

**आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'सी', मुंबई ।**  
**IN THE INCOME TAX APPELLATE TRIBUNAL "C", BENCH MUMBAI**  
**BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER**  
**& SHRI RAJESH KUMAR, ACCOUNTANT MEMBER**

आयकर अपील सं./ITA No.7089/Mum/2011

(निर्धारण वर्ष / Assessment Year :2008-09)

Shri Pandoo P. Naig, 96-98, Mint Road, Mumbai-400001	Vs.	ACIT, CC-32, Mumbai-400020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : <b>ACNPN 2800 J</b>		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

**AND**

आयकर अपील सं./ITA No.7364/Mum/2011

(निर्धारण वर्ष / Assessment Year :2008-09)

ACIT, CC-32, Mumbai-400020	Vs.	Shri Pandoo P. Naig, 96-98, Mint Road, Mumbai-400001
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : <b>ACNPN 2800 J</b>		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

**AND**

आयकर अपील सं./ITA No.6671/Mum/2012

(निर्धारण वर्ष / Assessment Year :2008-09)

ACIT, CC-32, Mumbai-400020	Vs.	Prakash B. Bandarkar, Room No.1, Baburao Chawl, Hanuman Takadi, Bhandup (W), Mumbai-400078
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : <b>AHLPB 1306 N</b>		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

**AND**

आयकर अपील सं./ITA No. 6672/Mum/2012

(निर्धारण वर्ष / Assessment Year :2008-09)

ACIT, CC-32, Mumbai-400020	Vs.	Pravin B. Bandarkar, Room No.1, Baburao Chawl, Hanuman Takadi, Bhandup (W), Mumbai-400078
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : <b>AHLPB 1306 N</b>		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

निर्धारिती की ओर से /Assessee by : Shri Vijay Mehta  
राजस्व की ओर से /Revenue by : Shri C.W.Angolkar  
सुनवाई की तारीख / Date of Hearing : 04/04/2016  
घोषणा की तारीख/Date of Pronouncement 24/06/2016

**आदेश / O R D E R****Per Sanjay Garg, Judicial Member :**

The cross appeals bearing ITA No.7089 & 7364/Mum/2011 have been filed by the revenue and assessee-Pandoo P. Naig, whereas, the Revenue has also filed two appeals i.e. ITA Nos.6671 & 6672 in cases of other two different assessees i.e. Shri Prakash B. Bandarkar & Shri Pravin B. Bandarkar.

2. Since common issues are involved in all the appeals, therefore, all the appeals have been head together and are being disposed of by this consolidated order.

3. Ld. AR, at the outset, has submitted that though survey action was carried in the case of all the above named three assessee, however, additions on substantive basis had been made by the AO in the case of assessee Shri Pandoo P. Naig only and in the cases of other two assessees i.e. Shri Prakash B. Bandarkar & Pravin B. Bandarkar, additions were made on protective basis only considering them as acting on behalf of assessee Pandoo P. Naig, therefore, they are also covered under the same search action; hence, the facts and circumstances mentioned in ITA No.7089/Mum/2011 in case of assessee –Shri Pandoo Naig, be considered in deciding all the appeals. The Ld. DR has also pleaded no objection for the same. Hence, the facts, for the sake of convenience, have been taken from ITA No.7089/Mum/2011 in case of assessee –Shri Pandoo Naig.

4. The facts of the case as have been summed by the Assessing Officer (hereinafter referred to as the AO) in the assessment order dated 28.12.10 passed under section 143(3) of the Act are reproduced as under:

**6. "Brief facts of the case:**

- (i) Information of various high value transactions were received by the Investigation Wing of the Income Tax Department from FIU-IND. These transactions were shown in the Saving Bank Account of Shri Prakash B. Bandarkar and Shri Pravin B. Bandarkar (both the brother) held in HDFC Bank, Fort Branch. These deposits and payments were/noticed over a short period of two months in F.Y. 2007-08.
- (ii) The inquiries made from by the said Bank elicited no satisfactory explanation from Account Holders about the nature and source of used deposits and purpose /destination of the payments.
- (iii) The KYC forms filed by Shri Prakash & Pravin Badarkar filled by these persons indicated that they were men of meager means, whose annual income was below Rs. 1 lac.
- (iv) Report of FIU IND suggested that Shri Prakash B.Badarkar and Shri Pravin B. Pandarkar were employees of Shri Pandoo Naig who was investing his funds in the Stock Market in the names of these persons.
- (v) Discreet inquiries were conducted and it was noticed that Shri Prakash & Shri Pravin Badarkar were living in a chawl in Bhandup locality that is predominantly occupied economically weaker section of society. Further, Shri Prakash & Pravin were brothers having no ostensible source of income which would explain the large turnover in their Bank accounts.
- (vi) In light of these facts and circumstances, survey action was carried out in the business premises of Shri Pandoo P. Naig at 22, Raja Bahadur Mansion, Bombay Samachar Marg, Mumbai-400023 on 09.05.2008 simultaneously, one more premise at Baroda was also covered.

- (vii) During the survey various loose papers and documents were found and impounded u/s. 133A (i)(3).
- (viii) During the survey statements of Shri Pandoo P. Naig and his father Shri T.K. Prabhakar Naig who was also present, recorded u/s. 131.
- (ix) Shri Pandoo Naig has admitted undisclosed income of Rs. 4 crores for A.Y. 2008-09 in his statement recorded on 6th June 2008.
- (x) Shri Prakash Bandarkar and Shri Pravin Bandarkar has offered Rs. 3,39,78,291 and Rs. 3,67,10,971/- respectively, the peak mount of their bank balance for taxation.

5. Thereafter the assessee filed the return of income for the above assessment year on 31.08.08 and offered to tax income under the heads of salary, house property, capital gains and income from other sources, declaring total income of Rs.4,09,33,530/- which included the amount of Rs.4 crores declared during the survey action. The return was selected for scrutiny assessment under section 143(3) of the Act. In the course of assessment proceedings, the AO made enquiries relating to the loose papers found during the survey action. However, the assessee Shri Pandoo P. Naig denied that those papers belonged to him. The AO, however, observed that the loose papers found during the survey action were suggestive of a number of transactions in shares. Share transactions happen to be the main activity/source of income of Shri Pandoo P. Naig. He therefore confronted Shri Pandoo P. Naig with the said papers as well as his statement made under section 131 during the survey action. However, the assessee Shri Pandoo P. Naig did not own up the documents. He, however, offered to tax the amount of Rs.4 crores, offered/declared during the survey action, in the return of income. But, he neither during the course of post survey proceedings nor during the assessment proceedings furnished any working in relation to declared income of Rs.4 crore for the assessment year under consideration, even though, the working of the same was specifically asked

by the AO vide order sheet entry dated 01.09.2010. The assessee was then questioned on this issue by the AO and several enquiries were made. The assessee filed reply in respect to the various queries raised by the AO wherein he submitted that the impounded papers were not found in his control and that the premises from which those papers were recovered were not under his control as the same was under occupation of M/s. Sai Broking, which was the proprietary concern of his mother Smt. Anandhi P. Naig and that the said firm had been carrying on business as share sub broker and the assessee was working as manager of the said M/s. Sai Broking. It was however submitted that the said M/s. Sai Broking ceased to carry on this business of share broking a few years back. It was also submitted that there were several visitors in the premises and the papers in question might be left by any of such visitor and that the same did not belong to the assessee. The assessee had not carried out any transactions as mentioned in the said paper; that whatever the share transactions were done by the assessee that were fully disclosed in his accounts and the resulting capital gains were duly offered in the income tax returns. That neither there was any handwriting of the assessee or his employees on the said loose papers nor they bore any signature of the assessee or any of the employee of the assessee and further that the impounded papers were dumb papers which did not lead anyone to a conclusion to ascertain the profit or loss resulting from such transactions or about the person to whom such profit or loss belonged. It was also explained that the persons namely Shri Prakash Bandarkar and Shri Pravin Bandarkar did not have any relationship with Shri Pandoo P. Naig. Further in a query put by the AO during the statement recorded of Shri Pandoo P. Naig that if, the assessee was not having any relationship with the said brothers, then, why the land line number of the assessee's premises was mentioned by them while opening the account in the HDFC bank branch at Fort, Mumbai; the assessee in his statement

