of SEK 1,682,132,196.80 (Rs.296.15 crores) equivalent to 20% of the contract value was disbursed by the Govt. of India to Bofors on May 2, 1986. The balance 60% of the contract amount equivalent to SEK 6,728,528,787.60 was paid to Bofors during August 1986 to 1990, from time to time, against the deliveries. The investigations revealed that an amount of SEK 242.62 million was paid by

M/s. AB Bofors, as commission, to Quattrocchi and W.N. Chadha through M/s. A.E. Services and M/s. Svenska, in contravention of the policy of the Govt. of India not to allow middlemen/agents in the deal. No commission was to be paid by Bofors in connection with the contract. If any such stipulation in this regard did exist, the commission amount should have been reduced from the contract price. Thus the Govt. of India had to pay excess amount of about SEK 242.62 million, which was passed on by Bofors to its agents Mr. W.N. Chadha and Mr. Quattrocchi against the express terms of contract.

2.29. It shall be pertinent to mention relevant dates in form of a chart to further corelate the events and history:

S.No.	Date	Particulars
1.	1975	Expert committee set up under Chairmanship of Lt. General K.V. Krishnarao which recommended induction of medium gun of 155mm caliber - -pg 157 of PB dated 12-04-2010.
2.	October 1978	Mr. W.N. Chadha entered with AB Bofors for representation in India for a period of three years ending in September 1981 which provided commission @ 2%
3.	March 1981	The Representation Agreement between AB Bofors and Mr. WN Chadha extended for another period of three years. This was followed by another agreement with M/s Anatronic General Corporation for a period of three years.
4.	March 1980-April 1982	Trials were conducted for guns whose tenders had been received by the Ministry of Defence –pg. 157.
5.	July 1982	Army Headquarters sent a draft CCPA paper to the Ministry of Defence in connection with procurement of guns. –pg 157
6.	October	Ministry of Defence asked Army Headquarters to

	1982	prepare detailed evaluation report on the basis of the trials conducted. –pg 157.
7.	December 1982	The General Staff Evaluation Report of 1982 shortlisted the following guns (a) British, (b) Austrian, (c) French Sofma and (d) FH-77B gun from Bofors, Sweden. – pg 157 & 158.
8.	May 1984	AB Bofors accepted as late as 30-11-9\84 a revised contract to Mr. WN Chadha with reduced rates since Bofors had not been able to get any business in India.
9.	May 1984	Negotiating Committee set up a negotiate with the short-listed companies. Pg 158.
10.	18.08.84 to 28.08.84	Negotiations were held between the short listed companies and the Negotiating Committee.
11.	24.08.198 4	Army Headquarters recommended that the British and Austrian systems were not acceptable and one again recommended Bofors, Seden and Sofma, France. – pg. 158-159.
12.	30.11.198 4	Mr. WNChadha signed the revised Representation Agreement with Bofors which provided commission @ 0.25% for a period of three years.
13.	End of 1985	Bofors informed Mr. WNChadha that as per the request of the Indian Prima Minister, Bofors could not employ any middlemen in the deal with the Indian authorities.
14.	03.01.198 6	Bofors sent a letter to Mr. WNChadha stating that all representation agreements between Anatroic/Mr. Chadha and Bofors stood rescinded . as on 31.03.1985.
15.	January 1986	Mr. WNChadha signed an Administrative Consultancy Agreement with Bofors under which he was to be paid 100,000 SEK per month irrespective of Bofors getting any business in India.
16.	17.02.198 6	Army Headquarters submitted their final technical evaluation report stating that the Swedish Bofors gun had a clear edge over the French Sofma gun. – pg. 159.
17.	10.03.198 6	Bofors confirmed that they did not employ any agent in India in respect of the deal with Ministry of Defence for the FH-77B gun deal – pg. 140.
18.	21.03.198 6	Revised offer received from Bofors, Sweden- pg. 159.

19.	22.03.1986	Revised offer received from Sofma, France-pg. 159.
20.	24.03.1986	The deal with Bofors was approved and MOU signed with the Government of Sweden-pg. 159.
21.	17.04.1987	Leading newspapers in India gave coverage to Swedish Radio Broadcast that bribes had been paid to senior Indian politicians and key Defence figures in connection with the Bofors gun deal. Pg. 140.
22.	04.06.1987	SNAB report submitted to Ministry of External Afairs – pg. 143.
23.	29.07.1987	Union Minister of Defence, Mr. KC Pant, moved motion in Lok Sabha for appointment of a Joint Parliamentary Committee. Pg. 144.
24.	12.08.1987	Rajya Sabha also approved formation of JPC-pg. 148.
25.	28.08.1987	JPC set up – pg. 148.
26.	28.08.1987	JPC submitted its report giving a clean chit to Shri WN Chadha – paper book dated 12.04.2010.

2.30. In the wake of these revelations, documents and evidences, the Income Tax Department commenced assessment proceeding in the assessee's case for different assessment years. It is pertinent to mention here that the assessment proceedings for AYs 1987-88 and 88-89 have been set aside by the CIT(A) on four occasions on the ground that investigations were in progress and material available on record was not sufficient to uphold the additions in respect of this commission. In the fifth round, the order of the AO has been confirmed by the CIT(A), which action is impugned before us.

2.31. The AO in the final detailed orders for AYrs 987-88 and 88-89, held that the assessee received commission from Bofors over and above the commission shown in his returns of income and made the additions, observing:

"5(i) M/s Anatronic General Corporation
The other account for business income pertains to M/s Anatronic General Corporation The details of income shown at Rs. 2,52,476/- includes receipts of Rs. 84,034/- from M/s Bofors. In the course of assessment proceedings the assessee was required to explain as to why M/s Sevenka Inc. Panama, should not be treated as a front company of the assessee and receipt in its hands during the year should not be treated as income of the assessee. The details of receipts in this regard are as under:

	SEK	Equivalent to Rs.
24.3.86	4,22,909.48	7,13,771
30.5.86	18,83,98,806	32,70,81,260
27.2.86	1,35,564	2,72,217
5.5.86	11,30,39,283.66	19,79,67,221
		52,60,34,469

(Rupee equivalent to SEKs are computed in accordance with Rule 115 of I.T. rules.)

5(ii) In this connection the assessee has filed a copy of the paper book which was furnished during the appellate proceedings. The main arguments advanced by the assessee are as follows:

(i) The alleged SNAB report is only a press report and more over this report has not been confronted for clarifications of the assessee.

(ii) The addition is being based on news paper reports only, they do not have any evidentiary value.

(iii) A number of extract have been reproduced from the report of Joint Parliamentary Committee (JPC) under scoring the argument of the assessee Coy. That Sh. W.N. Chadha cannot be described as middleman and there is no evidence to show that any middleman was involved in the process of acquisition of Bofors gun.

(iv) The assessee cannot be asked to establish that he is not a middleman. The onus in this regard lies on the department which has not been discharged. A

notional income cannot be added in the hands of the assessee.

(v) The assessee categorically denies that he has any knowledge about the existence of any Coy. By the name of M/s Svenska Inc.

(vi) The assessee agreed for a remuneration at a reduced rate because of the threat of cancellation of the contract.

(vii) The reliance on the phrase "well earned fee" in the letter written by Mr. Rehmberg cannot lead to a conclusion that Svenska was a front company of the assessee.

The submissions filed by the assessee have been considered but it is not possible to accept the same due to discussion made in the subsequent paragraphs of this order.

5(iii) It is seen that since 1978, Sh. W.N. Chadha, Proprietor of M/s Anatronic General Corporation, New Delhi has been sole representative of M/s AB Bofors in India. The arrangement between Shri Chadha and M/s Bofors was extended from time to time through various agreements including the agreements signed in 1978, 1981, 1984 and 1986. In March, 1986, the Government of India placed an order with M/s AB Bofors for supply of a specified number of 150 MM Field Howitzer 778 guns and spares. In November, 1984, i.e. during the process of selection and finalisation of the guns to be purchased, the Government of India informed the public at large and vendors dealing with defence equipments supplies to India, in particulars, that there shall be no agent or middleman in all deals with Government of India.

5(iv) However, the National Audit Bureau of Sweden (hence forth referred to as SNAB report) in its report dated 1.6.87 revealed that commission payments were made to those who "took care" of the Bofors FH 77-B deal with Indian

Government. The SNAB report further mentioned that these payments are unquestionably related to the Bofors gun deal mentioned above and the SNAB had come to this conclusion on the basis of written statements made by M/s AB Bofors to the Swdish National Bank.

5(v) The SNAB report also confirmed that some of these commission payments were made into the Swiss account of M/s Svenska Inc. a company registered in Panama (which is a known tax haven). The SNAB report has quoted the President of M/s AB Bofors Per Ove Morberg, who has stated that the Principal beneficiary in M/s Svenska Inc. is an Indian who has been an agent for Bofors for 10 to 15 years. It is, therefore, evident that Sh. W.N. Chadha (Nic name Win Chadha) who has been representing M/s Bofors in India since 1978, is the Principal beneficiary of the payments made by M/s Bofors into the accounts of M/s Svenska Inc.

5(vi) A study of the agreements made by M/s Bofors with M/s Svenska Inc. Panama on the one hand and M/s Anatronic General Corporation on the other hand shows a remarkable similarity and oneness. A comparative study of some of the salient features is given below:

1987 Agreement Sevenska	**Anatronic**
a) signed by Bofors on 21.12.78	a) Signed by Bofors on 21.12.78
b) Signed by Svenska on 11.12.78	b) Signed by Anatronic on 24.10.78.
c) Consultant for promotion of sales in India, Nepal & Srilanka. Functions not spelt out.	c) Sole representative for promotion of sales in detail paras 2.1 to 2.18
d) Allowed to represent following companies also i) Satt Electroniks ii) Kockums iii) Kariskronavarvet iv) Whitehead Moto Fides	d) Allowed to represent following companies also: i) Satt Electroniks ii) Kariskronavarvet iii) Kariskronavarvet iv) Whitehead moto fides.
e) Commission 4%	e) Commission 2% - 1 lac

1984 Agreement Svenska	**Anatronic**
a) signed by Bofors on 10.5.1984	a) Signed by Bofors on 10-5-1984
b) Signed by Svenska on 29.5.84	b) Signed by W.N. Chadha on 30.11.84
c) Consultant and adviser for promotion of sales in India, Nepal and Srilanka either directly or through sole representative in the territory. (Sole representative for India is Anatronic)	c) Sole representative for India for promotion of sales. Functions spelt out in detail.
d) Allowed to represent the same six companies as in the agreement with Anatronic.	d) Allowed to represent the same six companies as in 1981 agreement.
e) Commission 5% on ex-works value of the order.	e) commission 0.25% and 1 lac SEK P.A. for expenses.
f) Valid upto 30.9.1987 from the date of signature.	f) Valid upto 30.9.1987 from the date of signature.
1986 Agreement Svenska	**Anatronic**
a) signed by Bofors on 2.1.86	a) Signed by Bofors on 3.1.1986
b) Signed by Svenska on 13.1.86	b) Signed by W.N. Chadha on 13.1.86
c) Consultant and adviser for promotion of sales in India either directly or through administrative consultant in India.	c) Administrative consultant for administrative services in India. Not permitted without Bofors written consent to undertake sales activity.
d) Allowed to represent. i) Satt. Electronik ii) White-head Fides of Italy. iii) Kollmorgen Corp. of USA iv) Teledyne Mec. Of USA v) SAFT SOGFA France	d) i) Satt. Electronik ii) White-head Fides of Italy. iii) Kollmorgen Corp. of USA iv) Teledyne Mec. Of USA v) SAFT SOGFA France
e) Commission 3.2% by letter dated	e) Monthly payment of 1.00 Lac

5.5.87 from Svenska Split into 2.24% as termination charges & 0.96% for consultancy during the period of the contract.	SEK. A car every 3rd year and two 1st class Air Ticket to Sweden every year.
f) Validity 1.1.86 to 31.12.90 Commission on licence agreements to continue on payments being received by Bofors during two yrs. After 31.12.90	f) Validity 1.1.86 to continue after 31.12.90 until terminated by 6 months notice by either.
g) Can terminated due to major breach of contract by consultant or also by the administrative consultant in India.	g) Can be terminated due to major breach of contract by administrative consultant.

- It is seen that agreements were made or renewed on or about the same dates and were for identical periods of time.

- Both the companies were assigned the same products manufactured by same companies and were allowed to sell the products in the same territories.

- M/s Svenska Inc. was appointed to do business in India directly or though M/s Anatronic General Corp.

- The commission payable by M/s Bofors to Svenska Inc. and M/s Anatronic General Corp. reveals a very interesting pattern.

- In 1978 agreements, M/s Svenska Inc. was to get a commission of 4% and M/s Anatronic General Corp. was entitled to a commission of 2% thus total commission payable by M/s Bofors to the two representatives was 6%.

- In 1984 agreements the commission payable to M/s Svenska Inc. was increased to 5%. However, to begin with the commission payable to M/s Anatronic General Corp. was reduced from 2% to 0.25% and probably because of this Sh. W.N. Chadha did not sign the 1984

> agreement immediately. It was finally settled that M/s Svenska Inc. would get 5.75%. It is only then that Sh. W.N. Chadha Prop. of M/s Anatronic General Corp. signed the agreement and once again, the total commission payable to both M/s Svenska and M/s Anatronic General Corp. was 6%.

It can be thus seen that what was allegedly lost by M/s Anatronic General Corp. was gained by M/s Svenska Inc.

5(vii) The fact that Sh. W.N. Chadha was associated with the Bofors gun deal with Govt. of India is also reflected in one of the letter written by Sh. Sven Rambergain, a associate of Sh. W.N. Chadha who wrote on 7.7.86 (after the Govt. of India had placed the order of Bofors) as follows:

> "Thank you for the beautiful sterling silver … which you presented me through Mr. Linder has advised me however to wait a letter from you and so I did."
>
> I am very pleased that you were involved in the Bofors billion business, not only considering your well earned fee but also proving that Anatronic Corp. can do business which some people – not of course – doubted some years ago.
>
> I hope that Mr. Hallanbars will hear about your achievement however his health is not good and he is not showing himself …. ."

5(viii) The facts mentioned above strongly indicate that Sh. W.N. Chadha was actually involved in the Bofors gun deal. However, when the Govt. of India made its intentions known to the vendors that no middleman should be involved, M/s Bofors and Sh. W.N. Chadha made some re-arrangements and introduced another company namely M/s Svenska Inc. under the changed agreements while Anatronic General Corp. was allegedly retained to only provide support services in India to M/s Bofors and bulk of commission due to Sh. W.. Chadha was given through M/s Svenska Inc. As mentioned above Sh. W.N.

Chadha finally received commission of 6% due to him; partly in the accounts of M/s Anatronic General Corp. New Delhi and balance in the accounts of Svenska Inc.

5(ix) There is also positive evidence to show that some of agreements between M/s Bofors and M/s Anatronic General Corp. and M/s Svenska Inc. were ante-dated to take care of the new arrangements. For example, in the agreements between M/s Bofors and M/s Svenska Inc. signed in January, 1986, there is a reference to an event which occurred in March 12986. The relevant portion of the said agreement is reproduced below:

> "Clause 2.1.1. – on contract for sales related to Bofors 155 mm gun system including the supply contract and licensed agreement both signed on March 24,1986 Bofors will pay a commission of 3.2% of ex-works value of the order of ordnance received during the time of the validity of this agreement."

