**"The I.T. department filed an Affidavit in MP 41 of 1999 to rejoin the Affidavit of Smt Pratima Mehta in which false and misleading averments were made that there was no fault of the department, statutory or procedural in framing the assessment orders and its orders had not distorted the assets and liabilities picture and also denied that its assessment orders were high-pitched."**

IN THE SPECIAL COURT (TRIAL OF OFFENCES RELATED TO TRANSACTION IN SECURITIES) ACT, 1992 AT BOMBAY

IN THE MATTER OF M.P. NO. 41 OF 1999.

The Custodian.

Vs.

1. LATE SHRI HARSHD S. MEHTA
   LEGAL HEIRS OF SHRI HARSHAD S. MEHTA.
1(a) SMT. JYOTI H. MEHTA
1(b) SMT. RASILA S. MEHTA
1(c) SHRI AATUR MEHTA
2. SMT. DEEPIKA MEHTA
3. SMT. JYOTI MEHTA
4. SMT. PRATIMA MEHTA
5. SHRI SUDHIR S. MEHTA
6. SHRI ASHWIN S. MEHTA
7. SHRI HITESH S. MEHTA
8. SMT RASILA S. MEHTA
9. SMT REENA S. MEHTA
   Residing at Madhuli,
   Dr. A.B.Road,
   Worli,
   Mumbai – 400 018.

I, Shishir Srivastava,, Joint Commissioner of Income Tax (OSD), Central Range –7, Mumbai, do hereby solemnly affirm and sincerely state on the basis of records available and legal advise given to me as follows:

1. I am the Joint Commissioner of Income Tax (OSD), Central Range-7 Mumbai and as such am well acquainted with the facts of the case and competent to swear to this affidavit on the basis of papers and proceedings and the legal advice given to me.

2. I have carefully examined the affidavit filed by Mrs. Pratima H. Mehta dated 5.4.2006. On the basis of the records including various proceedings before the judicial and

quasi-judicial authorities and based on legal advise, I am filing this reply affidavit. I however reiterate the averments that are contained in my affidavit dated 28.02.2006 and 05.04.2006 deny the statements made on behalf of the fifth respondent which are in any way inconsistent thereto.

3. The entire edifice of the affidavit on behalf of the fifth respondent is based on an erroneous presumption that the monies which have been disbursed to the revenue towards income tax liabilities should only be treated as deposits thereby equating the amounts towards loans and not towards tax liabilities. This supposition is fundamentally erroneous. The amounts were directed to be paid to the income tax department by orders of this Hon'ble Court in accordance with the provisions of the Special Courts (Torts) Act, 1992 and in accordance with the principles laid down by the Hon'ble Supreme Court interpreting the provisions of the said Act in the case of Harshad Shanthilal Mehta Vs Custodian and others **(1998) 5 SCC 1**. The respondents herein have also misconstrued the judgment of the Hon'ble Supreme Court in the case of Aswin S Mehta Vs Custodian **(2006) 2 SCC 385** to make submissions that the amounts directed to be released towards tax liabilities should only be treated as refundable deposits contrary to the spirit and intent of the judgment of this Hon'ble Court and the very judgment relied upon. The claim by the respondents that in view of the assessment order now having been set aside by

the Hon'ble Income Tax Appellate Tribunal on procedural infirmities viz., on the ground of natural justice cannot change the basis of the disbursements made by judicial order and does not automatically warrant refunding the said sums collected or invest the said sums with some other authorities in interest bearing deposits. There is no direction by the Income Tax Appellate Tribunal to refund the tax collected and there could not have been such direction in the very nature of the facts and circumstances in which the order was passed by the Income Tax Appellate Tribunal which accepted the plea of the respondents to give one more chance. In fact, in the very application filed before this Hon'ble Court, in para 2, it has been stated by the respondents as follows:

> "I say that due to the development of several unforeseen and unfortunate incidents, I could not make full compliance and effectively defend my case. I say that now special efforts are being made by me to restore normalcy and enhance compliance."

4. At this juncture, it is relevant to point out that even the Hon'ble Supreme Court in the recent judgment in **(2006) 2 SCC 385** referred to above has taken note of the fact that the question with regard to the mode and manner of disbursement of the amount so far as the tax liabilities and the modus operandi resorted to by the appellants. The Hon'ble Supreme Court has duly taken note of the fact that there were instances of transactions resorted to by the respondents herein which disclosed the modus operandi to the effect that the monies were diverted from banks and financial institutions by late Harshad Mehta which were in

turn diverted to his family concerns and family members. These monies were used for speculative transactions and securities and the proceeds generated were used for acquiring assets. After taking note of the above submissions, the Hon'ble Supreme Court wanted this Hon'ble Court to go into these aspects. However, it is relevant to point out that the notified parties are now seeking to project themselves as innocent persons and as though public authorities including the Income tax department which acts in public interest seeking to victimize the respondents herein. But however, a perusal of the Janakiraman Committee report as well as the report of the Joint Parliamentary Committee would expose the entire scheme including the conduct and role of Shri Harshad Mehta and his family members and therefore the statement projecting the respondents herein that they have always been law abiding citizens appears to be self serving and without any basis. The present application itself is wholly misconceived is liable to be dismissed in the light of various orders that have been passed by this Hon'ble Court from time to time and the judgment of the Hon'ble Supreme Court coupled with the provisions of the Special Courts (Torts) Act and the conduct of the respondents apart from larger public interest.

5. I respectfully submit that the amounts were directed to be released to the Income Tax department only after ascertainment of liabilities and that be so when at the point

of time and even now the amounts were disbursed cannot be construed to be deposits as projected by the respondents. Merely by reason of the Hon'ble Income Tax Appellate Tribunal setting aside the assessment order not on merits but on a procedural basis would not warrant the consequences presumed by the respondents. The judgment of the Hon'ble Supreme Court have to be understood in the context in which it was given and it is not subject to the above amount which was collected in the past after ascertainment of liability. The Hon'ble Supreme Court was only adverting the well settled legal position with regard to future payments as would be evident from the express language of the judgment. The judgment of the Hon'ble Supreme Court should be read in the context of other observations made with regard to the conduct of the respondents and qua the tax liabilities. It could have never been the intention of the Hon'ble Supreme Court to whittle down or negate the effect of Proviso (a) to section 240 of the Income Tax Act and on a careful reading of the judgment of the Hon'ble Supreme Court, there is no contrary direction by the Hon'ble Supreme Court than the one stipulated as per the proviso (a) to section 240 of the Income Tax Act which reads as follows:

> *"S. 240 – Where, as a result of any order passed in appeal or other proceeding under this Act, refund of any amount becomes due to the assessee, the Assessing Officer shall, except as otherwise provided in this Act, refund the amount to the assessee without his having to make any claim in that behalf:*

*Provided that where, by the order aforesaid,-*

*(a) an assessment is set aside or cancelled and an order of fresh assessment is directed to be made, the refund, if any, shall become due only on the making of such fresh assessment;"*

6. I emphatically deny the allegations contained in para 2 that the Income tax department had sought to over-pitch the demands or take advantage of any situation. The best judgment assessments were passed only in accordance with the well settled principles and materials available on record in view of non-cooperation by the respondents. The respondents were not bonafide in their approach and appears to have adopted 'wait and watch' policy as held by this Hon'ble Court. It would be relevant to point out that any order on Miscellaneous Application 41 of 1995, this Hon'ble Court has held as follows:

> "It is clear to the court that the reason why estimate was not filed before the Income Tax Authorities or before this Court, is because the respondents or any of them do not want to commit anything on oath or disclose all their assets. The idea appears to be to stay quiet and let the Income Tax Authorities or C.B.I. or the Custodian discover whatever they can. The idea appears to be wait and see what is discovered and then not disclose anything else. This could not be permitted. The court sees no difficulties in proper accounts being taken or prepared under/or estimates

being filled. This is purposely not being done. Under the I.T. Act, penalties might be imposed. At this prima facie stage the submission that there would be Nil income is not acceptable".

I further state that the assessment orders have been framed in accordance with law and are not arbitrary as stated by the applicant. I further submit that the Income Tax Act, provides for the Best Judgement Assessment. The Assessing Officer has been vested with power and authority to make an Assessment to the Best of his Judgement under section 144 of the Income Tax Act, 1961, when an assessee commits one of the defaults mentioned therein. The section enjoins that on any one or more of these defaults happening, the Assessing Officer after taking into account all relevant material, which he might have gathered, shall, after giving the assessee an opportunity of being heard, make a best judgment assessment. In case of Harshad Mehta and other scam related cases, wherever the circumstances warranted, the Departmental Assessing Officers, while framing the best judgment assessment, have kept the above legal provisions and judicial pronouncements on the subject, as their guiding factors. In the specific case of late Harshad Mehta, the assessee had failed to comply with the requirement of law as provided in Section 144 of the Act and thus leaving no choice to the Assessing Officer but to pass an assessment order after conducting extensive enquiries, gathering relevant

information from all possible sources, intensive analysis of seized material, and after giving adequate opportunities to the assessee to represent his case. Thus, the assessments done are logical, sound and valid under the law. I am also obliged to bring to the notice of the Hon'ble Special Court that the assessment in (Late) Harshad Mehta's case for the Asst. Year 1992-93 has since been upheld by the CIT (Appeals), being the first appellate authority.