explained that he had not authorized Shri Prakash Bandarkar and Shri Pravin Bandarkar to give this number to the bank. However, they would have given the land line number of M/s. Sai Broking since the said persons used to trade through the said firm and used to come to the office quite often and use the computer terminals and spend some time in the office of M/s. Sai Broking. Since they were not having any land line number of their own, they might have given the land line number of the Sai broking to the bank. After considering the statement of the assessee recorded under section 131 during the survey action and further during post survey proceedings and the reply given by the assessee to the various queries raised by him, the AO concluded that since the assessee was present at the office premises during the survey action and that the loose papers were found from the said premises, therefore, the premises was owned by the assessee and the loose papers belonged to him. He further observed that the assessee had owned up some of the papers but one (Annexure A1), which the assessee did not own up. He, therefore, relying upon the provisions of section 292C of the Income tax Act, held that there was a presumption that the said loose paper belonged to the assessee and the entries made therein represented the unaccounted income of the assessee. He, after going through the transactions recorded in the said loose papers observed that the profit arising out from the various transactions was done at Rs.4,40,47,290/- and the total value of ownership was Rs.35,01,51,584/-. He accordingly added the said amounts of profit and shares ownership into the income of the assessee as undisclosed profit and investment. The Ld. AO also held that Shri Prakash Bandarkar and Shri Pravin Bandarkar were men of no means and in fact they were carrying on the share transaction business/investment on behalf of the assessee. He accordingly also added the amounts assessed/declared as undisclosed income of the said brothers as income of the assessee Shri Pandoo P. Naig on substantive basis, but,

assessed the same on protective basis in the hands of the Bandarkar brothers. The AO accordingly assessed a total income of Rs.42,48,68,140/- in the hands of the assessee Shri Pandoo P. Naig. He, however, setoff the amount of Rs. 4 Crores offered by the assessee in the return of income against the said additions. Being aggrieved against the said additions, the assessee Shri Pandoo P. Naig as well as the Bandarkar brothers Shri Prakash Bandarkar and Shri Pravin Bandarkar filed their appeals before the Ld. CIT(A).

6. The assessee Shri Pandoo P. Naig in his appeal before the Ld. CIT(A) took an additional ground, pleading that the amount of Rs.4 crores offered as additional income in the statement during survey proceedings was offered under pressure, coercion and threat of the Income Tax Authorities; that apart from the other additions made by the AO, the addition of Rs.4 crore, though offered by the assessee in the return of income, be also deleted. The Ld. CIT(A) admitted the said additional ground of the assessee for adjudication. The assessee submitted before him that in his statement, the assessee had stated that the said loose papers i.e. page No.35 & 36 did not belong to him, however, since the officials of the department had raised so many queries during the survey and post survey action hence, considering that the explanation given by the assessee would not meet the rigorous requirements of law and further with a view to buy peace of mind and to avoid any litigation in this regard, he had offered a sum of Rs.4 crore as additional income. That the assessee had accordingly declared the said additional income of Rs.4 crore in his return of income and an entry was also made by the assessee in his books of accounts. The Ld. CIT(A), however, observed that the assessee had not raised any question regarding the surrendered amount of Rs.4 crore during the assessment proceedings before the AO. He further observed that since the

loose papers were found from the premises of the assessee and hence as per the provisions of section 292C of the Income Tax Act, it had to be presumed that the said papers belonged to the assessee. Even the assessee had also offered the said amount in the return of income and since had not raised any objection in this respect during the assessment proceedings, hence, at the appellate stage before him, such a claim of the assessee that the surrender was under pressure was not acceptable. He, therefore, dismissed the above additional ground taken by the assessee. In respect to additions made by the AO on the basis of the loose paper, he observed that in view of the presumption laid under section 292C of the Act, the loose papers found during the survey action belonged to the assessee and the contents of the said papers were also presumed to be true and that the said transactions thus belonged to the assessee. He observed that the entries made in the relevant page No.36 were not reflected in the books of accounts of the assessee. He further observed that the entries given in the said loose paper were under three heads, firstly the amount of Rs.4,40,47,290/- was under the head 'Profits', the second entry of the amount of Rs.49710462/- was under the head 'Funding' and the third transaction of Rs.350151584/- was under the head 'Ownership'. He observed that though it appeared that the assessee had utilized funds of Rs.350151584/- and Rs.49710462/- to earn the profit of Rs.4,40,47,290/-, but no other corroborative evidence or unexplained cash or other asset was found in the possession of the assessee during the course of survey. He, therefore, held that this fact established that the assessee was not in his possession of any other unexplained asset except the profit earned of Rs.4,40,47,290 from the transactions noted in the loose paper, out of which the assessee, himself, had declared Rs.4 crore as his additional income in his statement under section 131 of the Act recorded during/post survey action. He accordingly held that since assessee had made the transactions of sale and purchase of shares outside

the books of accounts, hence, the profit of amount of Rs.4,40,47,290/- was the undisclosed income of the assessee. He accordingly confirmed the addition of Rs.4,40,47,290/- made by the AO and deleted the balance addition made of Rs.350151584/-. He also observed that the Bandarkar brothers were doing the business of purchase and sale of shares on commission basis and that the share transactions carried out by the said brothers did not belong to Shri Pandoo P. Naig. All the entries in their bank accounts were made through cheques and not even a single entry was in cash. That the entries belonged to different clients of Bandarkar brothers, on whose behalf they were doing this business and that not a single entry or transaction belonged to Shri Pandoo P. Naig. He, therefore, held that the decision of the AO by making the addition on substantive basis in the hands of Shri Pandoo P. Naig, merely on presumption that they were men of no means and used the telephone number and computer terminals of assessee, was not enough evidence to prove that the credit entries in the bank account of Shri Prakash Bandarkar and Shri Pravin Bandarkar belonged to the assessee. He accordingly deleted the additions made by the AO in respect of the income added on protective basis in the hands of Bandarkar brothers and substantively made in the hands of the assessee. In respect of appeals by the Bandarkar brothers against the addition made on protective basis by the AO, the Ld. CIT(A) called a remand report in respect of details and evidences submitted by the said Bandarkar brothers explaining the transactions of bank deposits in their bank account. After, considering the remand report, the Ld. CIT(A) observed that no transaction was carried out by the said brothers in the name of the assessee Shri Pandoo P. Naig; that it was established from the various evidences produced during the remand report that the said Bandarkar brothers were earning commission from sale and purchase of shares on behalf of the investors; that M/s. Hanuman Enterprises and M/s. Vivek Enterprises had transferred the shares to the D-

mat account of the said Bandarkar brothers; that those shares were sold by the Bandarkar brothers and the receipts were deposited in their bank account; that the proceeds were received through cheques; that later on cheques were issued to the investors M/s. Hanuman Enterprises and M/s. Vivek Enterprises by Bandarkar brothers after charging their common on the transactions. The bank account and other details of M/s. Hanuman Enterprises and M/s. Vivek Enterprises were also submitted to the AO for confirmation of the transactions. After perusal of the various documents, it was confirmed that the cheques issued by the said brothers were duly debited in their bank account in the name of M/s. Hanuman Enterprises and M/s. Vivek Enterprises, which transactions were duly confirmed by the bank also. The entries in the bank account of the said brothers were correlated with the bank accounts of M/s. Hanuman Enterprises and M/s. Vivek Enterprises and the same were found correct. The Ld. CIT(A) therefore concluded that it was established that the amount deposited in the bank accounts of the Bandarkar brothers belonged to M/s. Hanuman Enterprises and M/s. Vivek Enterprises and therefore, addition, if any, was to be made on substantive basis, that should have been in the hands of M/s. Hanuman Enterprises and M/s. Vivek Enterprises only. Whatever the commission was earned by the said brothers, that was duly disclosed in their accounts/return of income. No entry or connection of assessee Shri Pandoo P. Naig was established with the deposits in the accounts of the Bandarkar brothers. He accordingly deleted the additions made on protective basis in the hands of the Bandarkar brothers.