5(x) Besides the assessee has not addressed to the subsequent developments on the issue of commission received by M/s Sevenska Inc. Panama, which is the front company of Sh. W.N. Chadha. The Govt. of India as a part of investigation to find out the beneficiaries of commission paid by M/s Bofors has filed a FIR on 22.1.90 through CBI. Sh. W.N. Chadha and M/s Anatronic General Corp. have been named in this FIR. The said FIR relies upon the report of Swedish National Audit Bureau which states that "the current president of AB Bofors per Ove Morbarg, has in his talks with the Swedish National Bank stated that the principal beneficiary in sevenska Incorporated is "an Indian who has been an agent for Bofors for 10-15 years." Obviously the Indian Citizen who has been an agent for Bofors for 10-15 years is none other than Sh. W.N.Chadha.

5(xi) Further it would not be out of place to refer to the order dated 17.12.92 of the Hon'ble Supreme Court in which they have observed as under:

> "though we refrain from giving any positive finding with regard to the alleged payment of the bribe allowed to the respondent, the allegations made in the FIR u/s 154 of the Code of Criminal procedure prima-facie constitute the offence alleged therein."
>
> "It cannot be said that the report of the JPC has acquitted the respondent and others of all the charges leveled against them in appraisal of the entire evidence. On the other hand, the report spells out that Bofors did not co-operate and the evidence relating to the recipient of the amount was not forthcoming."

The above observations of Hon'ble Supreme Court effectively counters the contention of the assessee that the additions are based on mere news paper reports and JPC in this reports has given the assessee a clean chit. It will be relevant to mention that the Swiss Courts have also agreed about the commission of this crime.

5(xii) The discussion made in the above paragraph leads to the conclusion that there is sufficient material to show that Sh. W.N. Chadha was recipient of commission amounting to Rs. 52,60,34,469/- through its front company namely M/s Svenska Inc., Panama. Since Sh. Chadha has not disclosed the aforesaid commission income, the same is added to his income in this assessment order."

2.32 In first appeal, the CIT(A), after considering the assessee's arguments and the material available on record, confirmed the AO's action making the following observations:

I have considered the facts of the case, I find that the report of the Swedish National Audit Bureau (SNAB) and letter written by Sh. Sven Rabinbergfan dated 07.07.86 lead to the conclusion that commission income to the extent of Rs. 52,60,34,469/- has been received by Sh. W.N. Chadha, partly in the account of M/s Anatronic General Corp., New Delhi and balance in the

account of M/s Svenska Inc.Panama. The SNAB, vide report dated 01-06-87 revealed that commission payments were made to those who "took care' of the Bofors FH77-B deal with the Indian Government. The SNAB report also confirmed that commission payments were made into the Swiss account of M/s Svenska Inc., a company registered in Panama which is known as a tax haven'. The SNAB report has further quoted the President of M/s AB Bofors Per Ove Morberg, who has stated that the principal beneficiary in M/s Svenska Inc. is an Indian, who has been an agent for Bofors for ten to fifteen years. It was only Sh. W.N. Chadha, who had been representing Bofors in India since 1978. Therefore, he was the principal beneficiary of the payments made by M/s Bofors into the account of M/s Svenska Inc.

The above view is further corroborated by letter written by Sh. Sven Rabmbergan to the assessee Sh. W.N. Chadha who wrote on 07-07-86 (after the Government of India had placed the order of Bofors) as follows:-
"…. I am very pleased that you were involved in the Bofors billion business, not only considering your well earned fee but also proving that Anatronic Corporation can do business which some people- but I of course – doubted some years ago….."

It is further seen that the Government of India, as a part of investigation to find out the beneficiaries of commission paid by M/s Bofors, filed an FIR on 22.01.1990 through CBI. Sh. W.N. Chadha and M/s Anatronic General Corporation have been named in this FIR. This FIR relies upon the report of the Swedish National Audit Bureau which states that the current President of AB Bofors, Per Ove Morbarg, has in talks with the Swedish National Bank stated that the Principal beneficiary in Svenska Incorporated is "an Indian" who has been an agent for Bofors since ten-fifteen years. Obviously the Indian citizen who has been an agent for Bofors since ten-fifteen years was none other than Sh. W.N. Chadha.

Finally, the Assessing Officer has also pointed out that the Hon'ble Supreme Court vide order dated 17.12.92 has observed as under:-

"Though we refrain from giving any positive finding with regard to the alleged payment of the bribe allowed to the respondent, the allegations made in the FIR under section 154 of the Code of Criminal Procedure prima facie constitute the offence alleged therein."

The Hon'ble Supreme Court has further denied "it cannot be said that the report of the Joint Parliamentary Committee ahs acquitted the respondent and others of all the charges leveled against them in appraisal of the entire evidence. On the other hand, the report spells out that Bofors did not cooperate and evidence relating to recipient of the amount was not forthcoming."

The above observations of the Hon'ble Supreme Court effectively counter the contention of the assessee that the additions are based only on newspaper reports and the Joint Parliamentary Committee report ahs given the assessee a clean chit. Further the Assessing Officer has pointed out that the Swiss Courts have also agreed about the commission of this crime.

From the foregoing, it is clear that there is enough evidence to lead to the conclusion that the appellant Sh. W.N. Chadha, was recipient of Rs. 52,60,34,469/- as commission, through its front company namely M/s Svenska Inc.Panama. Report of the SNAB dated 01-06-87, letter dated 07-07-86 written by Sh. Sven Rabmergan to Sh. W.N. Chadha, observations of the Supreme Court in which the report of the JPC has been incorporated all to lead to the conclusion that Sh. W.N. Chadha was the recipient of Rs. 52,60,34,469/- as commission @ 6% through its front company M/s Svenska Inc., Panama and M/s Anatronic General Corporation, New Delhi.

It is clear that Sh. W.N. Chadha was actually involved in the Bofors gun deal. However, when the Government of India made its intentions known to the vendors that no middleman should be involved, M/s Bofors and Sh. W.N. Chadha made some rearrangements and introduced another company, namely M/s Svenska Inc. Under the changed agreements, Anatronic

> General Corporation was allegedly retained to only provide support services in India to M/s Bofors and bulk of the commission due to Shri W.N. Chadha was given through M/s Svenska Inc.
>
> In view of the above, increase in income by Rs. 52,60,34,469/- as receipt of commission of @ 6% partly in the accounts of M/s Anatronic General Corp. new Delhi and balance in the accounts of M/s Svenska Inc. is held to be in order and therefore upheld."

2.33. In the subsequent years, the AO held that this income received by the assessee has been utilized for earning purposes and on a notional basis, interest was worked out there on @ 5% per annum. This resultant amount was added in all the subsequent years as income. The CIT(A) confirmed these additions also.

2.34. Another addition relates to house property income which is continuing since earlier years.

2.35. The remaining grounds are in respect of staff welfare, salary to relative, motor car expenses and gifts presented by the assessee allegedly during the course of business. All these additions have been confirmed by the CIT(A).

ASSESSEE'S CONTENTIONS:

3.0 Aggrieved assessee is before us in second appeals. The Ld counsel for the assessee, Shri Ajay Vohra at the outset contends that the CIT(A) was not justified in confirming the additions in as much as except the CBI charge

sheet, no new material came in the possession of the AO, for the further collection of which material, the appeals were set aside to him. Broadly, on the same available material, the CIT(A) on the earlier occasions had repeatedly held that there was no sufficient material on record to sustain the additions made by the AO. In the absence of new reliable material indicating that the assessee actually received any commission or acted as a middleman as alleged, there is no justification in additions made by the AO and as confirmed by the CIT(A).

3.1 The Ld. Counsel for the assessee contends that there is no evidence on record that the alleged company Svenska Incorporated, Panama, was a front company of the assessee, or he was holding the power of attorney to operate these accounts. The additions have been made on the basis of adverse inferences drawn from following reports or information:

(i) Report of national audit bureau of Sweden (SNAB report)

SNAB report is only a press report and has not been confronted to the appellant. The addition has been made on the basis of newspaper reports and they do not have any evidentiary value.

- Quamarul Islam v. S.K. Kanta, AIR 1994 SC 1733
- Laxmi Raj Shetty v. State of T.N., (1988) 3 SCC 319.

(ii) Letter written by Sh. Sven Rhambergan, an alleged associate of the appellant.

The letter of Mr. Sven Ramberg on Pg. 56 does not show that any payment was made to Mr. Chadha for the contract between M/s Bofors and the GOI.

In any case, the letter written by Sh. Sven Rabmbergan, an alleged associate of the appellant, cannot be viewed as conclusive evidence that the appellant had received moneys. The truth of the contents of a document is not proved by mere contents of the document and

independent evidence for the purpose of substantiation is required. The letter may only be used as corroborative evidence.

(iii) Report submitted by JPC giving clean chit to assessee and holding that assessee was not the middleman and no commission as is alleged is received.

- The JPC in respect of assessee role has concluded that:

a. There was no evidence to relate Mr. W.N. Chadha to Svenska Inc. in Panama.

b. On page 223 para 7.184 - Chief District Prosecutor of Sweden did not find any evidence to show that the bribes have been paid to any Indian whether resident or non-resident to win the Bofors contract. As a result no further investigation was carried out.

c. Page 223 - Para 7.186 – The Inspector General of Military Equipment, Sweden has also confirmed that there was nothing to indicate that any of the Swedish laws have been violated so far Indian contracts were concerned.

d. On page 224 Para 7.191 – Bofors has stated that the Chief Prosecutor of Sweden, after investigation, had come to the conclusion that no offence was made under the Swedish law. Since the payment of bribe was also an offence under Swedish law it was pointed out that it can be reasonably inferred that no offence could be made out in respect of the payments made by Bofors.

iv) Observations of Honorable Supreme court in its order dated 17.12.1992 reported in AIR 1993 SC 1082)

Hon'ble Supreme court's observation are only preliminary in respect of prima facie criminal case against the assessee. These observation cannot be held to be indicting the assesses tax liability under income tax proceedings.

v) Charge-sheet filed by the CBI.

The charge sheet filed by the CBI has been held to be conclusive proof for the fact that Svenska was assesses front company and payment received in this account are assesses commission. Charge sheet has no evidentiary value as it is only a preliminary statement of accusations levelled against assessee by prosecution to be followed by a series of further steps as under:

On receipt of information under section 154 or 155 of CrPC, the Police may investigate into the allegations/information received regarding commission of an offence.

a. Upon completion of the investigation and after procuring evidence and/or examination of witnesses, the Police is required to file a report under section 173 of the CrPC before the Magistrate, inter alia, containing (a) the names of the parties, (b) the nature of information, (c) the names of persons who maybe acquainted with the case and (d) whether any offence appears to have been committed.
b. Thereafter, the Magistrate may call for further investigation or on the basis of evidence produced before it, and after giving a copy of all the evidences and statements recorded to the accused, may proceed to frame charges under section 211 of CrPC.
c. The charges, so framed, under section 211 of the CrPC are required to be proved in the trial, which may eventually lead to acquittal or conviction, as the case maybe, under section 232 or 235 of the CrPC.
d. The charge sheet is, therefore, only a report by the Police on the investigation conducted in the matter and does not, on its own, constitute any evidence. In fact, the contents of the charge sheet are not even required to be proved. It is only the charges which are framed by the Magistrate under section 211 of the CrPC which are required to be proved.
e. The charge sheet is only an opinion of the investigating officer about the commission of an offence or otherwise.
f. Reliance in this regard is placed on the attached cases:

SATYA NARAIN MUSADI V. STATE OF BIHAR	AIR 1980 SC 506
K VEERASWAMI V. UOI	(1991) 3 SCC 655

vi) Photo copies of Hindu News Paper.

Photocopies of documents procured from Hindu can not be relied on by Income Tax Authorities as:

1) The agreements produced by the Revenue for the first time before the Tribunal are photocopies of certain agreements alleged to have been entered into between Bofors and Svenska, of which the assessee has denied any knowledge during the course of assessment.

2) The Revenue neither possess originals nor produced the originals in any proceedings..
3) It is settled law that photocopies can be relied upon only when the originals are available with the person relying upon the same. Reliance is placed upon the following cases:
   a) Smt. J. Yashoda v. Smt. K Shobha Rani: 2007-TIOL-119-SC-Misc
   b) Ashok Dhulichand v. Mdahavlal Dube: AIR 1975 SC 1748
   c) Moosa S Madha v. CIT: 89 ITR 65 (SC)
   d) Ram Saroop Sainin v. CIT: 15 SOT 470 (Del)
   e) Moorti Devi v. ITO in ITO No. 1012/Del/2008
   f) Vimal Chandra Golecha: 134 ITR119 (Raj) – International documents must be notarized and consularized before they can be adduced as evidence.
   g) UOI v. Shantilal Motilal Mehta: 2006 (4) ALLMR 52

vii) Information received by letter Rogatory which gives immunity from use of such material in the cases of tax frauds.

- The Swedish authorities have stipulated that disclosed evidence cannot be used in tax proceedings to which CBI has agreed under an international protocol between 2 countries. The evidence being specifically excluded cannot be relied and has no evidentiary value.

viii) Concordance of dates between the agreements of Svenska and Anatronics:

1) A concordance of dates of agreements between Bofors and the assessee, on one hand, and Bofors and Svenska, on the other hand, has been prepared by the assessing officer to suggest that a consolidated commission of 6% was fixed by Bofors to be paid to the assessee either directly or through Svenska Inc.
2) However, a mere perusal of the statement of Mr. Chadha on Pg.72 – 73 of paperbook filed by the Revenue itself proves that the alleged concordance of dates is incorrect.
3) The concordance of rates of commission on pg. 190 of paperbook filed by the Revenue does not add up to 6% as alleged by the Revenue and, therefore, the theory of collusion between Bofors, Svenska and the assessee does not hold good.

3.2. The Ld. Counsel contends that none of the above evidence is reliable against the assessee.

3.3. It has been submitted that the burden of proof that the assessee received such payments rests on the Revenue. So for no documents or evidence has been brought on record that the assessee actually received extra payments. Reliance is placed on following case laws:

(i) CBI v. V. C. Shukla & Ors, AIR 1998 SC 1406

"The rationale behind admissibility of parties' books of account as evidence is that the regularity of habit, the difficulty of falsification and the fair certainty of ultimate detection give them in a sufficient degree of trustworthiness. Since, however, an element of self interest and partisanship of the entrant to make a person – behind whose back and without whose knowledge the entry is made – liable cannot be ruled out the additional safeguard of insistence upon other independent evidence to fasten him with such liability, has been provided for in section 44 by incorporating the words 'such statements shall not alone be sufficient to charge any person with liability'." (para 34)

(ii) Kishinchand Chellaram v. CIT, (1980) 125 ITR 713 (SC), at 723

"The burden was on the revenue to show that the amount of Rs. 107,350 said to have been remitted from Madras to Bombay belonged to the assessee and it was not enough for the revenue to show that the amount was remitted by Trilokchand, an employee of the assessee, to Nathirmal, another employee of the assessee. It is quite possible that Trilokchand had resources of his own from which he could remit the amount of Rs. 107,350 to Nathirmal. It was for the revenue to rule out this possibility by bringing proper evidence on record, for the burden of showing that the amount was remitted by the assessee was on the revenue."

3.4. It has been averred that the assessee does not have any knowledge about the existence of any company by the name of M/s Svenska Inc., and the assessee cannot be described as a middleman, as there was no evidence available to show that any middleman was involved in the acquisition of the Bofors gun by the Govt. of India. The onus to prove that the assessee was a middleman in the acquisition of Bofors gun, was on the department, which onus has not been discharged. Reliance has been placed on:

K. P. Verghese v. ITO, Ernakulam & Anr. 131 ITR 597

"It is a well settled rule of law that the onus of establishing that the conditions of taxability are fulfilled is always on the Revenue and the

> second condition being as much a condition of taxability as the first, the burden lies on the Revenue to show that there is understatement of the consideration and the second condition is fulfilled. Moreover, to throw the burden of showing that there is no understatement of the consideration, on the assessee would be to case an almost impossible burden upon him to establish the negative, namely, that he did not receive any consideration beyond that declared by him."

3.5. It has been argued that the documents allegedly acquired from Swiss Authorities in response to the Letters Rogatory issued by the Govt. of India, cannot be relied on as evidence by the Revenue. In any case, no such documents have been brought on record, much less confronted to the assessee. Hon'ble Supreme court in the case of Kishinchand Chellaram v. CIT, (1980) (supra) held that:

> "The sole question which arises for determination in the appeal is whether there was any material evidence to justify the findings of the Tribunal that the amount of Rs. 1,07,350 said to have been remitted by Tilokchand from Madras represented the undisclosed income of the assessee. The only evidence on which the Tribunal could rely for the purpose of arriving at this finding was the letter dated 18th February 1955 said to have been addressed by the Manager of the Punjab National Bank Limited to the Income Tax Officer. Now it is difficult to see how this letter could at all be relied upon by the Tribunal as a material piece of evidence supportive of its finding."

3.6. It has been urged that all the papers in behalf of Bofors – Svenska transactions like agreements, payment invoices, transfer of money, meeting of board of directors and resulting power of attorney, copy of Svenska bank a/c which have been conclusively relied on by the lower Authorities, are merely photocopies obtained from "The Hindu" newspaper. There is neither authentication of source, contents or allegations from either the editor of, or any other responsible person from the Hindu, to ratify them and allow the

assessee a chance of cross examination. This evidence cannot be relied on, as:

1) The news agency has not been produced with the originals or certified copies of the documents to testify them to be true and correct copies.
2) Page 152 of the paper-book filed by the Revenue – Termination agreement between Bofors and Svenska Inc. clearly suggests that the winding up costs were paid due to the restriction put up by the GOI and they do not amount to commission.

3.7. The Ld counsel, on the basis of the above arguments, pleads that there is no case against the assessee that Svenska was his benami front company, or that the alleged commission was received by him. The evidence being photocopies, hearsay or assumptions, is, firstly inadmissible and, in any case, it does not conclude that the assessee received this income. Therefore, the additions deserve to be deleted.

3.8. The notional interest income was added by the AO as business income on such alleged commission in assessment year 1988-89, by making the following summary observations:

> "4. Income from Business:
> In the assessment orders, it has been held that M/s Svenska Incorporated, Panama, is a front company of the assessee and accordingly the commission paid by M/s Bofors into the foreign bank accounts of M/s Svenska represents the receipt of the assessee assessable as income of the assessee. On the same analogy, accrued interest on the secret commission parked in foreign banks has also to be added to the income of the assessee. However, the quantum of accrued interest is calculated @ 5% cumulative on the principle amount as has been followed in other assessment years in this case. Such

accrued interest works out to Rs. 2,76,61,841/-, which is added to the income of the assessee."

3.9. The CIT (A) also confirmed this summary order by confirming the addition

3.10. The Ld counsel contends that the addition is purely notional in nature; made merely on surmises and conjectures. It is vehemently argued that the principal amount qua which the earning of interest is being notionally imagined itself is under serious challenge. There is no evidence that the assessee actually earned this commission or made any investment anywhere. Without there being even a remotest clue about receipt and investment, just by figment of imagination it has been concluded that the assessee was in possession of money, invested it for earning interest and earned the same at the rate of 5% pa. Nothing is available to hint as to who paid the interest and on which investment.

3.11. The Ld counsel vehemently argues that no evidence in respect of earning such notional income has been brought on record to suggest that the commission was received by the assessee and it was ever gainfully employed for earning some income in any manner whatsoever. In the absence of any information, evidence or record notional interest income cannot be added in the assessee's hands, merely on hypothetical observations. The addition is unjustified in all the years.

3.12. In respect of additions to income from house property, the Assessing Officer computed the income under the head "Income from house property" at Rs. 3,89,000 as against income of Rs. 26,000 declared by the assessee, after adding notional interest @ 15% on interest free security deposit received by M/s Hertz Agencies Pvt. Ltd.(HAPL), tenant of the assessee

and substituting rent of Rs. 2600 by Rs. 2900 as received by HAPL. The AO made the additions by making the following observations:

> "3(i) Income from house property located at E-1, Placimo, Bombay:
> The previous year of income from house property is 1.7.85 to 30.6.86. Against the returned rental income of Rs. 26,000/- income from house property was calculated at Rs. 3,89,000/- in the earlier orders which was arrived at after taking into consideration the yield factor of the interest free security deposit amounting to Rs. 24,00,000/- at 18% p.a. and annual value was determined by invoking the deeming provisions of Section 23(i) of the I.T. Act."

3.13. The above addition has been confirmed by the CIT(Appeals) in all the years.

3.14. The Ld. Counsel contends that this issue stands decided in the favour of the assessee by the order of the Tribunal in assessee's own case in asstt. Yrs. 1985-86, 1988-89,1991-92,1996-97. The ITAT, vide consolidated Order dated 5-11-2001 rendered in ITA nos. 3762/D/92, 2098/D/95; WTA nos. 208 to 211/Del/95 & ITA no. 2518/Del/95, has held as under:

> "25. After hearing rival submissions and considering the other materials on record we find that assessee deserves to succeed in these two grounds. There is no dispute that assessee is charging rent @ 2600/- from M/s Hertz Agencies who originally took flat on rent from Dr. D.M. Chaddha who was natural guardian of the owner of the flat. The rent of Rs. 2900/- was charged by M/s Hertz Agencies from BASF and the same has been shown by that assessee. There is no question adding back the same rent in the case of the assessee when the same was not received. The amount of Rs. 2600/- was only received as rent per month from June 1982. The same rent has been shown in Assessment year 1983-84 and 1984-85 which were duly accepted by the Department. Therefore we feel that there was no justification in adding the income on account of enhanced rent. Therefore the

AO is directed to accept the rent of Rs. 2600/- shown by assessee.

26. Regarding notional interest we find that there was no justification in making in addition on account of notional interest in the hands of the assessee. We further find that in case of M/s Hertz Agencies Pvt. Ltd. an addition of Rs. 3,89,000/- was made on account of notional income as it was found that security receipt of Rs. 15 lakhs, no income was shown on that account. The matter traveled up to the stage of Tribunal and Tribunal found that the security receipt of Rs. 15 lakhs has been duly shown in balance sheet and the amount of Rs. 15 lakhs has been utilized for the purpose of business and any income earned on that account have already been taken into consideration in profit and loss account. Accordingly the addition of Rs. 3,89,000/- was deleted. This decision was rendered by the Tribunal in ITA no. 7973/D/92 for assessment year 1987-88 vide its order dated 15.3.99. Therefore, we find that there is no question of any notional interest on account of security deposit which was received by a different legal entity. Accordingly, we delete the addition on account of notional interest."

3.15. Further, reference is also made to the following decisions in this regard:

CIT vs Satya Co. Ltd. 75 Taxman 193(Cal HC)
Super leasing V ACIT 56 TTJ(Bom) 258
CIT V J.K. Investors(Bombay) Ltd. 248 ITR 723
Commissioner Of Wealth Tax Vs. Akshya Textiles Trading & Agencies (P) Ltd:. 2008 214 CTR (Bom) 468

3.16. Apropos disallowance of business expenditure, the ld. Counsel contends that they are in the nature of business expenditure, many of them have been allowed by the Department and the ITAT in earlier years and as such, they should be allowed.

REVENUE'S CONTENTIONS:

4. The Ld Special Counsel for the Revenue Shri, G. C. Shrivastava, Advocate, on the other hand, vehemently contends that the contentions being put forth are not tenable. The proceedings under income tax and those under the criminal law are fundamentally different in nature.

4.1 The Bofors commission episode is a very complex investigation, it involved various national and international Agencies and extensive efforts to collect and collate the information. Discovery of evidence faced various road -blocks and even a single clue was so vital that it could have changed the line of investigation. Under these circumstances, the assessee's plea that the CBI Charge sheet did not amount to new material for the AO to make additions is not correct. The plea that the CBI charge sheet, being a preliminary report, cannot be relied as admissible evidence in income tax proceedings, is not tenable. The AO went through the CBI documents and found various clues about Svenska being assessee's front company, dates of concordance in Agreements, the Svenska Board authorized power to operate bank account in assessee's or any other name at his discretion. His Swiss bank A/c and Bofors invoices give all the details of transfer and their proximity with the dates of actual payments and the defense deal. There is no merit in assessee's plea in this behalf.

4.2 The Ld DR contends that Bofors has not denied making payments to the so called recipients Svenska and A E Services. It only says that they are not middleman or agent and the payment therefore represents winding up cost and it does not represent kickbacks or middlemens commission. Though this explanation has its own fallacies, the main issue before AO was to assess correct income tax payable by the assessee. Bofors officers earlier accepted having paid the commission to its old Indian agent. However in their

representation before the JPC, disclosure of actual names was avoided. This does not take away the evidentiary value of their earlier statement.

4.3. The AO, thereafter, by various inferences and facts based on material on record, i.e. concordance of dates, Mr Rhamberg's letter, Letter Rogaotary evidence, assessee's incorrect replies and other material collected by the CBI and other investigations, came to a proper conclusion that Svenska was the assessee's front company and the payments to Svenska were in fact payments to the assessee.

4.4 Replying to the written submissions filed by the assessee, the ld. counsel made the following contentions in respect of the assessee's each proposition:

S. No.	Summary of written prepositions of the Appellant	Response of the Revenue
1	Apart from the charge sheet filed by the CBI and certain Agreements between Bofors and Svenska all other evidences are the same, which have been considered earlier by the CIT-A (Appeal).	As submitted during the course of arguments, the first assessment made in the year 1990 was based on only two Agreements of Bofors – one with Anatronic and the other with Svenska and the letter of Mr. Ramberg. In the second assessment made in the year 1992, the SNAB report was added. In the third assessment, the details of FIR filed by the CBI and the observations of Hon'ble High Court were also relied upon. It is for the first time that vital facts like the existence of a bank account in which the money paid to Svenska was credited and the fact that such account in the Swiss bank was operated and managed by the assessee under a Power of Attorney, came to light.

2	There is no evidentiary value of the charge sheet. The charges have to be proved. The charge sheet is only a report on the investigation conducted in the matter and does not constitute an evidence. At best, it is an opinion of the Investigating officer.	Revenue has not placed reliance on the opinion of the Investigating officer given in the charge sheet or on the inferences drawn regarding the commission of any offence stipulated in the charge sheet. It is also not the case of Revenue that the assessee should be charged to tax merely because the charge sheet holds him guilty of certain offences. The reliance of the Revenue is mainly on Paras 54, 55, 57 & 58 of the charge sheet. Reliance is primarily on the facts given in the charge sheet particularly with regard to bank Account no. 99921-TU with Swiss Bank Corporation, Geneva. Mr. Chadha had given full Power of Attorney in favour of his wife and his sons. The Board of Directors of M/s Svenska, in their meeting held on 30.04.1980, authorized Mr. Chadha to open and operate bank accounts of any type at any banking institution through a Power of Attorney with the fullest rights and powers to substitute anyone else's name in place of his own. It was under this power given by the company Svenska that the said bank Account was opened and operated by Mr. Chadha. A perusal of invoices showing the payment of money by Bofors to Svenska clearly indicate that the money was credited to the said account no. 99921-TU. (Pages 165 to 171 of

		Revenue's Paper Book). This vital fact has not been denied in the written submissions. The legal heir and the son of Mr. Chadha, Shri Hersh W. Chadha, has not filed any statement or affidavit to the effect that the said Bank Account did not exist or if it existed, it was not in his favour or in favour of his mother, Ms. Kanta W. Chadha. Under these circumstances, a mere assertion that the Revenue cannot rely on the charge sheet is wholly misplaced. The facts given in the charge sheet, once confronted, have to be denied before the onus can shift to the Revenue.
3	The agreements filed by the Revenue are mere photocopies, the originals of which have not been produced. Photocopies can be relied upon only when the originals are available with the Revenue.	Photocopies can be relied upon as secondary evidence under certain circumstances. The provisions of the Indian Evidence Act were referred to. The authenticity of these documents has been confirmed from the foreign authorities through Interpol. These Agreements are typed on the letter head of Bofors or Svenska. There is no assertion that these agreements are false or fabricated. The only assertion is that originals must be produced. The plea of ignorance with regard to Agreements with Svenska is not sustainable in view of the fact that the payments arising from the said Agreements have been credited to the account no. 99921-TU, which was opened by the assessee under the Power of

		Attorney given by Svenska.
4	The SNAB report is only a press report and has not been confronted to the assessee.	SNAB report is not a press report. It forms a part of the Report of the Parliamentary Committee (JPC), the Report on which heavy reliance was placed by the assessee during the course of arguments.
5	Letter of Mr. Ramberg does not show that any payment was made to Mr. Chadha and further that the letter is not conclusive.	The contents of the letter clearly indicate that a substantial amount was paid to the assessee in the Bofors gun deal. The letter may not be conclusive by itself, but when seen in the backdrop of other circumstantial evidence, it assumes great importance and does corroborate the fact of the receipt of commission.
6	The assessee does not have any knowledge about the existence of a company in the name of M/s Svenska and the assessee cannot be described as a middleman.	The assessee cannot deny the knowledge about the existence of the company in the name of Svenska for the reason that Svenska, by their Board resolution dt. 30.04.1980, authorized the assessee to open any bank Account anywhere in the world in the name of the company and to operate such account the way he wanted. The question whether there was any middleman in the gun deal is of little importance. The most vital fact is that the appellant did receive commission through the bank account of Svenska and this fact is sufficient to establish that there was income chargeable to tax.
7	Documents obtained from the Swiss Authorities cannot be	The documents were obtained under a Letter Rogatory. What

	relied on as evidence.	has been relied on is the facts as appearing in the said documents.
8	Mr. Chadha in his statements pointed out material inconsistency in the concordance table of the Assessing Officer.	Mr. Chadha merely pointed out certain omission of dates and events. He did not demolish the propositions of the Revenue that both the Companies – Svenska & Anatronic – worked for Bofors for the same deals and at the same point of time. The Agreements were signed it or around the same time. While the commission of Anatronic was reduced following the declaration of the Govt. of India that there will be no middleman in the deal, the commission of Svenska was raised. The commission so paid to Svenska reached the assessee through the bank account as described earlier.
9	The assessee have relied on various observations in the JPC Report to point out that Mr. Chadha cannot be described as a middleman between Bofors & the Govt. of India.	The assessee has relied upon various observations in the voluminous Report of JPC. However, the conclusions reached by the JPC given under a separate chapter towards the end of the Report have not been referred to (Page 231). It has been pointed out by the JPC that Bofors did not cooperate with the JPC. The finding that there was no middleman is not relevant. What is relevant is whether the assessee received any commission over and above what was disclosed in the return of income. The Assessing Officer has referred to the observations of the Hon'ble Supreme Court in this regard on

		page 10 of his order. Para 167, 168 and 183 of assessee's paper book may also be referred to. The report of the JPC is of 1988. A lot of enquiries have been conducted since then and so many facts have came to light which can not be ignored by reference to the JPC report of 1988. The SNAB Report clearly states that an Agreement exists between Bofors & Svenska and substantial amounts have been paid to a previous agent of Bofors in India who was none other than the assessee. The Revenue placed reliance on the decisions in the cases of "Sumati Dayal" and "Durga Prasad More" (forming part of the Revenue's Paper Book and referred to in the course of arguments).