7. I state that the allegation of high pitch assessment is expressly denied. I further state that the assessment orders were passed on merits after considering all materials on record and after proper enquiry/allowing ample opportunities to the notified parties (persons/entities). I submit that Assessment orders have been confirmed by the first appellate authority. I further state that lately the ITAT also has not set-aside the orders on the grounds of facts/merits. The only reasons for setting aside has been that the scam had taken place and notified parties could not have generally put up the case in front of the department. There is no fault on the part of the department, statutory or procedural lapses, while passing the best judgment order. The Hon'ble ITAT has not adversely commented on this aspect of the assessment order.

8. I submit in regards to the allegations contained in para 4, the said allegation is totally baseless and are stoutly

denied. I state that the Income tax department was only seeking to protect its interest which has been duly taken notice of by this Hon'ble Court and it is not essential that disbursements were to be made only after final crystalisation under Section 9 of the Special Courts Act. The respondents have made submissions as though assessment orders have finally been set aside and that their stand on merits were held to be right. This is contrary to facts.

9. As regards allegations made in para 5, the opinion of the Chartered Accountants are only opinions and the power to pass assessment order would still lie with the quasi judicial authorities under the Income Tax Act in accordance with the provisions of the Act and based on the materials available. It is wrong to allege that the demands made by the revenue are preposterous.

10. With regard to the allegations made in para 6, I submit that it is not open to the respondent herein to rely upon subsequent events which transpired and is not justified in criticizing the disposal committee. The respondents' compliant of sale of shares in the year 2003 are pertaining to acquisitions which were nothing but tainted transactions which happened over a decade back. The ups and downs in stock market are regular feature. Assuming the stocks had been sold immediately after the statutory period, the complaint can be made now because of stock market fluctuations. It is not a question of premature sale of shares

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and is a sale pursuant to an ascertained liabilities in accordance with law. In any case, the allegations made in this para, primarily concerns with the custodian and therefore I am not elaborating any further.

11. As regards the allegations made in para 7, I have already explained the consequences of the order passed by the Hon'ble Income Tax Appellate Tribunal. I once again reiterate that the judgment of the Hon'ble Income Tax Appellate Tribunal is not on merits nor have the assessments been set aside on merits and is a result of the conduct of the respondents failing to appear which was only due to the non-cooperation of the respondents.

12. I submit that Setting aside does not tantamount to vindication of the notified party in any manner. Best judgment orders has been set-aside only on the ground of natural justice which was purposefully chosen by the notified parties (non-compliance and non-cooperation). Refer to the affidavit of sale of property dated 28.02.2006. I state that it is not the case of the ITAT that the opportunities were not given to the notified party(ies) for passing best judgment. I submit that sufficient opportunities were given to notified party(ies) to give true and correct affairs which the notified party did not avail. The ITAT has given just one more opportunity to notified party to give their true and correct picture of their affairs in the matter of Pratima Mehta. In fact it was on the behest of the notified party that the

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assessment order be set aside as he was notified party and could not represent himself properly to the statutory notices.

(Para 4 of appeal No. ITA No.637/Bom/1996) – During the hearing, the learned counsel for the assessee submitted that the assessee is a notified entity under Special Court (Trial of Offences Relating to Transactions insecurities Act), 1992 and as such the assessment was completed u/s.144 of the Act for non-compliance to the statutory provisions, and hence the order deserves to be set aside for making the assessment de-novo. He further contended that the Tribunal has considered identical assessee's own group and directed the revenue authorities to pass fresh order after affording adequate and proper opportunity to the assessee in support of his contention, he relied on the decision of ITAT (photocopy of the Tribunal order placed on file) in the case of DCIT Vs. Smt. Pratima H. Mehta in ITA No.4117-4671/Mum/2003 dated 23.2.2005 for AY 92-93 wherein the Tribunal, inter-alia held as under :

> *"From these facts, one conclusion that can be drawn is that there may be chances that assessee was not able to get full details to explain her case. If there is no unexplained investment by the assessee during the year under consideration, then in that situation, there should not be any addition against the assessee.*
>
> *We are also of the view at that point of time, there was general impression in the public that Shri Harshad Mehta and his group have pocketed thousands of*

*crores of rupees of the public through their wrong doings, as as such, people and concerns of that group were isolated. Banks were in a jeopardized situation, as there were scams involving various banks dealing with Shri Harshad Mehta and group. Therefore, all these authorities were non-cooperative in furnishing information relating to the transactions of Shri Harshad Mehta and his group. In view of all these factors, we are of the view that it is quite possible that some of the vital information, which were to be filed before the Assessing Officer or the CIT(A) could not be gathered by the assessee, being a lady and doctor by profession.*

*He was supposed to have all the details, as he was the master of the group, whereas in the case of assessee, who is a lady and doctor by profession, it is quite possible that her transactions were arranged by some others on her behalf and people turned non-cooperative out of fear, subsequent to search operations etc. In these circumstances, assessee's case has to be considered on a different footing."*

13. As regard the allegations made in para 8, it is not known as to how the respondents can make a statement with regard to disposal of case in future and the manner in which they will be disposed of by the Hon'ble Income Tax Appellate Tribunal. It is submitted that ITAT has set aside the order of 1996-97 and 1997-98 to CIT(A). Therefore, the demands for these A.Yrs. in Pratima Mehta case subsists and it is a demand due and payable.

14. As regards the allegations made in para 9, this Hon'ble Court has always been taking a holistic view of the matter

and it is not fair on the part of the respondents, in view of their past conduct, to comment upon how this Hon'ble Court should view the matter like some banks which have been speaking with the same voice.

15. Paras 10 and 11 – No comments.

16. As regard the allegations made in para 12, I would state that they are repetitive in nature. I deny that the revenue has been unfairly contesting the appeal. The revenue is only seeking to espouse the cause of justice and has been acting in utmost good faith and there is no question of distortion of assets and liabilities as sought to be projected by the respondents. I further submit that I do not understand as to what the notified party means. I say that it would create vested interest in favour of revenue. I think it is making clear the attitude of notified party who has no respect for Crown debts and amusing the words like vested interest of revenue. The revenue will always do what it ought to do to protect the interest of revenue and would not allow the people like notified party to get away with the legitimate dues of the government. I deny the assessments are high pitched – (Reliances placed on above paragraphs). I deny that interim disbursement has led to any distortion of asset/liability picture. The notified parties conspired with the banks to cause biggest ever scam and deserve no sympathy whatsoever. Already stated in previous affidavit that setting aside demand does not extinguish the demand. I further

state that the monies so released does not tantamount to any kind of deposits issued in favour of the assessee. The amounts released were not in the nature of deposits but against the tax liability of the said notified person. Hon'ble Justice Kapadia in its order dated 22.3.2000 stated :

> *"The notified party was assessed under the Income Tax Act for AY 92-93 falling within the statutory period as defined by the Supreme Court by its order dated 13.5.1998 in the case of Harshad Mehta Vs. The Custodian (Civil Appeal 5326/95 and Others). The priority demand for the A.Y. 92-93 (for the period relevant to 1.4.91 to 6.6.92) was the demand of income tax excluding interest and penalty. The particulars of the demand notices are given in each of the above matters. The regular assessment for A.Y. 92-93 was made on 27.3.1995. Hence, the amount demanded constitutes an ascertained liability for payment of tax which is quantified under the Act. The department has also relied upon the order passed by the Supreme Court on 26.8.1996 under which amounts were ordered to be released by the Custodian from the moneys held on fixed deposits subject to the Department giving an undertaking which, in the present case also, the Department has tendered.*
>
> *The application has been opposed by the notified party contending that in terms of the above judgement of the Supreme Court, the demand of the Department does not constitute an ascertained liability as the matters are pending in Appeal before the Appellate Authorities under the I.T. Act. It is also contended that till the demands are finally decided upon by the Appellate Authorities, no amount should be allowed to*

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*be withdrawn. It is further contended that the asset/liability position of the notified party is not clear, particularly in view of the fact that large number of creditors of the notified party are also required to be paid from the attached accounts. It is also urged that wrong parties have been notified and in the circumstances, till this Court examines the above position regarding the asset/liability of the notified parties and till this Court decides the applications relating to notification of wrong parties as alleged, no amount should be permitted to be withdrawn. It is further contended that the assessment in question are ex-parte assessments made by the department. It is further contended that prior payments have been made from the attached accounts which do not fall within the priority period and that in any event, the amount paid by the notified party to the department is more than the taxes payable by the notified party.*

*I do not find any merit in any of the contentions raised on behalf of the notified party. In terms of judgment of the Supreme Court in the case of Harshad Mehta, it is clear that the words 'taxes due' in Sec. 11(2)(a) refer to and ascertained liability for payment of taxes quantified in accordance with law. In the present matter, the demands of the I.T. Department run into several crores. They are based on the assessment orders passed by the A.O. These assessment orders may be subject matter of appeal before the Appellate Authorities. Nonetheless, they would certainly constitute an ascertained liability for payment of taxes. As regards the asset/liability position of the notified party, it may be mentioned that even according to the learned counsel appearing for the notified parties, the assessee is not in a position to state the amount of assessable income which*

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*according to the assessee, has accrued during the relevant period on the ground that his accounts have not been drawn up till today. If that is the position, then under no circumstances the Department would be in a position to recover the taxes particularly when the assessee claims that his accounts have not been drawn up and therefore, the asset/liability position is not clear. Moreover, the assessee has not disclosed the names of the creditors. The assessee himself has withdrawn applications in which it was alleged that wrong parties have been notified under the Act. The I.T. Act also permits best judgment assessments and, therefore, it cannot be said that ex-parte assessment orders are bad in law. Under the above circumstances, I do not find any merit in the contentions advanced on behalf of the notified parties. It is claimed that amount paid by the assessee is much more than the taxes payable under the Act and that prior payments which do not fall within the priority period have also been received by the Department. In this connection, it may be mentioned that vide order dated 26.8.96, the Supreme Court permitted the Department to withdraw certain amounts from moneys held on Fixed Deposits, subject to the department giving an undertaking to bring back to Court at a later stage with interest at 18% p.a. The department has, in its application, given a similar undertaking which is hereby accepted by this Court."*

The Hon'ble Justice Shri D.K. Deshmukh in its order dated 03.10.2003 stated:

*"It is further stated that pursuant to the interim order dated 26.8.96 passed by the Supreme Court, certain payments have been made to the Income tax Authorities. As per order dated 26.8.96 of the Supreme Court passed in Civil Appeal Nos. 5147,*

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*5226, 5325 and 6080 of 1995 and an amount of Rs.34,39,00,000/- was adjusted towards the Income tax for the year 92-93 in the case of Late Shri Harshad S. Mehta. In this application, such adjustment made and figures of the amounts adjusted in relation to the notified parties are also given. It is stated that against the orders passed by the Income Tax Authority, in certain cases, appeals have been filed which are pending. In short, the application of the Income tax departrnent is that as large amounts are lying in the attached account under the control of the Custodian, which have been invested in fixed*

*deposit, same amount should be released in favour of the income tax department on ad-hoc basis till the Court decides about disbursement either while declaring interim dividend or final dividend under section 11 of the Special Court Act. So far as Custodian is concerned, the custodian has filed a chart giving relevant details. That chart is taken on record and marked as 'X' for identification. In the chart the amounts which can be released in favour of the applicant on adhoc basis have been indicated. The learned counsel appearing for the applicant submits that this Court has passed orders from time to time releasing the amounts in favour of the Income Tax department from the attached accounts subject to the conditions which have been imposed by the Court. The learned counsel further points out that the Supreme Court by order dated 26.8.96 has released certain amounts on ad-hoc basis to the income tax department on certain conditions imposed by the Court.*

*The objection raised on behalf of the notified party is that the amounts should not be released in favour of the income tax department because the liability of the*

*notified party towards the income tax department is not yet crystallized as the appeals are pending. It was also submitted that if the amounts are released to the income tax department and if this court ultimately directs the income tax department to bring back the amounts, it will be difficult for this Court to get the amounts back from the income tax department.*

*So far as objection of the notified party and the SBI that in case amounts are released in favour of the income tax department, it will be difficult for this Court to bring back the same is concerned, in my opinion, as the amounts are to be released on undertaking to be given by the Government of India there will be no difficulty in getting the amounts back, if the Court so directs. One more aspect that is to be considered is that releasing these amounts, in favour of the income tax department on ad-hoc basis which are presently lying with the Custodian, is in the interest of the notified parties. If the payment of the tax which is assessed is delayed, under the I.T. Act, the notified parties will be liable to pay interest, but if the amounts are released in favour of the income tax department even on ad-hoc basis, the computation of interest on the amounts of tax will immediately stop. In this view of the matter, therefore, in my opinion, the notified parties are not justified in opposing the application. It is further to be seen here that all these amounts are presently lying unutilized in the attached account controlled by the Custodian. If the amounts are released in favour of the income tax department with an undertaking from the Government of India to bring back the amount on such terms and conditions including payment of interest as may be directed by this Court, the amounts can be utilized by the Government of India for welfare activities of the state.*

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*In my opinion, therefore, keeping the amount in the attached account will not serve any public interest."*

17. As regards the allegations made in para 13, the same have already been explained above and I reiterate that the orders of the Hon'ble Supreme Court has to be read in a proper perspective and Section 240 of the Income Tax cannot be rendered nugatory.

18. I state that the department have only made the position of law clear that setting aside an assessment order does not automatically make department liable to refund the taxes paid. However, this department is bound by the undertaking given to this Hon'ble Court by Secretary (Revenue) that as and when any amount is ordered to be brought back shall be brought back within the stipulated period. This has nothing to do with the position of law. I submit that the notified party is unnecessary trying to create confusion between the position of law and undertaking. I state that the paragraph of the Supreme Court's order quoted by the notified party income tax department is not making any fresh claim in respect of the demand relating to the said assessment orders. However, if any amount is paid under the said asst. order they don't become automatically refundable in view of provisions of section 240 of the I.T. Act, 1961. Moreover, in case of the present notified party Smt. Pratima Mehta, the demands for Asst. order for A.Ys. 96-97 & 97-98 are set-aside and restored to CIT(A) and therefore, the assessment order still exists and demand

continues to remain until the Commissioner (Appeal) deletes or modifies the assessment order.

19. I submit that assessment order for A.Y. 1996-97 and 1997-98 are set-aside and restored to CIT(A) and therefore, assessment order continues to subsists unless Commissioner (Appeal) modifies, deletes or enhances the assessed income and therefore, there is no basis of contention that Rs.36,38,83,152/- should be included in the asset base of the notified party. I say, Hon'ble Justice S.H. Kapadia in his judgment has categorically stated that once the assessment order is passed and notice u/s.156 is served demand becomes crystallized. The relevant portion of the order is being quoted for reliance.

> *"The notified party was assessed under the Income Tax Act for AY 92-93 falling within the statutory period as defined by the Supreme Court by its order dated 13.5.1998 in the case of Harshad Mehta Vs. The Custodian (Civil Appeal 5326/95 and Others). The priority demand for the A.Y. 92-93 (for the period relevant to 1.4.91 to 6.6.92) was the demand of income tax excluding interest and penalty. The particulars of the demand notices are given in each of the above matters. The regular assessment for A.Y. 92-93 was made on 27.3.1995. Hence, the amount demanded constitutes an ascertained liability for payment of tax which is quantified under the Act. The*

*department has also relied upon the order passed by the Supreme Court on 26.8.1996 under which amounts were ordered to be released by the Custodian from the moneys held on fixed deposits subject to the Department giving an undertaking which, in the present case also, the Department has tendered.*

*The application has been opposed by the notified party contending that in terms of the above judgement of the Supreme Court, the demand of the Department does not constitute an ascertained liability as the matters are pending in Appeal before the Appellate Authorities under the I.T. Act. It is also contended that till the demands are finally decided upon by the Appellate Authorities, no amount should be allowed to be withdrawn. It is further contended that the asset/liability position of the notified party is not clear, particularly in view of the fact that large number of creditors of the notified party are also required to be paid from the attached accounts. It is also urged that wrong parties have been notified and in the circumstances, till this Court examines the above position regarding the asset/liability of the notified parties and till this Court decides the applications relating to notification of wrong parties as alleged, no amount should be permitted to be withdrawn. It is*

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*further contended that the assessment in question are ex-parte assessments made by the department. It is further contended that prior payments have been made from the attached accounts which do not fall within the priority period and that in any event, the amount paid by the notified party to the department is more than the taxes payable by the notified party.*

*I do not find any merit in any of the contentions raised on behalf of the notified party. In terms of judgment of the Supreme Court in the case of Harshad Mehta, it is clear that the words 'taxes due' in Sec. 11(2)(a) refer to and ascertained liability for payment of taxes quantified in accordance with law. In the present matter, the demands of the I.T. Department run into several crores. They are based on the assessment orders passed by the A.O. These assessment orders may be subject matter of appeal before the Appellate Authorities. Nonetheless, they would certainly constitute an ascertained liability for payment of taxes. As regards the asset/liability position of the notified party, it may be mentioned that even according to the learned counsel appearing for the notified parties, the assessee is not in a position to state the amount of assessable income which according to the assessee, has accrued during the relevant period on the ground that his accounts have*

*not been drawn up till today. If that is the position, then under no circumstances the Department would be in a position to recover the taxes particularly when the assessee claims that his accounts have not been drawn up and therefore, the asset/liability position is not clear. Moreover, the assessee has not disclosed the names of the creditors. The assessee himself has withdrawn applications in which it was alleged that wrong parties have been notified under the Act. The I.T. Act also permits best judgment assessments and, therefore, it cannot be said that ex-parte assessment orders are bad in law. Under the above circumstances, I do not find any merit in the contentions advanced on behalf of the notified parties. It is claimed that amount paid by the assessee is much more than the taxes payable under the Act and that prior payments which do not fall within the priority period have also been received by the Department. In this connection, it may be mentioned that vide order dated 26.8.96, the Supreme Court permitted the Department to withdraw certain amounts from moneys held on Fixed Deposits, subject to the department giving an undertaking to bring back to Court at a later stage with interest at 18% p.a. The department has, in its application, given a similar undertaking which is hereby accepted by this Court."*

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I submit that the same view is also been taken by Hon'ble Justice D.K. Deshmukh in his order dated .

The Hon'ble Justice Shri D.K. Deshmukh in its order dated 03.10.2003 stated:

*"It is further stated that pursuant to the interim order dated 26.8.96 passed by the Supreme Court, certain payments have been made to the Income tax Authorities. As per order dated 26.8.96 of the Supreme Court passed in Civil Appeal Nos. 5147, 5226, 5325 and 6080 of 1995 and an amount of Rs.34,39,00,000/- was adjusted towards the Income tax for the year 92-93 in the case of Late Shri Harshad S. Mehta. In this application, such adjustment made and figures of the amounts adjusted in relation to the notified parties are also given. It is stated that against the orders passed by the Income Tax Authority, in certain cases, appeals have been filed which are pending. In short, the application of the Income tax department is that as large amounts are lying in the attached account under the control of the Custodian, which have been invested in fixed deposit, same amount should be released in favour of the income tax department on ad-hoc basis till the Court decides about disbursement either while declaring interim dividend or final dividend under section 11 of the Special Court Act. So far as Custodian is concerned, the custodian has filed a chart giving relevant details. That chart is taken on record and marked as 'X' for identification. In the chart the amounts which can be released in favour of the applicant on adhoc basis have been indicated. The learned counsel appearing for the applicant submits that this Court has passed orders from time to time releasing the amounts in favour of the Income Tax department from the*

attached accounts subject to the conditions which have been imposed by the Court. The learned counsel further points out that the Supreme Court by order dated 26.8.96 has released certain amounts on ad-hoc basis to the income tax department on certain conditions imposed by the Court.

The objection raised on behalf of the notified party is that the amounts should not be released in favour of the income tax department because the liability of the notified party towards the income tax department is not yet crystallized as the appeals are pending. It was also submitted that if the amounts are released to the income tax department and if this court ultimately directs the income tax department to bring back the amounts, it will be difficult for this Court to get the amounts back from the income tax department.

So far as objection of the notified party and the SBI that in case amounts are released in favour of the income tax department, it will be difficult for this Court to bring back the same is concerned, in my opinion, as the amounts are to be released on undertaking to be given by the Government of India there will be no difficulty in getting the amounts back, if the Court so directs. One more aspect that is to be considered is that releasing these amounts, in favour of the income taxdepartment on ad-hoc basis which are presently lying with the Custodian, is in the interest of the notified parties. If the payment of the tax which is assessed is delayed, under the I.T. Act, the notified parties will be liable to pay interest, but if the amounts are released in favour of the income tax department even on ad-hoc basis, the computation of interest on the amounts of tax will immediately stop. In this view of the matter, therefore, in my opinion, the notified

*parties are not justified in opposing the application. It is further to be seen here that all these amounts are presently lying unutilized in the attached account controlled by the Custodian. If the amounts are released in favour of the income tax department with an undertaking from the Government of India to bring back the amount on such terms and conditions including payment of interest as may be directed by this Court, the amounts can be utilized by the Government of India for welfare activities of the state. In my opinion, therefore, keeping the amount in the attached account will not serve any public interest."*

I say, in fact notified party is confusing the issues and not the department.

20. I submit that notified party again trying to confuse the issue. I submit that the Department never accepts money from any assessee u/s.240. After the assessment order is passed and demand notice under section 156 is given the demand becomes crystallized and that is how the department takes money against the demand or by way of advance tax or TDS. I submit that Section 240 is the provisions in the case of setting aside of assessment orders by any appellate authorities under the I.T. Act. I further state that it is duty bound to bring back the money if ordered so, by the Hon'ble Special Court and in past the department has brought back the money(ies) as and when this Hon'ble court has ordered within the stipulated time and therefore, the apprehension of notified party has no basis.

21. I state that in reply to para 17, there is no provisions in the I.T. Act, 1961 to take deposits. The I.T. dept. has accepted the money against the tax liability of the notified party(ies) and issued necessary challans thereof and the money has gone into the revenue account of the Govt. of India (consolidated fund of India). Further, interest u/s.220(2) has not been charged to the extent of monies appropriated towards tax dues of notified party(ies). Rest of the contention of the paragraph is repetition and needs no comments. I emphatically deny say that Custodian and Revenue have any common cause or objective. Their duties, obligations and responsibilities are defined under the respective Statutes and they are working strictly in accordance thereof.

22. The allegations made in para 18 have already been substantially dealt with above. I deny the allegation that department has inflated the liabilities. The increase in interest liability alleged by the petitioner is on account of interest u/s.220(2) levied prior to the order of the ITAT setting aside the assessment.

23. The allegations made in para 19A are denied and it is again a repetition. There is no question of brushing the doctrine of merger since the Hon'ble Income Tax Appellate Tribunal has not disposed of the appeal on merits. This is a case where the Hon'ble Income Tax Appellate Tribunal has remanded the matter for fresh adjudication mainly to give an

opportunity of being heard to the respondents. Therefore, the contention that the notice under Section 226(3) is illegal or there is no valid demand against the respondents is without merit and should be read in the context of what has been stated above.

24. I state that no interest shall be provided for set aside case. In case of no interim releases, the notified would have interest u/s. 220(2) which is statutory.

25. I state that no deletion of demand has taken place due to set aside proceedings. The demand is kept in abeyance till the finality of the reassessment proceedings. I further state that the set aside proceedings are only on the ground of natural justice.

26. As regards the allegations made in para 20, it is respectfully submitted that pursuant to the judgment of this Hon'ble Court on 2.7.1993 by Hon'ble Mr. Justice S. N. Variava, all the principles have been laid down in the lead judgment in Harshad Mehta Vs Custodian (1998) 5 SCC 1. The notified party respondent is seeking to selectively quote from the judgment and the judgment has to be read as a whole and it is reiterated that the revenue has been fully complying with the judgment of the Hon'ble Supreme Court under the principles laid down thereunder. There is no question of appointing any independent Chartered Accountant. The revenue justified the basis of the calculations. I would only reiterate that the revenue does

not have any grudge or prejudice against any individual and it is not only seeking to act as per law and in public interest.

27. I state that after the judgment of Justice Variava, Supreme Court has deliberated upon the issues of income tax and other creditors in great detail in Harshad Mehta Vs. Custodian (1998) 5 SCC 1 and the revenue is adhering to the said judgment. I state that the notified party is reproducing the paragraphs selectively in order to twist the same in their (he and she) favour. The judgment has to be read in whole and to be contextually followed.

28. I state that there is no relevance in relying on the books of account made by the assessee. It is the assessing officer who does the assessment in any case. The AO could not have waited for years to see the books of accounts, now prepared by the notified party. There is no use of preparing these books of accounts for the purpose of assessment now. I submit that under the income tax act it is the assessing officer who is competent to determine real correct income. There is no subsistence in the contention of the notified person/entity that the income reflected in his/her books of accounts prepared after the lapse of so many years reflects real and true income. I submit that the books of accounts so prepared now cannot be the books of accounts for the purpose of determining any income as per the provisions of IT Act.

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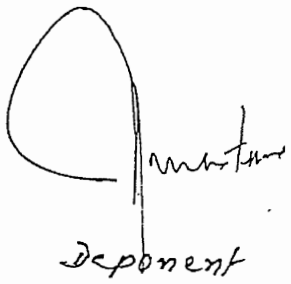
29. I state that there is no substance in notified party saying that it will cost public exchequer to refund a money with interest. On the contrary the assessee does not pay the tax liability. The interest becomes due u/s.220 which will raise the tax demand of notified parties.



Deponent

(Beni Chatterji)
Advocate for the
Respodent

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## VERIFICATION

I, Shishir Srivastava, Joint Commissioner of Income Tax(OSD), Central Range-7. Mumbai do solemnly declare and state that the statements made in paras 1,2,3 and 6 to 12 of the above application are based on information available from the records of the case and I believe the same to be true and para 4 & 5 are based on legal advise and I believe the same to be true.

Solemnly declared at Mumbai)
this 21st day of June , 2006)

Deponent

(BENI CHATTERJI)
Advocate for the Respondent

Before me,

~~Special Court, Mumbai~~
21/6/2006

ASSISTANT REGISTRAR.
Special Court (TORTS),
Mumbai.

21/6/06