IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, AHMEDABAD

BEFORE SHRI MUKUL Kr. SHRAWAT, JUDICIAL MEMBER
AND SHRI T.R. MEENA, ACCOUNTANT MEMBER

ITA No. 2691 & 2692/Ahd/2009
A.Ys. 2005-06 & 2006-07

The ACIT, Central Circle-1, Baroda	V/s.	**M/s. Jayesh Finance, 24, Sardargunj Bazar, Anand PAN: AADFJ 7889B**
(Appellant)		(Respondent)

IT(ss)A No. 236,237 & 238/Ahd/2011
A.Ys. 2004-05, 2005-06 & 2006-07

M/s. Jayesh Finance, 24, Sardargunj Bazar, Anand PAN: AADFJ 7889B	V/s.	**The ACIT, Central Circle-1, Baroda**
(Appellant)		(Respondent)

IT(ss)A No. 586, 587 & 588/Ahd/2012
A.Ys. 2004-05, 2005-06 & 2006-07

M/s. Jayesh Finance, 24, Sardargunj Bazar, Anand PAN: AADFJ 7889B	V/s.	**The ACIT, Central Circle-1, Baroda**
(Appellant)		(Respondent)

ITA No. 2689 & 2690/Ahd/2009
A.Ys. 2005-06 & 2006-07

The ACIT, Central Circle-1, Baroda	V/s.	**Late Mukesh J. Patel, L/H Smt. Meenaben J. Patel, Motikahdi Umreth. PAN: ANNPP 2266P**
(Appellant)		(Respondent)

Revenue by :	Shri D.S. Kalyan, T.P. Krishna Kumar, CIT-DR and J.P. Jhangid, Sr.D.R.
Assessee(s) by :	S/Shri S.N. Soparkar, Senior Advocate & Mukund Bakshi, A.R.

सुनवाई की तारीख/**Date of Hearing : 08/08/2013 & 13.9.2013**
घोषणा की तारीख/**Date of Pronouncement: 31/10/2013**

आदेश/O R D E R

PER SHRI MUKUL Kr. SHRAWAT, JUDICIAL MEMBER :

For A.Y. 2005-06 and 2006-07, the Assessee and the Revenue Department are in cross appeals. However, for A.Y. 2004-05 only the assessee is in appeal. All the appeals as per the nomenclature supra, these are connected appeals; hence consolidated and hereby decided by this common order. Registry has informed that the appeals filed by the assessee were "time barred", therefore, an order has been passed by ITAT 'C' Bench dated 06.09.2012 wherein the assessee's appeal bearing ITA No.236, 237, 238/Ahd/2011 were admitted after condoning the delay. Accordingly, these appeals are hereby adjudicated upon hereunder:

A. Assessee's Appeal (For A.Y. 2004-05, 2005-06 and 2006-07)(IT(SS) 236,237&238/Ahd/2011)

2. Ground raised by the assessee for these three years, emanating from three separate orders of CIT(A) all dated 31.3.2009, now under appeal, are identically worded, hence, reproduced below:

> *"1. The Ld. Commissioner of Income Tax (Appeals)-IV, Ahmedabad has erred in law and in facts in not appreciating the contentions and submissions of the appellant that the **unaccounted business of money lending and finance** carried out by it along with various persons was to be assessed to tax in the case of **Association of Persons (AOP)** and*

not in the case of the appellant firm. *Ld. CIT(A) ought to have held that the income of the unaccounted business could not have been taxed in the case of the appellant and the assessment made in taxing the income from unaccounted business deserves deletion.*

2. The Ld. CIT(A)-IV, Ahmedabad further erred in law and in facts in confirming the action of the Ld. A.O. in holding that the status of AOP as claimed was not existence as it had not obtained any Permanent Account Number nor any return was filed and hence the claim of the appellant in the taxation of income of unaccounted business could not be taxed in the status of AOP. The Ld. CIT(A) ought to have appreciated that the very fact that the business was carried outside the books itself established the reason for not obtaining the P.A. Number and, therefore, the rejection of the appellant's claim could not have been denied.

3. The Ld. CIT(A)-IV, Ahmedabad has further erred in facts and in law in concluding that the appellant itself has declared its status is that of a firm and, therefore, the claim of the firm being taxed as AOP could not be entertained. This observation and finding of the Ld. CIT(A) is in complete disregard of the appellant's contention where the claim was made by it with respect to the business carried on by it along with other persons, which was a different entity and 'person' other than the appellant firm. The finding and observation of the Ld. CIT(A) being contrary to the available material deserves to be cancelled."

3. At the outset, learned AR, Mr. S.N. Soparkar has stated before us that he is arguing only ground no.1 and rest of the grounds are in support of the main issue thus argumentative in nature.

4. **Facts in brief** as emerged from the corresponding orders of learned CIT(A)-IV Ahmedabad order dated 31.03.2009 and the AO's orders passed u/s. 153A (b) r.w.s 143(3), dated 14th August, 2008 were that the **assessee firm was subjected to search u/s. 132 of IT Act on 19.01.2006.** In consequence a notice u/s. 153A was issued. In compliance the assessee has filed the return declaring an income of Rs.1,36,646/- for A.Y. 2004-05,

Rs.67,219/- for A.Y. 2005-06 and Rs.13,57,120/- for A.Y. 2006-07. The assessee has raised a plea before the AO on the commencement of the assessment proceedings itself that the assessee should be assessed as **Association Of Person (AOP). A**s per AO the said plea was nothing but an afterthought to mislead the department. The AO has rejected the said contention of the assessee on the ground that the assessee had not obtained the PAN in the status of AOP. The AO has also noted that there was no evidence as to when, where and how those persons of the AOP have come together with common intention to run the business. What was the business conducted by the AOP? How the profit and loss of the alleged AOP was distributed among it's members? What was the instrument or document or any deed establishing the creation of the AOP?. Those were the questions raised by the A.O. There was no explanation by the assessee about the arrangement of the finance. According to AO, it was merely a statement by the assessee without supporting evidence, hence the claim was rejected.

In the assessment order, there was a mention of 'reference' to **Special Audit u/s.142(2A) of IT Act**. However, the Special Auditor has informed that the assessee had not produced the books of account, hence, the Special Audit could not be conducted. They had expressed, therefore, regret in not furnishing the report u/s. 142(2A) being unable to conduct the audit. For the said default on the part of the assessee, the AO had initiated penal provisions.