4.5 It is contended by the ld DR that the JPC has worked under a different frame work and separate terms of reference. There is no clean chit given to the assessee, as on various occasions, the JPC has categorically mentioned that proper information has not been submitted. During the deposition of the Bofors' representative, on various occasions, the Officer replied that the crucial information was not available at Delhi and would be supplied from Sweden. However there is no mention that any such information was ever furnished. The JPC had to submit its Report to both the House of Parliament within a reasonable time. Therefore, based on the

material laid before the Hon'ble Committee findings were given. The JPC report cannot be held to be giving the assessee a clean chit for unconcluded Income Tax, Criminal, FERA and other similar proceedings. Had it been otherwise, the Hon'ble Supreme Court would not have dismissed the assessee's petition to quash the FIR. Consequently, there is no merit in the plea that the JPC Report gives the assessee a clean chit from income tax liabilities.

4.6 The Revenue has filed a paper book on record, containing various documents in support of it's contentions.

4.7. Apropos additions on account of business income by way of interest earned on commission in subsequent years, the ld. DR relies on the orders of lower Authorities.

4.8. In respect of addition on account of House Property and business disallowances also the ld DR relied on the orders of lower Authorities.

ASSESSEE'S REJOINDER:

5. The Ld. Counsel for the assessee, in the rejoinder, contends as under:

1) The SNAB report, without naming the person, states that an agreement exists between Bofors and ______ concerning the settlement of commission subsequent to the FH-77 deal but does not state that commission was paid in connection with the deal.
2) The SNAB report also states that amounts have been paid to the previous agent of Bofors in India without naming the person, without indicating the nature of the payment (whether commission or otherwise) or even indicating as to what the purpose of the payment was.
3) The SNAB report further mentions that payments of SEK 170-250 million were made by Bofors as winding up costs but does not state to whom such payments were and for what purpose.

4) In the CBI charge-sheet, it is alleged that the assessee had a Power of Attorney to own and operate an account on behalf of M/s Svenska Inc. Leave aside the originals, even no Photocopy of such Power of Attorney has ever been produced.
5) Certain payments were received by Svenska Inc. from Bofors. The assessee denies knowledge of any such receipt, since it does own Svenska Inc.
6) Certain payments were made into the Bank Account (no.999921-TU) of the assessee with Swiss Corporation Bank. The aforesaid allegation can be proved only if the bank statement of the account is produced. In fact, the account number belongs to Svenska Inc. and not to the assessee. It is also alleged that the assessee had, through a Power of Attorney, authorized his wife, Mrs. Kanta Chadha and his son Mr. H.W. Chadha to operate the Bank Account. But what to talk of the originals, not even a photocopy of such Power of Attorney has ever been produced.

7) In a meeting of the Board of Directors of Svenska Inc., held on 30.04.1980, the assessee was authorized to open and operate bank accounts of Svenska Inc through a power of attorney. The allegation can be proved only if the Minutes of the meeting held on 30.04.1980 are produced. However, not even a photocopy of such Minutes of the meeting, much less the originals have ever been produced.
8) The Telex message only states that the evidence that Mr. Katre, Director CBI had handed over to the Chief Prosecutor is the same as that the Swedish authorities have in their possession. It does not state if the Chief Prosecutor himself has the originals so as to certify that the Agreements are true copies of the originals.

5.1. In respect of the alleged summary of discussion between the Govt. of India and Bofors,

1) Bofors has categorically denied payment of any bribe and has also confirmed that negotiations had been conducted directly with the

Govt. of India. Bofors has also stated that the SNAB Report was based on partial information and, therefore, carried incorrect impressions.

2) Bofors has also confirmed that in order to fulfill the conditions laid down by the Govt. of India it had had to terminate its Agreements with the Consultants in India and pay them for the settlement and that all agreements with the Consultants were terminated by January 1986.
3) Bofors confirmed that no winding up charges were paid to the assessee.
4) Bofors has also furnished the address of Svenska Inc. along with a list of Directors and its Bank Account details, which nowhere shows any involvement of the assessee.

5.2. The Ld counsel contends that there is no tangible material to even remotely suggest that any commission was paid to the assessee in connection with the Bofors Contract and, therefore, the addition made by the Assessing Officer and confirmed by the CIT(A) should be deleted. The documents furnished by the Revenue, cannot be admitted in evidence and, therefore, no addition in this regard can be sustained. Suspicion, howsoever strong, cannot form the basis for such additions. Reliance in this regard is placed upon the following decisions:

1) Krishnand v. State of Madhya Pradesh: AIR 1977 SC 796 – regarding the Prevention of Corruption Act
2) Jayadayal Poddar v. Mst. Bibi Hazra: AIR 1974 SC 171 – in respect of benami transactions
3) CIT v. K Mahim Udma: 242 ITR 133 (Ker)
4) Dhakeshwari Cotton Mills: 26 ITR 775 (SC)
5) Omar Saha: 37 ITR 151 (SC)
6) Jindal Saw: 118 TTJ 228 (Del)

<u>OBSERVATIONS, FINDINGS AND DECISION :</u>

6. We have carefully considered the rival arguments, the material available on record and the case laws cited by both the parties. The facts have been narrated above. We shall first decide various issues which have been raised for adjudication regarding the admissibility of the evidence relied on by the lower Authorities, as obtained from various Agencies, consequent to the search on the assessee, his statements on oath and to decide nature of income tax proceedings, assessee's tax liability etc. The same will be determined hereunder.

NATURE OF INCOME TAX PROCEEDINGS AND POWERS OF AO

6.1 The dispute before us concerns the determination of the income tax liability of the assessee rather than fixing any criminal liability or accountability of the assessee for any other law or obligation. The admissibility of documents, evidence or material differs greatly in income tax proceedings and criminal proceedings respectively. In criminal proceedings, the charge is to be proved by the State against the accused, establishing it beyond doubt, whereas as per the settled proposition of law, the income tax liability is ascertained on the basis of the material available on record, the surrounding circumstances, human conduct and preponderance of probabilities.

6.2. The proceedings for assessment before the Assessing Officer have been described as quasi-judicial in character by Hon'ble Supreme court in Indian & Eastern Newspaper Society v. CIT (1979) 119 ITR 996(SC).

i) In the case of Dhakeshwari Cotton Mills Ltd. Vs. CIT (1954) 26 ITR 775(SC), the Supreme Court has observed that assessment

proceedings are purely administrative. After the receipt of the return also the Assessing Officer is entitled to make private enquiries to find out as to whether there is reason to suspect that the return is incorrect or incomplete. No objection can be taken to such enquiries made behind the back of the assessee at that stage, as they are all administrative inquiries. They assume a quasi-judicial character only after the issuance of notices for assessment. This is so, because the Assessing Officer is not a court. Similar findings have been given in Official Liquidator & Liquidator of the Colaba Land & Mills Co. Ltd. Vs. Deshpande (VM) 1972 83 ITR 685 (SC).

ii) In Mahindra & Mahindra Ltd. v. Union of India AIR 1979 SC 798 it has been held that though the AO has the same powers as are vested in a court for the limited purposes mentioned in section 131, the proceedings before him are not strictly judicial proceedings , though they are deemed to be such for limited purposes.

iii) The Hon'ble Delhi High court in CIT (Addl) v. Jay Engineering Works Ltd. (1978) 113 ITR 389 (Del.) held that the Assessing Officer has, no doubt, to hear "evidence", but such evidence may consist of material which would be wholly inadmissible in a court of law.

iv) In Vimal Chandra Golecha v. ITO (1982) 134 ITR 119 (Raj), secondary evidence in the form of photo copies received from the Indian Consulate was held to be material on record.

v) The Hon'ble Supreme court in CIT v. East Coast Commercial Co. Ltd. (1967) 63 ITR 449(SC), held that even information contained in some judgment or admissions before a Commission's proceedings, before they were declared ultra virus, were also to be treated as material available on record.

vi) In the case of Baghat Halwai, In re (1928) 3 ITC 48 (All) it has been held that AOs proceedings are, to some extent, in the nature of a private inquisition; they are confidential and they are not open to the public. To some extent, he is a party and a judge in his own cause.

vii) The Hon'ble Supreme court in Gadgil (SS) v Lal & Co. (1964) 53 ITR 231 (SC), held that the AO is, no doubt, an Authority appointed by the State to exercise statutory powers to ascertain the income of a subject and the tax payable by him to the State, but his position cannot be equated to that of a judge or a court deciding a "lis" between a citizen and the State. He is not bound to lead "evidence" on his own account with a view to rebutting the evidence of the assessee.

viii) In CIT v. Metal Products of India (1984) 150 ITR 714 (P&H), it was held that the AO may gather information in any manner he likes, behind the back of the assessee and utilize the same against the assessee, even if it does not, in all respects satisfy the requirements of the Indian Evidence Act. What is necessary is that he should have material upon which to base the assessment; "material" as distinguished from "evidence" which includes direct and circumstantial evidence.

ix) In Gopinath Naik v. CIT (1936) 4 ITR 1 (All.), the Hon'ble Allahbad High Court held that the very nature of the proceedings for assessing the income tax liability, necessitates the use of such media as the AO chooses for collecting information which he may not like to disclose to the assessee and he would be perfectly within his rights to refuse to disclose to the assessee the source of his information and the name of the informant.

x) In Dinshaw Darabshaw Shroff v. CIT (1943) 11 ITR 172 (Bom.), the Hon'ble Bombay High court held that although an Assessing Officer making an assessment is not strictly acting as a court of law, it is clear from section 131, that he is acting in quasi-judicial capacity, and he ought to conform to the more elementary rules of judicial procedure, and in particular to conduct the case himself, and not allow somebody else, even his superior officer, to interfere in the conduct of the case. In other words, the Authorities acting under the Income-tax Act have to act judicially and one of the requirements of judicial action is to give a fair hearing to a person before deciding against him.

xi) In the case of S.S. Gadgil v. Lal & Co. (1964) 53 ITR 231 (SC) Honible Supreme Court held that proceedings for assessment is not a suit for adjudication of a civil dispute. The argument that income-tax proceeding is in the nature of a judicial proceeding between the contesting parties, is a matter which is not capable of even a plausible argument. The income-tax authorities who have power to assess and recover tax are not acting as judges deciding litigation between the citizen and the State: they are administrative authorities whose proceedings are regulated by statute, but whose function is to estimate the income of the taxpayer and to assess him to tax on the basis of that estimate. Tax legislation necessitates the setting up of machinery to ascertain the taxable income, and to assess tax on the income, but that does not impress the proceeding with the character of an action between the citizen and the State.

xii) It has been held by the Hon'ble Allahabad High court in ITO v. Joti Prasad Agarwal (1962) 44 ITR 574 (All.) that proceedings for

assessment are not proceedings relating to a civil rights. The liability to income-tax is not a civil right enforceable as such in courts of law. Such proceedings are of the nature of revenue proceedings

6.3. Rules of evidence do not govern the income tax proceedings, as the proceedings under the Income-tax Act are not judicial proceedings in the sense in which the phrase "judicial proceedings" is ordinarily used. The Assessing Officer is not fettered or bound by technical rules about evidence contained in the Indian Evidence Act, and he is entitled to act on material which may not be accepted as evidence in a court of law.

6.4. The Hon'ble Supreme Court in the case of Chuharmal v. CIT (1988) 172 ITR 250 (SC), in this context held that - What is meant by saying that the Evidence Act does not apply to proceedings under the Income-tax Act is that the rigor of the rules of evidence contained in the Evidence Act are not applicable, but that does not mean that when the taxing authorities are desirous of invoking the principles of the Act in proceedings before them, they are prevented from doing so. All that is required is that if they want to use any material collected by them which is adverse to the assessee, then the assessee must be given a chance to make his submissions thereon. The principles of natural justice are violated if an adverse order is made on an assessee on the basis of the material not brought to his notice.

6.5. In the case before us, it has not been challenged that relevant material was not confronted to the assessee, except the Swiss accounts pertaining to Svenska, assessee and the Resolution of board of directors and consequent power of attorney in the assessee's favour.

EFFECT OF CRIMINAL PROCEEDINGS ON INCOME TAX PROCEEDINGS:

6.7. The effect of parallel criminal proceedings on income tax proceedings has been rightly observed in the case of R.P. Vashisht Vs. DCIT (2006) 157 Taxman 301 by the Hon'ble Punjab & Haryana High Court - the assessee was a State Government servant. Pursuant to a search conducted at the premises of the assessee, certain loose slips relating to expenditure incurred by him for renovation of his ancestral house were found. One diary indicating payment of illegal gratification to the assessee was also found with one 'S', the liaison agent for the companies supplying the electricity goods to the State Administration. The Hon'ble High Court upheld the decision of ITAT, holding that whether the illegal gratification was received by the assessee or not, might have to be decided in criminal proceedings, but for the purpose of income-tax proceedings, the material in hand was sufficient to fasten the tax liabilities upon the assessee.

6.8. In view of the above referred judicial authorities, the material available before the AO, is reliable evidence in the case before us.

CONSIDERATION OF MATERIAL AVAILABLE ON RECORD:

SWEDISH AUDIT BUREAU REPORT (SNAB)

a. **THE SNAB REPORT**

i) The SNAB Report is an official document, prepared by the Swedish Govt. at the request of Govt. of India. It was submitted through the Indian Ambassador to Sweden by official channel. Its functions are broadly similar to comptroller & Auditor General of India. The JPC has accepted it as an official document. Material made available by this channel is obtained by due process of law. The

report has been furnished by the Swedish Govt. through diplomatic channels at the request of the Indian Govt. Both the countries are sovereign nations and it is wholly inappropriate on the part of asssessee to insist for originals. When the SNAB Report is reproduced in the JPC proceedings which are public documents, the SNAB report also becomes a public document. The assessee, while appearing before the JPC, neither demanded the originals nor doubted the authenticity of its contents. In our view, it is not available to the assessee to question SNAB report in income tax proceedings.

ii) We have already mentioned the difference between the evidence and material available on record in the Evidence Act and in income tax proceedings. The Income tax Act uses the words 'material available on record' and the SNAB Report accepted by the Govt. of India and the JPC and not objected to by assessee can not now be called in question. This Audit Bureau is not a private organization, but a Swedish Govt. Dept. In the light of these observations, we are unable to accept the assessee's plea that they are inadmissible evidence and can not be relied on in income tax proceedings.

b. SVENSKA AGREEMENT

The next objection is in respect of the alleged Svenska Agreement and concordance of dates and assesses claim that it has no connection with Svenska. The noteworthy fact is that payment of Svenska commission in Switzerland was increased and that of the assessee in India was reduced. The activities suggest that assessee's relation & role with Bofors remained the same, except cosmetic changes on paper. CBI information about the assessee holding Svenska power of attorney to operate, manage and windup the Swenska a/c and the Resolution of

Board of Directors was sufficient to come to a reasonable conclusion about the assessee's incorrect stand . Profound coincidences and concordance of dates between agreements, other material and various events lead to the process of drawing proper inferences, reckoning preponderance of probabilities, human conduct and surrounding circumstances.

c. The letter of Sven Rhambergan and its contents have not been denied by the assessee. It is admissible material on record.

d. The JPC Report, being an authentic report in public domain, is an admissible evidence. Whether it gives clean chit to the assessee or not will be dealt letter.

e. The Hon'ble Supreme Court's observations during the proceedings for quashing the charge-sheet are straightway admissible. It refers to prima facie criminal case against assessee, the observations therein being on the same subject matter and the same person, based on same material, it is an admissible evidence.

f. The Chargesheet filed by the CBI is admissible evidence. It refers to various enquiries and new facts. The contents and material therein has been held by the Supreme Court to constitute a prima facie criminal case against assesssee. The information contained in the charge sheet being from a Central govt. investigative agency, it is admissible and can be relied to come to ascertainment of proper facts.

g. Photo copies of Hindu Newspaper are part of the CBI charge sheet and are thus admissible as material available on record, subject to corroboration..

6.9. In view of above observations, we have no hesitation to hold that the all this material available on record is admissible in Income tax proceedings

and the lower Authorities committed no mistake in taking cognizance thereof. The issue of corroboration will be dealt with at appropriate places.

SECONDARY EVIDENCE ADMISSIBLE IN INCOME TAX PROCEEDINGS:

6.10. In the case of Vimal Chandra Golecha V. ITO (1982) 134 ITR 119 (Raj.), the Hon'ble Rajasthan High Court, in respect admissibility of photo copies of documents, which are used against an asssessee and the burden of proof on the Department, has observed as under:

> "…. It would thus be seen on the facts, as established on record, that the petitioner was afforded full opportunity of being heard before the impugned order of assessment was made. Natural justice which was said to have been violated is not so rigid and inflexible a concept as to insist invariably that the person concerned must be shown the original documents which are required to be explained by him. It is well settled that the requirements of natural justice depend on the circumstances of the case, the nature of the enquiry, the statute under which the Tribunal is acting and the subject-matter to be dealt with. In the context of the Act, the nature of the enquiry under section 142 and the fact that the original documents were said to be in the possession of a foreigner residing in a foreign country, the demands of natural justice were fully met by supplying the assessee with photo copies of the documents in the possession of the assessing authority. He denied the genuineness and correctness of these documents by seeing the photo copies. Had he seen the originals, he could have done no better than denying their genuineness and correctness. What was the value of these photo copies as 'material' for the reassessment of the petitioner's income was a question which had better be left at this stage to the professional judgment of a hierarchy of Income-tax authorities, with the Tribunal at the apex. The petitioner had already filed an appeal against the order of reassessment, which was pending. If still not satisfied, he would be entitled to appeal to the Tribunal. If the decision of the Tribunal also fails to satisfy him, he would be entitled to apply to the

> Tribunal for a reference on questions of law to the High Court. If the Tribunal refuses to make a reference, he would be entitled to apply directly to the High Court for an order to the Tribunal directing it to state a case. Thus there was no reason to entertain the writ petition at this stage.
>
> For all these reasons, the writ petition was wholly unsustainable, and was, therefore, dismissed in limine.

SUSPICIOUS AND DIBIOUS TRASANCTION HOW TO BE DEALT WITH:

6.11. The tax liability in the cases of suspicious transactions, is to be assessed on the basis of the material available on record, surrounding circumstances, human conduct, preponderance of probabilities and nature of incriminating information/ evidence available with AO.

6.12. In the case of Sumati Dayal V. CIT (1995) 80 Taxman 89 (SC), the Hon'ble Supreme Court has dealt with the relevance of human conduct, preponderance of probabilities and surrounding circumstance, burden of proof and its shifting on the Department in cases of suspicious circumstances, by following observations:

> "….. It is, no doubt, true that in all cases in which a receipt is sought to be taxed as income, the burden lies on the department to prove that it is within the taxing provision and if a receipt is in the nature of income, the burden of proving that it is not taxable because it falls within exemption provided by the Act lies upon the assessee. But in view of section 68, where any sum is found credited in the books of the assessee for any previous year, the same may be charged to income-tax as the income of the assessee of that previous year if the explanation offered by the assessee about the nature and source thereof is, in the opinion of the Assessing Officer, not satisfactory. In such case there is prima facie evidence against the assessee, viz., the receipt of money, and if he fails to rebut the same, the said evidence being unrebutted, can be used against him by holding

> that it is a receipt of an income nature. While considering the explanation of the assessee, the department cannot, however, act unreasonably.
>
> ……….. Having regard to the conduct of the appellant as disclosed in her sworn statement as well as other material on the record, an inference could reasonably be drawn that the winning tickets were purchased by the appellant after the event. The majority opinion after considering surrounding circumstances and applying the test of human probabilities had rightly concluded that the appellant's claim about the amount being her winning from races, was not genuine. It could not be said that the explanation offered by the appellant in respect of the said amounts had been rejected unreasonably and that the finding that the said amounts were income of the appellant from other sources was not based on evidence."

CIRCUMSTANTIAL EVIDENCE HOW TO BE USED

6.13. It would, at this stage, be relevant to consider the admissibility and use of circumstantial evidence in income tax proceedings. Circumstantial evidence is evidence of the circumstances, as opposed to direct evidence. It may consist of evidence afforded by the bearing on the fact to be proved, of other and subsidiary facts, which are relied on as inconsistent with any result other than the truth of the principal fact. It is evidence of various facts, other than the fact in issue which are so associated with the fact in issue, that taken together, they form a chain of circumstances leading to an inference or presumption of the existence of the principal fact.

In the appreciation of circumstantial evidence, the relevant aspects, as laid down from time to time are —

> (*1*) the circumstances alleged must be established by such evidence, as in the case of other evidence ;

> (*2*) the circumstances proved must be of a conclusive nature and not totally inconsistent with the circumstances or contradictory to other evidence.
>
> (*3*) although there should be no missing links in the case, yet it is not essential that every one of the links must appear on the surface of the evidence adduced ; some of these links may have to be inferred from the proved facts ;
>
> (*4*) in drawing those inferences or presumptions, the Authorities must have regard to the common course of natural events, to human conduct and their relation to the facts of the particular case.
>
> (5)The circumstantial evidence can, with equal facility, be resorted to in proof of a fact in issue which arises in proceedings for the assessment of taxes both direct and indirect, circumstantial evidence can be made use of in order to prove or disprove a fact alleged or in issue. In fact, in whatever proceedings or context inferences are required to be drawn from the evidence or materials available or lacking, circumstantial evidence has its place to assist the process of arriving at the truth."

6.14. It will also be worthwhile to consider the nature of burden of proof on the AO for proving a fact or circumstance in the income tax proceedings. The questions raised about the tax liability by the AO are to be answered by the assessee by furnishing reasonable and plausible explanations. If assessee is not forthcoming with proper or complete facts or his statement or explanation is contradictory, drawing of suitable inferences and estimation of facts is inevitable. Courts generally will not interfere with such estimate of facts, unless the inferences or estimates are perverse or capricious.

6.15. he Assessee's technical contentions about admissibility and reliance on material available on the AO's record are in the nature of contentions challenging criminal or civil liabilities in a court of law. We are dealing with a process of adjudication of assesses tax liability i.e. assessment under Income Tax Act rather than conducting criminal or civil court proceedings.

As held by the Hon'ble Supreme Court in the case of S.S. Gadgil (supra) no 'lis' is involved in adjudication of tax liability. The Assessee's contention that there was no new material before the AO after the CIT(A)'s setting aside order cannot be accepted. New information and material did indeed come on record. In our view, in a sensitive matter like this, even a single clue or revelation can be of great importance. To reverse the order of the AO on this technical plea will amount to taking a lopsided view of the proceedings. Besides, the JPC has underlined the importance of Reports of investigation agencies like CBI, DRI, ED whose were in the offing, as the relevant investigations were in process. In view of these observations, we do not accede to the assessee's pleas in this behalf. The Assessee's contentions and objections in this behalf that the material available on record was not admissible as evidence and that it cannot be relied on by the AO, are devoid of any merit and are rejected outright.

JPC'S FINDINGS AND THEIR EVIDENTIARY VALUE IN TAX PROCEEDINGS

6.16. We may advert to the findings of the JPC, which the assessee pleads, give him a clean chit:

i) From the JPC Report, it is clear that the Swedish National Audit Bureau or 'SNAB' furnished its Report, which was forwarded by the Swedish Embassy in India to the Govt. of India. The relevant part is as under:

> "It may be seen from the report that AB Bofors claims no middlemen were involved during the final phase of the negotiations but that costs did occur in connection with the winding up of dealing with earlier local agents. These costs were finally settled during 1986. According to the National Audit Bureau Investigation, an agreement exists

> on settlement of commission subsequently to the howitzer deal and information exists that considerable sums have been disbursed referring to this contract. There have been other payments made by Bofors during the period in question, the purpose and recipient of which it has not been possible to clarify with the aid of the data available to the National Audit Bureau.
>
> Only AB Bofors is in a position to give a full account of its own payments. The Government ha, therefore, again urged AB Bofors to assist in shedding light on the matter."

ii) Consequent to this Report, the Govt. of India, through the Defence Secretary, addressed a letter to the President of Bofors, Mr. Per Ove Morberg, on 16-7-1987, which, inter alia, stated as under:

> "In the context of your aforesaid repeated assertions, we are constrained to observe that:
>
> (i) The report of the Swedish National Audit Bureau establishes:
>
> > (a) That an agreement exists between M/s AB Bofors and …… concerning the settlement of commission subsequently to the FH-77 deal;
> > (b) That considerable amounts have been paid subsequently to among others, M/s AB Bofors previous agents in India;
> > (c) That to wind up previous arrangement, costs of 2-3% of the order sum, i.e. SEK 170-250 million were incurred and the final payments were made during 1986; and
> > (d) Payments totaling SEK 32 million were also made in Nov. –Dec. 1986.
>
> (ii) The aforesaid payments are in addition to payment at the rate of SEK 100,000 per month (i.e. SEK 1.2

million only during 1986) openly paid/ payable to M/s Anatronic General Corporation, New Delhi, through an Indian Bank, for administrative services rendered to your company since January, 1986.

Para 5 of this letter reads as under:

"In the aforesaid context, M/s AB Bofors have not only gone against our explicit wishes but have also violated the solemn assurances given to us by your company. Consequently, we call on your company to furnish us complete information regarding the transactions in para 4(1) above and specifically, all information in regard to the following aspects:

(i) The precise amounts which have been paid and the amounts which are due to be paid by you by way of commission, secret payments, etc. in connection with the Indian contracts;

(ii) The recipients of such amounts, whether they be persons or companies, and in the case of latter, their proprietors/ presidents/ directors, and place of incorporation.

(iii) The services rendered by such persons/ companies with reference to which such amounts have been paid;

(iv) Copies of the contracts, agreements and correspondence between your company and such recipients; and

(v) All other facts, circumstances and details relating to these transactions, in your possession."

iii) Further, later correspondence followed, in which, M/s Bofors instead of giving names or details of the recipients or any clue, only reiterated that the termination costs/ winding up costs were not paid to

any Indian citizen or Indian Company, any member of the Indian government or any government official. On further letters from Govt. of India, Bofors deputed their two officials, viz. Mr. Morberg, President; and Mr. Gothlin Sr. Vice President & Chief Jurist of Nobel Industries (perhaps chief Legal Executive of Nobel Industries), who appeared before the Defence Secretary on 16-9-1987 and before the JPC on 18-9-1987, where the Chief Jurist of the company accepted the fact of payment of termination costs to three companies, whose names were not disclosed on the pretext of secrecy. The statement of Mr. Morberg, is of relevance. It is reproduced in the JPC Report, to the following effect:

> "7.61. While clarifying as to why the payments were made after the signing of the agreement, Mr. Morberg stated as follows:
>
> > "We had to pay the termination costs in both the situations- if we have an order and if we do not have an order. Naturally there would have been another termination cost if we have not received an order. But termination costs we have had to pay in all cases."
>
> 7.62. About the currency in which the winding up costs were paid, the witness stated:
>
> > "All our payments concerning winding up costs were paid in Swedish Kroner and they were paid through Swiss Banks."
>
> 7.63. As regards payments to M/s Anatronic General Corporation, the witness stated:
>
> > "The payment concerning Anatronics, I suppose goes through the Indian banks …. But all

payments were made in Swedish Kroner also for Anatronics."

7.64. When the Committee wanted to know the names of the three international consultants, to whom winding up charges had been paid by Bofors, the Chief Jurist stated:

"When we go over to the International Consultancy Agreements, we would like to request you, the names which we think are rather sensitive, we would like to keep them in confidentiality and we would like perhaps not to mention them before the whole session but to give them perhaps to you. (The Chairman)."

7.65. The Bofors President added:

"You must understand that for us this is an extraordinary stand to take – a commercial company to give names (of companies) with which we have agreements. That has never happened before the Bofors history since we started in 1646. So, this is a very special situation for us. We would appreciate if this information could be handled as secret as possible and that you may suggest us how to handle this situation."

v) We may point out that there is no reference in the JPC Report whether these names were given to the Chairman and inference or revelation from it. JPC has specifically referred to the reports available till 22-2-1988 with Investigative agencies, which is considered by it at page 134 of the JPC report and is as under:

"7.85. The Investigating Agencies, after making inquiries both in India and abroad through personal visits and through our Missions and other sources abroad, particularly with the assistance of Interpol, tried to obtain the maximum possible information. Based on the available information they gave their report to the Chairman on 22nd February, 1988. The Report was made

available to the Members for study on 24th February, 1988 and thereafter. The main findings of the Investigating Agencies in relation to the three companies, which had been paid winding up charges by M/s AB Bofors are given in the following paras:-

(a) M/s Svenska Inc. Pharma:

The Investigating Agencies have reported that the information about the company ascertained through official sources revealed that the names of the three Directors were:

(1) Carmen Fernandez de Perez – President
(2) Virginia Cover de Rodriguez- Vice President
(3) Marccla Rangel de Sarmicnto – Secretary.

These are the same as given by M/s AB Bofors

The objectives of the Company are:

(a) To establish, to promote and carry out import and export of securities, possessions and effects in all the branches; moreover the operations with financiers, capitalist, insurers, promoters of the share omission.

(b) To establish companies, to construct, purchase, to rent and load vapor boats or any kind of this, instead like airplane and ground transportation and used for transport crews or raw materials and any kind of products to any nature, between any country, port or airport in panama and all the world."

Enquiries conducted in Panama revealed that the Company was managed by an advocate, Ms. Marccla Rozas de Percz, who was also acting as the local representative of the Company. The Investigating Agency also gathered that the President, the Vice

President-cum-Treasurer and the Secretary of the company were all ladies and were not persons of any means and that is why her office address had been given as their address. Initially, Jose Antonio Valdes Dutary was the President of the Company, but later Ms. Carmen Fernandoz de Perez was made the President. The advocate informed that she had hired the Post Box for receiving the mail of the company, but to her knowledge since the incorporation of the company, there were hardly any transactions. However, she used to be paid her retainer fees and service charges from Switzerland. During the last 2 years she had not received her retainer fees and service charges, etc., from the principals and, therefore, she has discontinued the payment to the Post Office for the post box. She did not know anything more about the functioning of the company and its activities. From the Companies Registration office, no returns or annual statements of accounts in respect o of this company were found.

Enquiries conducted at the address of Geneva viz. 7. Rue Du la Confederation disclosed that it was the office of the Swiss Bank Corporation and obviously this was the address of the bakers of Svenska Inc. Panama.

(b) Moresco/ Moincao S.A.(PITCO)

According to M/s AB Bofors one Mr. La Fonte. And employee of Credit Suisse (Bankers) was aware of the payments made to the company. The inquiries made by the Investigating Agencies revealed that no person by that name was working in this Bank.

Enquiries made at the Company's Registration Office, Geneva and scrutiny of published information in respect of all Companies registered in Switzerland revealed that no Company by the name of Moineao SA was registered in Switzerland. Similarly, the names of MORESCO and PITCO were also not found in these records. Physical verification at the address given by Bofors viz. 30 Rue Du Rhone, did not show the existence of any of the three

Companies. MOINEAO, MORESCO or PITCO. There was no sign board showing any of these names at this address. However, since it had been learnt during the initial enquiries, that Moincao SA was registered in Lausanne, enquiries were made in the Lausanne Registry.

From the particulars given above, it is seen that this is a Company whose business is "Trade in Immovable properties". The address at Lausanne is C/0 Bernard Nicod SA another local firm. The present Directors of the company are:-

(1) Mr. Clande Blanchet, citizen of Clees, residing in Lausanne, Secretary.

(2) Mr. Maurice Blyard, citizen of Riex residing at Lausanne, Administrator.

(3) Mr. Willy Mock, citizen of Appenzell, residing at Paycrne, President of the Company.

The names of the three Directors, who are all residents of Switzerland are different from the names of the Directors as furnished by Bofors.

However, M/s Credit Suisse, 2, Place Bol Air 1204, Geneva were aware of the transactions relating to receipt of payment by M/s MOINEAO SA. This Bank did not disclose any information to the Investigating Agencies on the ground that it would be a criminal offence under the Swiss Laws governing the banking secrecy, particularly under Section 271 and 273.

Further, the manufacturers' Hanover Trust, 84 Rue du Rohne, Geneva (the second banker whose name was given by Bofors) did not have any transactions with MOINEAO SA or MORESCO or PITCO and no transactions were made through them by the aforesaid

Companies to make payments to any Indian residing in India or outside India through their Branch.

According to the Investigating Agencies, the functioning of this company seems to be mysterious as no trace of this company has been found at the address in Geneva given by Bofors. It seems that the Company registered in Switzerland is only a front organization being run for persons not residing in Switzerland.

(c) M/s A.E. Services Ltd.

The Investigating Agencies have found that a company called Target Practice Ltd. had been incorporated in London on 27th July, 1978 with a nominal capital consisting of 100 ordinary shares of pound 1 each. Only two shares of Pound 1 each were subscribed. The promoter of the Company was one Major R.A. Wilson, a retired army officer who was the Gorkha Regiment in India till 1947 and later in the British Army upto 1962. He specialized in defence contracts and is supposed to be one of the important lawyers in the field. On 9th August, 1979, the name of the company was changed to A.E. Services Ltd. The ultimate holding Company is CIAOU ANSTALT VADUZ, registered in Licchtenstein. Among the new directors were Mr. Mylcs Tccdale Stoot and Ms. Rita Zumbrunnen whose names were given by Bofors. They both had one share each of pound 1, while 98 shares all of pound 1 each were held by Division Beneficiaries Accreditcurs Ltd., 1501, Hutchison House, Hong Kong.

Major R.A. Wilson informed the Investigating Agencies that M/s A.E. Services Ltd., U.K. was connected with M/s A.B. Bofors for the Bofors contract with India. M/s A.E. Services Ltd. had entered into an agreement with M/s A.B. Bofors some time in 1985 to represent Bofors in India and some other countries. The A.E. Services Ltd.- Bofors Contract contain carefully drawn secrecy clauses.

The Investigating Agencies were informed that this agreement had to be cancelled following pressures placed upon Bofors by the Swedish Govt.'s decision that there should be no middlemen. Cancellation occurred effectively on 5th March, 1986. At that time, the only advice given by M/s A.E. Services Ltd. to Bofors related to the manner and timing of negotiations and the content of the Contract. The advice was given to Mr. Martin Ardbo personally. M/s A.E. Services Ltd. had done no work in India. Bofors assured M/s A.E. Services Ltd. that there should be a payment made embracing the work done and compensation for the loss arising to M/s A.E. Services Ltd. upon cancellation. The payment would have to be made within six months of 5th March, 1986. The payment was to be to the order of US $ 7.3 million. Mr. Wilson confirmed that M/s A.E. Services Ltd., U.K. were paid US $ 7.3 million on or around 11th September 1986. He further stated that this amount had been kept in M/s Nord Finanz Bank, 1, Bahnhafsstrassc, CH 8022, Zurich. He stated that this amount has nod been hitherto utilized, so that if any demand was received from the Inland Revenue Department on M/s A.E. Services Ltd. U.K. the same would act as a cover. No Indian or any Indian legal entity, whether resident or non-resident in India, stated to be connected with the holding company CIAOU which stands for Consortium for Information Assimilation and Output Unit. This organization has a number of "units" in different countries (but none in India), consisting of lawyers, accountants, consultants and other experts to obtain vital information which is assimilated and processed into equipment; in other words- in case a manufacturer of defence equipment/ supplier is on the lookout for a market for his product, CIAOU helps "to open the door" to such markets. No Indian individual, received any payments whatsoever from the compensation given by Bofors to M/s A.E. Services Ltd..

(d) Anatronic General Corporation of Shri V.N. Chadha

The enquiries made by the Investigating Agencies about the role of shri W.N. Chadha revealed that prior to 1984 Shri Chadha used to receive his commission through the Govt. of

India, i.e. after the delivery was completed, the Company used to get 98% and 2% was given to him by the Government of India. However, in 1984, the position changed. He and other Indian representatives were barred from participating in any negotiations regarding defence deals including discussions on technicalities and price structure.

The Investigating Agencies were informed that Shri W.N. Chadha owned three Contracts, viz. AGC, Hertz Agencies Pvt. Ltd. and AGCPL- limited Companies representing various arms manufacturers. According to him he has received payments which were due to him or to his concerns except in one or two cases which were under dispute. He also mentioned that after the recent hue and cry, Bofors had not made monthly payments of 1 lakh SEK since July, 1987. He however, expected to receive these sums shortly."

6.17. Investigating Agencies pointing out the Secrecy Laws of Sweden and other handicaps, concluded as under:

"(i) It has not been possible to identify the real owners of the three companies whose names were furnished by M/s A.B. Bofors, viz.:

(a) M/s Svenska Inc. Panama
(b) M/s Moineao S.A. Lussane, Switzerland.
(c) M/s A.E. Services Ltd. U.K.

The companies have been registered in tax havens obviously for the purpose of tax avoidance and secrecy. Svenska Inc. Panama is not reported to have done any business during the last two years and perhaps even earlier.

(ii) The nature of services provided by the foreign companies to M/s AB Bofors in securing the Indian contract, till the termination of the Agreements with them by payment of winding up costs are not known except to a limit extent in the case of M/s A.E. Services Ltd.

(iii) Even in the case of M/s A.E. Services Ltd. from the available details it seems that this company was brought into picture in November, 1985 and at the insistence of the Indian Government that no middlemen should be employed in the contract being executed by M/s AB Bofors, this agreement was terminated and a lump sum payment was made to M/s A.E. Services Ltd.

(iv) The information furnished by Shri W.N. Chadha of Anatronic Geneal Corporation, shows that no payments of a large scale were received by him prior to 1986 and the payments received in India upto 1985 were for services rendered during the trials of the guns and negotiations of the contract. The details of the amounts paid to him as given by M/s AB Bofors tally with the details of the amounts furnished by him in his income tax returns.

The information available at this stage does not show the involvement of any Indian, residing in India or outside India or any Indian associates in the large payments amounting to 319 million Swedish Kroners. M/s A.E. Services Ltd. one of the three companies has categorically stated that no payment has been made by them to any Indian residing in India or abroad or to any Indian associates and has even signed a declaration to that effect."

6.18. The assessee W.N. Chadha, went on refusing any knowledge or intimation about the above three Companies and stated that he had never met them and had never heard of them till the episode appeared in the newspapers. The JPC, however, on the basis of the information available to it, recorded its findings in respect of the assessee and M/s Anatronic General Corporation, as under:

"7.196 The Committee find that prior to January, 1986 Shri W.N. Chadha was the Bofors' sole representative for the Republic of India under a Representation Agreement. The Agreement was signed in 1978 for a period of three years, was

replaced by another Agreement in March 1981 and again in November, 1984. The contents of the Agreements appear to have remained the same except for the remuneration provided in form of commission on the value of sales. In the March, 1981 Agreement, the commission was shown as 2 per cent on payments received by Bofors, but in the November, 1984 Agreement this was reduced to 0.25 per cent. Agreements earlier to January, 1986 also provided for compensation as reimbursement for expenses an amount of SEK 100,000 per annum. The January 1986 Agreement under which Bofors appointed Shri W.N. Chadha as Administrative Consultant on a remuneration of SEK 100,000 per month counted from January 1,1986, but without any commission on sales. It is evident that the status of Shri W.N. Chadha vis-à-vis Bofors for their business in India, prior to January, 1986, was that of a representative entrusted generally with the promotion of sales of Bofors' ordnance and performing the various support services for the Bofors' personnel. The Agreements prior to January, 1986 did not, however, confer on Shri W.N. Chadha the status of a duly authorized agent to enter into any contract with a customer or bind Bofors in any way without their written consent. Even with regard to negotiations, the condition was that direct business negotiations were to be handled by Bofors, with the participation of the representative, and that the representative had no authority to make contracts on behalf of or any another way to bind Bofors. These are important restrictions and they show that the role of Shri W.N. Chadha as representative was essentially a supportive one. Though the Agreement did provide for the participation of the representative, Shri Chadha has claimed that he never, in fact, took part in any negotiations or meeting in the Ministry of Defence. This is borne out by the documents furnished and evidenced tendered by the officers of the Ministry of Defence as also the Bofors' officials. The Committee find that in so far as the contract for the FH-77B Howitzer gun is concerned, Shri W.N. Chadha did not represent Bofors in any negotiations with the Ministry of Defence.

7.197. The Committee, however, does not accept Shri W.N. Chadha's contention that even prior to January 1986 he

> was not interested in the promotion of sales of Bofors ordnance or that the words ‘commission’ and ‘remuneration’ have the same meaning. The provisions with regard to remunerations for Anatronic General Corporation was on commission basis to the extent that sales of Bofors’ ordnance in India were effected, Shri Chadha as the representative would have been entitled to receive a commission on payments received by Bofors at the rate of 2 per cent under the March, 1981 Agreement till it remained in force, and one quarter of 1 per cent under the November 1984 Agreement till end of 1985.
>
> 7.198. The Committee find that Bofors paid a total amount of Rs. 59.20 lakhs to the A.G.C. (Anatronic General Corporation) and AGCPL (Annatronic General Corporation Private Limited) during the period 1979-87 (upto June, 1987). This includes an amount of Rs. 9.25 lakhs received by AGC as reimbursement of trial expenses for the gun during the years 1980-82.
>
> 7.199. On the basis of the foregoing, the testimony of Shri W.N. Chadha together with the testimony of the Bofors’ representatives and the records furnished and evidence tendered by the officers of the Ministry of Defence, the Committee feel that Shri W.N. Chadha cannot be described as a middleman between Messrs A.B. Bofors and the Ministry of Defence Government of India.

6.19. The JPC was enquiring into the state of affairs at the relevant time in 1987 and 88, whereas the Income tax proceedings commenced much later. The JPC has given various findings to the effect that a lot of crucial information was not provided by the Bofors representatives. On the other hand, at the assessment stage, a lot of other material collected by the Investigative Agencies was available. Besides, it remains the settled position that income tax can be levied on actual or deemed receipt. Consequently the JPC findings do not apply as res judicata. The Hon’ble Supreme Court also has held so

6.20. As regards the investigations under the FERA into the affairs of Anatronic General and Shri W.N. Chadha, the Committee understood that the Directorate of Enforcement was making further investigations and some cases were also sub judice. The Committee would, therefore, refrain from making any comments in this regard.

6.21. The JPC clearly refers to investigations upto 22-2-1988, whereas a lot of material has been collected by the investigative Agencies subsequently. The JPC in clear terms has held that various proceedings were sub judice and it was therefore that no comments were made in respect of FERA and the income tax proceedings were at a nascent stage.

6.22. Information about the assessee's Swiss Bank Account, the Rahmberg letter, the Svenska Board resolution, the Power of Attorney, information about the Svenskas lady Directors, advocates revealations about there being no business in Svenska were not available on record. The JPC on the material available only held that Mr. Chadha could not be held as a middle man.

6.23. We have made it clear that finding the middleman is not the only issue for assessment of tax liability in Income tax proceedings. The liability to tax rests on many considerations, including the various deeming provisions of the Income Tax Act.

6.24. The JPC refers to secrecy conditions and Bofors' undertaking to furnish further information, which does not appear to have been submitted by Bofors. The JPC had to submit a timely report to the Parliament in these circumstances, which cannot be ignored. The JPC has held that as per the prevailing circumstances and the available record, it cannot be concluded that Mr. Chadha was a middleman and that he received the kickbacks. It

rather states that no comment was being offered for impending investigations. The JPC report nowhere says that Mr. Chadha or any other entities were held to be immune or exonerated from such charges. In our view the JPC has neither intended to oust the jurisdiction of the Investigative Agencies, nor has given findings constituting res judicata on the issues. Therefore, we do not find ourselves persuaded to hold that the JPC gave any clean chit to the assessee.

6.25. In view of these observations we are unable to hold that the JPC gave a clean chit to the assessee, or that its findings in any way exonerate the assessees liabilities and accountability in other proceedings including income tax proceedings. The JPC's findings nowhere claim to be applied as res judicata. Hon'ble Supreme court also, while rejecting assessee's petition seeking discharge from the criminal case, held accordingly.

APPLICATION OF MATERIAL TO RELEVANT ISSUES OF THE CASE

6.26. Reverting to the original controversy, though Bofors accepts the above amounts were accordingly paid, but is trying to wriggle out of the situation by stating that the winding up charges were meant for services which are not performed by agents or middlemen. These payments as per Bofors, do not violate either Indian Defense policies or the covenants of the Agreement with Govt. of India in this behalf. Therefore. As per its stand, Bofors has neither mis reprsented nor committed any criminal act.

6.27. The clinching mistake or omission on the part Bofors is that it should have been intimated to the Govt. of India to clarify that these were not regarded as agent or middleman services. This was of paramount importance, because the Govt. of India had a vested right to know about the

activities of intermediary agents or similar associates and to ask for reduction of the deal price, where agents or middlemen were involved. Bofors cannot be allowed to define the services of an agent. In a contract, both parties are equal. They are supposed to act faithfully and such defense contracts have to adopt a transparent and discernible meaning of the terms used therein. Bofors cannot unilaterally choose to hold as to who an agent is and what will be regarded as an agent's activity. May we mention here that apart from the contract papers, the Indian Prime Minister, in a personal meeting requested the Swedish Prime Minister, Olofe Palme, that agents should be eliminated from the deal and agent attributable cost should be reduced from the deal price. Bofors acknowledges this personal meeting of the Heads of the respective countries.

6.28. The Assessee's long-standing connections as a representative of Bofors and its looking after the sales promotion and their interests in India are not denied. It is contended that since Bofors' business prospects were going down, the assessee's commission was reduced from 2% to .25%. The facts clearly state that rather the prospects were brightening and reaching pay dirt. The facts give a converse picture i.e. business was picking up. After a trial test of the guns, four bidders, including Bofors were short listed by the Govt. of India, besides in Question no. 94 of statement given to AO about sale of other supplies, clearly indicates the continuity of Bofors business . The Govt. was seized with a huge multibillion gun deal, here Bofors ranked as a potential bidder, so actually the business prospects of Bofors were shining and bright and not plummeting, as tried to be contended. In question no. 91, while replying to a query about reimbursement of expenses the assessee replied that "to smaller places like Deolali, Pokhran etc. he was being sent". All these facts clearly indicate that

the prospects of the Bofors business were brightening and lots of activities were going on, the replies of both the assessee and Bofors are contrary to the apparent situation and against normal human conduct. These are glaring inconsistencies in the explanations, due to which, the process and clock of adverse inferences gets triggered in the circumstances.

6.29. The AO in AY 1987-88, disallowed foreign travel expenses claimed as business expense by the assessee by making following observations:

> "12 FOREIGN traveling:"
>
> The expenditure under this head includes foreign visits undertaken by the assessee to Bankok, Manila and Hongkong for which the assessee could not adduce any evidence to prove the business expediency. Hence sum of Rs. 41,504/- incurred on foreign traveling to the aforesaid places is disallowed."

The assessee, before CIT(A), made further submissions contending that these expenses were incurred to attend a Regional Conference of Defence Suppliers, on behalf of Bofors, at Mainta, Hongkong. CIT(A) allowed the assessee's claim of foreign travel expenses by observing as under:

> "98. Before me, the counsel has pleaded that the Assessing Officer has disallowed a sum of Rs. 41,504/- incurred by the appellant, on foreign traveling to Bangkok, Manila and Hong Kong. The appellant, who was representing Bofors was asked by them to attend their regional conference and exhibition which took place at Bangkok, Manila and Hong Kong. The appellant had to attend the said conference in order to meet the foreign principals and be updated on the latest developments in its field on business as well as to discuss other business matters with the foreign principals. It is submitted that the appellant before proceeding on foreign tour took the requisite permission from the Reserve Bank of India. In view of the above, the said expenditure could not be disallowed, on the ground of want of proof of business expediency. Tour expenses for attending international conference connected with the

> business of the assessee is a deductible expenditure as held in the case of CIT Vs. S. Krishna Rao (1997) 76 ITR 664 (A.P).
> 99. I find that it has been conceded that the appellant was representing Bofors and was asked by them to attend their regional conference and exhibition which took place at Bangkok, Manila and Hong Kong. It has been admitted that the appellant had to attend the said conference in order to meet the foreign principals and be updated on the latest developments in its field of business.
> 100. In view of the arguments tendered on behalf of the appellant, the Assessing Officer is directed to allow Rs. 41,504/- incurred by the appellant on foreign traveling as expenses connected with the business of the assessee."

Assessee's own admission and CIT(A)'s observations clearly show that assessee was very representative of Bofors, accordingly they deputed him to attend a principal to principal Defence Suppliers Conference on behalf of Bofors. Therefore, assessee and Bofors cannot be believed in saying that Mr. Chadha was not a representative but only a booking agent. He had much more important functions to perform and it also indicates that part of the remuneration was diverted to bye pass Indian Defense policy and given through Svenska.

6.30. The inferences which emerge are:

i) The statements of Bofors and the assessee that Bofors' business was in a slow down, are not correct.

ii) The assessee's role was as Bofors' representative and not limited to the arranging of hotel bookings and receiving fax etc. as claimed, therefore these assertions are also incorrect.

iii) The relations of Bofors and the assessee were not only limited to India but other countries also.

iv) Mr. Chadha was a very important functionary of Bofors, who deputed him to attend the Regional Conference to meet other suppliers on a principal to principal basis.

v) The assessee continued to be the Bofors' agent and was entitled to appropriate remuneration. To bye pass law and policies same was camouflaged by splitting, paying minor part in India and major part by Svenka in Swizerland.

6.32. From the above, it is clear that both Bofors as well as the assessee have made incorrect statements in this behalf. It is natural that in such situations, parties do give self-serving statements. It is for the fact-finding authorities to ascertain the truth by lifting the corporate veil.

6.33. It may be recalled that despite the full knowledge about the Indian Defense Policy of 1985 to eliminate agents, Bofors' intimation about the liaisoning remuneration of one lakh sweedish kroners to Anatronic Corpn. for hotel bookings, fax etc., was a cover up, as Anatronic was neither a Company nor an incorporated entity but a proprietorship concern of Mr. Chadha, who in his individual capacity performed very important activities, like visiting defense establishments and high level conferences. This is not any inference drawn but the assessee's own admission on oath. The facts of Bofors' delay in communication of having dispensed with their agent, Mr Chadha's delayed signing of such consequential Agreement and his continuing with functions befitting the status of a full fledged agent or representative, all militate against the self-serving statements of the assessee and Bofors.

SNAB REPORT RELEVANCE:

6.34. The SNAB report has further quoted that "President of M/s AB Bofors Per Ove Morberg, stated that the principal beneficiary in M/s

Svenska Inc. is an Indian, who has been an agent for Bofors for ten to fifteen years". There is nothing available to suggest that the President of Bofors, while making this disclosure to the Audit Organization of his own country, would tell a lie. We are unable to comprehend a situation where Mr. Morberg whose work was to protect the interest of Bofors in India, would make a statement incriminating an Indian, if such an Indian was not involved. In the entire record, except the name of Mr Chadha, the name of no other Indian occurs and the SNAB report refers only to the old Indian agent of Bofors.

6.35. The only logical and inescapable conclusion, which can be drawn from all these facts, coincidences, record and the various parameters laid down by the Hon'ble courts in this behalf, as discussed hereinbefore, is that Mr. Win Chadha was the principal beneficiary of the payments made by Bofors into the account of M/s Svenska Inc.

6.36. It is clear from the record that SNAB verified the original papers and knew the names. However, due to some pressing strategic considerations, these names were not disclosed in its Report to the Govt. of India. This import of disclosure can neither be ignored, nor underestimated. It is the duty of the Revenue Authorities to be mindful of clues and coincidences and bring them to logical conclusions, otherwise clandestine tax evasion through shady economic deals, will go undetected, as appears to be the order of the day. India is neither a tax haven, nor a banana republic. Rather, it has an established dispensation of the rule of law, making tax dodgers answerable and accountable. In such type of transactions, it is hard for the AO to unearth direct evidence or demonstrative proof. Therefore, circumstantial evidence and appropriate appreciation thereof acquires great importance. The Hon'ble

higher courts have rather emphasized that in tax proceedings the exercise of deducing facts can be undertaken on circumstances and facts.

6.37. The Sweedish Govt, consequent to the Govt. of India's official request has come on record that commission was paid to the Indian agent of Bofors. The interesting question for consideration at this juncture is as to whether an official statement of a sovereign State can be relied on in tax proceedings. It will be pertinent to consider that the Swedish Govt. has very good relations with the Indian Govt., as its defense industries are major suppliers of armaments to India. The Swedish Govt. would not like to compromise it's Indian relationship by incorrect revelations about one supplier. If the statement of a sovereign govt. sent through diplomatic channels and that too on the request of Indian Govt., is not acceptable or reliable evidence in Indian tax proceedings, no case of cross-border tax evasion can ever be detected or proved. No burden can be cast on the AO in impossible terms. We see no reason to hold that the Swedish Govt. and its own Audit Department SNAB gave any wrong report by mentioning Indian agent as recipient. Besides, all the circumstantial evidence, as deliberated, leads to this conclusion. Mere non-mentioning of names of recipients cannot be capitalized by Bofors or assessee to derail the tax liability.

SVEN RAMBERG'S LETTER

6.38. Sven Ramberg's letter, which is not denied by the assessee, clearly indicates that Mr. Chadha received a well earned and congratulatory fee in this deal. The assessee claims that this letter was written by a Swedish friend Ramberge as the Bofors gun deal was a big news in Sweden. He thanks the assessee, as a friend, for sending a shining present, admires his capabilities

in the field of gun deals and congratulates him for earning a well deserved fee.

6.39. The surrounding circumstances on the other hand, have an entirely different story to tell. In the first place, there was no agent in the Gun deal. No Swedish newspaper would quote Mr. Chadha as being the agent and as having earned a good fee in the deal. If Sven were a friend worth sending a shining silver present all the way from India, Mr. Chadha would have also intimated him at the relevant time that ,he was no longer the agent of, but merely an errand boy for Bofors. Had that been the case, a letter from such a friend would express consolation (rather than congratulations) for Mr. Chadha having lost the substantial fee, which could otherwise have been well earned by the assessee.

6.40. The assessee was far too experienced not to understand that absolute secrecy is the key to defense deals and that the Bofors Agreements had a standard clause of secrecy. He would under any circumstance, not disclose the details of a defense contract and the commission involved therein to his friend, unless there was more than met to eye. The letter is not innocuous, as sought to be proffered by the assessee. To the contrary, it leads to a clear fact that Mr. Rahmberg along with Mr. Linder was an associate having concern with the deal and was waiting for a letter from the assessee. The assessee's reply doesn't appeal either to logic or to business realities, much less to human conduct desirable from an old hand like the assessee in the sensitivities of a defense deal. This letter which is accepted by the assessee, has important value as circumstantial evidence. Since incorrect replies are given by the assessee in his statement on oath, the AO is not obliged to give further evidence to prove him wrong, a suitable inference is to be drawn by the Revenue Authorities

6.41. All these facts and material available on record do not fit into the set up of human probabilities and surrounding circumstances to render assertions and statements made by the Bofors and assesses, as believable.

6.42. In our view, the Swedish Govt.'s Official communication, Sven Ramberg's normal and probable human conduct, the preponderance of probabilities, all read together harmoniously, clearly indicate the facts to be otherwise than those suggested.

6.43. We are conscious of the fact that the I.T. Deptt. was carrying out investigations in difficult circumstances ascribable to the sensitive nature of enquiries, their ramification on national politics and public perception. It was very difficult to get information and documents and to examine concerned links due to the premeditated surreptitious cover up of transactions and smokescreen corporate jugglery. There is no presumption in law that the AO is supposed to discharge an impossible burden to assess the tax liability by direct evidence only and to establish the evasion beyond doubt as in criminal proceedings. This is why Hon'ble courts by way of a catena of binding judicial pronouncements, have held that tax liabilities can be assessed by Revenue Authorities on consideration of material available on record, surrounding circumstances, human conduct, preponderance of probabilities and nature of incriminating information/ evidence available on record.

6.44. In such clandestine operations and transactions, it is impossible to have direct evidence or demonstrative proof of every move. The income tax liability is to be assessed on the basis of the above parameters and when the witness i.e. the assessee is not forthcoming with proper facts and chooses to be elusive and evasive, the AO has no choice but to take recourse to estimate. The only caveat is that it should be reasonable and based on

material available on record. It should not be perverse or based merely on conjectures. In our view, herein the AO has considered the relevant aspects in quite a reasonable and tenable manner. In our considered view all the above material available on record and the facts and circumstances make it clear that this income is taxable in the hands of the assessee.

CHARGE SHEET FILED BY CBI

6.45. The assessee claims that the material contained in the charge-sheet filed by the CBI, is inadmissible in income tax proceedings. We have already held that the same is admissible as material available on record. AO has not built up his case only on this charge-sheet, and has made efforts to bring on record other evidence and circumstances against the assessee. The . Hon'ble Supreme court has also held that the assessee is prima facie liable to be charged under the IPC and JPC has also not given any immunity to the assessee. In view thereof, it cannot be held that AOs case rests only on a charge-sheet.

"THE HINDU" NEWS PAPER MATERIAL

6.46. The assessee contends that the Agency of "The Hindu" newspaper neither authenticated the source of their information nor the originals thereof were ever produced and that the assessee was never given opportunity to cross examine them, and that consequently, it is not proved that Svenska is the assessee's front company or there is any power of attorney and existence of Swiss Bank Account No. 99921-TU. In the absence of such material, as per the assessee, the additions cannot be sustained.

6.47. We have already observed that the assessee continued to provide valuable services to Bofors in this defense deal as a responsible representative, or agent, or whatever term may be used to describe such a relationship. The Bofors' President, at first blush, accepted that payments

were made to its earlier agent in India. SNAB, on the basis of the statement and verification of the record gave a Report to the Swedish Govt., that payments were made in this deal. No name was mentioned. The Swedish Govt. acceding to the Indian Govt.'s request, sent this Report through the Indian Ambassador to Sweden. The CBI enquired into the matter. Letters Rogatory were issued by competent Indian court. On the basis of these inquests, it was revealed that the assessee did have a Swiss Bank Account. Existence of Svenska was accepted by Bofors and its main beneficiary was attributed to be the old Indian agent. Information received gave details of Bofors' invoices which were not denied. Amounts, dates and installments tallied. In our view the information of this magnitude and relevance demonstrates beyond question that the assessee was the recipient of this commission. "The Hindu" newspaper is a further corroboration of the facts which show that the assessee is the recipient.

6.48. Besides, from the grounds of appeal filed before us and those before the CIT(A), it comes out that no specific ground for insistence on the personal attendance of "The Hindu" newspaper officials was specifically requested by the assessee. There is no letter in the assessee's paper book evincing that any specific request was made by the assessee for "The Hindu" news agency's personal attendance and cross examination. The plea in this behalf, without taking any specific ground in the first and second appeals and without there being any request available on the paper book, cannot be accepted at this belated stage. As already mentioned, the AO is obliged to confront the assessee only the material gathered by him, which is disputed. The assessee instead of giving proper explanation, went on taking a stand of bland denial and taking technical objections about originals on every

information. This specious plea is a mere afterthought aimed at trying to thwart the assessment of correct income and is liable to be rejected as such.

6.49. In our considered view even if this Hindu Newspaper material is ignored, it would not change the fact that Svenska and its funds were payments made by Bofors for the assessee. The income is deemed to be received by the assessee.

LETTER ROGATORY AND IMMUNITY

6.50. The assessee's pleads that some material was obtained by Letter Rogatory with immunity provided by Swedish law from being used against third parties in tax frauds in the nature of duties, custom, money laundering etc. The immunity if any was applicable to money laundering, custom duties etc and that too for tax frauds only. There is no mention of income tax proceedings therein. The impugned orders are for assessing regular income tax proceedings and not for tax frauds. Consequently this plea of the assessee bears no merit and deserves to be rejected.

6.51. Mr. Chadha, along with Ottavio Quotrocci and the Hindjuas, opposed the Letter Rogatory proceedings before the Swiss Courts. Now if the assessee had no link with Svenska and his Swiss Bank Accounts, there was no need for him to have challenged these proceedings costing a fortune in Switzerland. If the assessee was as clean as claimed, he would have rather welcomed the supply of information by the Swiss authorities to the Govt. of his own country and would have avoided the trouble and cost of such litigation. Challanging the action of proper disclosure by the Swiss Govt. to the Indian Judicial System leads to an important adverse inference against the assessee.

SVENSKA FACTS AND CONCORDANCE OF DATES

6.52. We have already held that the material available on record is admissible in income tax proceedings. Adverting to the alleged inconsistencies in the concordance table of dates, the fact is that many events tally and complement each other, which indicate that there was a palpable similarity in the events. The exception proves the rule. Some of the mismatches are bound to happen in such a mammoth investigation.

6.53. On the one hand Bofors desired to eliminate the middleman on paper and removed the assessee's name and brought in Anatronics, whose commission was reduced; whereas on other hand the corresponding reduction was paid to Svenska in its Swiss Bank Account which was to be operated by the assessee. Bofors claims that this is no coincidence that these are winding up/termination charges. The question is, if they were so conscientious why not informed the Govt. of India. In our view, the assessee and Bofors have failed to instill confidence in their statements, explanations and responses to successive disclosures during investigations. In our view, the concordance chart is reliable in most of the events and it clearly proves that Svenska is the assessee's front company. The actual income due to the assessee out of this Defense Contract from Bofors was camouflaged and split up in the name of Anatronic errand remuneration and Svenska's commission as winding up charges.

6.54. It cannot be ignored that at the relevant time, the impugned Defense Deal was at a very advanced stage. Bofors had completed detailed calculations about costing, comparative bidding, testing i.e. a series of

antecedents to finalize such deal had already been undertaken. The assessee was actively engaged in the finalization of the Deal in his role as agent or representative. It is unthinkable that Bofors would terminate the assessee's service at this crucial juncture and not compensate him for the agreed commission.

6.55. While giving his statement, the assessee deposed that he had no knowledge whatsoever about Svenska and this name was unknown to him till it became media news. The assessee's statement is not correct. Svenska was the assessee's front. By the Svenska Board Resolution dtd. 30-4-80, he was authorized to open, operate and deal with Bank Account for it in the manner he liked. Bank Account No. 99921–TU, where the money was transferred, belonged to the assessee.

6.56. Besides, the assessee was Bofors' agent since 1978, looking after their business interests and meeting other leading operators in the world defense industry in conferences, suggests that he had earned the faith of Bofors. It is difficult to believe that Mr. Chadha was unaware of the work of related entities like AE Services and Svenska, who were assigned hugely remunerative jobs called as winding up, or termination of contract, or by any other term which may be used in the defense deals jargon.

6.57 We are dealing with a case where investigations were blocked in one way or another. Whenever they reached a degree of objectivity Bofors and assessee tried to deflect or deflate ascertainments of facts. But this does not mean that law will not have its course. Therefore various judicial authorities have held that for income tax proceedings material available on record should not necessarily be one which will be admissible in criminal or civil

court proceedings. In the statement on oath before the JPC also, the assessee did not come out with the truth. The Assessee's role since the past has been of Bofors' Indian agent in Defense Deals and it is hard to believe that the assessee was relegated to the position of a mere booking agent for hotels and errands and that an obscure Panama based company was paid the difference of commission. In view of the discrepancies and inconsistencies in the facts as projected, the misstatements given by the assesses from time to time, they cannot be relied on as being unworthy of credence. Under these circumstances, assessee's case has to be decided on the preponderance of probabilities, normal probable human conduct and the material on the record.

6.58. We have already mentioned AO is not concerned as to whether the assessee is held as a middleman or commission agent, or whether the actions are legitimate or against the Indian Defense Policy. His endeavor is to bring to Govt. the taxes which are due, an exercise far different than criminal or civil court proceedings.

6.59. All through, the assessee has demanded 'where are originals?' There has never been any challenge to the contents thereof as false or incorrect. It has to be borne in mind that the evidence has been collected by the JPC and by premier Investigating Agencies of the Indian Govt. Their contents broadly match with each other and the facts mentioned therein are corroborated by cross or direct references. The facts have a clear inter se corroboration, which cannot be called a mere coincidence. An inference cannot now be raised against this material that the contents thereof are fabricated or incorrect. The evidence was obtained by lawful means - by diplomatic or other official and govt. channels. Questioning their contents or

veracity in income tax proceedings will amount to disbelieving the whole system. The assessee has nowhere claimed these documents to be false or fabricated the insistence is only on production of originals, or their admissibility. The Hon'ble Courts have laid down parameters for the Revenue Authorities in tax proceedings to respond to such circumstances also. Therefore, the assessee's plea in this behalf cannot be accepted.

6.60. We now proceed to dwell upon the issue of burden of proof. If the AO, during the course of proceedings comes across some material indicating any accrual or receipt of income in the hands of the assessee, he is empowered to investigate the matter and ask relevant questions. The AO's burden is initial in nature, the assessee, thereafter, has to give a proper explanation, which means, it must be true and disclosing proper facts, more particularly when they are in the exclusive knowledge of the assessee. The assessee has no option to remain selective, elusive, evasive or restrained in disclosure. After such explanation, statement or other disclosure of the assessee, the AO will ascertain the correctness of the assessee's submissions on the basis of material available on record, the surrounding circumstances, the conduct of the assessee, the preponderance of probabilities and the nature of incriminating information/ evidence available with him. In the light of all these, the AO in this case discharged onus cast on him and came to the conclusion that the assessee was liable to tax qua Svenska commission.

6.61. The fact about the assessee's dominant position at the time of ripening of the prestigious defense deal, maintaining/operating key bank accounts, and his capacity to transfer funds, the trail whereof has been demonstrated by the AO, all lead to the inescapable inference that the above income accrued or is deemed to have accrued to the assessee.

6.62. There is enough material on record to hold that the payments were indeed made by Bofors to Svenska AE Services and Moresco through the above Foreign Bank Accounts, in connection with the defense Deal with the Govt. of India. Merely by giving convenient alibis, like winding up or termination cost to these payments Bofors cannot escape from conclusion that these payments were made in relation to this Defense Deal, call it payment to winders up, terminators, or middleman, or agent. Therefore, the assessee is liable to pay income tax as determined by the AO in this behalf.

WHETHER OTHER ENTITIES ARE AMENABLE TO INCOME TAX JURISDICTION IN BOFORS PAYOUTS

6.53. The subject matter from which these payments flew and a substantial part of the services rendered by assessee. A.E. Services, Ano, Moresco etc. pertain to this Indian Defense Contract, executed in India. All these entities are amenable to jurisdiction of Indian Income Tax Department, to bring to tax the amount which accrues or arises to them for these services, or is received, or it is deemed to be so by them. Indian income tax is leviable on all types of income, including legal and illegal income, whether recipients are Indian or foreign resident. In these facts, all the connected entities are clearly amenable to Indian tax jurisdiction for their respective income.

6.64. The Hon'ble Bombay High Court recently has dealt about jurisdiction in the case of Vodafone International Holdings BV (2010) 193 Taxman 100, as under:

> "By the provisions of sub-section (2) of section 5, the income of a non-resident from whatever source derived is includible in the total income, if it is received or deemed to be received in India or if it accrues or arises or is deemed to accrue or arise to him in India during the year. Breaking down sub-section (2)

> into its components, it covers income of a non-resident which (i) is received in India; (ii) accrues in India; (iii) arises in India; (iv) is deemed to be received in India; (v) is deemed to accrue in India; or (vi) is deemed to arise in India. [Para 80]
>
> Income is said to accrue or arise when the assessee has a right to receive the income. The words 'accrue' and 'arise' are used in distinction to the word 'receive'. The words 'accrue and arise' indicate a right to receive. Section 9(1) defines the circumstances in which income is deemed to accrue or arise in India. Sub-section (1) of section 9 defines in clause (i), income which shall be deemed to accrue or arise in India. Clause (i) is, in turn, distributed into four categories. These categories cover income accruing or arising, whether directly or indirectly: (i) through or from any business connection in India; (ii) through or from any property in India; (iii) through or from any asset or source of income in India; or (iv) through the transfer of a capital asset situated in India. In each of these four categories, the law has postulated the existence of a nexus with India which invokes taxing jurisdiction. The nexus is provided in the case of the first category from a business connection in India; in the second, by the situs of the property in India; in the third, from any asset or source of income in India; and in the fourth, by the situs of the capital asset which is transferred, in India. The Parliament has been careful to ensure that even while adopting a deeming fiction in defining incomes which are deemed to accrue or arise in India, there must exist a nexus with India upon which the jurisdiction to tax is founded. [Para 81]

6.65. In Vodafone case, a foreign entity acquired shares for controlling the interest of an Indian company, from another foreign entity, by way of a contract executed in a foreign territory. Consideration of transfer war also paid and received in the foreign country. Jurisdiction was invoked by the Indian Income Tax Department against the purchaser on the issue that it had made the payments to a foreign national, without deducting and withholding tax called as TDS in India. The purchaser Vodafone challenged the jurisdiction contending that neither the contract nor the consideration, nor

the seller, nor even the purchaser were located in Indian Tax jurisdiction and this being so, India had no jurisdiction on such transaction. Hon'ble Bombay High Court upheld the jurisdiction invoked by the Indian Tax Authorities.

6.66. In the Bofors supply case the fundamental contract was executed in India between Bofors and Defense Department. Payments were made from India and the services were to be rendered in India. All the incidental payments would have an Indian connection. Therefore, the Indian tax jurisdiction is squarely invoked.

6.67. Before us, neither of the parties has adverted to any other investigations. We are surprised to observe that though the Department has proceeded against the assessee, no action seems to have been taken against either Services or Ottavio Quattrocci and other related entities, by the Income Tax Department. Bofors admittedly paid the amounts to the assessee, AE Services, Quotrocci and other entities. It's liability for withholding tax is built in. Mr Ottavio Quatrocci was living in India for a considerable time. The issue about his tax residence status should have been verified.

6.68. In our view the Department should have carefully examined the issues about their taxability and their having PE in India and appropriate proceedings should have been undertaken to assess and recover taxes. We may point out there exists a serious issue apropos Bofors for not having deducted withholding tax i.e. TDS, from such payments to the assessee/ Svenska, AE Services, Quottrocci. In our view, to enforce the rule of law, these steps were desirable to bring all the relevant income tax violations to a logical end by the Income Tax Department. Inaction in this regard may lead

to a non-existent undesirable and detrimental notion that India is a soft state and one can meddle with its tax laws with impunity.

WHETHER COURTS HAVE VALIDATED PROCEEDINGS USING THEIR EXTAORDINARY POWER VESTED BY INDIAN CONSTITUTION

6.69. The Hon'ble Supreme Court in the case of Green World Corporation 181 Taxman (SC) 111, has dealt with a some what similar issue. In that case proceedings u/s 148 of the Act for reopening of completed assessment were found to be not valid by the Hon'ble Supreme Court. By the time the matters reached before Hon'ble Supreme court, they had become time barred. However, looking at the irregularities, the Hon'ble Court exercising its extraordinary powers under Article 142 of the Constitution of India, directed the Department that assessment be reopened. The Hon'ble Court held as under:

> **"35.** This case poses before us some peculiar questions. Whereas the order under section 263 of the Act and consequently the notices under section 148 of the Act have been held to be not maintainable, we are constrained to think that the Assessing Officer had passed an order at the instance of the higher authority which is illegal. For the aforementioned purpose, we may not go into the question of *bona fide* or otherwise of the authorities under the Income-tax Act. They might have proceeded *bona fide* but the order of assessment passed by the Assessing Officer on the dictates of the higher authorities being wholly without jurisdiction, it was a nullity. We, therefore, are of the opinion that with a view to do complete justice between the parties, the assessment proceedings should be gone through again by the appropriate assessing authority.
>
> **36.** It is true that despite order passed by the High Court, CIT (Delhi) has not been impleaded. Presumably, because of the said defect in the order passed by the High Court of Himachal Pradesh at Shimla,

revenue could not implead CIT (Delhi) as a party in the appeal. CIT (Delhi), however, has been impleaded as a party in the Special Leave Petition (SLP) filed by the Assessee. CIT (Delhi) has although in an irregular manner filed a rejoinder. Counter affidavit was filed by the assessee in the appeal preferred by the revenue and the same is on record. The said authority, therefore, is otherwise before us.

37. It is now well-settled that this Court in exercise of its extraordinary jurisdiction under Article 136 of the Constitution of India may, in the event an appropriate case is made out, either refuse to exercise its discretionary jurisdiction or quash both the orders if it is found that setting aside of one illegal order would give rise to another illegality.

In Transmission Corpn. of A.P. Ltd. v. Lanco Kondapalli Power (P.) Ltd. [2006] 1 SCC 540, this Court held :—

> "(53) It is now well-settled that this Court would not interfere with an order of the High Court only because it will be lawful to do so. Article 136 of the Constitution vests this Court with a discretionary jurisdiction. In a given case, it may or may not exercise its power. . . ." (p. 555)

We, therefore, in exercise of our jurisdiction under Article 142 of the Constitution of India direct that the assessment be reopened by the Commissioner of Income-tax, Delhi-VII.

38. These appeals are disposed of with the aforementioned directions. No costs."

6.70. In view of the above observations, the Department may examine these issues and, if so advised, may take necessary appropriate action.

<u>CONCLUSION</u>

BOFORS COMMISSION

6.71. Keeping in consideration the rival contentions, all the facts, the material available on record, the probable normal human conduct, the surrounding circumstances, the preponderance of probabilities and the legal propositions, we have not hesitation to hold that assessee received the

impugned commission as added by AO as his income for AYs 1987-88 and 1988-89. This ground of the assessee is dismissed.

INTEREST ON SUCH COMMISSION

6.72. No material has been brought on record to suggest that the assessee made any investment of any kind. Our earlier findings are based on a lot of material about issues related to commission. There is no similar material to indicate that the assessee either made any investment or earned any interest income. The AO while estimating 5% deemed interest on the entire income, has not either referred to or relied on any material whatsoever. In these circumstances we are unable to uphold such additions on account of notional interest income. This ground in all the years is allowed.

BUSINESS EXPENSES IN A Y 1987-88

6.73. We have already held that the assessee was carrying on a wide-spread business. Earlier, the ITAT has deleted or suitably reduced the additions made by lower authorities. Since we have held the scope of assessee's apparent business as enlarged one, the , interest of justice will be served, if assessee's claims in respect of business expenditure and allowances, as claimed, are allowed. These grounds of the assessee are accordingly allowed.

HOUSE PROPERTY INCOME

6.74. The ITAT, in assessee's own case in past many years, has been accepting assessee's income by recording the above mentioned findings. Respectfully following the same we delete the additions in all the years.

INTEREST U/S 234

6.75. Levy of interest u/s 234 is held to be consequential in nature.

7. In the result, assesses appeals for AY 1987-88 and 1988-89 are partly allowed and all other appeals are allowed on above terms.

Order pronounced in open court on 31-12-2010.

Sd/-	Sd/-
(R.C. SHARMA)	(R.P. TOLANI)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Dated: 31-12-2010.
MP
Copy to :

(1) Assessee
(2) AO
(3) CIT
(4) CIT(A)
(5) DR