7. Now aggrieved by the order of the Ld. CIT(A), the assessee, Shri Pandoo P. Naig has come in appeal before us, agitating the confirmation of addition to the extent of Rs.4,40,47,290/-; whereas, the Revenue has come in appeal against the action of the Ld. CIT(A) in deleting the addition of

Rs.35,01,51,584/- made in the hands of assessee Shri Pandoo P. Naig as unexplained investment and further against the deletion of additions made of Rs.3,39,78,291/- and Rs.3,67,10,971/- respectively on account of offer/declaration made by Shri Prakash Bandarkar and Shri Pravin Bandarkar on peak credit basis in their accounts, but added by the AO into the income of the assessee Shri Pandoo P. Naig on substantive basis. The Revenue has also filed appeals agitating the action of the Ld. CIT(A) in deleting the additions made on protective basis in the hands of Bandarkar brothers namely Shri Prakash Bandarkar and Shri Pravin Bandarkar.

8. We have heard the rival contentions and have also gone through the records.

9. The Ld. A.R. of the assessee has brought our attention to page 41 of the paper book which is the copy of the seized document on the basis of which the impugned additions had been made by the AO. We find that the same is a computer generated/printed document. The Ld. A.R. has stated that a perusal of the said document gives no inference that the same in any manner relates to the assessee Shri Pandoo P. Naig. He has further stated that neither there is any handwriting of the assessee Shri Pandoo P. Naig on the said document nor it bears signature of Shri Pandoo P. Naig or any of his employees. He has further stressed that all the computers etc. were thoroughly checked/examined by the tax authorities. That the data in the alleged document did not match at all with any of the data/ entries/soft copies of documents in the computers at the premises in question. Even neither any such transactions in any of these scripts nor any name of any person, as may be deciphered from the seized document, was found entered into any of the details/data in the computer systems of the assessee. He has further submitted that the assessee Shri Pandoo P. Naig had neither any concern nor relation with any of the persons mentioned in the said seized

document and nor any of such persons named therein is known to the assessee. He has further submitted that now with the use of advanced technology, even the third stage deleted data on the hard disks of the computers can be retrieved. That, if, the assessee Shri Pandoo P. Naig would have any relation with the said data or the same had been prepared using the computer systems of the assessee, the same could have been very easily retrieved by the Revenue Authorities from the computers of the assessee. He has further invited our attention to question No.36 put during the statement recorded of Shri Pandoo P. Naig under section 131 during survey action on 9/10.05.2008. In the said question No.36, a mention has been made about a cheque payment of Rs.18188000/- on 09.01.2008 to one Shri Nirmalbhair regarding which Shri Pandoo P. Naig had answered that neither the said paper belonged to him nor he had any concern with the persons/companies named in the said document. That neither he nor any of the companies in which he was a director, had ever made any payment of Rs.18188000/- by cheque to Shri Nirmalbhair on 09.01.08. The Ld. A.R. has further invited our attention to page 87 of the paper book which is the copy of the statement of Shri Pandoo P. Naig recorded on June, 6<sup>th</sup> 2008 during the post survey action. The Ld. A.R. has invited our attention to question No.3 put to Shri Pandoo P. Naig during the said statement, wherein, reference has been made to different papers and the assessee has been asked to explain regarding each set of papers. A table has been prepared in this regard and a reference has been made regarding USD account number 01-4792424-01 in the name of Image Securities FZC with Standard Chartered bank, Dubai and account No.6101224 in the name of M/s. Crikwood Capital Investment Corporation. The assessee specifically denied any concern of his or any of his family members with regard to page 17 and account No.6101224 in the name of M/s. Crikwood Capital Investment Corporation. The assessee made a statement that he did not

know that to whom said accounts belonged or to whom the company M/s. Crikwood Capital Investment Corporation belonged. The assessee admitted that page 46 referred to in the said queries belonged to his father's account, but there were no incriminating evidence or details on the said paper. The assessee, however, categorically denied his relation to other papers and his concern or relation with any of the names of persons mentioned in the said documents. The Ld. A.R. in this respect, has stressed that the data like account number, the name of the account holders, the reference of cheque payment etc. were the records which could have been verified by the Revenue Authorities and if the assessee would have got any concern, dealing or transactions with the said accounts or with the persons named in the said documents, the Revenue could have easily detected the same. However, despite making much investigations, the Revenue could not establish any link of the assessee with the said bank accounts or with the persons or the companies named in the seized documents. The Ld. A.R. has also invited our attention to question No.9 put to assessee- Shri Pandoo P. Naig during the said statement recorded on June, 6<sup>th</sup>, 2008 wherein the AO has repeatedly by using different wordings put the same queries to the assessee so as to extract some concern or relation of the assessee with the seized documents but could not succeed in this respect. Even when the assessee was asked to give the details/computation in relation to the additional income declared of Rs.4 crore, the assessee had categorically replied that neither any of the transactions belonged to him nor he had any concern with the said transactions. The additional income was just offered because of the consistent pressure of the revenue authorities during as well post survey proceedings. The Id. AR has further invited our attention to the fact that an undertaking had been obtained from the assessee in his statement that the additional income would be offered for taxation in A.Y. 2008-09 and that he would not claim any expenditure in respect of this

additional income offered. In the end of the statement, it has been requested by the assessee that subject to his declaration of the said income, no penalty or prosecution be initiated against him or any of his family members or associate concerns and that he has offered the said income in bonafide belief that no adverse view will be taken. The Ld. A.R. has further invited our attention to the relevant observations of the AO in 'para 8(e)' of the assessment order wherein he has observed that Shri Pandoo P. Naig has not owned up the documents impounded from the premises in question and further that though he had quantified an undisclosed income of Rs.4crores and offered the same for tax for A.Y. 2008-09, however, neither during the course of post survey proceedings nor during the assessment proceedings, Shri Pandoo P. Naig had submitted the working of disclosure of income for A.Y. 2008-09 even though working of the disclosure was specifically asked by the AO vide order sheet entry dated 01.09.10. He has further contended that the presumption under section 292C was rebuttable presumption and that as per the various case laws, addition cannot be made merely on presumption basis alone, but there should be some corroborative evidence for such a presumption. He has further submitted that the alleged document on the basis of which the presumption against the assessee has been drawn by the lower authorities is a dumb document and is not suggestive of any such presumption against the assessee. The Ld. A.R. has further invited our attention to the findings of the Ld. CIT(A) recorded at page 16 of the impugned order that no corroborative evidence or unexplained cash or other asset was found in the possession of the assessee during the survey. He has further contended that the additions in this case have been made only because the assessee had declared additional income of Rs.4 crore during survey action. He has vehemently contended that the assessee, in fact, was forced to make such a declaration and that such a declaration was not voluntary. He has invited our attention to page 33 of