5. During the course of survey at the office premises of the assessee certain **promissory notes totaling Rs.74,60,550/-** were found and impounded. There was a list in the assessment order as follows :-

> "*..Annexure – a/17 – Page No.1 to 268, found from the office premises and it contains the number of **promissory notes** signed by various persons, without mentioning the date of loan given and amount of loan given and some of them were mentioned the amount of loan given which are list out as under:*

Page No. of seized material found	*Name of the persons by whom promissory note has been signed*	*Amount mentioned on promissory note (Rs.)*	*Date of loan given*	*Explanation for accountedness*
14	*---*	*1,00,000*		*Incorporated in the cash flow prepared and submitted in the case of AOP*
27	*Shri Hasmukhbhai D. Patel*	*4,00,000*		*Incorporated in the cash flow prepared and submitted in the case of AOP*
39	*Parth Construction*	*3,50,000*		*Incorporated in the cash flow prepared and submitted in the case of AOP*
65	*Someshwar Corporation*	*10,00,000*		*Promissory note obtained from the party but subsequently, this transaction was not taken place.*

84	*Dhoribhai Dwarkadas Patel & Sons*	*16,00,000*	*2005-06*	*-Do-*
86	*Jalaram Developers*	*3,00,000*	*29.09.04*	*Incorporated in the cash flow prepared and submitted in the case of AOP.*
120	*Samir Kanubhai Patel*	*1,00,000*	*24.02.05*	*This transaction is recorded in the books of assessee firm.*
125	*Jashbhai Dahyabhai*	*5,00,000*	*9.2.05*	*-Do-*
158	*Tusharbhai P. Kotecha*	*40,000*	*22.9.04*	*Incorporated in the cash flow prepared and submitted in the case of AOP*
161	*Vasantbhai B. Somaiya*	*18,00,000*	*29.9.04*	*-Do-*
170	*Kamal Ambalal Patel*	*7,50,000*	*19.11.04*	*-Do-*
184	*Vimalbhai Kanubhai Patel*	*50,550*	*16.16.04*	*-Do-*
193	*Niravkumar Somaiya*	*3,70,000*	*13.06.03*	*-Do-*
243	*Laxmi Agency*	*1,00,000*		*Incorporated in the cash flow prepared and submitted in the case of AOP*
	Total	*74,60,550*		

So, the AO had made a list of the names of the persons by whom those promissory notes have been signed along with amount mentioned in the promissory notes. The assessee has mainly contended that the cash flow was submitted, that too in the case of

AOP. On the basis of the person-wise promissory notes, the total amount came to Rs.74,60,550/-. The AO has further noted that those promissory notes were obtained by the assessee from those parties to secure the amount of loan given to those borrowers. Those promissory notes have specified the repayment of loan, period of loan and the interest of loan charged by the assessee. The conclusion of the AO was that the story of existence of AOP was nothing but a fabricated story. For the financial year 2003-04, the lead year, the AO has noted that an amount of Rs.3,70,000/- was given on 13.06.2003 to Sri Nirav Kumar Somayo; hence, taxed in the A.Y. 2004-05. The matter was carried before the First Appellate Authority.

6. The main contention of the assessee was that the AO was not justified in making the assessment in the status of partnership firm. According to the assessee, the assessment was to be made on AOP. It was contended that few persons related to each other have joined together and conducted the business of money lending jointly. Hence, the assessment ought to have been made on AOP. It was also mentioned that the said business was started as per **an oral understanding amongst the members**. Learned CIT(A) was not convinced and held as under:

> *"I have carefully considered the contentions of learned counsel as well as gone through the records. ON perusal of assessment order, it has been noticed that the Assessing Officer had be adopted the status of the Partnership Firm as declared in the Return of Income by the Appellant. The Appellant has not claimed status of Association of Persons (AOP) in the return of income filed in response to the notice issued u/s 153A on 20.07.2007 in consequence to the search conducted in M/s. Jayesh Finance group of cases and Return of Income was filed*

on 31.03.2008, i.e., after a gap of more than eight months. However, for the first time, the Appellant claimed the status of Association of Persons (AOP) in its reply filed on 21.03.2008 i.e. prior to filing of Return on 31.03.2008 in which status of the Appellant was claimed as Partnership Firm. In other words, the Appellant had voluntarily on its own declined, the claim of status of Association of Persons (AOP) and filed the return in the original status of Partnership Firm. It may be mentioned that the status of the Appellant has to be claimed in the Return of Income and the Appellant cannot be claim any other/different status separately by way of filing of a simple reply on a piece of paper. The filing of Return and status claimed in it has a statutory/sanctity. However, status cannot be changed by way of filing the letter/reply as claimed by learned Counsel in his pleadings. Therefore, the Assessing Officer has to adopt the status as claimed in the Return of Income and he cannot be guided by filing a simple reply since the Assessing Officer has no discretionary power to change the status of any Assessee on his own without any fresh material in his possession to do so at his discretion since the status has to be necessarily and statutorily adopted by the Assessing Officer as claimed by the Appellant in the Return of Income filed by it. In other words, a Return furnished may be accepted as to the particular status of the Assessee. Hence, the Assessing Officer may proceed on the basis of that declared status in the Return of Income for the purpose of assessment unless there is anything otherwise in the return or in assessment proceedings to suggest different status for assessment purpose. However, the assessee cannot claim the status other than the declared in the-Return of Income by way of filing a simple reply in advance on 21 03.2008 before actual filing of Return to discard the status likely to be declared in future in the Return of Income which was filed ten days later on 31.03.2008. Further, it may be mentioned here that the Assessing Officer, in the present case, has a specific and assigned jurisdiction u/s 127(2) of Income-tax Act, 1961 vide Order No.BRD/CIT-ll/Juris/2006-07, dated 30.06.2006 issued by the CIT-II, Baroda, after conduct of search u/s 132 on the basis of which case was transferred to him of Partnership Firm M/s. Jayesh Finance only w.e.f. 01.07.2006 (and not of Association of Persons as now claimed by the Appellant since the residuary jurisdiction lies with territorial Assessing Officer). Hence, the Appellant has failed to prove that it has filed any Return in the status of AOP with the territorial Assessing Officer having normal residual jurisdiction. Further, it was pleaded by Learned Counsel that there was oral understanding among the members of AOP for which no evidence whatsoever was produced by the Appellant either at the assessment stage or at the Appellate stage to substantiate the existence of the AOP since the same status was not claimed in the return of income. It was held by Hon'ble Bombay High Court in case of CIT v/s. ***Associated Cement and Steel Agencies (147 ITR 776) that where a return was submitted in the status of a Firm,***

> ***the assessment in the status of an Association of Persons (AOP) was not permissible.*** *Similar view was also held by Hon'ble Rajasthan High Court in case of CWT v/s.* ***Jagdish Puri (163 ITR 458).*** *In the present case, the Appellant has failed to claim the existence of the status Association of Persons (AOP) in the return of income. Further, the Assessing Officer is empowered to change the status after giving an opportunity to be heard if there is material available in his possession requiring to change the status in the assessment as claimed in the return of income. However, it is not right of the Assessee to claim the status independently and separately by a reply whereas it failed to claim the same status in the Return of Income filed ten days later than the reply filed voluntarily. The case laws relied upon by Learned Counsel are not applicable to the facts of the present case since facts of the present case are different from the facts of the cases relied upon by Learned Counsel. Therefore, the contentions of Learned Counsel cannot be acceded to which are hereby rejected. Keeping in view of above facts and circumstances of the case as well as respectfully following the judgments (supra), there is no infirmity in the status adopted by the Assessing Officer in the assessment order on the basis of status claimed by the Appellant in the Return filed in response to notice issued u/s 153A. Hence, the validity of the status as Firm adopted in the assessment order is hereby confirmed and first ground of appeals hereby dismissed."*

Being aggrieved, now the assessee is further in appeal before us in all the three years.

7. From the side of the assessee, learned AR, Shri S.N. Soparkar and Shri Mukund Bakshi appeared. They has pleaded that the following persons have started the business of financing:

> *"1. Shri Jayesh R. Patel.*
> *2. Shri Nikul C. Patel*
> *3. Shri Chhotabhai Patel*
> *4. Shri Mukeshbhai J. Patel*
> *5. Shri Rameshbhai J. Patel*
> *6. Shri Rohitbhai Patel; and*
> *7. Smt. Alkaben N. Patel"*

7.1 Learned AR, Mr. Soparkar, Senior Advocate, has informed that the partnership under which the assessment was made was

constituted by two persons, namely, Jayesh Patel and Sri Nikul C. Patel. However, the business of the AOP was looked after by all the members. He has also tried to explain the activities handled by those persons. A query has been raised from the Bench that whether the AOP had filed any return of income. **The learned AR has informed that no return was filed by the AOP**. His argument was that a tax can only be recovered from those persons who have earned the income. The business was not carried out by the Firm but by the group of persons and they have joined hands with the intention to earn profit, therefore, the activity of the financing was required to be assessed in the status of the AOP. Few case laws relied upon were :

"1. ITO Vs. Ch. Atchiah 218 ITR 239 (SC)
2. M.V. Valliappan & Ors. Vs. CIT 170 ITR 238 (Mad)
3. ACIT Vs. Minor Janak Patel 80 TTJ (Ahd) 756
4. ITO Vs. K. Venkatesh Dutt 87 TTJ (Bang) 494
5. CIT Vs. Sriram Jagannath 250 ITr 689 (Raj) (HC)"

Learned AR has informed that certain documents were seized from the residence of Sri Nikul C. Patel such as balance sheet as on 30th of May, 2004, 30th of September, 2004, etc. Those Balance- Sheets have disclosed assets and liabilities in respect of the money lending business. Those papers did not belong to the Firm and Mr. Nikul C. Patel being the main person managing the affairs of the AOP, therefore, those assets and liabilities were connected with the AOP business. In respect of the **arrangement of the finance,** learned AR has drawn our attention at **page 22 of the paper book** consisting the names of **17 persons from whom a finance of Rs.3,57,67,032/-** was stated to be arranged by the alleged AOP. On that page there was a list of the persons to whom

the loan was advanced. Learned AR thus reiterated that the same was connected with the business of the AOP. He has also pleaded that the assets which were mortgaged were registered in the name of the family members on behalf of the AOP. In case of default on the part of the borrower, therefore, the AOP could take the action. That fact of the registration of the mortgaged property in the name of the members of the family thus proved that the business was not carried by the Firm but by a group of persons forming AOP.

8) From the side of the Revenue, Shri D.S. Kalyan and Sri T.P.Krishna Kumar, learned CIT-DRs appeared and pleaded that there was no evidence at all in respect of the creation of the AOP. **It was a concocted story having no supporting evidence. During the course of search proceedings, statement of one Sri Nikul C. Patel was recorded and at that time he had offered an amount of Rs.80,00,000/- but there was no mention of AOP by him.** The Revenue has conducted the search on the Firm and the group of cases and thereupon issued the noticed u/s.153A inviting the return of the assessee. In compliance, the assessee had furnished his return of income and that too was by this assessee in the status of **'Firm'**. There was no information either in the possession of the Revenue Department or informed by the assessee that there was an AOP on which a search action could have been made. The extract of certain account found at the residence of Mr. Nikul C. Patel were the details of the unaccounted income of the Firm. Even the bank accounts have also not demonstrated that those had no relation with the business of the Firm. Although, the

banks' account were maintained by those persons, but transaction had belonged to the business of the Firm. Ld. DR has pleaded that the assessee has informed that about 17 persons have contributed the funds, then why only 15 persons were named as the members of AOP? Instead only15 persons have claimed to be the members of the AOP. He has also distinguished the case laws cited from the side of the assessee. Learned DR has mainly contested that there was no evidence on record to establish the profit sharing ratio by the members of the AOP. Even the return of the Firm was filed by the assessee in the normal course, in any case, not under protest. He has placed strong reliance on the paper book filed by the Revenue Department containing the **statement of Sri Nikul C. Patel,** and the **seized material** recovered from the residence of Mr. Mukesh Patel and Mr Nikul C. Patel.

9) We have heard the submissions of both the sides at some length. We have examined the facts of the case. The undisputed fact is that the Revenue Department had carried out the **search operation in the name of the assessee, a Registered Firm, on 19.01.2006. Revenue has informed that the entire search related proceedings/ authorizations etc. were in the name of the said Registered Firm.** Thereafter all the proceedings, in consequence thereupon, were started in the name of the Firm. As far as the initiation of the search proceedings in the name of the Firm by the Revenue Department was concerned, the same was started on the basis of the information related to the Firm. Revenue Department even did not have the iota of information about the

existence of alleged AOP or that there was an AOP of the said members. In the absence of any information about the existence of the AOP, the Revenue Department was justified in implementing the search proceedings on the Firm. We have examined the statements and the relevant seized material to know as to whether the same belonged to the AOP as claimed/alleged by the assessee. We have found that the Revenue Department was fully justified in conducting the search operation on a person whose records were available with the Revenue Department. We hereby endorse the view of the Revenue Department that merely by making an assertion that the AOP was in existence, the same could not be accepted, unless and until supported by the clinching corroborative evidences. In the absence, it was nothing but a bald statement. It was asked on number of occasions to place on record any documentary evidence establishing the existence of the AOP, but the assessee had failed to place any such material on record. Naturally, an AOP ought to have been formed by execution of some document or deed duly signed by members of the AOP. Contrary to this, learned AR has pleaded that the **AOP was formed through oral agreements between those members. This plea has no basis; hence, the same is hereby rejected.** Before the date of search or even after the completion of search, there was no evidence altogether in respect of the existence of the AOP. The assessee had utterly failed to place on record any corroborative evidence in support of the alleged claim.

The decision, such as CH. ATCHAIAH, 218 ITR 239 (supra), was delivered to settle an altogether different controversy.

The context and the issue before the Honble Court was dissimilar from the issue in hand. Even the decision of **MV Valliappan and others 170 ITR 238** (supra) was in the context of "charging section". These orders are connected with the general provisions of IT Act. Undisputedly a "right person" is to be taxed and the assessment ought to have been made in respect of that person. But presently before us this is not the controversy but the controversy is that the assessee has failed to establish even the 'status' as per law of that "Person". Even, the presence of the banks' account have not established, remotely, the formation of the AOP. Otherwise also, an account of the Firm can be opened in the name of the persons either individually or jointly, but that does not establish the 'status' for Income Tax purpose. That apart, for opening an account in the bank a declaration, whether Individual/HUF/AOP/Firm, is required to be made on the application form, however, that too in support of the claim is not produced. Further, the partners have the option to involve the family members. In such a situation those family members do not run the business in their individual capacity but they definitely run the business in the name of the Firm; as if representing the affairs of the Firm. In all respect such persons who have dealt with business, were not in the capacity of a member of an association of persons, but represent the business of the Firm. If the AOP was in existence then the same could have been informed to the Revenue Department at the time of the search. In support of this finding we place reliance on **Associated Cement and Steel Agencies 147 ITR 776 (Bom.).**

9.1) Under the section of **"definitions"** the Act prescribes that "person" includes an 'Association of Person' or body of individuals, **whether incorporated or not as per Section 2(31) of IT Act.** We have examined this section in some detail below.

9.2) As far as the assessment of an AOP is concerned, the law is absolutely clear that the status of AOP must exist perfectly in the eyes of law. Under the definition of 'persons' under Section 2(31) an **AOP is a judicial entity**, therefore, its existence should be recognized by a judicial authority. Such judicial entity is therefore required to be formed by observing certain judicial norms. Only a claim, not supported by an independent legal sanction, is nothing but a mere verbosity. Even the fallout of the decision of ITO V/s. **Ch. Atchaich 218 ITR 239 (SC)** (supra) is that if the parties offer their respective income and also get themselves assessed independently, but if the AO wants to initiate action for a collective assessment under the status of AOP then such approach is going to create a hardship. Rather, in a situation when an assessment has regularly been made continuously in the hands of the firm then the AO should be precluded to take any action to assess under any other status. While studying this issue of alleged existence of AOP, we have come across a precedent, namely**, Milan Supari Stones, 184 ITR 106 (MP),** wherein a raid was conducted at the business premises of the firm, as well as at the residence of the partners. They have found that the assessee firm and certain other firms have common partners, therefore, issued notice u/s. 148 to assess the group of firms as "association

of firms". It was held that to treat the assessee and other firms as "association of persons" was not valid because of two reasons:- (a) there was not evidence to show that the assessee formed the alleged AOP and (b) the registration of the firm was not cancelled meaning thereby the business of the firm was in existence. Therefore in the absence of these ingredients it was unjustified on the part of the assessee to stress upon to assess as AOP.

9.3) **AOP is a juristic legal entity**. Thus being a judicial person is subject to assessment, thus, has to be formed by combination of persons for the purpose of a joint venture duly recognized by an authority of law. If possible, and in the interest of claimant, the creation of AOP can also be witnessed by an instrument. The *locus-classius* on the subject as to what constitute AOP, the Hon'ble Apex Court in the case of **Indira Balakrishna 39 ITR546(SC)** has opined that a group of persons can be held to be liable to assessment as an Association of Persons, but there should be a definite creation. In order to constitute an association, persons must join in a common purpose or common action and the object of the association must be to produce income, but it is not enough that the persons receive the income jointly.

10. In this manner as also under the totality of the facts and circumstances of the case, grounds being identical for all the three years, are hereby rejected.

B. Revenues's Appeal (For A.Ys. 2005-06 and 2006-07) (ITA No. 2691 & 2692/Ahd/2009)

11. Revenue's appeals are arising from the orders of learned CIT(A)-IV both dated 31st March, 2009. For these two years Revenue has raised almost identically worded grounds of appeal, reproduced from the lead year, i.e., A.Y. 2005-06 as under:

The Ld. CIT(A) has erred in law and on facts and circumstances of the case in directing AO to ***allow the telescoping of addition of Rs.3,60,38,841/- (1,15,49,288/- for A.Y. 2006-07) on account of unexplained loans received by the assessee against income of AOP after verifying from the seized material available, when assessee has not filed return of AOP.***

2. The Ld. CIT(A) has erred in law and on facts and circumstances of the case in directing AO to allow the ***telescoping of*** *addition of Rs.31,73,559/- on account of* ***profit earned*** *as per seized Annexure A-9 assessee against income of AOP after verifying from the seized material available, when assessee has not filed return of AOP.*

3. The Ld. CIT(A) has erred in law and on facts and circumstances of the case in directing AO to verify from the seized material available in the possession of AO whether all additions are covered in telescoping of income of AOP on the basis of ***profit earned from unaccounted money lending business*** *as well as working out of* ***addition on the basis of incremental peak credit*** *which amounts to setting aside the assessment."*

12. At the outset, we have noted that the grounds raised by the Revenue Department are raising issues revolving around the computation of the correct income in the hands of the Firm instead AOP. Learned CIT(A) has decided the merits of the case by discussing each addition and dismissed the plea of the assessee that the assessment be changed to the status of AOP but the adjustment would be allowed. Rather, learned CIT(A) has given a categorical finding that the AO had correctly made the assessment in the status of "partnership firm".

13. **Alternatively**, the assessee has raised a plea that **a peak of all the transactions** could have been considered by the AO. In this connection, the arguments of learned counsel before learned CIT(A) was as per para 17.1, as follows:-

"The Fifteenth Ground raised in this appeal is that the Assessing Officer was not justified in making an addition of Rs.2,55,150/- in respect of profit earned on sale of flat for a consideration of Rs.6,71,000/- and advance given, of Rs. 4,00,000/- to Shri S.K. Setia (Kulvindersing H. Setia) and interest of Rs. 15,850/- on the basis of Annexure - A/19 (Page No.114 & 115) seized from the residence of Shri Nikul C.Patel, Partner of the Firm. This investment was made out of the balance from the ***cash flow statement*** *where the* ***unexplained receipt is quantified as unaccounted income.*** *In the course of search, Shri Nikul Patel vide his statement dated 20.01.2006 i.e. the date of search, had made a disclosure of an amount of Rs. 80.00 lakhs in response to question No. 50. On the above, the appellant prays that the same be considered as covered and* ***telescoped in such undisclosed income*** *shown in the Cash flow statement. Learned Counsel pleaded further that the peak or highest of all the transactions taken together during the financial year relevant to the Assessment Year under consideration is the method adopted by the Assessing Officer for calculation of undisclosed income on the basis of peak credit worked out in the cash flow statement prepared after search in the form of cash book prepared on the basis of seized material copy of which were supplied by the Department to the Appellant. All the transactions should have been considered jointly. So, the addition of Rs.1,04,490/- in respect of interest income relatable to advance given to Shri S.K. Setia on the basis of Annexure - A/19 (Page No. 114 & 115) seized from the residence of Shri Nikul C.Patel, Partner of the Firm, is covered by undisclosed income which is contended to be reflected in the consolidated cash flow statement of the Firm.*

17.1 Learned Counsel pleaded that the peak or highest of all the transactions taken together during the financial year relevant to the Assessment Year under consideration is the method adopted by the Assessing Officer for calculation of undisclosed income on the basis of peak credit worked out in the cash flow statement prepared after search in the form of cash book prepared on the basis of seized material copy of which were supplied by the Department to the Appellant. All the transactions should have been considered jointly. So, addition made is covered/undisclosed income which is contended to be reflected in the consolidated cash flow statement of the Firm. On the above, the appellant prays that the same be considered as covered and telescoped in such undisclosed income shown in the Cash flow statement.

25.0 The twenty-third ground raised in this appeal is regarding claim of the appellant of ***principle of telescoping and matching of income*** *of total unaccounted activities carried out of the Appellant on the basis of cash and fund flow statement submitted by the Appellant before the Assessing Officer.*

Learned Counsel pleaded that the total unaccounted business was conducted out of the books of account and on the basis of which cash flow statement was prepared which should have been taken into consideration while making the additions in the present case where the unexplained receipt is quantified as unaccounted income. Ld. Counsel further contended that ***if theory of peak is accepted as correct method of working out of undisclosed income then all other additions are not required to be made.*** *Hence, Ld. Counsel further contended that when there is an addition of peak balance, there cannot be separate addition in respect of different items which are either included or made out of peak balance. The AO ought to have reduced the incremental peak in the next year to the extent of the undisclosed income declared by the appellant during particular earlier assessment year and difference should have been added. "*

14. After considering the aforementioned submission of the assessee, learned CIT(A) has given direction as follows:

"Keeping in view of above facts and circumstances of the case as well as respectfully following the judgments (supra), all the transactions should have been considered jointly on the basis of Peak Credit reflected in the Cash Flow statement on the basis of seized documents. So, ***Assessing Officer is directed to verify from seized material*** *available in his possession whether all additions are covered in the telescoping of income earned on the basis of unaccounted business and the* ***amount of profit earned from unaccounted money lending*** *business as well as working out of addition on the basis of incremental peak credit. Hence, the twenty-third ground of appeal is Partly allowed."*

15. On this issue, we have heard both the sides. It is an established way of computation of income where ever there is **recycling of cash** in a financial business to work out the peak credit. Particularly in a situation, when no regular or proper books of account are maintained by the assessee then a **cash flow statement** is generally prepared. The department then makes an addition on the basis of the **peak credit,** as appearing in the cash-flow-statement, if there is recycling of cash. That peak credit is thus treated as an unexplained income of the assessee. But that working ought not to be final. Certain other factors are also

required to be taken into account, as suggested in the Grounds of Appeal by the Revenue. As far as the assessee is concerned, the undisputed fact is that on the basis of the seized material a cash follow statement was prepared which was supplied to the AO. After the search, the working of the said cash flow statement was, therefore, required to be examined by the AO, that too after due verification from the seized material. We are of the view that **a cash flow statement which was prepared on the basis of the seized material must not be ignored.** Once the assessee is in the business of finance then the assessee is required to furnish the cash flow statement, so as to arrive at the figure of the incremental book credit, as per the prevalent practice. We are taking this view on the basis of decision of Hon'ble Gujarat High Court pronounced in the case of **Pipush Kumar O. Desai, 247 ITR 568 (Guj.)**, wherein a cash flow was prepared by the assessee after the conclusion of the search. That was directed to be considered, especially when there was absence of books of account. On the basis of the cash flow statement the availability of cash was accepted.

Next, in the case of **Swaroop Chandra Kojuram, 235 ITR 732**, wherein the question before the Hon'ble High Court was whether the benefit of **peak credit theory** could or could not be granted to the assessee. The Hon'ble Court has held that it was not a referable question of law. It was pleaded, quote "***it was submitted that a refinement or extension of the peak theory occurs where the credits appear not in the same account but in the accounts of different persons. If the genuineness of all the***

persons is disbelieved and all the credits appearing in the different accounts are held to be assessee's own money, the assessee will be entitled to a set off and a determination of the peak credit after arranging all the credits in chronological order. It was admitted that these propositions should not, however, be treated as propositions of law. They are inferences based on normal probabilities and can be displaced by material on record which may indicate facts to the contrary." unquote. It was held by the Hon'ble Court that the theory of peak credit presupposes an adverse finding against the petitioner that certain borrowings made by the petitioner from the cash creditor were the borrowings from non-genuine creditors and therefore the same is to be treated as unexplained fund-borrowing to the assessee. Having found, the borrowings had been made from various characters which were not genuine, the question of law arises so as to determine the quantum of the addition to be made under the theory of incremental peak credit to be applied so as to ascertain the maximum amount which the petitioner had in the books of account at particular date during the year which is to be treated as non-genuine.

So the **logic behind the applicability of the peak credit** theory is that if the borrowing from various persons is to be treated as non-genuine then systematic repayment to such person should also be treated as non-genuine. Such recycling thus constituted **unexplained credits and unexplained debits**, thus, accordingly a **netting of the two** is required to be worked out from the cash flow statement. In the back-ground of the above observations it can

finally be summarized that the procedure to be followed by the A.O. ought to be to first work-out the interest income generated from the finance business, on one hand, and the interest paid to the parties as per seized material, so as to arrive at the net figure of interest earned from the finance business. Thereupon, the net investment is to be worked out, which shall be the difference between the borrowings from the parties and the loans advanced to the parties. The third figure is the incremental peak as computed on the basis of the cash flow. Then the A.O. is required to decide whether the net undisclosed investment in the finance business is to be taxed or the net undisclosed finance business income is to be assessed. In any case the telescoping amongst these two computations are permissible in such type of working. These suggestions are not exhaustive so the A.O. is directed to finalize the correct figure of net addition as per law and as per the accounting principles. We hold accordingly.

15.1 During the course of hearing, when this question of working of the incremental peak cash credit was argued, learned AR has drawn our attention on the order given effect to the orders of learned CIT(A) u/s. 250 of IT Act for A.Y. 2004-05, 2005-06 and 2006-07. It is contested that the AO has not correctly appreciated the directions of learned CIT(A) and there was a default in giving the effect to the order of learned CIT(A). **Now the present position is that the aforesaid directions of learned CIT(A) have now been challenged by the Revenue Department in the grounds of appeal as reproduced above.** Therefore, the said directions are now required to be modified in the light of the

directions presently given in this judgment by us. The aforesaid directions of learned CIT(A) thus stood merged with the fresh finding given in this judgment of the Tribunal. We, therefore, direct the assessee to co-operate with the Revenue Department in preparation of a cash flow statement on the basis of the seized material and thereupon compute the incremental peak credit in respect of the findings of the assessee. As a result we hereby resolve the controversy. The effect of the above finding is that the grounds raised by the Revenue stood allowed but restored back with directions to adopt the correct way of computation of undisclosed income, needless to say as per law.

16. To sum up, the issue raised by the assessee to assess the income in the status of AOP is hereby dismissed. However, the income of the Firm is required to be assessed as per the direction made hereinabove, resultantly, the appeals of the Revenue are allowed for statistical purpose.

C. **Assessee's Appeal (ITA No. A.Y. 586, 587, 588/Ahd/2012) (For A.Y. 2004-05, 2005-06 and 2006-07)**

18. These three appeals have been filed by the assessee against the orders of learned CIT(A)-IV, Baroda, dated 19.09.2012. The assessee is aggrieved by the confirmation of penalty levied u/s. 271(1)(c) of IT Act. For A.Y. 2004-05, a penalty of Rs.54,39,500/-, for A.Y. 2005-06 penalty of Rs.65,33,600/- and for A.Y. 2006-07 penalty of Rs.10,88,527/-

was imposed u/s.271(1)(c) which was affirmed by learned CIT(A), hence the assessee is in appeal before us. Facts being identical, therefore, these appeals are consolidated and hereby decided by this common order.

19. Facts in brief as emerged from the corresponding penalty order passed u/s.271(1)(c), dated 18.03.2011 for the years involved are that a search u/s.132 was carried out on the assessee on 19th of January, 2006. The assessee was found to be in the business of money lending. For A.Y. 2004-05, the assessment was made u/s.143(3) r.w.s. 153A of the IT Act and the total income was determined at Rs.4,96,645/-. For A.Y. 2005-06, the total income was determined at Rs.4,11,01,180/- and for A.Y. 2006-07, the total income was determined at Rs.1,29,06,408/-. For these years, the assessee preferred an appeal and learned CIT(A) has recorded the contention of the assessee in respect of assessment in the status of AOP, however, a direction was given that all the transactions were required to be considered jointly on the basis of the peak credit reflected in the cash flow statement to be prepared on the basis of the seized documents. The AO was directed to verify from the seized material available whether all the entries are reflected to arrive at the incremental peak. Side by side it was also to find out the unaccounted business profit earned to be telescoped against the unaccounted money lending business investment of the assessee. The AO had worked out the alleged unexplained peak credit and that was made the basis for levy of impugned penalty. According to AO, the assessee had concealed particulars of the

income, therefore, subjected to levy of penalty u/s. 271(1)(c) of IT Act. When the matter was carried before the first appellate authority, the view was taken in favour of the Revenue as follows:

"Subsequent to passing of above appeal order of CIT(A)-IV, Ahmedabad the AO while giving effect to such appeal order worked out the unexplained cash credit/unsecured loans of Rs.45,77,096/- and the unexplained capital balances in the name of partner of the assessee firm at Rs.1,05,85,211/- on the basis of entries found in the seized materials/documents and balance sheet as on 31.03.2004. In the appeal effect order, after adding the above two amounts of Rs.45,77,096/- and of Rs.1,05,85,211/-, the net amount of addition was worked out at Rs.1,51,62,307/- in view of above direction of the Ld. CIT(A). Now in view of ground of appeal No.2 of the appellant, the question arises whether the entire basis of addition is altered and in the impugned order and the income is quantified on a basis which is entirely different than the one which existed in the assessment made by the AO and hence the basis on which the satisfaction for initiation of penalty having been altered in its entirety, the penalty is unsustainable and unwarranted. In my opinion, the issue raised by the appellant as per the ground of appeal no.2 is not only incorrect and untenable but also devoid of any merits. The undisputed fact is that the addition was made in the case of appellant for the year under consideration on the basis of 'incriminating documents' (i.e. as per Annexure-A/17) and this addition was duly confirmed by the Ld, CIT(A) and the Ld. CIT(A) after considering the facts and circumstances of the case has clearly mentioned in his appeal order that no interference is called for in making addition on this account. Thus the Ld. CIT(A) has dismissed the appeal of the appellant. ***However, the Ld. CIT(A) in view of request of the appellant and also after considering the facts and circumstances of the case and in view of decisions of various Hon'ble Courts has only directed the AO to verify those seized materials available in his possession and to find out whether all additions are recovered in the telescoping of income earned on the basis of unaccounted business and the amount of profit earned from unaccounted money lending business as well as working out of addition on the basis of incremental peak credit.*** *At this place the point to be noted is that in the case of appellant order u/s. 143(3) r.w.s, 153A of the IT Act have been passed for the year under consideration as well as for A.Y. 2005-06 and 2006-07. The very fact is that in all these three assessment years, the. additions have been made in the case of appellant on the basis of incriminating documents impounded /seized during the course of survey and search action and such additions have duly been confirmed by the CIT(A) by dismissing the appeals of the appellant. Thus, the very basis of addition is not altered at all. The only thing is that the Id. CIT(A) has directed the AO to considered all the transactions jointly on the basis of peak credit as reflected in the cash flow statement on the basis of seized documents. Thus, the Ld. CIT(A) has asked the AO to follow certain method of working the quantum additions and that*

too only on request of appellant which was made before him during the course of appellate proceedings. The additions in the case of appellant have mainly been made on the basis of incriminating documents, but the ld. CIT(A) wanted to ensure that all the additions made in the case of appellant for the above three assessment years are covered in the telescoping of income earned on the basis of an unaccounted business. Thus, I fully agree with the view of the AO that the bases of additions are not changed, but certain method of working has been adopted for computing such undisclosed income. In my opinion the ld. CIT(A) has adopted a very judicious an well accepted method of working of peak credit and while following the direction of ld. CIT(A), the AO has given effect to his appeal order for above three assessment years and as a result of which the undisclosed income in a particular assessment year has been partly reduced and in particular assessment year has been partly increased. ***The very source on the base of additions in the case of appellant for the year under consideration is only seized materials as found during the course of search/survey action and in appeal effect order only figure/quantum of such addition due to following the direction of Ld. CIT(A) of telescoping of income on the basis of incremental peak credit has been changed. Thus, the basis or nature of addition for all these three years have not been altered as contented by the appellant, but only re-working of quantum additions has been done. In all these three assessment years, the undisclosed income of the appellant have been computed on the basis of incriminating documents only irrespective of the fact that for a particular year the income is partly reduced and for a particular year the income is partly increased due to following certain method of working, but the very fact remains that the unaccounted income was computed by the AO on the basis of incriminating documents for all these three years and such additions will certainly attract the provisions of Section 271(1)(c) of the IT Act."***

19.1 From the side of the assessee, few case law cited are as under:

1. ITO Vs/ Goldpar Hosiery Mills & Knitwears, 77 ITD 340 (chd.)
2. Standard Salt Works Ltd. V/s. ITO, (2001) 73 TTJ (Ahd) 71.
3. ACIT V/s. Pardeep Publication, (2010) 130 TTJ (Asr)(UO) 92.

20. The current position is that the main appeals of the Revenue as well as the appeals filed by the assessee challenging the addition made as per the assessment order for the respective years

are now restored back to the file of the AO to re-determine the quantum of the addition as per the direction hereinabove. Since, the quantum of appeals are restored back for re-adjudication to the file of the AO, therefore, the very basis of levy of concealment penalties are simultaneously to be decided afresh along with the assessment order.

21. In the result, these appeals are allowed for statistical purposes only.

C. **Revenue's Appeal (ITA No.2689 & 2690/Ahd/2009) (A.Y.2005-06 & 2006-07)**

22. These two appeals have been filed by the Revenue arising from the order of learned CIT(A)-IV, Ahmedabad, both dated 31st of March, 2009. From the side of the respondent a legal heir, namely, Smt. Meenaben Mukesh Patel (wife) is brought on record. For both the years, Revenue has raised the grounds as under:-

"The Ld. CIT(A) has erred in law and on facts and circumstances of the case in ***deleting addition of Rs.16,46,300/- on account of short term capital gain on account of sale of land.***

On the facts and in the circumstances of the case, the Ld. CIT(A) ought to have upheld the order of the Assessing Officer on the above points."

23. Facts in brief as emerged from the corresponding orders for A.Y. 2005-06 and 2006-07, respectively, passed u/s. 143(3) read with section 153A(b), both dated 14.08.2008, were that consequence upon a search u/s. 132 of IT Act carried out in the

case of M/s. Jayesh Finance, the assessee was served with the notice and the proceedings were initiated u/s. 153A of IT Act. During the course of survey at the residential premises of Sri Mukesh J. Patel, certain documents (purchase deed) were found pertaining to nine plots at Arihant Park House, Jhathodiya. On the basis of those documents, action was taken in the case of the said firm and a protective assessment was made in the case of the assessee as follows:

"A search proceedings was conducted at the residential premises of Shri Mukesh J Patel, who is "benami" of the assessee. The assessee has also vide para 29, page 24 of its submission dated 29/07/2007, has accepted that Shri Mukesh J Patel is acting as benami of the firm (AOP, the imaginary entity of the assessee). During the course of search at the residential premises of Shri Mukesh J Patel Annexure A/2 was found and impounded Page 8 of said annexure A/2 demonstrates the details of nine plots at Arihant Park House, Jhathodiya, in the form of purchase deed. This transaction is also supported by annexure A/19, a loose paper file containing 1 to 85 pages, impounded from the office premises of the assessee during the course of survey. The assessee was asked to furnish the details of the same. In response thereto, the assessee has stated that this purchase deed dated 02/06/2005 is from Jayesh Indravadan Shah for Rs.1,95,000/-. Shri Jayesh I Shah is one who who was lent loan Rs.8,50,000/- by the assessee by way of account payee cheque. Later, Shri Jayesh I. Shah was not able to repay; the loan of Rs.8,50,000/-, therefore, the said 9 plots of land was transferred in the name of Shri Mukesh J Patel, benami of the assessee firm. In the same context, during the course of survey at the office premises of the assessee, annexure A/19 & A/21 were impounded. Page No.5 to 17 of annexure A/19 are sale deed for a plot dated 08/07/2004 between Shri Mukesh J. Patel, seller, and Shri Navinchandra Ambalal Patel, buyer for a consideration of Rs.1,59,700/- In this context, it is pertinent to mention here that Shri Nikul C. Patel, PAO holder has transferred plot Nos.15, 19, 31, 35, 38, 92, 42, 43 & 44 of land bearing R.S. No.188/1/2b/3/4 in the name of Shri Mukesh J PateJ benami of the assessee, The assessee was asked to explain these transactions. In response thereto, the assessee repeats the story of AOP. Therefore, it is held that the assessee failed to submit valid reply. For want of valid reply, I have no any other alternative but to add Rs.14,37,300/- (Rs.1,59,700x 9 plots). Similarly, out of these nine plot a plot No.19 was sold at the consideration of Rs.3,70,000/- on 10/11/2004 by the assessee. Since an amount of Rs.1,59,700/- has already been covered in Rs.14,37,300 the difference i.e., Rs.2,09,300/- (Rs.3,70,000 minus Rs.1,59,700) has been added to the total income of the assessee as short term capital gain on account of sale of land.

Since, the assessee is benami of M/s. Jayesh Finance, addition to the extent of Rs.16,46,600/- is made on protective basis in the hands of the assessee. Penal proceedings u/s. 271(1)(c) of the Act are initiated."

24. When the matter was carried before learned CIT(A), it was held that the AO is to verify from the cash flow statement that the amount of profit earned from the sale transaction of those plots is covered in the incremental peal and the assessment is to be made **in the hands of the firm on substantive basis**. The directions of the learned CIT(A) was as under:

I have carefully considered the contentions of learned Counsel as well as gone through the records. I was held in case of M/s. Jayesh Finance that status of Association of Persons (AOP) was not in existence since M/s. Jayesh Finance itself had claimed status as Firm while filing its Return of Income. The Assessing Officer has to make assessment on the basis of declared status in the Return of Income for the purpose of assessment. Further, it may be mentioned here that the Assessing Officer, in the present case, has a specific and assigned jurisdiction u/s 127(2) of Income-Tax Act, 1961 vide order No.BRD/CIT-II/Juris/2006-07, dated 30.06.2006 issued by the CIT-II, Baroda, after conduct of search u/s 132 on the basis of which case was transferred to him of Partnership Firm M/s. Jayesh Finance only w.e.f. 01.07.2006 (and not of Association of Persons as now claimed by the Appellant since the residuary jurisdiction lies with territorial Assessing Officer). It was held by Hon'ble Bombay High Court in case of CIT v/s. Associated Cement and Steel Agencies (147 ITR 776) that where a return was submitted in the status of a Firm, the assessment in the status of an Association of Persons (AOP) was not permissible. Similar view was also held by Hon'ble Rajasthan High Court in case of CWT v/s. Jagdish Puri (163 ITR 458). The Assessing Officer had already made this addition in case of the Partnership Firm M/s. Jayesh Finance, therefore, addition of Rs.16,46,300/- as benami of M/s. Jayesh Finance on protective basis in respect of sale of plots to various persons as these were transacted by the Appellant on behalf of the Partnership Firm. Therefore, the income itself has to be taxed in the case of the Partnership Firm. This amount was received and recorded in the cash book/cash flow. Since the income has been included in the cash book, the same b considered as covered and telescoped in such income vide submission dated 29.07.2008 submitted before Assessing Officer during assessment proceedings. The business of money lending was not recorded in the books of accounts and, therefore, the entire business from such activity was income from unaccounted business. Keeping in view of above facts and circumstances of the case, where ***the income itself has to be taxed in the case of the Partnership Firm,*** *then it could not be taxed in the case of the Appellant. Therefore, Assessing Officer is directed to verify from seized material available in this possession whether this income is covered in the cash flow statement the amount of profit earned from unaccounted sale*

transactions of plots to various persons on the basis of incremental peak credit in case of the Partnership Firm where it was added on substantive basis. Further, ***the addition on protective basis in case of the Appellant is hereby deleted*** *with the directions to the Assessing Officer to consider this amount of addition in case of the partnership Firm on substantive basis of cash flow statement and incremental peak credit in case of the Firm. Hence, the single ground of appeal is allowed."*

25. After hearing both the sides, we are of the view that there was no fallacy in the directions of learned CIT(A). The case of M/s. Jayesh Finance has already been discussed in details in above paragraphs. In those paragraphs, we have directed the AO to compute the unaccounted income from Finance business, on one hand and on the other hand, the AO is directed to determine the incremental peak credit on the basis of the cash flow statement and then the unexplained investment in the finance business should be set off against the unaccounted income if found invested in the finance business. Only the balance, on netting, is required to be assessed on substantive basis in the hands of the firm. Since, we have already given these directions; therefore, on the same lines these two appeals are hereby decided. Hence, the grounds taken by the Revenue has no legal force therefore dismissed.

26. In the result, these two appeals of the Revenue are hereby dismissed. Overall result is as under:-

(a). ITA No. 2691 & 2692(Revenue's Appeal) Allowed for statistical purpose.

(b). ITA No.236, 237 & 238 (Assessee's Appeal) Dismissed.

(c) ITA No. 586, 587 & 588 (Assessee's Appeal) Allowed for statistical purpose.

(d) ITA No. 2689, 2690 (Revenue's Appeal) Dismissed.

Sd/-	Sd/-
(T.R. MEENA)	**(MUKUL Kr. SHRAWAT)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Ahmedabad; Dated 31/10/201
Prabhat kr. Kesarwani, Sr. P.s.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त (अपील) / The CIT(A)-III, Ahmedabad
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad