

IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH: KOLKATA
[Before Shri Mahavir Singh, JM & Shri M. Balaganesh, AM]

I.T.A No.1179/Kol/2012
Assessment Year: 2004-05

Assistant Commissioner of Income-tax, Vs. M/s. Inland Road Transport Pvt. Ltd.
Central Circle-IV, Kolkata. (Now known as Inland World Logistics
Pvt. Ltd. (PAN: AAACI5607C)

(Appellant) (Respondent)

&

I.T.A Nos.1225 & 1226/Kol/2012
Assessment Years: 2006-07 & 2005-06

Assistant Commissioner of Income-tax, Vs. M/s. Inland Road Transport Pvt. Ltd.
Central Circle-IV, Kolkata. (Now known as Inland World Logistics
Pvt. Ltd. (PAN: AAACI5607C)

(Appellant) (Respondent)

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C.O. No. 83/Kol/2012
In I.T.A No.1225/Kol/2012
Assessment Year: 2006-07

M/s. Inland Road Transport Pvt. Ltd. Vs. Assistant Commissioner of Income-tax,
(Now known as Inland World Logistics Central Circle-IV, Kolkata
Pvt. Ltd.)

(Cross Objector) (Respondent)

&

I.T.A Nos.1426 & 1427/Kol/2012
Assessment Years: 2007-08 & 2008-09

Assistant Commissioner of Income-tax, Vs. M/s. Inland Road Transport Pvt. Ltd.
Central Circle-IV, Kolkata. (Now known as Inland World Logistics
Pvt. Ltd. (PAN: AAACI5607C)

(Appellant) (Respondent)

&

C.O. No. 99/Kol/2012
In I.T.A No.1427/Kol/2012
Assessment Year: 2008-09

M/s. Inland Road Transport Pvt. Ltd. Vs. Assistant Commissioner of Income-tax,
(Now known as Inland World Logistics Central Circle-IV, Kolkata
Pvt. Ltd.)

(Cross Objector) (Respondent)

&

I.T.A Nos.1480 & 1481/Kol/2012
Assessment Years: 2009-10 & 2010-11

Assistant Commissioner of Income-tax, Vs. M/s. Inland Road Transport Pvt. Ltd.

Central Circle-IV, Kolkata.

(Now known as Inland World Logistics
Pvt. Ltd. (PAN: AAACI5607C))

(Appellant)

(Respondent)

&

C.O. Nos. 100 & 101/Kol/2012**I.T.A Nos.1480 & 1481/Kol/2012****Assessment Years: 2009-10 & 2010-11**M/s. Inland Road Transport Pvt. Ltd. Vs. Assistant Commissioner of Income-tax,
(Now known as Inland World Logistics Pvt. Ltd.)Central Circle-IV, Kolkata
(Cross Objector) (Respondent)

&

I.T.A No.1479/Kol/2012**Assessment Year: 2010-11**Assistant Commissioner of Income-tax, Vs. Ratan Kumar Somani
Central Circle-IV, Kolkata.
(Appellant) (Respondent)

Date of hearing: 29.04.2016

Date of pronouncement: 29.06.2016

For the Revenue: Shri Niraj Kumar, CIT, DR

For the Assessee/Cross Objector: B.C. Jain, AR

ORDER**Per Shri M Balaganesh, AM**

All these appeals of the revenue and cross objections of the assessee arise out of the separate orders of the Learned CITA in Appeal Nos. 235-241/CIT(A)C-I/CC-IV/Kol/11-12 dated 18.06.2012, 19.06.2012, 06.07.2012, 13.07.2012 & 18.07.2012 in the case of Inland Road Transport (P) Ltd and Appeal No. 163/CIT(A)C-1/CC-IV/Kol/11-12 dated 09.07.2012 for Asst Year 2010-11 in the case of Shri Rattan Kumar Somani, against the separate orders of assessment framed by the Learned AO u/s 153A/143(3) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act'). As the issues involved are identical in nature, they are taken up together and disposed off by a common order for the sake of convenience.

2. Rejection of books of accounts of the assessee and resorting to estimation of profits u/s 145(3) of the Act for all the years

Since ground is common for all the years, we dispose of this ground by this common order by taking the facts from ITA No. 1179/Kol/2012.

2.1. The brief facts of this issue are that the assessee is engaged in the business of transportation and predominantly deriving freight income. There was a search u/s 132 of the Act in the residential and business premises of the assessee along with survey operations carried out u/s 133A of the Act in several other premises on 5.11.2009. The books of accounts and documents were seized / impounded in the course of search and survey operations. The income tax status of the assessee for various assessment years are depicted in the following chart:-

Sl.No.	Particulars	<u>ASST YEARS</u>						
		<u>2004-05</u>	<u>2005-06</u>	<u>2006-07</u>	<u>2007-08</u>	<u>2008-09</u>	<u>2009-10</u>	<u>2010-11</u>
1	Return filed u/s 139(1)	Yes	Yes	Yes	Yes	Yes	Yes	Yes
2	Income declared u/s 139(1)	1357390	1879890	12518450	54191200	62336025	61567441	40128454
3	Date of filing the return u/s 139(1)	1.11.14	31.10.05	30.11.06	15.11.07	15.6.09	22.5.10	15.10.10
4	Income assessed u/s 143(3)	1422390	2029890	13300450	NA	NA	NA	231742770
5	Date of Order u/s 143(3)	29.12.06	6.12.07	29.12.08	NA	NA	NA	30.12.11
6	Income assessed u/s 143(1)	NA	NA	NA	54191200	NA	NA	NA
7	Date of Intimation u/s 143(1)	NA	NA	NA	2.12.08	NA	NA	NA
8	Income declared u/s 153A	1422390	2029890	12518449	54191200	62336025	61567441	NA
9	Date of filing the return u/s 153A	15.3.11	15.3.11	15.3.11	15.3.11	15.3.11	15.3.11	NA
10	Income assessed u/s 153A	22980430	53572690	59137540	853881630	126225500	98194840	NA
11	Date of Order u/s 153A	30.12.11	30.12.11	30.12.11	30.12.11	30.12.11	30.12.11	NA

2.2. The Ld. AO made the assessment u/s. 153A at total income of Rs.2,29,80,430/-. The Ld. AO noted in the assessment order that he was not satisfied about the correctness or completeness of the books of account; and then, invoked the provisions of section 145(3) of the Act. The Ld. AO estimated the net profit at Rs.2,38,10,815/- as against that of Rs.21,87,774/- as shown in the return thereby resulting in addition of Rs.2,16,23,041/-. The Ld. AO has narrated various reasons in the assessment order which constituted the basis for his satisfaction that the books of account of the assessee are not correct or complete within the meaning of section 145(3) of the Act, which may be summarized as under -

(a) The Ld. AO has noted in the assessment order that the assessee failed to produce the books of account and other relevant records in course of the assessment proceedings u/s 153A of the Act. It was explained before the Ld. AO that assessee's business premise at P- 223, Strand Bank Road, Kolkata - 700 001 was severely hit by massive fire, which started on 13-02-2010 and continued for many days, in which important records and documents of business, including computers and substantial electronic data, was destroyed. The Ld. AO noted that there was no detail as to which records were actually destroyed in the fire. The Ld. AO wondered how the data stored in the computers could also be destroyed. The Ld. AO believed that the assessee should have followed the normal practice of maintaining parallel set of records at an alternative location. The Ld. AO also wondered as to how the assessee could, in absence of records, carry out the business vis-a-vis its creditors and debtors. The Ld. AO thus concluded that the submission made by the assessee that the books of account and other relevant records could not be produced as they were destroyed in the fire was not acceptable.

(b) In course of the assessment proceedings u/s 153A of the Act, the Ld. AO required the assessee to produce the books of account. The Ld. AO also required production of party-wise and lorry-wise details of lorry hire charges; and, party-wise details of certain expenses e.g. lorry hire charges, computer expenses, legal charges, etc. along with supporting vouchers for the assessment years 2004-05 to 2010-11. It was explained before the Ld. AO that lorry-wise or party-wise ledger of lorry hire charges was not maintained by the assessee in its financial records as there was no requirement of law to maintain such records nor the assessee needed such details for the purposes of its business. The expenditure was charged to lorry hire charges account on actual payment basis. However, the assessee being public carrier maintains Lorry hire contract cum challan wherein all relevant particulars such as lorry number, driver's license number, etc. is mentioned for the purposes of record as well as for internal control. It was further explained that party-wise ledger of expenses was not maintained in the financial records as there was no

requirement of law to maintain such records nor the assessee needed such details for the purposes of its business. The expenditure was charged to respective accounts on actual payment basis. As relevant details are available in the vouchers which was properly maintained and preserved, there was no need to enter such details in electronic data. The assessee reiterated that it was unable to produce hard copy of the documents desired by the Ld. AO as the same was destroyed in the fire. The soft copy of such documents was available on the customized package which cannot be copied or run at other places or computers. However, the assessee claimed to have compiled and furnished information as far as was practically possible in view of the event of fire and consequent destruction of important records. The assessee also produced records for different branches which were not destroyed in the fire. It was argued that the original assessment for three assessment years 2004-05, 2005-06 and 2006-07 was made u/s. 143(3); and, the books of account and all relevant records were produced during the course of the original assessment proceedings. The then AO had accepted the books of account as no adverse finding was recorded by him in the original assessment order(s). The book result was always accepted by the Ld. AO; and, routine disallowances only were made in the assessment order(s). Also, the method of record maintenance regularly followed by the assessee was never questioned or disputed by the Ld. AO. Moreover, no adverse material was found in course of the search or survey operation. It was contended at the assessment stage that, in view of the above, the book result could not be reviewed in the assessment proceedings u/s 153A of the Act.

The Ld. AO noted in the assessment order that the assessee claimed to have furnished electronic data regarding lorry hire charges pertaining to the assessment years 2008-09, 2009-10 and 2010-11 which was factually incorrect. The Ld. AO maintained that the assessee only furnished day-wise or month-wise expenses on lorry hire charges; and, secondly, no detail was submitted for other expenses. The Ld. AO also noted that the assessee did not submit the details required for the purposes of verification from third party and government authorities. The Ld. AO

did not accept the contention of the assessee that no addition u/s 153A of the Act could be made in the assessment years 2004-05, 2005-06 and 2006-07 as no adverse material relating to these years was found in search. The Ld. AO noted that there was no requirement in law that some material must be found in search in order to make assessment u/s. 153A of the Act. The Ld. AO was of the opinion that once search is initiated u/s 132 of the Act, assessment had to be made u/s 153A of the Act in respect of 6 assessment years immediately preceding the assessment year relevant to the previous year in which the search is conducted. For, the AO placed reliance on the decision of the Hon'ble ITAT 'D' Bench, Delhi in the case of Shivnath Rai Harnarian (India) Ltd vs DCIT [2009] 117 ITD 74 and that of the Hon'ble ITAT 'A' Bench, Chennai in the case of Harvey Heart Hospitals Ltd vs ACIT [2010] 130 TTJ 700. The Ld. AO finally concluded that re-assessment u/s 153A or 153C of the Act need not necessarily be based on incriminating material found in search.

(c) The Ld. AO found that TDS certificates were issued in the name of one Sri N K Sharma for payments made to different vehicle operators totalling to Rs.73,22,73,315/- on account of lorry hire charges in the financial year 2006-07. The tax was also deducted at source on such payments and TDS certificates were issued in the name of Sri N K Sharma. Search u/s 132 was simultaneously conducted in the case of Sri N K Sharma who in his statement u/s 132(4) of the Act denied having any involvement in the business activity of the assessee. Sri N K Sharma also stated that payment @ Rs.25,000/- per month was made to him by the assessee for lending his name for disbursement of cash to the lorry operators or owners. He also declared that he intended to claim refund on account of tax deducted in his name in his return of income; and then, return the refund so received to the assessee. However, Sri N K Sharma later retracted his statement made u/s 132(4) of the Act on the ground that he was sick and under the influence of medicine which was administered by his doctor in the presence of the search party; that he was exhausted as the search continued till late night; that he signed the statement without understanding its content to avoid further mental and physical fatigue, and, he did so only on the advice of his doctor. In

course of the assessment proceedings in his own case, Sri N K Sharma contended that he was working for the assessee through duly executed agreement which was also produced before his assessing officer before the date of search. It was also contended before the AO that the statement u/s. 132(4) of the Act was not properly recorded and that its content was misleading. As the majority of payments totalling to Rs.73,22,73,315/- on account of lorry hire charges was made in cash, the AO required the assessee to produce the supporting bills and vouchers. However, no compliance was made on the ground that the bills and vouchers as required by the AO were destroyed in the fire. The Ld. AO then concluded that the genuineness of the above expenses was doubtful. Relying on the statement of Sri N K Sharma recorded u/s 132(4), the Ld. AO inferred that the assessee had created a fictitious entity to circumvent the TDS provisions, and also, to make fraudulent claim of refund. The AO concluded that the assessee company indulges in using unfair means for evading taxes.

(d) The AO required the assessee to furnish details of cash payments exceeding Rs.20,000/- made to the vehicle operators or owners in the financial years corresponding to the assessment years 2004-05 to 2010-11. It was submitted, and subsequently reiterated, before the AO that there was no single cash payment exceeding Rs.20,000/- within the meaning of section 40A(3). The books of account are audited u/s 44AB and the tax audit report duly submitted along with the regular return has certified that there was no violation of the provisions contained in section 40A(3). It was contended that cash payments of lorry charges was the normal custom; and, that it was also within the parameters of law. The AO observed in the assessment order that there are many transporters who make payments through banking channel for lorry hire charges as well as for expenses. If the assessee had made payments in cash, it was all the more important to maintain proper records. But, the assessee failed to substantiate its claim by producing supporting, records and documents on the ground that they were destroyed in fire.

(e) The AO has referred to seized diaries marked ILRT/1 and IRLT/2 containing details regarding disbursement of cash (totalling to Rs.90,44,020 in the assessment year 2008-09 and Rs.12,29,600/- in the assessment year 2009-10) by the assessee. It was claimed at the assessment stage that the seized diaries were memorandum records kept for the purposes of internal control only; and, that the noting made therein does not refer to any expenditure. However, alternatively, the total disbursement on any particular day was covered by the cash balance available with the assessee company. It was contended at the assessment stage that the abstract of cash available with the assessee company as filed before the AO clearly shows that there was sufficient cash balance to account for the said cash disbursement on any particular day. The AO noted that no cash book was produced before him; and consequently, he was unable to verify whether or not the disbursement of cash as contained in the seized diaries was actually recorded in the cash book.

f) The AO has referred to document marked IRT/21 impounded in survey at the office of the assessee. The AO found that page 9 and 10 of the said impounded document reflected the profit & loss account and balance sheet of the assessee company for the assessment years 2008-09 and 2009-10 which did not tally with those enclosed with the returns filed in compliance to notice u/s 153A. It was submitted before the AO that the impounded material at page 9 and 10 of IRT/21 was actually copy of print out taken by the survey party at the time of the survey. These documents contain rough estimates or projected data prepared by the sales executives for procuring contracts from prospective clients or for the purposes of submission along with tenders; moreover, such rough estimates or projected data is subject to further revision before their actual submission. They were not prepared by the regular accountant from the regular books of account. These facts were duly explained before the survey party by the supervisor of accounts Sri Shankar Sharma in his statement recorded u/s 133A in course of the survey operation. The AO however noted in the assessment order that the assessee had failed to explain the discrepancy between the profit & loss account

and balance sheet pertaining to the assessment years 2008-09 and 2009-10 as reflected in the impounded document IRT/21 and those enclosed with the returns filed in compliance to notice u/s 153A. The AO further observed that the assessee had also failed to explain the basis for arriving at the figures appearing in the profit & loss account and balance sheet as contained in the impounded document IRT/21.

(g) The AO noted in the assessment order that Sri Laxmi Narayan Somani, who was the key managerial person of the assessee group, had voluntarily made disclosure of Rs.24 crores in his statement u/s 132(4) recorded on 09-11-2009 on account of bogus claim of expenses. The AO further noted that Sri Laxmi Narayan Somani later retracted his statement u/s 132(4) in so far as the bogus claim of expenses was concerned. It was declared at the assessment stage that the statement regarding bogus claim of expenses was incorrect. The AO observed that there was no material on record to show that the statement u/s 132(4) was made under threat or coercion. The AO also referred to various judicial decisions in this regard.

Lastly the Ld. AO concluded, in view of the above, that he was not satisfied about the correctness or completeness of the books of account; and consequently, has decided to apply the provisions of section 145(3) of the Act. The Ld. AO then estimated the net profit at Rs.2,38,10,815/- by applying net profit rate of 1.93% on gross receipts of Rs.1,23,37,21,009/- thereby resulting in addition of Rs.2,16,23,041/-.

3. The revenue has raised the following grounds for the Asst Year 2004-05 :-

“1. That on the facts and circumstances of the case and in law, Ld. CIT(A) erred in holding that provisions of section 145(3) of I.T. Act, 1961 cannot be invoked in this case and also in overlooking the judicial decisions mentioned by the AO in paragraph 23 of the Assessment Order.

2. That on the facts and circumstances of the case and in law, Ld. CIT(A) failed to appreciate that assessee could not produce any evidence to support its financial results.

3. That on the facts and circumstances of the case and in law, Ld. CIT(A) erred in upholding the spacious argument of non- submission of evidence due to its destruction in fire without appreciating that day to day business of the assessee was not possible if everything was destroyed in fire.

4. *That on the facts and circumstances of the case and in law, Ld . CIT(A) erred in holding that assessment proceedings u/s. 143(3) is a witness to the facts that the books of accounts and other relevant records along with supporting documents were properly maintained by the assessee.*

5. *That on the facts and circumstances of the case and in law, Ld. CIT(A) failed to appreciate that even at the time of original assessment u/s. 143(3) of I.T. Act, 1961, the assessee failed to submit evidence In respect of service charges and miscellaneous expenses as is borne out by the Assessment Order.*

6. *That on the facts and circumstances of the case and in law, Ld. CIT(A) failed to appreciate that since no basic evidence whatsoever was placed before the AO, there was no option but to reject the book results and estimate the assessee profit u/s. 145(3) of I.T. Act, 1961.*

7. *That on the facts and circumstances of the case and in law, Ld. CIT(A) failed to appreciate that incriminating material .was found or other assessment years and that it indicated the modus oppendi followed by the assessee for earlier assessment years.*

8. *That on the facts and circumstances of the case and in law, Ld. CIT(A) failed to appreciate that in his statement Sri Laxmi Narayan Somani has stated that the expenses were inflated and that on this ground alone, provisions of section 145(3) could be invoked by the AO and also erred in overlooking the judicial decisions mentioned by the A.O. in paragraph 20 of the Assessment Order.*

9. *That on the facts and circumstances of the case and in law, Ld. CIT(A) failed to appreciate the provisions of section 153A and the decisions relied upon by AO on its interpretation.”*

The same grounds are raised by the revenue for the other asst years in respect of the issue of rejection of books u/s 145(3) of the Act and resorting to estimation of income.

4. The Learned AR argued that the Learned AO erred in applying the provisions of section 145(3) of the Act which is without any proper basis. He argued that there is absolutely no need to reject the book results as it was duly explained that the assessee's business premises was severely hit by fire in Feb 2010 in which important records and documents of business, including computers and substantial electronic data were destroyed. He further argued that the books of accounts and records including the computer data were seized and impounded during the course of search and survey operations from various premises and the details called for were very much available with the records of the department itself. Despite this fact, the assessee had produced the details that were available with it out of data retrieved together with the supporting documents to the extent possible. He argued that original assessment proceedings for three assessment years 2004-05,2005-06 & 2006-07 were completed u/s 143(3) of the

Act wherein the entire books of accounts and all relevant records were produced before the Learned AO prior to the search and the same were duly accepted by the Learned AO in the scrutiny proceedings. In the said regular assessment proceedings, the books results have always been accepted and the method of record maintenance regularly followed by the assessee has never been questioned or disputed by the Learned AO in the past. But still the Learned AO insisted on production of records (party wise or lorry wise ledger of lorry hire charges of party wise ledger of expenses) that were destroyed in fire. He further contended that no adverse material was found in the course of search or survey operations which could possibly justify the rejection of books of account.

4.1. He further argued that the Learned AO was not justified in relying solely on the statement of Sri N K Sharma recorded u/s 132(4) of the Act which was made under stress and which was signed without understanding its content only with a view to avoid further mental and physical fatigue. In the course of assessment proceedings in his own case, Shri N K Sharma had clarified before the Learned AO that the statement u/s 132(4) of the Act was not properly recorded and that its content was misleading.

4.2. He further argued that the statement of Sri L N Somani regarding disclosure of Rs 24 crores had no bearing on the book results already declared by the assessee in its returns which were also accepted by the department and when no adverse materials were found in the search. It was argued that the Learned AO had referred only to the statement recorded by the ADIT (Inv) on 9.11.2009 but has conveniently ignored the various explanations, containing clarifications regarding the contents of the said statement, which were subsequently made before the ADIT (Inv). He argued that the statement regarding bogus claim of expenses was incorrect as no incriminating material was found in the search which could even remotely suggest that there was any case of bogus claim of expenses. He argued that in the absence of any supporting material, the statement made by Sri L N Somani which was later retracted, has no evidentiary value.

4.3. He argued that the premises at P-223, Strand Bank Road, Kolkata, which was massively hit by fire was not under ownership or exclusive control of the assessee. It actually belongs to the Kolkata Port Trust in which offices and godowns of various

other business concerns were also located. The event of fire is evidenced by the FIR lodged with the police and intimation to the concerned fire authority of the Government, and also by the press reports published in newspapers. It was argued that fire broke out when the post search investigation was in progress and so the same was also verified by the ADIT (Inv). The fire was spread over large area of the premises and the fire authority of the Government had to struggle for many days before they could control it. He argued that as the fire broke out suddenly, it was practically impossible for the assessee to prepare inventory of the records which were destroyed in fire and accordingly he argued that the Learned AO was not justified in his observation that there was no detail of the records which were destroyed in the fire. He argued that the Learned AO erred in wondering as to how the electronic data could also be destroyed. In this regard, he argued that the Learned AO failed to appreciate that computers are not fire proof and as the computers were destroyed in fire, substantial electronic data were also lost. With regard to the observation of the Learned AO that the assessee should be following the normal practice of maintaining parallel set of records at an alternative location, he explained that the record of business as maintained by the assessee is already voluminous and so it cannot be expected to maintain parallel set of record at an alternative location. The observation of the Learned AO by expressing surprise as to how the assessee could in the absence of records, carry out its business with the customers, he argued that the Learned AO had never had the occasion to interact with the customers nor did he ever ask the assessee to narrate the problems that it was facing in dealing with the customers. He argued that it is a matter of fact that many customers have filed claims against the assessee for the goods stored in the godowns which were also destroyed in the fire.

4.4. The Ld AR submitted that the Ld. AO required the assessee to produce the books of account; party-wise and lorry-wise ledger of lorry hire charges; and, party-wise ledger of certain expenses along with supporting vouchers for the assessment years 2004-05 to 2010-11. It was explained before the AO that. party-wise or lorry-wise ledger of lorry hire charges was not maintained by the assessee in its financial records as there was no requirement of law to maintain such records nor the appellant needed such

details for the purposes of its business. The expenditure was charged to lorry hire charges account on actual payment basis. However, the assessee being public carrier maintains Lorry hire contract-cum-challan wherein all relevant particulars such as lorry number, driver's license number, etc. is mentioned for the purposes of record as well as for internal control. These contract-cum-challans form the primary documents on whose basis further record is compiled and maintained. It was further explained that party-wise ledger of various expenses as called for by the AO was not maintained in the financial records as there was no requirement of law to maintain such records nor the assessee needed such details for the purposes of its business. The expenditure was charged to respective accounts on actual payment basis. As relevant details are available in the vouchers which was properly maintained and preserved, there was no need to enter such details in electronic data. The assessee reiterated that it was unable to produce hard copy of the documents desired by the AO as the same was destroyed in the fire. The soft copy of such documents was available on the customized package which cannot be copied or run at other places or computers. The Ld AR contended that the appellant compiled and furnished as much information as was practically possible in view of the event of fire and consequent destruction of important records and electronic data. Secondly, the appellant also produced records for different branches which were not destroyed in the fire. The AO found no defect in the data that was produced before him at the assessment stage. Also, the AO found no defect "in the voluminous electronic data that was seized in course of the search and was naturally available with him. The Ld AR submitted that the original assessment for three assessment years 2004-05, 2005-06 and 2006-07 was made u/s 143(3); and, the books of account and all relevant records were produced during the course of the original assessment proceedings as was evident from the order sheets). The then AO had accepted the books of account as no adverse finding was recorded by him in the original assessment orders). The book result was always accepted by the AO; and, routine disallowances only were made in the assessment order(s). Also, the method of record maintenance regularly followed by the assessee was never questioned or disputed by the AO. The Ld AR submitted that the AO was insisting on production of records that was destroyed in the fire. Secondly, he insisted on production of detail in such form that was not possible to prepare from the financial record that was

maintained by the assessee. It was argued that the AO has no legal authority to advise the manner in which the record is to be maintained. For example, party-wise or lorry-wise ledger of lorry hire charges or party-wise ledger of expenses was not maintained by the assessee in its financial records as there was no requirement of law to maintain such records nor the assessee needed such details for the purposes of its business. Secondly, the method of record maintenance regularly followed by the assessee has never been questioned or disputed in the past by the assessing officers.

4.5. The Learned AR further argued that the Ld AR admitted that TDS certificates were issued in the name of Sri N K Sharma for payments made to different vehicle operators totalling to Rs.73,22,73,315/- on account of lorry hire charges in the financial year 2006-07. The tax was also deducted at source on such payments and TDS certificates were issued in the name of Sri N K Sharma. It was argued that the AO was not justified in relying solely on the statement of Sri N K Sharma recorded u/s 132(4) which was made under the influence of medicine administered by his doctor in the presence of the search party, and, which was signed without understanding its content on the advice of his doctor only with a view to avoid further mental and physical fatigue. In course of the assessment proceedings in his own case, Sri N K Sharma had explained that he was working for the assessee through duly executed agreement. It was also contended before the AO that the statement u/s 132(4) was not properly recorded and that its content was misleading which has been conveniently ignored by the AO. Also, the AO was not justified in observing that the genuineness of the expenses was doubtful. The freight paid vide the said TDS certificates earned corresponding freight receipts at the destination. The necessary supporting evidence for such receipts was duly produced at the assessment stage; but, the AO has failed to mention this vital fact in the assessment order. The AO was not justified in holding that the assessee was guilty for circumventing the TDS provisions when tax has been deducted at source as per the provisions of Chapter XVII – B and also paid to the credit of the central government. The Ld AR contended that even if the TDS certificate was issued in wrong name, there was no violation of the TDS provisions as the tax was duly deducted at source and also paid. But, even otherwise, there was no case for invoking the provisions of section

145(3). Above all, the issue relates to the assessment year 2007-08 which cannot be made the basis for drawing adverse inference in the year under consideration i.e. for the Asst Years 2004-05 to 2006-07.

4.6. We have heard the rival submissions and perused the materials available on record including the paper book filed by the assessee. The Learned DR at the outset doubted the fact of premises of assessee gutted by fire. According to him , only premises at 223 , Strand Bank Road , Kolkata was gutted by fire as evidenced in Learned CITA order. But the registered office of the assessee is at No. 221/2, Strand Bank Road, Kolkata. Hence the basic premise of the assessee that the premises was gutted by fire wherein the books of accounts together with several other documents were destroyed and hence, the books of accounts could not be produced before the Learned AO is patently false and under this scenario, the Learned AO had no other option but to resort to estimation of profits of the assessee u/s 145(3) of the Act. In response to this, the Learned AR argued that the search took place on 5.11.2009 and massive fire took place in Feb 2010 in the premises of the assessee which was widely reported in the media and in support of which he referred to the relevant paper cuttings and First Information Report (FIR) of Police in the paper book filed by him. It was argued that the assessee had duly replied to the notice of the Learned AO that the hard copies of various documents desired by the Learned AO prior to Feb 2010 could not be produced due to massive fire in the premises of the assessee in Feb 2010.

4.6.1. The Learned AR vehemently opposed to the allegation by the Learned DR about non-production of books of accounts willingly. He pointed out that the Learned AO was asking the assessee to do an impossible task. He further argued that the Learned DR's assertion that the assessee had no connection with the address at which fire took place i.e P-223, Strand Bank Road, Kolkata was factually incorrect and misleading. The Learned AR pointed out that survey u/s 133A of the Act was conducted at the premises at P-223, Strand Bank Road, Kolkata . He pointed out that such survey was conducted against M/s Somani Services P Ltd , another entity in the same Inland group. He further stated in course of such survey, various documents were impounded in the name of said Somani Services P ltd, where large number of papers belonged to Inland Road Transport

P Ltd (assessee herein). The electronic data impounded in the survey included transactions of Inland World Logistics P Ltd. The same AO completed the scrutiny assessment of said Somani Services P Ltd for Asst Year 2010-11 almost simulataneously where the impounded records have been considered. In support of this contention, he also placed the copy of the scrutiny assessment order u/s 143(3) framed on 9.3.2012 for Asst Year 2010-11 in the hands of Somani Services Pvt Ltd. He therefore submitted that important records having been destroyed in fire, could not have been produced before the Learned AO.

4.6.2. The Learned AR further contended that without prejudice to the aforesaid factual position, the search team has seized electronic data and other records as narrated by the Learned AO in the assessment order itself. It is not in dispute that the assessee had submitted the entire documents and records of various branches which were not affected in fire before the Learned AO. It is also not in dispute that the soft copies of the data regarding lorry hire charges for Asst years 2007-08 to 2010-11 were very much available with the Learned AO which fact has not been controverted by the revenue before us. Hence there is no need to resort to any estimation of profits for those years. As far as Asst Years 2004-05 to 2006-07, the book results have been accepted as such by the Learned AO u/s 143(3) proceedings and assessments completed accordingly. The Learned AR further stated that the corresponding comparable cases cited before the Learned AO should have been considered, in case the book results were not acceptable to the Learned AO. The assessment u/s 144 has to be based on past records of the assessee. We find that the assessee had filed its objections before the Learned AO objecting to the comparables chosen by the Learned AO for estimation of net profits as below:-

(i) Associated Road carrier (ARC) has a portfolio of business where we were either not all present during the relevant years under consideration or our activities in such nature of business was on a marginal scale for the period mentioned. Kindly take the case of tender business for the corporate world – in this case we were marginally present only and ARC was having large chunk of it. In addition to the above, top line from that sector, the other sector was specialized transportation of heavy merchandise where we were not present till 2010. ARC again was involved in the express division which is a high profit margin business whereas Inland did not venture into that part at all as it was not having sufficient skilled manpower to take the venture.

(ii) M/s Ideal Movers (P) Ltd is a company established by the Essar Group particularly to provide the services to the said group. Ideal's biggest client is Essar till date and they have limited exposure to other clients. Whereas Inland has vast variety of clientele and does not have group or associate whose major scale of work is handled by it.

(iii) V.Trans (India) Ltd is in the mode of express transportation as well as warehousing sector. Their exposure to hard core transportation is Nil, whereas our company is into hardcore transportation and has not presence in the specialized sector of express handling as well as warehousing. Our company does not provide that nature of service due to lack in expertise and specialized manpower. The said person is able to earn high margin as their major contributor is Gujarat where the revenues are high with reasonable high margin.

Accordingly the assessee objected to the comparables chosen by the Learned AO. The assessee gave its comparables of various entities which are in line with its activities in terms of turnover, volume of business, nature of services etc. It was further explained that the data furnished by the assessee are indicative of the reasonable rate of net profit earned by different carriers carrying on almost identical business as that of assessee. The names and addresses of those comparables together with PAN, wherever available, were also submitted. It was stated that assessee is engaged both in bulk cargo transportation and retail bookings. In case of bulk cargo, which by nature, is of low margin and high volume business. Cost of interest is very high as the outstanding are huge. A lot of cargo is booked by assessee at fixed rates and due to even small variances in rates at the time of actual deliveries, there will be adverse variances in margins. The assessee produced comparable cases of 14 cases to make it comparable with its net profit ratio and proved before the Learned AO that its net profit was higher than the comparables for the Asst Years 2006-07, 2007-08 and 2008-09. These are reproduced in pages 22-24 of assessment order.

4.6.3. We find that there is no finding given by the Learned AO that freight paid or received is not recorded accurately and correctly. Similarly, there is no finding that the various expenses claimed in the accounts are not incurred for the purposes of the business of the assessee or not related to the business activities of the assessee. There is no finding that the entries in the soft copies made available to the Learned AO are false or fabricated. The comparable cases given by the Learned AO were duly distinguished by the assessee on various counts and we find that the same was not discussed by the

Learned AO in his order. On the contrary, the assessee had given lot of comparables (ie comparable 14 public carriers) wherein the data were taken from website of Registrar of Companies and also requested the Learned AO to use his unfettered powers to examine those comparables which was not done by the Learned AO. Under these circumstances, the net profit reflected by the assessee in its books and returns should have to be accepted. We are in complete agreement with the Learned AR that the proceedings u/s 153A of the Act cannot be taken as a measure / platform to review the books of accounts and the trading results of the assessee especially when no incriminating materials were found during the course of search regarding the same in respect of the concluded assessments. We also find from the assessment orders filed before us for the Asst Years 2011-12 and 2012-13 which were admittedly completed u/s 143(3) of the Act and part of the paper book filed by the assessee, the Learned AO had accepted the trading results of the assessee based on the books of accounts produced before him and had not resorted to make any additions on that count. Hence consistently the books of accounts have been accepted by the revenue in the earlier years prior to search and in years subsequent to search proceedings. In these circumstances, we find that the Learned CITA had rightly rejected the action of the Learned AO in applying the provisions of section 145(3) of the Act and consequentially resorting to estimation of net profits for all the assessment years and accordingly we find no infirmity in the order of the Learned CITA.

4.6.4. With regard to the addition made in the sum of Rs. 73,22,73,315/- for the Asst Year 2007-08 towards lorry hire charges , the Learned AO found that the payments totaling to Rs. 73,22,73,315/- were made to different vehicle operators on account of lorry hire charges after deduction of tax at source. However, instead of issuing the TDS certificates in the name of vehicle operators, the TDS certificates were actually issued in the name of Shri N.K.Sharma. It was argued that the entire addition was made only based on the statement given by Shri N.K.Sharma which was made under stress and signed without understanding its content only with a view to avoid further mental and physical fatigue. We find that Shri N.K.Sharma had during the course of proceedings had contended that the statement u/s 132(4) of the Act was not properly recorded and

that its content was misleading. It is not in dispute that the tax has been deducted at source on the said lorry hire charges as per the provisions of Chapter XVII B of the Act and TDS remitted to the account of Central Government. The Learned CITA had given a categorical finding that the freight paid vide said TDS certificates earned corresponding freight receipts at the destination for which the necessary supporting evidences for such receipts were duly produced at the assessment stage which has not been mentioned in the assessment order. This finding has not been controverted by the revenue before us. We find that the Learned CITA had observed that there is no failure on the part of the assessee in deducting and remitting the tax due on the payments made towards lorry hire charges amounting to Rs. 73,22,73,315/-. We find that there is a violation of provisions of section 203 of the Act in as much as the TDS certificates were not issued in the name of the concerned vehicle operators. We find that the Learned AO had made this disallowance on the ground that there was violation of TDS provisions which was infringement of law without explaining under which explicit provisions of law, he intends to disallow the subject mentioned expenditure. It is not the case of the Learned AO that the said expenditure towards lorry hire charges is not incurred by the assessee for the purpose of its business. Under these circumstances, we find that there is no need to disallow the expenditure. Hence no addition could be made in the instant case in the sum of Rs. 73,22,73,315/- for the Asst Year 2007-08.

4.6.5. In view of the aforesaid findings, we hold that the Ground Nos. 1 to 10 raised by the revenue for the Asst Years 2004-05 to 2008-09 ; Ground Nos 1 to 9 raised by the revenue for the Asst Year 2009-10 ; Ground Nos. 1 to 6 raised by the revenue for the Asst Year 2010-11 and Ground No. 12 raised by the revenue for the Asst Year 2007-08 are dismissed.

5. Disallowance of rent paid to various co-owners u/s 40(a)(ia) of the Act

The brief facts of this issue is that the Learned AO observed that the assessee had paid rent to the tune of Rs. 7,62,000/- to Mr Y U Parthasarathy from its Bangalore Branch without deduction of tax at source. The assessee explained that the payment in question had been made to 13 individual co-owners and individual payment of each coowner is

less than the amount liable to TDS. It also stated that the separate ownership of the landlords in respect of the tenanted premises was also confirmed vide letter dated 24.7.2004 of the landlords. The Learned AO observed from the photo copy of the agreement that the words 'having equal shares in the property' had been added in para 2 of page no. 3 in hand above the typed line without any authentication by the lessors. Accordingly, he entertained a doubt about the genuineness of that part of the agreement and since the original agreement was not submitted by the assessee, he proceeded to disallow the fact of existence of several co-owners and accordingly disallowed the rent of Rs. 7,62,000/- u/s 40(a)(ia) of the Act for non-deduction of tax at source. Before the Learned CITA, the assessee pleaded that the assessee having surrendered the tenancy long back was not able to get the desired co-operation from the erstwhile landlords and stated that the Learned AO ought to have made verification from the said landlords directly to ascertain the truth. The addition made was upheld by the Learned CITA on the ground that no evidences were produced by the assessee to prove the genuineness of handwritten version in the rent agreement i.e 'having equal shares in the property' . Aggrieved, the assessee has preferred cross objections before us on the following ground No.1:-

"1. That in the facts and circumstances of the case, the Ld. CIT(A) erred in confirming disallowance of rent paid to various co-owners totaling Rs.762000/- for so called non deduction of tax at source under sec. 194-I, where there was no obligation to deduction of tax at source."

5.1. The Learned AR reiterated the submissions made before the lower authorities. In response to this, the Learned DR vehemently relied on the orders of the lower authorities.

5.2. We have heard the rival submissions. We find that the Learned AR was not able to furnish the original rent agreements or any other documents even before us to prove that the endorsement made in hand in the rent agreements have been duly authenticated by the various lessors by affixing their signatures in the rent agreement. Hence it could safely be concluded that the Learned AR was not able to produce any evidences to prove the existence of multiple co-owners except making an oral statement in this regard. We find that the Learned AR without discharging his onus to prove the veracity of the claim

of deduction had only tried to simply shift the burden to the department by making the Learned AO to verify the facts from the landlord. We find that the primary onus lies on the assessee to prove and substantiate its claim which is not discharged in the instant case. Hence we find no infirmity in the order of the Learned CITA in this regard. **Accordingly, the Ground No. 1 raised by the assessee in CO 83/Kol/2012 is dismissed.**

6. Disallowance of rent paid to Kolkata Port Trust u/s 40 (a)(ia) of the Act

The brief facts of this issue is that the Learned AO observed that the assessee had paid rent to the tune of Rs. 76,15,435/- to Kolkata Port Trust without deduction of tax at source. The assessee replied that there was no liability to deduct tax at source on the said payment and accordingly there was no violation of provisions of section 194I of the Act. The Learned AO not convinced with the reply proceeded to make disallowance u/s 40(a)(ia) of the Act. Before the Learned CITA, it was argued that the payment to the Kolkata Port Trust was made in compliance to the order of the court and hence no tax was required to be deducted. The Learned CITA not being convinced with this argument, upheld the disallowance made by the Learned AO. Aggrieved, the assessee is in appeal before us on the following ground no.2:-

“2. That in the facts and circumstances of the case, the Ld. CIT(A) erred in confirming the disallowance of Rs.7615435/- for the rent paid to Kolkata Port Trust, without deduction of tax at source under sec. 194I, although there was no obligation to deduction of tax at source.”

6.1. We have heard the rival submissions. The Learned AR placed before us a copy of the certificate issued by the ACIT, TDS, Kolkata u/s 197(1) of the Act in Proceedings No. ACIT/TDS/Cir-58/Certificate u/s 197(1)/2005-06/7 dated 18.5.2005 directing all the payers to deduct 0% TDS on rental payments made to M/s Kolkata Port Trust and the said certificate shall remain in force up to 31.3.2006 until otherwise cancelled by the issuing authority. The Learned AR fairly submitted that this document was not furnished by the assessee before the lower authorities. Hence in the interest of justice and fair play, we deem it fit and appropriate, to set aside this issue to the file of the Learned AO, to verify the veracity of the certificate u/s 197(1) of the Act produced by the assessee and if the same is found to be correct, then the Learned AO is directed to

allow deduction of rent paid to Kolkata Port Trust as there will be no obligation to deduct tax at source on the assessee for the Asst Year 2006-07. **Accordingly, the Ground No. 2 in CO 83 /Kol/2012 raised by the assessee is allowed for statistical purposes.**

7. Addition made u/s 68 of the Act – Rs. 68,50,000/-

7.1. The brief facts of this issue is that the Ld. AO has mentioned in the assessment order that survey u/s 133A was conducted on 05-11-2009 in the offices of two companies - Respect Vyapaar (P) Ltd and Akashnet Sales (P) Ltd; and, statement of their directors was recorded. It was stated by the director of Respect Vyapaar (P) Ltd that, during the financial year 2006-07, his company had given loan totalling to Rs.28,00,000/- to the appellant in lieu of cash received from them. Similarly, it was stated by the director of Akashnet Sales (P) Ltd that, during the financial year 2006-07, his company had given loan totaling to Rs.40,50,000/- to the appellant in lieu of cash received from them. The Ld. AO verified from the bank account of the said companies maintained with the UCO Bank that loan totaling to Rs.28,00,000/- and Rs.40,50,000/- was actually given by them to the assessee. It was explained at the assessment stage that the loans were taken by the assessee through account payee cheque which is duly reflected in the bank account of the loan creditors; and, which has already been verified by the AO. The loan creditors are regularly assessed to income tax, and, their assessment details are available with the AO. The loans given to the assessee are duly reflected in the balance sheet of the loan creditors; and, the interest paid by the assessee on such loans is duly declared in their return. The loan confirmation, and also, the balance sheet of the loan creditors were filed before the AO. The assessee also deducted tax on payment of interest. It was contended that the assessee had discharged its onus of establishing the identity and creditworthiness of the loan creditors and also the genuineness of the loan transactions. It was also contended that no cash was ever given to the loan creditors. There was no material found in search or otherwise suggesting that cash was given to the loan creditors. The AO relied on the statement of the directors of the said companies recorded at the time of survey, and, held that the loan confirmation of the loan creditors filed by the assessee at the assessment stage was only after-thought.

The AO then added the amounts of Rs.28,00,000/- and Rs.40,50,000/- under the provisions of section 68.

The Ld. AR contended that no incriminating material was found in search which supports the contention of the AO that cash was given to the loan creditors. The AO has examined the bank accounts of the loan creditors but no cash deposit was found in those bank accounts either before or after the loan was given to the assessee. The AO has relied solely on the statement of the directors of the said companies who have already retracted their statements by filing confirmation of loans. It is only the presumption of the AO that cash was transferred to the loan creditors.

7.2. The addition made by the Learned AO was deleted by the Learned CITA. Aggrieved, the revenue is in appeal before us on the following ground no.11:-

“11. That on the facts and circumstances of the case and in law, Ld. CIT(A) erred in deleting addition of Rs.68,50,000/- u/s. 68 of I. T. act, 1961.”

7.3. We have heard the rival submissions. We find that the Learned CITA had deleted the addition by observing as under:-

“The only ground on which the addition was made by the AO is that the loans were obtained by the appellant by transferring equal amounts of cash to the loan creditors. The AO has made this conclusion on the basis of the statement given by the directors of the lending companies in course of survey u/s 133A at their offices. But then, these statements were retracted when the lending companies gave their loan confirmation which was filed at the assessment stage. The AO has brought no material on record to dispute the loan confirmations duly filed before him. The AO has verified the bank account of the loan creditors. It is not the case of the AO that cash was deposited in their bank account before, or after, the loan was given to the appellant. The department has made no recovery of cash from the premises of the loan creditors. No incriminating material was found in search nor was any gathered or brought on record by the AO in course of the assessment proceedings which could even remotely suggest that cash was transferred by the appellant to the loan creditors. In this factual background, the contention of the AO that cash was given by the appellant to the loan creditors for obtaining loans remains unsubstantiated. The AO has placed reliance solely on the statement made by the directors of the lending companies, But then, those statements also were later retracted by giving loan confirmations which could not be disputed or disproved by the AO. The statement recorded u/s 133A, when the same was later retracted by giving loan confirmation, and, when no corroborative material was found in search or surveyor was otherwise gathered by the AO, has no evidentiary value. The assertion made by the AO that receipt of loans involved transfer of cash has no basis. The appellant has produced sufficient evidence to show that the loan transactions are genuine which has not been disproved or even disputed by the AO. On the other hand, the conclusion of the AO is based on mere assumptions and presumptions. The decision of the AO is not based on proper findings. The explanations, and also the documents, submitted by the appellant have been summarily rejected by the AO more on

presumptions than on factual ground. An assessment has to be made on the basis of the material available on record. But, in the present case, presumptions have led the AO to a state of affairs where salient evidences were overlooked and the material on record was ignored. On the other hand, the AO has brought no Positive material on record to substantiate or support his conclusion that there was transfer of cash for obtaining the loans. In view of the above, the addition made by the AO is neither sustainable in law nor on facts. The addition of Rs.68,50,000/- is deleted.”

The Learned AR vehemently relied on the order of the Learned CITA in this regard. Further he stated that the two parties from whom loans were received by the assessee were also assessed by the same AO. The Learned DR could not controvert any of the findings given by the Learned CITA in his order before us. Hence we deem it fit not to interfere with the order of the Learned CITA in this regard. **Accordingly, the Ground No. 11 raised by the revenue for Asst Year 2007-08 is dismissed.**

8. **Addition made u/s 68 of the Act – Rs. 2,48,500/-**

8.1. This addition of Rs. 2,48,500/- was made on account of seized material marked SR / 14. The brief facts are that 13 bank deposit slips in the name of one Sarat Chandra Patra showing total cash deposits of Rs.2,48,500/- in Punjab National Bank, BRBB, Kolkata was seized in search. It was contended at the assessment stage that the appellant was neither related to the bank account mentioned in the deposit slips nor with the person Sarat Chandra Patra. It was explained that some of the visitors to the office of the assessee company might have left the deposit slips by mistake; however, the AO could investigate the matter further as the details of the bank account was available with him. The AO found that the cash deposits were made in a branch of the PNB in Durgapur through its branch at BRBB, Kolkata. The AO observed that no person can leave 13 bank deposit slips by mistake. The AO then held that, since the bank deposit slips were seized from the premise of the assessee company, the cash deposits reflected therein had to be treated as its undisclosed income. The AO thus made addition of Rs.2,48,500/-. The addition made by the Learned AO was deleted by the Learned CITA.

8.2. Aggrieved, the revenue is in appeal before us on the following ground no.12:-

“12. That on the facts and circumstances of the case and in law, Ld. CIT(A) erred in deleting addition of Rs.2,48,500/- as made by the AO on cash deposit.””

8.3. We have heard the rival submissions. The Learned AR vehemently relied on the order of the Learned CITA in this regard. The Learned DR vehemently relied on the order of the Learned AO. We find that the assessee had claimed complete ignorance about the concerned person Sri Sarat Chandra Patra whose pay in slips were found and seized during the course of search. Admittedly the said 13 pay in slips represented cash deposits made in a bank account to the tune of Rs. 2,48,500/- were in the name of Sri Sarat Chandra Patra who is not at all related to assessee. We find that the assessee had discharged its primary onus of disowning the document and the presumption as to ownership of the document in the course of search has been duly rebutted by it. Moreover, there was no other corroborative evidences found in the course of search or thereafter to prove the linkage or relation of the assessee with the concerned account holder and the cash deposits found credited in that bank account. We hold that had the Learned AO made corresponding verification with the concerned bank account of Shri Sarat Chandra Patra, that would have eventually led to the concerned party and the said party could have been asked to explain the sources of cash deposits in his bank account. We hold that merely by finding a pay in slip of a third party in the premises of the assessee during the search would not automatically lead to framing of an addition in the hands of the assessee when especially no other corroborative evidences were brought on record to establish the nexus and link of the assessee vis a vis the said seized document. In these circumstances, we hold that the Learned CITA is justified in deleting the addition made in the sum of Rs. 2,48,500/- in the hands of the assessee. **Accordingly, the Ground No. 12 raised by the revenue for Asst Year 2008-09 is dismissed.**

9. Addition towards cash payments – Seized Document Reference ILRT /1

9.1. During the course of assessment proceedings, the Learned AO observed from the seized material in the form of a pocket diary marked ILRT/1 which contains record of cash payments made to different persons during the period from 21.11.2007 to 30.10.2009, that the following cash payments were made in the various years under consideration as below:-

Asst Year 2008-09 - Rs. 42,88,000/-
Asst Year 2009-10- Rs. 31,87,300/-
Asst Year 2010-11 - Rs. 15,68,720/-

9.2. It was explained that the diary was only memorandum record maintained for the purposes of internal control. For the sake of clarity of the issue, the submissions made at the assessment stage is extracted from the assessment order as under -

“In view of the nature of business of the company, funds have to be kept ready at different points where goods are loaded in the vehicles. The loading takes place after 10 p.m. in the night, before which the vehicles are not permitted to enter the places of loading. The office of the Company closes by 6 p.m. The funds required at such booking points are estimated by staff of the company at such booking point and approximate required amounts are to be kept ready. The person handing over the cash at office keeps record of the amounts paid and the name of the person to whom the amounts are paid. Generally, even the acknowledgements of the receiving persons are obtained and the same are visible in the copies of the seized papers. The details of ultimate utilization of such funds are forwarded to the office on the next date. The said ILRT/1 and IRTL/2 is memorandum records of internal handling over and handling of the funds. The cash are handed over to concerned dealing clerks out of cash balance of the office. As these amounts are regularly checked and cleared within a day or two, entries for the same at the time of handling over the funds are not considered necessary by the company, as the full account is duly cleared within reasonable time and on receipts of such details, the same are recorded in the regular cash book. Considering the nature of business, different persons are assigned to handle the cash required at loading centres in the night after loading of the vehicles. One of such persons is made accountable and therefore signatures are obtained at the time of handing the cash to him.

The AO required the appellant to produce the books of account for verification of the transactions recorded in the seized diary on item-to-item basis. However, as the appellant could not get the transactions verified from the cash book, the AO treated the amount of Rs.42,88,000/- as undisclosed income of the assessee and added the same to its total income.

9.3. Before the Learned CITA , it was submitted that the Ld AR submitted that the AO has not appreciated the nature of the entries made in the seized diary with reference to the practical compulsions of the transport business, It was explained that the trucks are not permitted entry in day-time; and consequently, tile loading can begin only after 10 pm for which cash fund is required. However, the office of the assessee company closes by 6 pm; and so, cash fund is handed over to a trusted employee who is made accountable for its utilization as well as for the submission of the supporting documents regarding incurring of the expenses. When the cash fund is handed over to the employee, an entry is made in the diary (on the right-hand side) recording particulars

such as date and amount, and generally, the name of the employee; and, his signature is also obtained. The employee is responsible for providing cash funds for incurring of expenses at odd hours when the office of the company is not open for business; and also, for the submission of the supporting documents. In due course, the employee submits the supporting documents regarding incurring of expenses along with the left-over of cash fund earlier provided to him in the office of the company. Once such accounts are received, the contra entry is made in the diary (on the left-hand side) recording the date and amount. It is for this reason that the date of receipt of accounts is always at a later date than that when the cash fund was handed over to the employee. The amount is the same as the cash fund given to the employee would tally with the total expenses incurred and the left-over of such cash fund. Copy of seized diary marked ILRT/I was filed in course of the appellate proceedings. The Ld AR explained that the source of the cash fund provided to the employee is the cash-in-hand available in the cash book of the appellant company. However, when the cash fund is given to the employee, no entry is made in the cash book. On receipt of the accounts from the employee, necessary entry is made in the cash book and the cash balance is reduced accordingly. It was for this reason that the entry made in the diary would not tally with the cash book on day-to-day basis. But then the source of the cash fund made available to the employee for the purposes of the business on any date is explained as the cash fund is covered by the cash-in-hand available on that date in the Cash Book of the appellant company. For, it was contended that the abstract of the cash available with the appellant company was filed at the assessment stage which clearly shows that there was sufficient cash balance to account for the cash disbursement on any particular day. The AO has thus erred in observing that he was unable to verify whether or not the disbursement of cash as contained in the seized diary was actually recorded in the cash book without analysing the nature of entry made in the seized diary. It was argued that the AO has blindly added the amounts appearing on both the sides when one side records payments whereas the other side records receipt of accounts. The seized diary also shows that there is no cumulative payment - rather it contains record of certain transactions which is squared-up on the same day or after a few days. Without prejudice to the above, the Ld AR has taken an alternative plea that the diary records payments as well as receipts, and so, only

the peak amount can be assessed; and, the peak being less than the normal cash balance in the cash book, no addition can be made.

9.4. The Learned CITA observed as below:-

“I have considered the submission that was made on behalf of the appellant. I have also perused the assessment order and the material on record, I find substance in the argument that the addition of all the amounts appearing on both sides of the diary is not based on proper appreciation of the seized material. I find from the perusal of the copy of seized diary marked ILRT 11 that entry is made on both sides - the right-hand side recording payments and the left-hand side recording receipts. The word "paid" is generally mentioned on the right-hand side whereas the word "received" is mentioned on the left-hand side on many pages e.g. page 7, 15, 19, 23, 41, etc. Secondly, the amount on both the sides is the same, and, the name of the person appearing against them is also the same. Thirdly, the left-hand side entry is made at a later date than the right-hand side entry. Fourthly, the seized diary does not show cumulative payments; instead, it records transactions which were eventually squared-up in a few days or so. The above facts clearly suggest that the right-hand side records 'payments' whereas the left-hand side records 'receipts'. They also give credence to the submission that the 'payments' correspond to the handing over of cash fund whereas the 'receipts' mean receipt of accounts regarding incurring of expenses and the left-over of the cash fund. In this factual background, it appears that the "payments" appearing on the right-hand side correspond to 'payment of cash whereas the left-hand side represents its utilisation. The appellant was therefore liable to explain the source of such payments which total to Rs.21,84,000/-. It was contended before me that these payments were made from the cash-in-hand available in the cash book of the appellant company; and, that the corresponding expenses were also subsequently recorded in the cash book. For, the abstract of the cash available with the appellant company was filed at the assessment stage which clearly shows that there was sufficient cash balance to account for the cash disbursement on any particular day. However, it was conceded that the entry made in the diary would not tally with the cash book on day-to-day basis. It is not the case of the AO that there was not sufficient cash balance in the books of the appellant company. The AO has made the addition only for the reason that the cash payment could not be verified from the cash book on day-to-day basis. I am of the opinion that the appellant company has not been able to discharge its onus in establishing that the payments recorded in the diary were actually made from the cash book. Secondly, there is no material on record to suggest the actual nature of the utilisation of cash. The alternative plea taken by the Ld AR that only the peak amount should be assessed cannot be accepted in view of his earlier contention that cash was paid for the purposes of expenses. Once the cash was utilised for the purposes of expenses, it was not available for plough-back into the cash flow, and consequently, the peak theory is not applicable. In view of the above, it is to be held that the appellant has failed to discharge its onus in establishing that the cash payments totalling to Rs.21,84,000/- as recorded in the seized diary marked ILRT/1 actually came- from the regular cash book. The addition on this account is therefore sustained to the extent of Rs.21,84,000/-. The appellant gets relief of Rs.21,04,000/-.”

Aggrieved, both the assessee as well as the revenue is in appeal before us. The revenue had raised the following ground for Asst Year 2008-09:-

“11. That on the facts and circumstances of the case and in law, Ld. CIT(A) erred in deleting addition of Rs.21,04,000/- as made by the AO on cash payments.”

The assessee has raised the following ground in its cross objection:-

“1. That in the facts and circumstances of the case, the ld. CIT(A) erred in confirming part additions to the extent of Rs.2184000/- being part of the amounts noted in memorandum records described as ILRT/1.”

Similar grounds are raised by the revenue and assessee (in its CO) for Asst Years 2009-10 and 2010-11 with variance in figures. Hence the decision rendered for Asst Year 2008-09 would apply with equal force for the Asst Years 2009-10 and 2010-11 also in this regard.

9.5. We have heard the rival submissions and perused the materials available on record including the copy of the seized material enclosed in the paper book filed by the assessee. The assessee claimed that the cash balances are sufficiently available on each date of funding to other godowns though it is recorded in the cash book on a subsequent date. The assessee had also stated before the Learned AO that it is ready to demonstrate the availability of cash balance for making payments to other godowns and what is maintained in the seized document is only memoranda records and hence the delay in recording the entries in the cash book on a subsequent date is quite natural. But this fact is very crucial which has not been the subject matter of examination by the revenue and substantiated properly by the assessee. We find in the facts and circumstances, deem it fit and appropriate, to set aside this issue to the file of the Learned AO, to decide this issue afresh, in accordance with law. Needless to mention that the assessee be given reasonable opportunity of being heard. The assessee is at liberty to file fresh evidences in this regard to substantiate its contentions. **Accordingly, the Ground No. 11 of revenue in Asst Year 2008-09 & CO No.1 of assessee in Asst Year 2008-09 ; Ground No. 10 of revenue in Asst Year 2009-10 & CO No.1 of assessee in Asst Year 2009-10 and Ground No. 7 of revenue in Asst Year 2010-11 & CO No.1 of assessee in Asst Year 2010-11 are allowed for statistical purposes.**

10. Addition towards cash payments – Seized Document Reference ILRT /2

10.1. The addition of Rs. 12,29,600/- was made by the Learned AO on account of seized material marked ILRT/2. This seized document is a pocket diary containing record of cash payments made to different persons totaling to Rs. 12,29,600/- during the

Asst Year 2010-11. The Learned CITA held that the seized diary ILRT/2 is similar to ILRT /1 and accordingly held that the cash payments totaling to Rs. 6,27,300/- as recorded in the seized diary could not be explained by the assessee from the regular cash book. Accordingly he granted relief to the extent of Rs. 6,02,300/- and sustained the addition made by the Learned AO to the extent of Rs. 6,27,300/- .

10.2. Aggrieved, both the assessee as well as the revenue are in appeal before us. The revenue had raised the following ground for Asst Year 2010-11:-

“8. That on the facts and circumstances of the case and in law, Ld. CIT(A) erred in deleting addition of Rs.6,02,300/-, as made by the AO on cash payments.”

The assessee has raised the following ground in its cross objection:-

“1. That in the facts and circumstances of the case, the Ld. CIT(A) erred in confirming part additions to the extent of Rs.875560/- being part of the amounts noted in memorandum records described as ILRT/1.”

10.3. We have heard the rival submissions and perused the materials available on record including the copy of the seized material enclosed in the paper book filed by the assessee. The assessee claimed that the cash balances are sufficiently available on each date of funding to other godowns though it is recorded into the cash book on a subsequent date. The assessee had also stated before the Learned AO that it is ready to demonstrate the availability of cash balance for making payments to other godowns and what is maintained in the seized document is only memoranda records and hence the delay in recording the entries in the cash book on a subsequent date is quite natural. But this fact is very crucial which has not been the subject matter of examination by the revenue and substantiated properly by the assessee. We find in the facts and circumstances, deem it fit and appropriate, to set aside this issue to the file of the Learned AO, to decide this issue afresh, in accordance with law. Needless to mention that the assessee be given reasonable opportunity of being heard. The assessee is at liberty to file fresh evidences in this regard to substantiate its contentions. **Accordingly, the Ground No. 8 of revenue in Asst Year 2010-11 and CO No.2 of assessee in Asst Year 2010-11 are allowed for statistical purposes.**

11. Addition towards payment through credit card

The facts of the case with regard to this issue for the Asst Year 2008-09 are stated herein and considered for adjudication. Similar facts are prevalent in Asst Year 2009-10 except with variance in figures.

11.1. During the course of assessment proceedings, the Learned AO found that the assessee had made payments of Rs. 58,63,375/- to ICICI Bank against credit card bills and Rs. 4,75,903/- to its Director Sri Ratan Kumar Somani. The Learned AO observed that no details of credit card payments were furnished by the assessee and also stated that the nexus of the same vis a vis the business of the assessee was not established by the assessee. Accordingly he proceeded to disallow a sum of Rs. 63,39,278/- on account of payments against credit card bills in Asst Year 2008-09. Similar addition was made in Asst Year 2009-10. The Learned AO held that the credit card expenses were personal expenses of the Directors and employees of the assessee company.

11.2. The assessee explained that the assessee company had taken 51 smart fleet cards in the name of its executives from the ICICI Bank which can be used only for the purposes of fuel and lubricants. The smart fleet card is accepted only at authorized HPCL Petrol Pumps, and so, they cannot be used for any other purposes. The assessee company has fleet of vehicles owned by it as well as hired by it as public carrier. The drivers of selected vehicles were provided with the smart fleet cards to meet the en-route expenses towards fuel and lubricants. On receipt of the accounts on expenses along with relevant bills from the driver and its subsequent confirmation with the statement of the smart fleet card, the appellant company would make payment to the ICICI Bank which is debited in its books under the head "Lubricants". For the year under consideration, such expenses on fuel and lubricant totals to Rs.57,38,337/-. However, this figure differs slightly from that of the AO primarily due to cancellation of one cheque of Rs.1,33,010/- and possible allowance of minor rebates. Copy of lubricant account was filed in course of the appellate proceedings. The Ld AR further explained that the assessee company had made payment of Rs.4,75,903/- against the expenses incurred on tour by its director Sri Ratan Kumar Somani through his credit card. The expenses mainly relate to travelling and hotel charges on tours undertaken by him for the purposes of the business

of the assessee company, and, are debited in its books under the head "Travelling". It was argued that the payments were clearly allowable as business expenses of the assessee company. The detail of travelling expenses, which totals to Rs.8,69,858/-, was filed in course of the appellate proceedings. The Ld AR contended that it was not fair for the AO to observe in the assessment order that no detail related to credit card payments was produced before him when he had never asked for it. No query in this regard was ever raised in the series of notices that the AO had issued u/s 142(1). This fact is also evident from the assessment order which is completely silent about it. But, even otherwise, the AO had no legal sanction or authority to draw adverse inference only on the basis of conjectures and surmises. The Ld AR contended that the entire payment on account of credit cards is made from the bank account of the assessee company which is duly disclosed in its books of account. The payment or its source is not in dispute. The AO has made the disallowance on the ground that the expenses were not made for the purposes of the business. But then, there was no material on record which could possibly constitute the basis for the conclusion that was drawn by the AO. Secondly, without having any supporting material on record, the AO has concluded that the credit card payments relate to the personal expenses of the directors and employees, The AO has failed to appreciate the ground reality that no company could possibly afford to burden itself with the personal expenses of its directors or employees to the extent of an astronomical figure of Rs.63,39,278/-. The Ld AR finally concluded that the action of the AO was not based on any material fact or evidence found in course of the search or collected during the proceedings of assessment.

11.3. The Learned CITA observed that on perusal of the assessment records, it was found that no details were called for by the Learned AO regarding the credit card expenses to the assessee during the course of assessment proceedings. Accordingly, the entire details of the same were furnished by the assessee before the appellate proceedings at the instance of the Learned CITA. He held that the entire expenditure incurred on credit card were for the purpose of the business of the assessee and the Learned AO's observation that the expenses were personal in nature has got no basis without bringing any material on record to that effect. Accordingly, he granted relief for

a sum of Rs. 58,63,375/-. However, with regard to the payment to its Director Sri Ratan Kumar Somani, the assessee was not able to produce any details regarding the nature of payment and the business nexus of the same before the Learned CITA and accordingly he confirmed the addition made in the sum of Rs. 4,75,903/-. Aggrieved, the assessee as well as the revenue are in appeal before us. The revenue had raised the following ground in Asst Year 2008-09 :-

“13. That on the facts and circumstances of the case and in law, Ld. CIT(A) erred in deleting addition of Rs.58,63,375/- as made by the AO on payment through credit card.”

The assessee had raised the following cross objection in Asst Year 2008-09:-

“2. That in the facts and circumstances of the case, the Ld. CIT(A) erred in confirming addition of Rs.4,75,903/- being the business expenses incurred by the assessee through credit card of one of its director namely Sri Ratan Kumar Somani.

3. Without prejudice, it is submitted in the facts and circumstances of the case, that the additions for the business expenses through the credit card of Sri Ratan Kumar Somani is highly excessive.”

Similar grounds are raised by the assessee (in its CO) for Asst Year 2009-10 except with variance in figures. Hence the decision rendered for Asst Year 2008-09 would apply with equal force for the Asst Year 2009-10 also in this regard.

11.4. We have heard the rival submissions and perused the materials available on record. The facts stated hereinabove remain undisputed and hence are not reiterated for the sake of brevity. We find that the Learned CITA had verified the entire details of the credit card payments made by the assessee and after verification of the same and on hearing the explanations of the assessee, had come to a conscious conclusion that the expenditure to the tune of Rs. 58,63,375/- incurred towards credit card bills were genuinely incurred for the purpose of the business of the assessee. The Learned DR could not controvert the findings of the Learned CITA before us in this regard.

11.5. With regard to the credit card payments of Sri Ratan Kumar Somani (Director), the Learned AR stated that the assessee company availed the facility of credit cards issued in the names of the Directors including Sri Ratan Kumar Somani. Such usage was done mainly for meeting the travelling expenses and charges for hotels. Payments were made by the assessee directly to the service providers. He placed some of the

evidences of credit card statements and payments made thereon in the paper book filed before us and also stated that the said payments were duly reflected in the regular books of accounts maintained by the assessee and hence there is no need to make any addition in this regard. It was argued that no payment was made to Director Sri Ratan Kumar Somani. The payments were made to different service providers such as banks for travelling expenses incurred for the purposes of the assessee company. The Learned AR stated that the tax auditor and the statutory auditor had reported that no personal expenditure has been debited to profit and loss account. We hold that the assessee company being a non-natural person cannot have any personal element thereon and all the expenditure incurred thereon had to be construed only for official purposes. In this regard, we place reliance on the decision of the Hon'ble Gujarat High Court in the case of Sayaji Iron and Engineering Co vs CIT reported in 253 ITR 749 (Guj) which directly supports the case of the assessee. We find that the Learned AO had made the entire addition based on surmises and conjectures without bringing any material on record. It is well founded proposition that what is apparent is real and the allegation to prove the contrary is on the person making such allegation. The following decisions support our view in this regard:-

CIT vs Daulat Ram Rawatmull (1973) 87 ITR 349 (SC)
Sukhdayal Rambilas vs CIT (1982) 136 ITR 414
Madura Knitting Co vs CIT (1956) 30 ITR 764 (Mad)

11.5.1 In view of the aforesaid facts and circumstances and respectfully following the judicial precedents thereon, we have no hesitation in deleting the addition made in the sum of Rs. 4,75,903/- for the Asst Year 2008-09. Similar relief is also granted for the Asst Year 2009-10.

11.6. Accordingly, the Ground No. 13 of revenue for Asst Year 2008-09 is dismissed ; Ground No. 2 of Cross Objection of the assessee for the Asst Years 2008-09 & 2009-10 are allowed and Ground No. 3 of Cross Objection of the assessee for the Asst Years 2008-09 & 2009-10 are dismissed as infructuous.

12. Addition towards immovable property in Gurgoan – Rs. 1,67,07,000/-

The brief facts are that document showing purchase of commercial unit in Gurgaon for Rs.1,67,07,000/- was impounded in survey. It was submitted at the assessment stage that the investment was made out of bank loan as well as own fund of the assessee company which is duly reflected in its books of account. The AO noted that no document explaining the investment was filed before him. The AO held that in absence of supporting evidence, the investment in the property is treated as undisclosed income of the assessee company. The AO thus made addition of Rs.1,67,07,000/-.

12.1. The Learned CITA observed that –

“The Ld AR explained that the assessee company had made investment for purchase of office space in Gurgaon. The impounded document that the AO has referred in the assessment order is actually the conveyance deed which was registered in the year under consideration. But then, payments by way of advance was made in the earlier years as well. For, the appellant started with payment of Rs.29,44,000/- in the financial year 2006-07 which was followed by those of Rs.85,12,500/-, Rs.37,69,368/- and Rs.29,79,261/- in the subsequent years. These payments were made through banking channel which is recorded in the regular books of account. The investment is duly reflected in the balance sheet for the assessment year 2007-08 and the subsequent years which the AO has not cared to verify. The investment was financed to the extent of Rs.1.15 crores by the ICICI Bank which was duly explained at the assessment stage. The AO is not justified in his observation that there is no supporting evidence to explain the investment when the same is duly reflected in the balance sheet of the company filed from year to year. The amount of Rs.1,67,07,000/- as considered by the AO in the assessment order actually comprises the consideration of Rs.1,56,00,000/-, stamp duty of Rs.10,92,000/- and registration fees of Rs.15,000/-. But, the assessee had to incur various other incidental expenses and the total investment was Rs.1,82,05,129/- which is duly recorded in the books of account. The detail of payment as made against the purchase was filed in course of the appellate proceedings. The copy of balance sheet for the relevant years was also filed. I have perused the material on record. I find merit in the submissions of the assessee. The assessee has made payment towards the purchase of the said property in the financial year 2006-07, and also, in the subsequent years. The payment was made through the banking channel. The investment was also financed by bank loan. Above all, the investment is duly reflected in the balance sheet for the relevant years. For, it is duly shown on the asset-side the balance sheet under the head "LOANS & ADVANCES". The AO was thus not justified in his observation that there is no supporting evidence to explain the investment when the same is duly reflected in the balance sheet of the company. The addition of Rs.1,67,07,000/- is deleted.”

12.2. Aggrieved, the revenue is in appeal before us on the following ground :-

“9. That on the facts and circumstances of the case and in law, Ld. CIT(A) erred in deleting addition of rs.1,67,07,000/-, as made by the AO on investment in immovable property.”

12.3. The Learned DR vehemently relied on the order of the Learned AO. On the contrary, the Learned AR relied on the order of the Learned CITA.

12.4. We have heard the rival submissions and perused the materials available on record. We find that the Learned CITA had given a categorical finding for deleting this addition by stating that the monies paid for purchase of immovable property at Gurgoan had been duly disclosed by the assessee in its balance sheet and hence there is no case for making any addition. The Learned DR could not controvert the factual findings given by the Learned CITA before us. **Accordingly, the Ground No. 9 raised by the revenue for Asst Year 2010-11 is dismissed.**

13. Addition made towards Capital Expenditure – Rs. 4,45,66,268/-

The brief facts of this issue is that the assessee carried out certain renovation and reconstruction work on the land and godowns taken on rent from M/s Somani Services P Ltd and incurred an expenditure of Rs. 4,45,66,268/-. In the books the assessee chose to capitalize the same. But in the return, the same was claimed as deduction which was disallowed by the Learned AO treating the same as capital expenditure. The Learned AO did not grant depreciation on the said capital expenditure. The Learned CITA upheld the action of the Learned AO. Aggrieved, the assessee has preferred cross objections before us for Asst Year 2010-11 as below:-

“3. That in the facts and circumstances of the case, the Ld. CIT(A) erred in confirming disallowance of Rs.4,45,66,268/- being expenditure for the purposes of the business of the appellant treating the same as capital expenditure.

4. Without prejudice and in the facts and circumstances of the case, the Ld. CIT(A) erred in denying depreciation on the aforesaid amount of Rs.4,45,66,268/-.”

13.1. The Learned AR argued that the land and godowns were taken on rent by the assessee from M/s Somani Services P Ltd and used for the purpose of business of the assessee. Hence the renovation expenditure incurred on the rented premises is to be allowed as revenue expenditure. Without prejudice to this argument, he argued that the assessee should at least be granted the benefit of depreciation on the said capital expenditure. In response to this, the Learned DR fairly agreed for grant of depreciation on the expenditure incurred.

13.2. We have heard the rival submissions and perused the materials available on record. We find that the Learned CITA had given a categorical finding that the assessee

had constructed a new four-storied commercial building on the rented premises for which building plan was also sanctioned from the local authority. We find that the case laws relied upon by the Learned AR were prior to the amendment brought in section 30 by the Finance Act 2003 with effect from 1.4.2004 and hence therefore not applicable for the Asst Year under appeal. Hence we hold that the expenditure incurred is capital in nature and admittedly the same is used for the purpose of business of the assessee and hence the assessee is entitled for depreciation thereon. The Learned AO is directed to grant depreciation on the same accordingly for this year. Needless to mention that the Learned AO has to correspondingly rework the written down value of the block for the consequential impact and benefit of depreciation in subsequent years. **Accordingly, the Ground No. 3 of Cross Objection of the assessee for Asst Year 2010-11 is dismissed and Ground No. 4 of Cross Objection of the assessee for Asst Year 2010-11 is allowed.**

14. Addition towards Unexplained Expenditure – Seized Document Reference ILRT /12 – Rs. 6,82,500/- and Seized Document Reference ILRT/23 – Rs. 11,24,093/-

The Learned AO treated a sum of Rs. 6,82,500/- and Rs. 11,24,093/- as unexplained expenditure on account of seized material marked ILRT/12 and ILRT/23 respectively. . The Learned AO observed that the seized material ILRT/12 contain details of expenses of Rs. 5,32,500/- incurred on civil construction work at the residence of Alipore and those of Rs. 1,50,000/- at the office at Strand Bank Road. Similarly the Learned AO observed that the seized material ILRT/23 contain details of expenses of Rs. 11,24,093/- incurred on civil construction work at the residence of Alipore. The argument of the assessee that the contents mentioned in the seized document were only estimates and not actual expenditure incurred, did not hold water before the Learned AO. This action of the Learned AO was upheld by the Learned CITA. Aggrieved, the assessee has preferred Cross Objection for Asst Year 2010-11 on the following grounds:-

“5. That in the facts and circumstances of the case, the Ld. CIT(A) erred in confirming addition of Rs.6,82,500/- for the alleged expenditure vide seized material marked as ILRT/12, whereas the said seized document did not contain record of any expenditure relating to the company at least to the extent of Rs.5,32,500/- and in any case the same were noting of memorandum record only for/by others.

6. That in the facts and circumstances of the case, the Ld. CIT(A) erred in confirming addition of Rs.1,50,000 on the basis of seized document marked as ILRT/12, which was noting of some estimate only.

7. That in the facts and circumstances of the case, the Ld. CIT(a) erred in confirming addition of Rs.11,24,093 on the basis of seized document marked as IRTL/23 whereas the said seized document did not contain record of any expenditure relating to the company and in any case the same were noting of memorandum record only for/by others.”

14.1. The Learned AR reiterated the submissions made before the lower authorities and the Learned DR vehemently supported the orders of the lower authorities.

14.2. We have heard the rival submissions. We find that the seized documents contain the place where certain works were carried out / purported to be carried out with figures. It does not contain any date, mode of payment, name of the contractor who was engaged for the work etc. We find that the Learned AO had recorded a finding that a sum of Rs. 5,32,500/- indicated in the said seized document was towards the civil works carried out at the residence of Somani family at Alipore, Kolkata. Similarly for Rs. 1,50,000/- , the Learned AO had recorded a finding that the said seized document was towards the civil works carried out for Strand Bank Road office. Similarly he had recorded a finding that a sum of RS. 11,24,093/- indicated in the said seized document was towards the civil works carried out at the residence of Somani family at Alipore, Kolkata. The Learned AO had recorded a finding that these three payments were not recorded in the books of accounts of the assessee. These findings recorded by the Learned AO had not been controverted by the assessee before us. We find both the premises recorded in the seized document has got linkage and nexus with the assessee. We find that the primary onus lies on the assessee to disprove that the documents seized during search does not belong to it which has not been discharged by the assessee in the instant case. Hence we find no infirmity in the order of the Learned CITA in this regard. **Accordingly, the Ground Nos. 5, 6 & 7 of Cross Objection of the assessee for Asst Year 2010-11 are dismissed**

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15. Addition of Rs 9 crores as undisclosed income

The brief facts of this issue is that pursuant to the search and seizure operations conducted in the premises of the assessee on 5.11.2009, the following assets were found and seized :-

	Cash	Jewellery
Found	Rs. 3,23,283	Rs. 97,70,729
Seized	Rs. 3,00,000	Rs. 54,80,387

The Key person of the group Shri Laxmi Narain Somani gave a statement u/s 132(4) of the Act and made disclosure of Rs 24 crores for the entire group which includes Rs 9 crores on behalf of the assessee herein for the Asst Year 2010-11. Thereafter, the assessee filed his return of income declaring taxable income of Rs. 6,36,590/- without including the sum of Rs 9 crores. Laxmi Narayan Somani was asked by the Learned AO vide questionnaire dated 28.02.2011 to explain the reason for not declaring income for AY 2010-11 as per disclosure because he had made disclosure on behalf of Ratan Kumar Somani himself. He stated vide his letter dated 24.03.2011 (para No. 9) that there was no evidence of earning of any undisclosed income by Ratan Kumar Somani resulting in any undisclosed thing. He further added that the said statement was never made by him with the consent/authority/advice of Ratan Kumar Somani and that it was not based on any document seized during search, hence submission in relation to Ratan Kumar Somani should be treated as unwarranted/irrelevant and contrary to the facts and should not be relied upon.

15.1. Before the Learned CITA, the assessee contended that the AO has erred in law in relying solely on the statement made by third party for drawing adverse inference in the case of the assessee; and, that too, when such third party had also retracted the declaration contained in his statement and there was no corroborative material on record to support the declaration. Sri Laxmi Narain Somani had, vide his letter dated 24-03-2011, duly explained before the AO that the said statement u/s 132(4) was not made by him with the consent or authority of the assessee; that no incriminating material representing undisclosed income of the assessee was found in search; and, that the

disclosure made u/s 132(4) was unwarranted and irrelevant as it was not based on any material found in search.

15.2. The Learned CITA appreciated the contentions of the assessee and deleted the addition made in the sum of Rs. 9 Crores in the hands of the assessee. Aggrieved, the revenue is in appeal before us on the following ground:-

“1. That on the facts and circumstances of the case and in law, Ld. CIT(A) erred in deleting addition of Rs.9,00,00,000/-, made by the AO as undisclosed income.”

15.3. We have heard the rival submissions and perused the materials available on record. The facts stated hereinabove remain undisputed are not reiterated for the sake of brevity. Both the Learned AR and Learned DR reiterated their respective submissions from the orders of the lower authorities. We find that the entire addition of Rs 9 crores has been made based on the statement u/s 132(4) of the Act made by the key person of the group Shri Laxmi Narain Somani who had made disclosure of Rs 9 crores in the name of the assessee just to make the total disclosure to Rs 24 crores. Later, the said person had filed a reply letter dated 24.3.2011 before the Ld. AO retracting the statement wherein it was duly mentioned that the disclosure of Rs 9 crores made in the hands of the assessee herein was made without verifying the complete seized documents and without the consent / advice of the assessee. For the sake of convenience, the letter dated 24.3.2011 by Shri Laxmi Narain Somani is reproduced hereunder:-

“On the fateful date of search, I was not present at any of the spots. At the insistence of the Id DDIT [Investigation] in the control of search against me, I had to rush to Kolkata from interior village in Maharashtra and immediately on attending his office, I was asked to make statement regarding undisclosed income. I have not looked into any of the seized papers - I did not have any opportunity to discuss any details with any of the executives looking after the accounts of the company. Thus statement for undisclosed income; if any, would not have been possible. However, the statement made during continuance of search was made without any corroborative evidence - except certain basic facts about delay in filing of returns of income for asst year 2009-10 of various persons. I am in the bona fide belief that in case the return of income of any person is not filed for any asst year before .the date of search, the same is considered as undisclosed income for the purpose of search. With this belief, I made the statement which contained statement regarding undisclosed income. I again wish to reiterate that there was no material, at the time of making the statement, indicating any undisclosed income.

In para 12 of the submissions made by me as per annexure to your notice/letter- the basis for giving the break up was 'to make the total of 24 crores'. Thus, it is evident that the disclosure was made for a particular amount - without looking into any details it was stated in the submissions "it may be noted that neither there is detail or manner or record of earning such undisclosed income in the seized records nor the concerned individual is

having any such record or data of such income". The statement itself makes clear that there is no evidence of earning of any undisclosed income by said Sri Ratan Kurnar Somani. I was not aware about the activities of said Sri Ratan Kumar Somani resulting in any undisclosed - the said statement was never made by me with his consent/his authority/his advice. The said statement was not based on any documents seized in course of search. In the particular facts of the case, the submissions in relation to Sri Ratan Kurnar Somani may kindly be treated as unwarranted/irrelevant and contrary to the facts and should not be relied/acted upon."

The Ld AR further submitted that the assessee also furnished his explanation at the assessment stage. It was submitted before the AO that the assessee never earned any undisclosed income which was also evident from the fact that no document or asset representing his undisclosed income was found in search. For the sake of convenience, the submission of the assessee at the assessment stage is reproduced hereunder:-

"Kindly refer to your query regarding non inclusion of sum of Rs.9 crores in the return of income under sec 153A for asst year 2009-10/regular return for asst. year 2010-11. This is to submit that I never earned any income, which may tantamount to undisclosed income in the previous years relevant to the above assessment years. Such income was not revealed by any of the documents seized from my custody in course of search. Therefore there did not arise any question of offering any income in the aforesaid returns as undisclosed income. Needless to mention, I never offered any such income in course of subsequent to search proceedings under sec 132. Further, so called statement, made by any other person, including my relatives, without my prior consent or confirmation or authority should not be used against me."

15.3.1. We hold that the statement u/s 132(4) of the Act made by Shri Laxmi Narain Somani disclosing a sum of Rs 9 Crores in the hands of the assessee without the consent of the assessee cannot be legally enforceable on the assessee. It is not in dispute that no incriminating documents or assets representing such undisclosed income of Rs 9 Crores belonging to assessee were found in the search and seizure operations. We also find that the statement u/s 132(4) of the Act given by Shri Laxmi Narain Somani had been later retracted by him clearly adducing the reasons for the retraction. Hence no addition could be made in the hands of the assessee based on the statement of a third party which was later retracted. Reliance in this regard is placed on the following decisions:-

(i) Pullangode Rubber Produce Co. vs State of Kerala and Anr (1973) 91 ITR 18 (SC)

The Hon'ble SC has observed that an admission is an extremely important piece of evidence but it cannot be said that it is conclusive. It is open to the person who made the admission to show that it is incorrect.

(ii) CIT vs Ravindar Kumar Jain (2011) 201 taxman 95 (Jharkhand HC)

“6. We have considered the submissions made by the learned counsel for the appellant and perused the reasons given in the orders passed by the CIT(A).

7. It is not in dispute that during the course of search, the assessee first submitted that he has nothing to disclose and therefore first stand of the assessee was that he had no undisclosed income and then the assessee alleged to have stated that he had also undisclosed income of Rs. 7 lakhs. However, the Assessing Officer himself found that out of said amount of Rs. 7 lakhs, the amount which the assessee stated has been deposited in the Bank, was not found in any Bank and amount of Rs. 3 lakhs had already been deleted by the Assessing Officer himself. Therefore, part of alleged admission of assessee was not found correct. Not only this, even from the order passed by the Assessing Officer itself it is apparent that the assessee, in addition to stating that he deposited Rs. 3 lakhs in different Saving Bank Accounts of Oriental Bank of Commerce, he also lent some money to private persons that fact was also found not correct by the Assessing Officer himself. Therefore, the admission made by the assessee before the Assessing Officer during the course of search contained three facts-(i) that he had no undisclosed income, (ii) the assessee had undisclosed income of Rs. 7 lakhs, and (iii) that he had invested Rs. 4 lakhs in stock of M/s. Moolchand Jain and Sons in support of which there was no evidence collected by the Assessing Officer and then deposit of Rs. 3 lakhs in the Bank Account which could not have been if his statement as given at the relevant time is deemed correct, because the assessee also stated that he lent some of the amounts to some persons. Therefore relying on only one such statement given by the assessee in these circumstances where out of three two facts were found to be not correct, then in these facts and circumstances, it was the duty of the Assessing Officer to collect more evidence in support of the fact that there was undisclosed income of Rs. 7 lakhs in the hands of the assessee. These reasons had been considered by the CIT(A) as well as by the ITAT and therefore, their findings about the taxable income of the assessee has been given in the facts of the case.

(iii) Kailashben Manoharlal Chokshi vs CIT (2010) 328 ITR 411 (Guj)

“Held, that the statement of the assessee was recorded under section 132(4) of the Act at midnight. In normal circumstances, it was too much to give any credit to the statement recorded at such odd hours. The person would not be in a position to make any correct or conscious disclosure in a statement if such statement was recorded at such odd hours. The assessee had given proper explanation for all the items under which disclosure was sought to be obtained from the assessee. With regard to the investment in house property he had stated that he took the plot in 1964 from the housing society which was constructing the bungalow for which the assessee made contribution from time to time and took possession in 1974 when only one ground floor was constructed. He had been living there and during 1986 to 1988 he had constructed the first floor and had incurred expenses of Rs. 2,03,185.65 and this amount had been withdrawn from the account of the firm which he was a partner. The Departmental Valuer had accepted the cost of construction and there was no reason to make addition of Rs. 4 lakhs on the basis of the disclosure made by the assessee. The Revenue had not brought any evidence to establish

that the assessee had in fact incurred Rs. 4 lakhs and that amount was invested out of undisclosed income. The addition on account of gold ornaments could not be sustained since looking into the quantum of holding and the assessee's explanation this was a normal holding which could be found in any middle class Indian family. The furniture on the ground floor was 15 years old and the assessee had spent Rs. 25,000 for renovation after making withdrawal from the firm's account. With respect to furniture in the first floor a detailed source of investment of furniture purchased with due confirmation from the party concerned had been filed by the assessee before the Assessing Officer. Since no payment for this additional furniture was made by the assessee till the date of search, no addition could be made on this count. The explanation of the assessee was convincing but not been considered by the authorities below. Merely on the basis of the admission of the assessee the additions could not be made unless and until some corroborative evidence was found in support of such admission. The statement recorded at such odd hours could not be considered to be a voluntary statement, if it was subsequently retracted and necessary evidence was led contrary to such admission. The Tribunal was not justified in making addition of Rs. 6 lakhs."

(iv) Similar views were expressed by the Hon'ble Courts in the following cases:-

CIT vs Chandrakumar Jethmal Kochar reported in (2015) 230 Taxman 78 (Gujarat)

M.Narayanan & Bros vs ACIT reported in (2011) 339 ITR 192 (Mad)

CIT vs S Khader Khan Sons reported in (2008) 300 ITR 157 (Mad) which was later approved by Hon'ble Supreme Court

Bachittar Singh vs CIT reported in (2010) 328 ITR 400 (P&H)

15.3.2. In view of the aforesaid facts and findings and respectfully following the judicial precedents stated hereinabove, we do not find any reason to interfere with the order of the Learned CITA in this regard. **Accordingly, the Ground No.1 raised by the revenue is dismissed.**

16. Addition towards cash (Rs. 3,23,283/-) and Jewellery (Rs. 97,70,729/-)

During the course of search, Cash of Rs. 3,23,283/- and Jewellery worth Rs. 97,70,729/- was found in the residential premises of the assessee at No. 9, New Road, Anugrah Building, Alipore, Kolkata. The Learned AO observed that the warrant of authorization u/s 132 of the Act was in the name of the four brothers of the assessee group, namely, Shri Laxmi Narain Somani, Shri Ratan Kumar Somani (assessee), Shri Shyam Sundar Somani and Shri Radha Kishan Somani. The Learned AO observed that the assessee

resides in Kolkata whereas his brothers live in places outside Kolkata and accordingly concluded that the said cash and jewellery found as belonging to the assessee and proceeded to treat the same as income of the assessee. However, no separate addition was made towards the same in the assessment in view of addition made in the sum of Rs 9 Crores by the Learned AO.

16.1. Before the Learned CITA, the assessee contended that the explanation given by the assessee vide letter dated 17.3.2011 that the cash of Rs. 3,23,283/- found in search belongs to Shyam Sundar Kamal Kumar Somani (HUF) was not appreciated by the Learned AO. The income tax assessment particulars of the said HUF file was given together with its PAN. The AO issued a letter dated 28-10-2011 to the Karta of the HUF requiring him to produce the cash book and bank statement for the financial year 2009-10 and copy of income tax return along with the computation of income, profit & loss account and balance sheet pertaining to the assessment year 2010-11. The Karta of the said HUF responded vide its letter dated 03-11-2011 and submitted all documents as required by the AO. The cash book and bank statement as well as copy of income tax return along with the computation of income, profit & loss account and balance sheet pertaining to the assessment year 2010-11 was produced before the AO. The copy of correspondence between the AO and the HUF was filed in course of the appellate proceedings. The assessee tried to explain the cash balance found at the time of search by way of filing the cash book of the said HUF file for the period 1.4.2009 to 5.11.2009 which is summarized as under:-

DATE	PARTICULARS	DEBIT	CREDIT	BALANCE
01-04-2009	To Opening Balance	1,000		1,000
09-04-2009	To Vijaya Bank Ch no. 893279	25,000		26,000
29-05-2009	To Vijaya Bank Ch no. 893281	5,00,000		
30-05-2009	By Drawings for personal use		1,00,000	5,26,000
08-06-2009	By Drawings for personal use		1,00,000	4,26,000
05-11-2009	By cash seized by IT Department		3,00,000	3,26,000
				26,000

Based on this cash book, it was contended that no addition need to be made towards the cash found at the time of search as it stands fully explained. The Learned CITA deleted the addition of Rs. 3,23,283/- in the hands of the assessee.

16.2. During the course of search, the total jewellery found in the residential premises of the assessee group in Kolkata, Mumbai and Delhi comprises 4458.760 grams of Gold Jewellery and 258.320 carats of Diamond which are summarized as below:-

Sr. No.	Premise	Weight of gold (gms)	Weight of diamond (cts.)	Value (Rs.)
1	Kolkata	3706.900	223.490	97,70,729
2	Delhi	284.090	8,050	12,84,954
3	Mumbai	<u>467.770</u>	<u>26.780</u>	<u>10,621,865</u>
	Total	<u>4458.760</u>	<u>258.320</u>	<u>1,21,18,548</u>

It was explained before the AO that the appellants were a joint family and jewellery belonging to different family members was found in search at the residential premises in Kolkata, Mumbai and Delhi. This is also evident from the fact that the warrant of authorisation u/s. 132 was issued in the name of the four brothers and the panchanama at the residential premise in Kolkata was also drawn in their joint name. It was submitted before the AO that the jewellery found at the residential premises actually belong to the family members and their HUFs. While the AO has considered the jewellery found in Mumbai in the hands of Sri Laxmi Narayan Somani and that found in Delhi in the hands of Smt Chandu Somani w/o Sri Radha Kishan Somani; the entire jewellery found in Kolkata has been considered by the AO in the hands of the assessee on the presumption that he alone resides in Kolkata. But then, this was factually incorrect. For example, one brother Sri Shyam Sunder Somani was present in Kolkata at the time of the search; secondly, Sri Navin Somani s/o Sri Laxmi Narayan Somani was also present who actually signed the panchanama. The finding of the AO that the entire jewellery belongs to the assessee is also contrary to the material on record. For, the panchanama containing description of jewellery drawn at the residential premise in Kolkata clearly shows that different items of jewellery was recovered from different bed rooms belonging to the brothers and was also found on different persons. The confirmation given in this regard by different family members was also produced at the assessment stage which has been ignored by the AO. It was explained before the AO that the jewellery found at the residential premises actually belongs to 15 family members and their HUFs out of which 11 are separately assessed to wealth tax in the same Central Circle-IV, Kolkata. The wealth tax return of such 11 persons is being filed regularly.

The assessee has produced in course of the appellate proceedings supporting documents such as acknowledgements of wealth tax returns, valuation reports enclosed with the wealth tax returns, wealth tax assessment orders, etc. It was submitted that the wealth tax returns of 4 lady members of the family is not filed as there is no wealth tax liability, but then, it is customary that any woman of a Hindu family would have some jewellery. The Ld AR submitted that 17815.910 gms of gold jewellery and 1713.120 cts of diamond is declared by the said 11 persons in their wealth tax returns which was summarized as under -

Sr. No.	Family members	PAN	AO	Weight of gold (gms)	Weight of diamond (cts)	Value (Rs.)
1.	Puspa Devi Somani	AJWPS3190G	CC-IV	1947.180	171.700	31,36,389
2.	Ratan K Arun K Sornani HUF	AADHR1573C	CC-IV	1187.260	94.250	6,35,787
3.	Arun Sornani HUF	AAHHA2882D	CC-IV	464.900	65.000	11,89,173
4.	Raj. Kumar Somani HUF	AAJHR5626L	CC-IV	930.780	92.800	20,75,163
5.	Sanyukta Sornani	AGAPM4363Q	CC-IV	1120.980	79.250	13,67,725
6.	Sweta Somani	AVUPS8671A	CC-IV	1112.720	134.400	17,51,953
			Total	6763.820	637.400	1.01.56,190
7.	Mohini Devi Sornani	AJWPS3193F	CC-IV	645.410	162.800	15,44,583
8.	Laxmi Devi Sornani	AMIPS6052J	CC-IV	2156.560	222.320	22,83,625
9.	Shanti Devi Somani	ALOPS2029Q	CC-IV	2957.640	330.000	29,67,100
10.	Chandu Somani	AXEPS3622D	CC-IV	2551.080	219.600	26,38,598
11.	Navin Somani	AXEP53620B	CC-IV	<u>2741.400</u>	<u>141.000</u>	<u>15,93,819</u>
		GRAND	TOTAL	<u>17815.910</u>	<u>1713.120</u>	<u>2,11,83,915</u>

The Ld AR contended that the jewellery found in search at residential premises of the assessee group was far lower than the total jewellery declared by the family members and their HUFs in the wealth tax returns duly filed before the date of search. For, the total jewellery found in search at the residential premises comprises 4458.760 grns of gold jewellery and 258.320 cts of diamond whereas the appellant group has declared in their wealth tax returns 17,815.910 gms of gold jewellery and 1713.120 cts of diamond. It was submitted that the appellant group are a joint family and it was only the presumption of the AO that the brothers live separately. The brothers do go outstation and even reside for the purposes of the business; but then, all have their headquarters in Kolkata. All the family members are regularly assessed in Kolkata. The panchanama containing description of jewellery drawn at the residential premise in Kolkata clearly shows that different items of jewellery was recovered from different bed-rooms belonging to the brothers and was also found on different persons. The confirmation claiming ownership of jewellery given by different family members was produced at the assessment stage. The Ld AR further submitted that if the contention of the AO that the

entire jewellery found in search from the residential premise in Kolkata belongs to the appellant is accepted for the sake of argument, even then the total jewellery found in search is not in excess of the total jewellery declared by the assessee's family in their wealth tax return. For, the total jewellery found in search at the residential premise in Kolkata comprises 3706.900 grns of gold jewellery and 223.490 cts of diamond whereas the assessee's family has declared in their wealth tax returns 6763.820 grns of gold jewellery and 637.400 cts of diamond. The Ld AR concluded that, in view of the above, the jewellery found in search is duly explained, and, that there was no basis or justification for the AO to hold that the jewellery found in search has to be added to the income of the assessee. In fact, there is no finding in the assessment order that the jewellery so found represents undisclosed income of the assessee.

16.3. The Learned CITA appreciated the contentions of the assessee and deleted the addition made in the sum of Rs. 3,23,823/- towards cash found and Rs. 97,70,729/- towards Jewellery in the hands of the assessee. Aggrieved, the revenue is in appeal before us on the following ground:-

“2. That on the facts and circumstances of the case and in law, Ld. CIT(A) erred in holding that no addition in respect of cash of Rs.3,23,283/- and jewellery of Rs.97,70,729/- found during the course of search can be made by AO and that the assessee's explanation on this issue is acceptable.”

16.4. We have heard the rival submissions and perused the materials available on record including the paper book filed by the assessee. We find that the assessee had explained before the Learned AO that the cash found in search belongs to Shyam Sundar Kamal Kumar Somani (HUF) . We find that the Learned AO had verified this contention of the assessee by cross verification from the Karta of the HUF who had duly confirmed by replying in writing before the Learned AO. We find that no defects were pointed out by the Learned AO in the cash book and the details submitted by the Karta of HUF. We also find that the said HUF in its Balance sheet filed as on 31.3.2010 (Pg 186 of the paper book) had duly disclosed the cash seized of Rs. 3,00,000/- in its Balance Sheet. This itself goes to prove that the cash is owned by the HUF and hence the explanation given by the HUF that cash found belongs to them deserves to be accepted. No contrary evidence were brought on record by the revenue to disbelieve the same. Accordingly,

we hold that the Learned CITA had rightly deleted the addition made towards cash found in the sum of Rs. 3,23,283/-.

16.4.1. Apropos the addition made towards Jewellery in the sum of Rs. 97,70,729/- , we find from the above discussions that the jewellery found at the time of search was much less than the jewellery declared by the family members of the assessee and their HUFs in their wealth tax returns prior to search and wealth tax assessments on the returns so filed were completed u/s 16(3) of the Act accordingly for which evidences were submitted in the paper book filed by the assessee. The Learned CITA had recorded a categorical finding that there is no material on record that such jewellery declared before the date of search were subsequently sold or transferred by the assessee or their family members. We find that the revenue was not able to bring any contrary evidence to this before us. We find that the Co-ordinate Bench decision of this tribunal in the cases of Tulika Kedia vs ACIT in IT(SS) A No. 71/Cal/1997 which in turn placed reliance on its other decision in the case of Manju Devi Kedia vs ACIT in IT(SS) A No. 73/Cal/1997 had held as under:-

“Respectfully following the Tribunal’s order in the case of other family/group member in IT(SS)A No. 73 (Cal) of 1997 by E-Bench, Calcutta dated 23.12.1999, we conclude that when a much larger amount of jewellery had been disclosed by all the members of the family to the I T Department and the jewellery found at different places aggregated to a much smaller figure, there is no case for making any addition on account of finding of jewellery during the course of search and seizure operation.”

We hold that even if the individual items of jewellery did not match with the wealth tax returns already filed prior to the search, no addition could be made towards jewellery as long as the jewellery found during the search is less than the jewellery disclosed in the wealth tax returns prior to the search. This is so because the jewellery being a fashion industry had to be remade according to changing fashion and designs. We find that this contention also gets support from the fact that the jewellery other than those under consideration was not found in the search, which means the logical conclusion would be that the same are sent for re-making to be in line with the changing fashion and designs. We find that the confirmation filed by the different family members of the assessee claiming ownership of their respective jewellery together with the respective list of items were neither disputed nor disproved by the Learned AO. Hence we hold

that the entire jewellery found at the time of search valued at Rs. 97,70,729/- stands duly explained. We also find that the Learned AO had not given any finding in his assessment order as to how the Jewellery amounting to Rs. 97,70,729/- would become the undisclosed income of the assessee. Under these circumstances, we find no infirmity in the order passed by the Learned CITA in this regard. **Accordingly, the Ground No. 2 raised by the revenue is dismissed.**

17. Non-granting of benefit of set off of Long Term Capital Loss of Asst Year 2004-05

The brief facts of this issue is that the assessee filed the return of income for the Asst Year 2004-05 on 1.11.2004 which according to the Learned AO was beyond the due date of filing the return. In the said return, the assessee had claimed carry forward of Long Term Capital Loss and the same was set off by the assessee against the Long Term Capital Gains on sale of land at Joka during the Asst Year 2010-11. The assessee did not grant the benefit of set off of carry forward Long Term Capital Loss of Asst Year 2004-05 on the premise that the return for Asst Year 2004-05 was not filed by the assessee on or before the due date prescribed u/s 139(1) of the Act. The assessee submitted that CBDT vide its order F. No. 220/1/2004-IT(A-II) dated 22-07-2004 had extended the due date for filing of return from 31-07-2004 to 31-10-2004. And, since the 31st October, 2004 happened to be Sunday, the last date for filing the return stood automatically extended to 01-11-2004 in view of section 10 of the General Clauses Act, 1897. The Ld AR submitted that the CBDT had also clarified this issue vide its Circular No. 639 dated 13-11-1992 which is extracted below -

“Where the last day for filing return of income/loss is a day on which (IT) office is closed, the assessee can file the return on the next working day and, in such cases, the return will be considered to have been filed within the specified time limit. This clarification also applies to the returns under other direct tax enactments. The above clarification has been issued in view of section 10 of the General Clauses Act, 1897.”

17.1. The Learned CITA in his order observed as under :-

“I find merit in the contention of the appellant. The AO has not allowed the set-off for the reason that the return for the assessment year 2004-05 was filed on 01-11-2004 which was beyond the due date. However, this finding of the AO is not correct. For, the CBDT had extended the due date for filing of return from 31-07-2004 to 31-10-2004. Since the 31st October, 2004 was Sunday, the appellant could file the return on 01-11-2004 which is to be considered to have been filed within the due date in view of section 10 of the General

Clauses Act, 1897 and CBDT Circular No. 639 dated 13-11-1992. In view of the above, the AO was not correct in holding that the return for the assessment year 2004-05 was filed beyond the due date. The AO is accordingly directed to allow the set off as per the provisions of law.”

Aggrieved, the revenue is in appeal before us on the following ground:-

“3. That on the facts and circumstances of the case and in law, Ld. CIT(A) erred in deleting addition of Rs.4,31,806/- as made by the AO on LTCG.”

17.2. We have heard the rival submissions. We find that the Learned CITA had rightly granted the benefit of set off of carry forward long term capital loss of Asst Year 2004-05 to be set off against the long term capital gain in Asst Year 2010-11 by placing reliance on the CBDT Circular supra and section 10 of General Clauses Act. Hence we find no infirmity in the order passed by the Learned CITA in this regard. **Accordingly, the Ground No. 3 raised by the revenue is dismissed.**

In the result, to Sum up:-

ITA No. 1179/2012	AY 2004-05	Revenue Appeal	Dismissed
ITA No. 1226/2012	AY 2005-06	Revenue Appeal	Dismissed
ITA No. 1225/2012 CO No. 83/2012	AY 2006-07 AY 2006-07	Revenue Appeal Assessee Cross Objections	Dismissed Partly allowed for statistical purposes
ITA No. 1426/2012	AY 2007-08	Revenue Appeal	Dismissed
ITA No. 1427/2012 CO No. 99/2012	AY 2008-09 AY 2008-09	Revenue Appeal Assessee Cross Objections	Partly allowed for statistical purposes Partly allowed for statistical purposes
ITA No. 1480/2012 CO No. 100/2012	AY 2009-10 AY2009-10	Revenue Appeal Assessee Cross Objections	Partly allowed for statistical purposes Partly allowed for statistical purposes
ITA No. 1481/2012 CO No. 101/2012	AY 2010-11 AY 2010-11	Revenue Appeal Assessee Cross Objections	Partly allowed for statistical purposes Partly allowed for statistical purposes
ITA No. 1479/2012	AY 2010-11	Revenue Appeal	Dismissed

Order is pronounced in the open court on 29.06.2016

Sd/-

(Mahavir Singh)
Judicial Member

Sd/-

(M. Balaganesh)
Accountant Member

Dated : 29th June, 2016

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. ASSESSEEs -
- 2 Respondent –
3. The CIT(A), Kolkata
4. CIT , Kolkata
5. DR, Kolkata Benches, Kolkata

/True Copy,

By order,

Asstt. Registrar.