the paper book which is the copy of the letter dated July, 16<sup>th</sup>, 2011 addressed to CIT(A), Mumbai wherein, it has been explained that the assessee was time and again asked questions regarding the said dumb document and the assessee Shri Pandoo P. Naig always denied that the said document belonged to him. It has been further submitted that the additional income was got declared under coercion, threat and undue influence of the survey party. In order to get rid of the mental trauma and long interrogation, the assessee made the above stated declaration without realizing the meaning or consequences thereof. It has been further submitted that the statement made by Shri Pandoo P. Naig and the consequent tax paid was not voluntary but under threat and duress. That the assessee has been maintaining the proper accounts and the income earned from business, capital gains and other sources was duly declared on year to year basis in the respective returns of income. The Ld. A.R. has invited our attention to the fact that even in his accounts, the assessee made an entry on 31.03.08 i.e. at the end of the year, crediting his capital account with an amount of Rs.4 crore on account of cash introduced .However, on the next day i.e. 01.04.08 i.e. on the first day of the next financial year, he reversed the said entry due to the fact that there was no such cash available with him. Further, since he was asked to make the payment of taxes on such additional income declared during survey action, he made payment of Rs.15560030/- towards tax by en-cashing the fixed deposits which were held by him and also by obtaining loans from outsiders. The Ld. A.R. has further submitted that the assessee, being not very much educated person and being fearful of any adverse action by the Income Tax Authorities, could not gather courage to retract from his statement/promise made to the Income Tax Authorities during survey action and therefore offered the additional income as per the statement given and paid taxes also. However, when the case of the assessee was selected for scrutiny and the AO again

made queries in this respect and even made the additions of all the figures which were written on the said dumb document, the assessee thus was left with no alternative, then to challenge the illegal additions made by the AO and gathered courage to bring the true facts before the first appellate authority and took the additional ground before him that the income declared during survey action was under threat and coercion. That the said ground since was admitted by the Ld. CIT(A) for adjudication, but has been decided against the assessee on the basis of presumption under section 292C of the Income Tax Act. The Ld. A.R. of the assessee has submitted that the facts on the file, itself, speak that neither any asset nor any cash was recovered from the premises or possession of the assessee nor any such evidence was found which may show that the assessee had ever earned such income. That the said dumb document did not belong to assessee, but perhaps, to some other person, who visited the premises of the assessee and inadvertently left the same there. The Ld. A.R. has further invited our attention to the written submissions made by the assessee before the Ld. CIT(A) that in spite of explaining about all the papers which were found during the survey action and also explaining about the papers which the assessee specifically claimed that they did not belong to him; the assessee was, not only during survey action but also on each subsequent occasions, threatened with that huge addition and that penalties would be levied against him; that under this fear, coercion, threats and to get rid of the mental trauma and interrogation, the assessee was left with no choice but to offer the said income for tax. The assessee just declared the said Rs.4 crores in his return of income as additional income as promised during the survey action but since the assessee was not having any such income from any source, hence no source of such income was explained in the return of income. The AO time and again asked for the working of the income but since there was no working and it was only declaration under threat, hence

no working was filed with the AO. Even the AO has also not correlated the said additional income under any source of income but has given the credit of the same against the additions made on the basis of dumb document. The Ld. A.R. has further submitted that even in the case of Bandarkar brothers, such an additional income was got declared under threat and coercion on the basis of peak credits in their bank accounts. However, the Bandarkar brothers, before the CIT(A) and in the remand proceedings, explained the relevant credit entry in their bank account and it was found that the bank entries were duly explained and each of the amount was credited or paid through cheque only. In view of this, the additions in case of Bandarkar brothers on the basis of remand report of the AO have been deleted by the CIT(A) and that, itself, proves that the declaration/ surrender not only from the assessee but also from the Bandarkar brothers was obtained by the revenue authorities under threat and coercion. The Ld. A.R., therefore, has submitted that the additions made by the AO on account of the seized document were liable to be set aside.

10. The Ld. D.R., on the other hand, has submitted that since the assessee himself had offered for taxation the additional income of Rs.4 crore, hence at this stage, the assessee is estopped from his act and conduct to agitate the taxation of the said income of Rs. 4 crores. He has further submitted that the statement of Shri Pandoo P. Naig was recorded under section 131 of the ACT and that no pressure as alleged by Shri Pandoo P. Naig was ever exerted upon him. He has further submitted that the AO had made the addition on the basis of incriminating document under the provisions of section 68 of the Act on account of unexplained income/investment. He has further submitted that the Bandarkar brothers were men of no means and that the investments made by them were on behalf of the assessee and even the phone number of the assessee's premises was given by them to the

bank while opening bank account. He has further submitted that in view of the provisions of section 292C, the additions on the basis of the document found from the premises of the assessee have rightly been made by the AO. He has further submitted that there is no evidence on the file that any threat, pressure or coercion was exerted by the Revenue officials.

In rebuttal the Ld. A.R. has invited our attention to the summons issued to the father and mother of Shri Pandoo P. Naig. He has invited our attention to summons dated 23.05.08 issued to Shri T.K. Prabhakar Naig requiring him to be present in the office of DDIT Investigation Unit, Mumbai along with documents including passport in original, copies of the bank accounts and also of the firms where he was partner, copies of confirmations of any loan outstanding, copy of balance sheet, profit and loss account along with copies of bank accounts ever operated by him or his wife in any foreign country during last six years. Similar type of summons were also issued to Smt. Anandhi Naig - mother of assessee pandoo. P. Naig and wife of Shri T.K. Prabhakar Naig. Thereafter, summons dated May 28, 2008 were issued to Shri T.K. Prabhakar Naig and Mrs. Anandhi Naig asking them to be present in the office of the DDIT Investigation along with various details including exhaustive note in relation to the businesses carried out by them, their partnership in any firm, list of bank accounts and the sources of their income during stay abroad etc. The Ld. A.R., therefore, has submitted that not only he, but also, his ailing father and mother were disturbed and he was compelled to offer and return the additional income without any incriminating material, asset, cash or source of investment found during the course of survey.

11. We have considered the rival contentions. The Ld. A.R. in this case has made two fold submissions. Firstly, that the incriminating document does not belong to Shri Pandoo P. Naig and that he has no concern,

whatsoever, with the alleged loose papers found during the search action. Secondly, that his statement recorded under section 131 during survey action u/s 133A was under force, threat, coercion and undue influence etc. and that the same cannot form the basis for making addition of additional income.

Firstly, we discuss about the nature of the document found during the survey action and whether as per the provisions of section 292C, the addition of income on the basis of such a document is justified in the hands of assessee? Admittedly, the loose paper relied upon by the opposite parties is a computer generated/printed document. No name of the assessee or any of his employees is mentioned on the said document. The said document does not bear any signature or handwriting of Shri Pandoo P. Naig or of any of his employees. There are three headings in the said document i.e. 'profit', 'funding' and 'ownership'. There are certain names of scripts/companies along with codes/short names of persons which have been mentioned in the said document. The assessee Shri Pandoo P. Naig has specifically denied his relation or connection with the document or any of the transactions or the name of the persons mentioned therein. Further a perusal of various documents on file reveals that assessee Shri Pandoo P. Naig was subjected to various queries and investigations to extract his relation or concern with the said document or the transactions mentioned therein. But, despite their best efforts, no evidence could be extracted by the Revenue Authorities which may establish the concern of Shri Pandoo P. Naig with the transactions or the persons mentioned in the disputed document. The said document is a dumb document. The assessee Shri Pandoo P. Naig had explained that this document did not belong to him and it might had been left by any person visiting his office. Along with the said document, certain other documents were also found wherein some reference of some amounts paid by cheque, bank account numbers etc. had been

mentioned. The Revenue Authorities could have easily detected, if such an account number or payment had been made by or to the assessee through such a banking channel. Though the document in question is a computer generated document but no soft copy of the said document had been found or could be retrieved from the data in the computers at the premises of the assessee. The case of the AO is that the entries in the said document represent the undisclosed investments and profits earned by the assessee. The AO has made additions of the total of figures mentioned under the headings 'profit', and 'ownership' but has not made any addition in relation to figures mentioned under the heading 'funding' as mentioned in the said document. There is no finding or observation made by the AO as to the name of persons mentioned in the said document against the transactions as to why those names should be ignored and the transactions be treated as relating to the assessee Pandoo P. Naig only. Even the AO has ignored the figures under the head 'funding.' A perusal of the impugned document gives impression that the transactions mentioned therein relate to many persons and that the same do not belong to any single person or that the same relate to some brokerage agent/firm which carried on transactions on behalf of other persons. Admittedly, no evidence of any holding, asset, valuable property or cash in the possession of the assessee had been found during search action or even during post survey investigations. The AO in the assessment order in para 8.4(1)(i) himself has given a finding that the share broking business carried on by the mother of the assessee under the name and style of Sai Broking had been ceased/stopped a few years back. Even no data or any details relating to any such transactions or persons could be found or retrieved from the computers in the premises of the assessee. Under such circumstances, it is difficult to presume that the figures written on such a dumb document is the undisclosed income of the assessee. Even the Ld. CIT(A) in the impugned order has made a specific

observation that no corroborative evidence or unexplained cash or other asset was found in the possession of the assessee during the course of the survey and he therefore has deleted the additions in respect of figures mentioned under head 'ownership' in the alleged document. The Id. CIT(A) thus disbelieved the part of the document which the AO had treated as depicting the unexplained investments of the assessee. Hence, out of the three parts of the document, one part has been ignored by the AO, the second part has been disbelieved by the CIT(A). However, the Id. CIT(A) has confirmed the additions only in respect of heading 'profit'. However, the point which gains importance at this stage is that when the source of funds/ investments have been disbelieved by the CIT(A) , there left no reason for him to assume the alleged profits from such non existing source/investments. The Id. CIT(A), thus, made the impugned additions only because the assessee had made a declaration/offer of income of Rs. 4 crores during the survey action. Hence, viewed from any angle, the Revenue could not establish the concern or the relation of the assessee Shri Pandoo P. Naig with the above said dumb document.

12. Now coming to the presumption under section 292C. The provisions of the said section for the sake of convenience are reproduced as under:

“(1) Where any books of account, other documents, money, bullion, jewellery or other valuable article or thing are or is found in the possession or control of any person in the course of a search under section 132 or survey under section 133A, it may, in any proceeding under this Act, be presumed—

(i) that such books of account, other documents, money, bullion, jewellery or other valuable article or thing belong or belongs to such person;

(ii) that the contents of such books of account and other documents are true; and

(iii) that the signature and every other part of such books of account and other documents which purport to be in the handwriting of any particular person or which may reasonably be assumed to have been signed by, or to be in the handwriting of, any particular person, are in that person's handwriting, and in

the case of a document stamped, executed or attested, that it was duly stamped and executed or attested by the person by whom it purports to have been so executed or attested.”

13. A perusal of the above provisions shows that section 292C states that where any books of accounts, other documents .... etc. are found in possession or control of any person in the course of search action under section 132 or survey action under 133A; it may be presumed that such books of account, other documents etc. belong to such person and that the contents of such books of account and other documents are true.

14. We find that the wording of the section 292C which supposes the presumption to be taken is qualified with the words ‘may be’, **hence, it may or may not be presumed that such documents belong to the person searched.** Firstly, the section uses the word ‘may presume’ and not ‘shall presume’, hence the presumption of facts under section 292C is not a mandatory or compulsory presumption, but, a discretionary presumption; secondly, such a presumption is not a conclusive presumption but is a rebuttable presumption because it is a presumption of fact not a presumption of law. Under the circumstances, it is to be examined by the competent authorities as to whether the presumption under the section is attracted owing to the nature of the documents and the contents of such documents found during search/survey action. Such a presumption, thus, is not an absolute or conclusive presumption, but, it has to be taken in the light of any corroborative, correlating or circumstantial evidence found during the search or survey action. It has been held time and again by various courts of law that where, the Revenue Authorities are vested with any discretionary power, the same is to be exercised judicially. The assessee Shri Pandoo P. Naig, in this case, has, from the very beginning, denied his link or relation with the seized document or with any of the transaction made therein. As observed above, no corroborative, correlating

or circumstantial evidence has been found either during the survey action or during post survey investigations which may make a connection or in any manner relate the assessee-Shri Pandoo P. Naig with the said document or the transactions mentioned therein. Hence the nature of document seized does not point any strong/reliable or standalone presumption under section 292C of the Act against the assessee Shri Pandoo P. Naig.

15. Now we have to examine as to what should be the degree and evidence to be produced by the assessee/person searched to rebut such presumption. The assessee Shri Pandoo P. Naig in this case has denied any knowledge or link or connectivity with the said document or the contents of the said document. Now under such circumstances, how an assessee or the person searched can prove that the said document does not belong to him or that he has no connectivity with such a document, when, he, himself, is not aware of any of the contents/transactions or persons named therein. He, under such circumstances, is left with no alternative then to specifically deny the said document and to show from his accounts, books, other evidences and business documents and from all other material gathered during the search action that he has no concern or relation with the said document or that any evidence found in his premises or possession is not suggestive of any link of him or any person or employee related to him with the alleged document/loose paper found during the search/survey action. The AO may also call upon or make enquiries whether such a relation of the assessee can be established with any of the transactions mentioned in such document; which course has, in fact, been adopted by the AO in this case but he could not find any evidence or of any relation of the assessee with such type of transactions of the assessee. The assessee is not supposed to prove the negative when under the circumstances, it seems impossible to do so. The assessee thus has discharged his burden of rebuttal of presumption in this

case. Under such circumstances, the additions in this case solely on the basis of presumption under section 292C, which stands rebutted by the assessee as discussed above, cannot be held to be justified. The Hon'ble Allahabad High Court in the case of "CIT vs. Babu Mohanlal Arya Smarak Educational Trust" (2014) 42 taxman.com 255 (Allahabad) has observed that where in a case no evidence of actual receipt of own money/capitation was found during the search action, no incriminating evidence or corroborative evidence was found; The presumption under section 292C stands rebutted by denial of the assessee under such circumstances. The Hon'ble Delhi High Court in the case of "Principal Commissioner of Income Tax vs. Delco India Pvt. Ltd." (2016) 67 taxman.com 357 (Del.) has observed that where the assessee had clearly denied having any dealing with the concern mentioned in the loose papers found and has also produced all necessary details before AO to make necessary enquiries in this respect and the AO has made such enquiries, then, under such circumstances, such presumption stands rebutted. The Kolkata Bench of the Tribunal in the case of "Nirmal Fashions Pvt. Ltd. vs. DCIT" (2008) 25 SOT 387 (Kol.) has held that section 292C is a presumptive provision but same is a rebuttable presumption and the document found during the search action has to be considered, considering the totality of the facts of the case. The deeming provision cannot be applied mechanically ignoring the facts of the case and the surrounding circumstances of the facts are to be considered before the drawing and inference of undisclosed income on the basis of loose papers. Where the Revenue has searched the business premises as well as residential premises of the firm/partners and not a single evidence of purchase or sale outside the books of account was found, and, under the circumstances, it seems impossible to carry on business on a huge scale outside the books unless there is some unrecorded stock, cash, debtors etc.; when no significant asset outside the books or no evidence of ostensible

expenditure is found outside the books, under such circumstances, additions made on the basis of loose papers by making certain presumptions, which were found to be untenable or contrary to other evidence on record, cannot be held to be justified and deserved to be deleted. The co-ordinate Nagpur bench of the Tribunal in the case of “ACIT vs. Buldana Urban Co-operative Credit Society Ltd.” (2013) 153 TTJ (Nag) 728 in somewhat similar circumstances has observed that presumption given under section 292C is not conclusive but is rebuttable. The assessee, since, in the beginning has denied that the loose papers found to be belonged to him and the same were not in the handwriting of any of the employees; there being no corroborative evidence available on record of found during the course of search which may prove wrong the contention of the assessee that the said paper does not belong to him and the assessee offers a plausible explanation regarding the recovery of such a document in his premises, then under the circumstances the additions in the absence of any corroborative evidence cannot be held to be justified. The Lucknow bench of the Tribunal in the case of “Satnam Singh Chhabra vs. DCIT” (2002) 74 TTJ 976 (Lucknow) has held that the uncorroborated loose papers found during search action cannot be taken as a sole basis for the determination of undisclosed income. The circumstantial evidences in the case in hand, such as there being no soft copy/data available in the computer systems of the assessee in relation to the alleged document or correlating any transaction as mentioned in the said document; no recovery of any valuable asset, bullion money or jewellery or any other evidence of any investment at the premises of the assessee; no discovery of any incriminating evidence despite thorough investigations of the books of account, bank accounts and other evidences during the survey action, post survey action and during the assessment proceedings; the fact that the assessee during his statement recorded during the survey action and post survey action, though, offered additional income of Rs.4 crore, but, has

specifically denied his relation or link or entering into any transaction depicted in the said document; the assessee has not been found in relation or in contact with any of the person named in such document; no connection of the assessee with any of the bank accounts mentioned in the recovered documents and further the fact that the assessee has not introduced any cash in his books of accounts on account of additional income, for which he had already paid tax also, together constitute good rebuttal to the initial presumption u/s 292C in this case.

16. Now coming to the relevancy of statement/ disclosure made by the assessee during survey under section 133A of the Act. The survey action was carried out in the case of the assessee on the basis of high value transactions carried out in the case of Bandarkar brothers and it was considered by the Revenue Authorities that perhaps Bandarkar brothers had made high value investments for or on behalf of the assessee Shri Pandoo P. Naig. The said Bandarkar brothers during/ post the survey action investigations had offered the peak amount of their bank balance for taxation as additional income. However the AO found that they had not included the transactions relating to the deposit of Rs.33978291/- and Rs.36710971/- respectively in their bank accounts for the purpose of determining the peak credit. He accordingly added the said amounts into their income but on protective basis. During the appellate proceedings before the Ld. CIT(A), the said Bandarkar brothers produced evidence relating to the transactions in their bank accounts and a remand report was also called upon by the Ld. CIT(A) from the AO. After examination of the transactions and necessary verifications, it was found that the said deposits/ transaction in the bank accounts of the Bandarkar brothers was duly explained. There was no cash deposit and each of the deposit was through cheque and each of the transaction stood explained. No undisclosed deposit

relating to the above transactions was found in the bank accounts of the Bandarkar brothers. The Ld. CIT(A), relying upon the said evidence, deleted the additions made by the AO in the hands of the Bandarkar brothers on protective basis, which amount in fact was added in the hands of the assessee by the AO on substantive basis. Now the fact which strikes one's attention as to when the transaction in Bandarkar brothers account was through banking channel and there was no scope for addition of Rs.33978291/- and Rs.36710971/- respectively as their undisclosed income then what prevented them to explain the transaction of deposit during survey action or post survey action. The facts itself, speak that the Bandarkar brothers might have offered this additional income under pressure from the Revenue Authorities but subsequently they reconciled each transaction and proved genuineness of each of the deposits and the additions were deleted in their case. Under such circumstances the offer/surrender made by them proved to be not volunteer but under mistaken belief or pressure. Considering the above facts, we have to see what sanctity can be attached to the surrender of income made by the assessee during the survey action. It is to be noted that during the survey action, no evidence of any such share transactions, investment, undisclosed income etc. was found except the loose paper which the assessee from the beginning and consistently denied to be belonged to him. Despite such denial, a declaration was made by Shri Pandoo P. Naig offering additional income of Rs.4 crore. These facts and circumstances are of the more relevance in the light of the facts and circumstances of the case of Bandarkar brothers whose offer/declaration of income of peak credit as undisclosed income relating to the deposit of Rs.33978291/- and Rs.36710971/- has been proved to be wrongly obtained. The facts and circumstances on the file speak that the declaration taken during the course of survey from the assessee was not based on any material evidence or

belief that the assessee has any undisclosed income or profit but the same perhaps was got from the assessee under force, pressure or threat. If, there might have been any income of the assessee and he had made voluntary declaration of additional income during the survey action, he, having deposited the tax on such additional income declared, under such circumstances, would have introduced the cash of Rs.4 crores as his liquid assets in his accounts, which he would have been able to use as accounted for money for his future investments. But the facts in the case reveal that the assessee on the last day of the accounting year, in view of the declaration made, introduced cash of Rs.4 crores, but, on the first day of the next financial year, reversed the said entry because no cash was available with him. However, neither he disclosed any source or activity from which the declared income should be considered to have been earned by him nor the AO could point out as to from which specific transactions the assessee might have earned such an income. The assessee even deposited the taxes on the additional income by en-cashing his fixed deposits (FDRs) and by taking loan from other persons. Neither there was any evidence of assessee having any asset, undisclosed income or profit nor the assessee after declaration of the income introduced any cash into his books of account despite paying the taxes for the same. An argument can be made that it may be the modus operandi of the assessee to convince that the declaration made by him was false or wrong and that the same was under pressure or threat. Even if, for the sake of arguments, we assume it so, it is to be noticed that the assessee had paid taxes on the income disclosed and if the AO would have accepted his returned income as per the disclosure, the assessee would have got no chance or opportunity to claim that the disclosure made by him was under force, coercion or duress. He would have been left with no alternative than to console himself with the taxes paid in consequence of such declaration made. Under such circumstances,

it will be wrong to assume that the assessee would have taken such a risk only to get an opportunity to contend that the statement made by him was wrong or false or the same was under pressure, threat or coercion. Had the AO not made huge additions on the basis of the loose paper sheet trading of the figures mentioned therein as undisclosed income/profit of the assessee there might have no chance to claim the deletion of the additional income assessed by the AO on the basis of declaration made during the survey action. Once the assessee was forced into the litigation, then only he gathered courage to fight for his rights and to show that neither the alleged loose paper belongs to him nor he had any undisclosed income or profits and further that even the declaration taken from him during his statement was under threat and pressure.

We may deem it fit to mention here that the effect of force, threat undue influence or coercion depends upon the mental state of a person and it may vary from person to person. The assessee Shri Pandoo P. Naig in this case appeared to be carrying on such pressure and fear of possible consequences of retracting from his declaration till he was burdened with additional additions based on the figures of the one loose paper and till he gathered courage to contest the same by way of filing appeal before the Ld. CIT(A).

17. So far so, the legal sanctity of a statement made under section 133A during the survey action is concerned, the various courts have held time and again that such statements do not have any evidentiary value. The Hon'ble Madras High Court in the case of "CIT vs. S. Khaderkhan Son" (2008) 300 ITR 0157 has observed that an offer of additional income made in a statement during the course of survey action under section 133A of the Act has no evidentiary value especially when there was no material on record to prove the existence of such disclosed income or earning of such income in the hands of the assessee. The Hon'ble High Court further observed that

section 133A of the Act does not empower any Income Tax Authority to examine any person on oath, hence, any such statement has no evidentiary value and any admission made during such statement cannot, by itself, be made the basis for addition. The above findings of the Hon'ble High Court have been upheld by the Hon'ble Supreme Court as the appeal against the said order has been dismissed by the Hon'ble Supreme Court vide order dated 20.09.12 reported in (2012) 25 Taxman.com 413. Similar view has been adopted by the Hon'ble Delhi High Court in the case of "CIT vs. Dhingra Metal Works" (2010) 328 ITR 0384 and by the Hon'ble Kerala High Court in the case of "Paul Mathews & Sons vs. CIT" (2003) 263 ITR 0101. Even the Hon'ble A.P. High Court in the case of "Naresh Kumar Agarwal" (2015) 53 taxmann.com 306 (Andhra Pradesh) has observed that where, in the absence of any incriminating material etc. found from the premises of the assessee during the course of search, statement of assessee recorded under section 132(4) would not have any evidentiary value. Similar view has been adopted by the Jaipur bench of the Tribunal in the case of "Shree Chand Soni vs. DCIT" (2006) 101 TTJ 1028 (Jodhpur). The Hon'ble Delhi High Court in the case of "CIT vs. Harjeev Agarwal" in ITA No.8/2004 vide order dated 10.03.16 has observed that a statement made under section 132(4) of the Act on a stand-alone basis, without reference to any other material discovered during search and seizure operation, would not empower the AO to make a block assessment merely because any admission was made by the assessee during search operation. In the case of "Commissioner of Income Tax vs. Sunil Agarwal" (2015) 64 taxman.com 107 (Delhi-HC), the assessee therein, during the course of search, made a categorical admission under section 134 that the cash amount seized belonged to him and it represented undisclosed income not recorded in the books of accounts. The assessee did not immediately retract from the above admission but only during the assessment proceedings at a

belated stage. In his retraction, the assessee stated that the surrender was made under a mistaken belief and without looking into books of account and without understanding law and that he had been compelled and perturbed by events of search and that the pressure of search was built so much that he had to make the surrender without having actual possession of the assets or unexplained investments or expenses incurred and that there was no such income as undisclosed. The Hon'ble Delhi High Court, after considering the fact and circumstances of the case, while dismissing the appeal of the revenue, observed that though the fact that the assessee may have retracted his statement belatedly, yet, it did not relieve the AO from examining the explanation offered by the assessee with reference to the books of account produced before him. Although, a statement under section 132(4) of the Act carries much greater weight than the statement made under section 133A of the Act, but a retracted statement even under section 132(4) of the Act would require some corroborative material for the AO to proceed to make additions on the basis of such statement.

In the case of "Basant Bansal vs. ACIT" reported in (2015)63 taxmann.com 199 (Jaipur Trib.), having somewhat similar facts, the assessee therein, during the search and seizure action u/s 132 of the Act, offered a summary discloser of income as undisclosed and the department accepted the summary surrender of income and thereafter advance tax for the said surrendered of income was also deposited, but thereafter it was contended by the assessee that the surrender was made under threat or coercion and that no incriminating material was found during the search action. The stand of the department was that the admission was voluntary and was not under a mistaken belief of fact or law and that the assistance had enough time to go through the facts of their case, law applicable in their case and take advice from their counsels and advisors before filing the letter of surrender of undisclosed/unaccounted income and that the admission by

them was final and binding on them; The co-ordinate Jaipur Bench of the Tribunal, after overall appreciation of the fact and evidences before it, observed that the assessee's surrender was not based on any incriminating material and that the discloser being not voluntary and extracted by the department in creating a coercive situation cannot be relied solely to be basis of addition as undisclosed income. The co-ordinate bench of the Tribunal while relying upon various case laws of the higher authorities observed that it is well settled legal position that merely on the basis of a statement which is not supported by the department with cogent corroborative material cannot be a valid basis for sustaining such ad-hoc addition. The co-ordinate Jaipur Bench of the Tribunal (supra) further observed that the issue of existence of pressure, threat, coercion during search proceedings is to be judged by reference to the existing facts and circumstances, human conduct and preponderance of possibilities. During the search proceedings, record relating thereto being in exclusive custody of the searching officers, it is their wish and will which prevails during the fateful period. That it is almost impossible for the assessee to adduce demonstrative evidence of exerting such pressure. The co-ordinate bench of the Tribunal (supra) while holding so, apart from relying upon various decisions of the higher courts has also relied upon the decision of the Tribunal in the case of "Dy CIT vs. Pramukh Builders" (2008) 112 ITD 179 (Ahd.) wherein it has been held that even in the absence of proof of coercion or pressure, the statement by itself cannot be taken as conclusive. Therefore, merely in the absence of proof of pressure, threat, coercion or inducement the statement cannot be held as conclusive and additions cannot be made by solely relying on a statement or a letter.

The case of the assessee, before us, is on better footing as in this case, the statement recorded of the assessee was under section 133A [not under section 132(4)], which being without oath has a very weak/ low

evidentiary value as compared to the statement made u/s 132(4) of the Act. It has been held by the various High Courts and the Hon'ble Supreme Court that a statement made under section 133A, stands alone, has no evidentiary value.

18. Even the CBDT Letter No.286/2/2003-IT(Inv) dated Oct 3, 2003 in this respect read as under:

"To

The Chief Commissioners of Income Tax, (Cadre Contra)  
&  
All Directors General of Income Tax Inv.

Sir,

**Subject: Confession of additional Income during the course of search & seizure and survey operation – regarding**

Instances have come to the notice of the Board where assesseees have claimed that they have been forced to confess the undisclosed income during the course of the search & seizure and survey operations. Such confessions, if not based upon credible evidence, are later retracted by the concerned assesseees while filing returns of income. In these circumstances, on confessions during the course of search & seizure and survey operations do not serve any useful purpose. It is, therefore, advised that there should be focus and concentration on collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed before the Income Tax Departments. Similarly, while recording statement during the course of search it seizures and survey operations no attempt should be made to obtain confession as to the undisclosed income. Any action on the contrary shall be viewed adversely.

Further, in respect of pending assessment proceedings also, assessing officers should rely upon the evidences/materials gathered during the course of search/survey operations or thereafter while framing the relevant assessment orders

Yours faithfully,"

A perusal of the above circular also shows that it is in the notice of the statutory controlling body of the Income Tax Authorities that the revenue officials are used to take confessional statements from the person

searched under force, pressure or threat and that is why they have made it mandatory that additions solely on the basis on such statements should not be made and that corroborative evidences should be collected or obtained before making such additions. The circular of the CBDT is binding on the revenue officials. In the facts and circumstances of this case, when seen in the light of above case laws and CBDT circular, additions in this case cannot be said to be justifiably made.

19. Now coming to the point, whether, the claim put by the assessee Shri Pandoo P. Naig by way of additional ground before the Ld. CIT(A) regarding the deletion of addition of Rs.4 crore offered during the survey action and thereby offered in the return of income can be allowed at this stage?

The Ld. Counsel for the assessee in this respect has placed reliance on the decision of the Hon'ble Supreme Court in the case of "National Thermal Power Co. Ltd." vs. CIT" 229 ITR 383. The facts before the Hon'ble Supreme Court were that the assessee in that case offered the interest amount for taxation and the assessment was completed on that basis. Before the Ld. CIT(A), the assessee though had taken a number of grounds of appeal, however, the inclusion of the said amount of interest was not challenged. The inclusion of the said amount of interest was not objected to even in the grounds of appeal as originally filed before the Tribunal. However, the assessee by way of subsequent letter raised the additional ground in relation to the said inclusion of interest into the income of the assessee. In the above circumstances, the question before the Hon'ble Supreme Court was "Where on the facts found by the authorities below a question of law arises (though not raised before the authorities) which bears on the tax liability of the assessee, whether the Tribunal has jurisdiction to examine the same?" The Hon'ble Supreme Court while answering the said

question observed that under section 254 of the Income Tax Act, the power of the Tribunal in dealing with the appeals is expressed in the widest possible terms; the power of the Tribunal under section 254 is not restricted only to decide the grounds which arise from the order of the Commissioner of Income Tax (Appeals); that both the assessee as well as the department have a right to file an appeal/cross objection before the Tribunal and the Tribunal is not prevented from considering questions of law arising in assessment proceedings although not raised earlier. While answering the question in affirmative, the Hon'ble Supreme Court concluded that the Tribunal has jurisdiction to examine a question of law which arises from the facts as found by the authorities below and having a bearing on the tax liability of the assessee.

20. The facts of the case in hand are on better footing. In the case in hand, though under consistent pressure, the assessee offered the additional income for taxation in the assessment proceedings but when he was burdened with many more additions, he at the first instance during the appeal before the Ld. CIT(A), challenged the offer of additional income on the basis of statement recorded under section 133A. Even the said ground was also admitted by the Ld. CIT(A) for adjudication though finally decided against the assessee. The full bench of the Hon'ble Bombay High Court in the cases of "Ahmedabad Electricity Company Ltd. vs. CIT" and "Godavari Sugar Mills Ltd. vs. CIT" by way of a common order dated 30.04.1992 (1993) 199 ITR 351 has observed that the basic purpose of an appeal procedure in an income tax matter is to ascertain the correct tax liability of the assessee in accordance with law. Therefore, at both the stages, either by the Appellate Assistant Commissioner or before the Appellate Tribunal, the appellate authority can consider the proceedings before it and the material on record before it for the purpose of determining the correct tax liability of the assessee. The appellate authorities, of course,

cannot travel beyond the proceedings and examine new source of income, for that purpose other separate remedies are provided to the department under the Income Tax Act. The Hon'ble full bench of the Bombay High Court observed that apart from the above, there was nothing in section 254 or section 251 which would indicate that the appellate authorities are confined to considering only the objections raised before them or allowed to be raised before them either by the assessee or by the department, as the case may be. They can consider the entire proceedings to determine the tax liability of the assessee.

The Hon'ble Bombay High Court in the case of "CIT vs. Pruthvi Brokers and Shareholders Pvt. Ltd." (2012) 349 ITR 336 (Bom.) has observed that the assessee is entitled to raise not merely additional legal submissions before the appellate authorities, but is also entitled to raise additional claims before them. The appellate authorities have jurisdiction to deal not merely with additional grounds, which became available on account of change of circumstances or law, but with additional grounds which were available when the return was filed. The words 'could not have been raised' must be construed liberally and not strictly. There may be several factors justifying the raising of a new plea in an appeal and each case must be considered on its own facts. The co-ordinate bench of the Tribunal in the case of "Shri Chandrashekhar Bahirwani" ITA No.7810/M/2010 and 6599/M/2011 vide order dated 17.06.2015 while deciding the question as to whether the income cannot be assessed less than the returned income has observed as under:

“5. Now coming to the finding of the Ld. CIT(A), that income cannot be assessed less than the returned income, the Ld. A.R. of the assessee has submitted before us that the action of the Ld. CIT(A) in rejecting the claim of the assessee on this ground was not justified. He has further relied upon the decision of the Hon'ble Gujarat High Court in the case of "Gujarat Gas Ltd. vs. JCIT" (2000) 245 ITR 84. In the said case, the words of the Circular No.549, para 5.12, dt. 31<sup>st</sup> October, 1989, providing that the assessed income under section

143(3) shall not be less than the returned income was considered by the Hon'ble High Court and it was held that as per proviso to section 119 of the Act, the Board cannot issue instructions to the Income Tax Authority to make a particular assessment or to dispose of a particular case in a particular manner as well as not to interfere with the discretion of the Commissioner in exercise of his appellate functions. It was further held that the AO, while exercising his quasi judicial powers, was not bound by the said circular and should have exercised his powers independently. The Hon'ble High Court, therefore, directed the AO to make the assessment without keeping in mind the said circular. It may be further observed that the Hon'ble Bombay High Court in the case of 'Pruthvi Brokers & Shareholders Pvt. Ltd.' ITA No.3908 of 2010 decided on 21.06.12, while relying upon the various decisions of the Hon'ble Supreme Court and other Hon'ble High Courts has held that even if a claim is not made before the AO, it can be made before the appellate authorities. The jurisdiction of the appellate authorities to entertain such a claim is not barred. The Hon'ble High Court has further observed that the decision of the Hon'ble Supreme Court in the case of 'Goetze (India) Limited v. CIT' (2006) 157 Taxman 1, relating to the restriction of making the claim through a revised return was limited to the powers of the Assessing Authority and the said judgment does not impinge on the power or negate the powers of the appellate authorities to entertain such claim by way of additional ground. Even otherwise, the Ld. CIT(A) ought to have considered the claim of the assessee in exercise of his appellate jurisdiction under section 250 of the Act. Moreover, if the assessee is, otherwise, entitled to a claim of deduction but due to his ignorance or for some other reason could not claim the same in the return of income, but has raised his claim before the appellate authority, the appellate authority should have looked into the same. The assessee cannot be burdened with the taxes which he otherwise is not liable to pay under the law. Even a duty has also been cast upon the Income Tax Authorities to charge the legitimate tax from the tax payers. They are not there to punish the tax payers for their bonafide mistakes. In view of our above observations, it is held that the assessee is not liable to pay Capital Gains Tax, though originally he had subjected himself to the said tax as per his return of income. The AO is directed to process the claim of refund in this respect as per provisions of the law."

21. In view of the above observation, we hold that the Ld. CIT(A) though, rightly admitted the question of law as to whether the income offered by the assessee in the return of income consequent to offer made in his statement recorded during the survey action can be challenged before

the appellate authority, but wrongly decided the same in favour of revenue. In view of our findings given above and in view of the various case laws as discussed above, we have no hesitation to hold that the additional income was returned by the assessee perhaps under force, pressure, threat or coercion and under the mistaken belief. The assessee, in our view, was not liable to pay tax on the said additional income returned. We accordingly direct the Department to refund the taxes, if any, paid by the assessee in respect of additional income offered during the survey action.

22. In view of our findings given above, we uphold the order of the Ld. CIT(A) deleting the additions in the cases of Bandarkar brothers. ITA No.6671/Mum/2012 & ITA No. 6672/Mum/2012 of the revenue are therefore dismissed. So far as in the case of Shri Pandoo P. Naig, the appeal of the assessee bearing ITA No.7089/Mum/2011 is hereby allowed while that of Revenue bearing ITA No.7364/Mum/2011 is hereby dismissed.

Order pronounced in the open court on this 24/06/2016.

**Sd/-**  
**(RAJESH KUMAR)**

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 24/06/2016  
Kishore, SPS

**Sd/-**  
**(SANJAY GARG)**

न्यायिक सदस्य / JUDICIAL MEMBER

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A), Mumbai.
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

*ITA No.7089&7364/11*

*ITA No.6671&6672/12*

उप/सहायक पंजीकार  
(Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai