

आयकर अपीलिय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL,
JAIPUR BENCHES , JAIPUR

श्री भागचन्द्र, लेखा सदस्य एव श्री कुल भारत, न्यायिक सदस्य के समक्ष
BEFORE: SHRI BHAGCHAND, AM & SHRI KUL BHARAT, JM

आयकर अपील सं./ITA No. 746/JP/2014
निर्धारण वर्ष/Assessment Year : 2009-10

Smt. Renu Agarwal 25, Dayal Nagar, Gopal Pura Bye-Pass, Jaipur	बनाम Vs.	The ACIT Central Circle- 3 Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAOPA 6576 B		
अपीलार्थी /Appellant		प्रत्यर्थी /Respondent

राजस्व की ओर से/ Revenue by:Smt. Pratima Kaushik, CIT -DR
निर्धारिती की ओर से/ Assessee by: Vijay Goyal, CA

सुनवाई की तारीख/ Date of Hearing : 30/01/2017
घोषणा की तारीख/ Date of Pronouncement : 14 /02/2017

आदेश/ ORDER

PER BHAGCHAND, AM

The assessee has filed an appeal against the order of the ld.
CIT(A)-Central, Jaipur dated 9-09-2014 for the assessment year 2009-10
raising therein following grounds of appeal.

“1. On the facts and in the circumstances of the case, the ld. CIT(A) erred in holding that cancellation agreement was found in post search operations and is fabricated document more so when this document was seized by the Income Tax Department vide Exhibit 4 of Annexure AS from 1, Dayal Nagar, Gopalpura Bye Pass, Jaipur on 12-10-2010 during the

course of search which started from 22-09-2010 and continued upto 12-10-2010.

2. On the facts and in the circumstances of the case and in law the Id. CIT(A) erred in confirming the addition of Rs. 76,00,000/- made by the AO on account of alleged unexplained investment in purchase of Plot No. 281,10-B, Gopal Pura Bye Pass, Jaipur

3. That the order of the Id. CIT(A) confirming the addition made by the AO is arbitrary, whimsical, capricious, perverse and against the law and facts of the case. The order of the Id. CIT(A) in this regard deserves to be set aside and addition made by the AO deserves to be deleted.

2.1 During the course of hearing, it is noted that the assessee filed the following additional ground under rule 11 of ITAT, Rules 1963.

“On the facts and in the circumstances of the case and in law the service of the assessment order was not complete within the time specified in the Act as the AO has treated the Annexures ABCDEF and G as part of the assessment order as mentioned in para 10 and 14 of assessment order and the copy of the said Annexures A,B,C,D,E,F and G was not annexed to the assessment order and served to assessee with assessment order. Therefore, and thus the assessment order deserves to be declared as time barred and void ab initio and the impugned assessment u 153B r/w 143(3) of the I.T. Act is liable to be annulled.

However, at the outset of the hearing, the Id. AR of the assessee prayed for withdrawal of this ground for which the Id. DR has no objection. Hence, the additional ground raised by the Id. AR of the assessee is dismissed as withdrawn.

3.1 Apropos Ground No. 1 to 3 of the assessee, brief facts of the case are that the original return was e-filed by the assessee on 29-09-2009 declaring income at Rs. 2,86,24,330/-. Search and seizure operations were carried out on 22-09-2010 at the business and residential premises of the assessee group. Incriminating evidence was gathered during the course of search operations. Notice u/s 153A of the Act was issued on 06-09-2011 and in response to this notice a return of income was e-filed by the assessee on 6-12-2011 declaring total income at Rs. 2,86,24,330/-. The assessment u/s 153B/143(3) of the Act was completed on 31-03-2013 at total income of Rs. 3,62,24,330/- by the AO by observing as under:-

“26. In nut shell, we can say that out of the three agreement made in respect of plot “281-B, Scheme 10-B, Gopalpura Bypass, Jaipur” two were not authentic and were just the colourable devices. The agreement that was made on 25-06-2008, which reflected total sale consideration of Rs. 1,41,000,000/- is the actual agreement which reflects that ON money has been paid by the assessee for purchase of plot.

27. All these facts and circumstances clearly indicate that the assessee is deliberately misleading the Department to avoid payment of taxes on the true income, although admitted on a number of occasions during and after search

28. Reliance is placed on judicial pronouncement which clearly prove that there is evidentiary value of admissions made by the assessee. Some of the important decisions in this regard are as follows:-

Sterling Machine Tools vs. CIT 122 ITR 926	The legal value of an admission is that it is the best evidence that an opposite party can rely upon, and though not conclusive is decisive of the matter unless unsuccessfully withdrawn or proved erroneous
82 ITR 540 (SC) CIT vs. Durga Prasad More (SC)	It is true that an apparent must be considered real. Until it is shown that there are reasons to believe that the apparent is not the real. In case of the present kind of a party who relies on a recital in a deed has to establish the truth of those recitals, otherwise it will be very easy to make self-serving statements in documents either executed or taken by a party and rely on those recitals. It all that an assessee who wants to evade tax is to have some recitals made in a documents executed by him or executed in his favour then the door will be left wide open to evade tax. A little probing was sufficient in the present case to show that the apparent was not real. The taxing authorities were not required to put on blinkers while looking at the documents produced before them. They were entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents.
DR S.C. Gupta vs. CIT 248 ITR 782 (Alld.)	In Pullangode Rubber Produce Co. Ltd. vs. State of Kerala 1973) 91 ITR 18 (SC) it was held that an admission is an extremely

	important piece of evidence though it is not conclusive. Therefore, a statement made voluntarily by the assessee could form the bases of assessment. The mere fact that the assessee retracted the statement could not make the statement acceptable. The burden lay on the assessee to establish that the admission made in the statement at the time of survey was wrong and in fact there was no additional income. This burden does not even seem to have been discharged.
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29. Accordingly, it is held that the assessee has made unexplained investment by paying ON money of Rs. 76,00,000/- for purchase of plot which is added to the income of the assessee for the year..’’

Conclusively, the AO made the addition of Rs. 76.00 lacs as unexplained investment towards purchase of plot and added the same to the total income of the assessee.

3.2 Being aggrieved, the assessee carried the matter before the Id.

CIT(A) who confirmed the action of the AO by observing as under:-

4.4 I have carefully perused the order of the AO and submissions of the AR of the appellant and do not concur with the submissions of the AR on the following grounds:

- i) The facts of the case are that search and seizure operations were carried out in the case of Shree Ram Group, Jaipur to which the appellant belongs on 22.09.2010. During the course of search, documents regarding purchase of plot no. 281, 10B Scheme, Gopalpura Bypass were found and seized.

ii) The chronological order of these Agreements to sale and the final registered sale deed is as follows:-

- a) Agreement to sale dated 15.5.2008 for Rs. 65 lakh
- b) Agreement to sale dated 25.06.2008 for Rs. 1.41 Cr.
- c) Third agreement was for cancellation of the Agreement to sale dated 26.06.2008
- d) Final, registered sale deed dated 27.06.2008 was for Rs. 65 lakh which was as per the DLC rates.

On perusal of both the Agreements to sale it is noted that they have been drafted using stamp paper and contained the full details of the plots of land to be transferred in legal language common to such conveyance deeds. Moreover, both the Agreements dated 15.5.2008 and 25.6.2008 have signatures of witnesses. As compared to these two agreements, the cancellation agreement has been simply drafted on a plain piece of paper and was found subsequently in the past search operation of PO at the office of Sh. Ashok Agarwal on 12.10.2010. It does not have any signatures of witnesses.

iii) The relevant portion of the agreement dated 25.6.2008 for the transfer of this property for 1.41 Cr. are being produced herewith for ready reference:

”मुझकों अपने व्यवसायिक आवश्यकताओं की पूर्ति करने हेतु रूपयों कर आवश्यकता होने के कारण मैंने अपने उक्त प्लॉट संख्या बी-281, 10 बी स्क्रीम, गोपालपुरा बाईपास, जयपुर की भूमि सम्पूर्ण स्वत्वों बाहरी, भीतरी, नीचे, ऊपर मय निर्माण सहित बिना रखे किसी अंश व भाग के श्रीमती रेणु अग्रवाल पत्नि श्री अशोक अग्रवाल निवासी नारायण निवास, गोपालपुरा बाईपास, जयपुर को रूपये 1,41,00,000/- अक्षरे एक करोड़ इक्तालीस लाख रूपये मात्र के बदले अपनी प्रसन्नता से पूर्ण रूप से बिचौती करना तय करके यह विक्रय अनुबन्ध पत्र क्रेता के हित में लिख कर प्रतिज्ञा करता हूँ कि मैं और मेरे उत्तराधिकारी, स्थानापन्न प्रतिनिधि, कायम मुकामान भी सम्मिलित होकर निम्नांकित नियमों की पालना करेंगे।

1. यह कि मूलधन की तयशुदा 1,41,00,000/- रूपये अक्षरे एक करोड़ इक्तालीस लाख रूपये जो कि निम्न चैकों के द्वारा विक्रेता ने क्रेती से प्राप्त कर लिये हैं।

S.N.	Name of the Bank	Amount	Cheque No.	Cheque Date
1.	C.B.I., Tonk Road, Jaipur	10,00,000	111203	23-04-2008
2.	C.B.I., Tonk Road, Jaipur	10,00,000	111204	23-04-2008
3.	C.B.I., Tonk Road, Jaipur	11,00,000	111817	08-03-2008
4.	C.B.I., Tonk Road, Jaipur	17,00,000	111220	28-06-2008

5.	C.B.I., Tonk Road, Jaipur	17,00,000	111219	01-07-2008
	Total	65,00,000		

शेष बकाया राशि 76,00,000/- अक्षरे छियन्तर लाख रूपया अन्दर मियाद एक माह में विक्रय पत्र कराते वक्त अदा कर दी जायेगी। उक्त प्लॉट की भूमि का कब्जा मौके पर क्रेती को सम्भलवा दिया है। इस सम्पति से संबंधित समस्त मूल कागजात क्रेती को दे दिये है।”

It is to be noted that this Agreement was dated 25.06.2008 and the conveyance did was registered on 27.06.2008 just two days after this Agreement. It is clear from the Agreement that all the cheque payments had been made and the portion of the unaccounted money for this land transaction was to be given within a month of registration of the land. Furthermore, no mention was made here regarding any construction activity required to be undertaken by the seller for Rs. 75 lakhs or details of the same. Moreover, it is not clear as to why these details regarding construction activity were not incorporated in the agreement particularly when it is so detailed and specific about all the other facts of the transactions.

iv) a). Just two years later, search and seizure operations were conducted at the residential and business premises of the assessee and these two agreements alongwith the registered sale deed were found and confronted with the assessee's husband Sh. Ashok Agarwal on 22.09.2010 who was managing all the financial affairs of the appellant. He admitted to a payment of Rs. 1.41 Cr. having been made for the purchase of this plots in the name of his wife.

The relevant excerpts of his statement u/s 132(4) are being produced herewith for ready reference:-

प्रश्न 24. मैं आपकी तलाशी के दौरान पाए गए दस्तावेजों में Annexure-As Exhibit-7 दिखा रहा हूँ। जिसके बारे में आपका क्या कहना है?

उत्तर जी हॉ मैंने यह Annexure-As Exhibit-7 देख लिया है। इस Annexure-AS Exhibit-7 का पेज 1 से 3 कंचन बाई मीणा द्वारा मुझे मुख्तारनामा आम द्वारा अधिकृत किया गया है। पेज-4,5,6 सुभाष चन्द्र बन्सल को दिए गए चैकों की फोटो प्रतियों है। जो मेरी बहियों में दर्ज है। पेज-7 से 19 श्री सुभाष चन्द्र बन्सल से प्लॉट नं.281, 10 बी गोपालपुरा बाईपास, जयपुर के प्लॉट खरीद के दस्तावेज है। जिसमें पेज 7 से 9 इकरारनामा (विक्रय अनुबन्ध) है, जिसमें प्लॉट नं.बी.281, 10 बी स्कीम, गोपालपुरा बाईपास, जयपुर का प्लॉट रूपये 1,41,00,000/- में खरीदा गया था। तथा इस प्लॉट की रजिस्टरी रूपये 65,00,000/- में हुई है। जिसके बारे में पेज 10 से 19 है। इस प्रकार मैंने प्लॉट सं.बी-281, 10बी स्कीम, गोपालपुरा बाईपास, जयपुर की खरीद में रूपये 76,00,000/7 अक्षरे छियन्तर लाख रूपये

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रजिस्ट्री के अतिरिक्त भुगतान किया गया था। जो मैंने बहियों से बाहर खरीद के लिए भुगतान किया है। जिसे मैं अपनी अतिरिक्त आय के रूप में स्वीकार करता हूँ। और इस पर जो भी आयकर नि.व.2008-09 के लिए बनेगा, वह मैं अदा कर दूँगा। इसका मैं आपको वचन देता हूँ।

iv) b). In the post search inquiry on 29.09.2010, seven day after the search proceedings the appellant admitted that around Rs. 3.50 Cr. had been invested in the house on this property and in response to question no. 9 he once again reiterated that the payment of Rs. 1.41 Cr. had been made for purchase of this land. The relevant excerpts of this statement are reproduced below for reference:

प्रश्न 10. मैं आपको पुनः तलाशी के दौरान जब्त दस्तावेज Annexure-As Exhibit-7 दिखा रहा हूँ इसके बारे में आपका क्या कहना है?

उत्तर इस Annexure को देखने के पश्चात् पृष्ठ 1 से 3 कंचन बाई मीणा, द्वारा मुख्तारनामा आम जिसमें मुझे अधिकृत किया गया है। पृष्ठ 4,5,6 सुभाष बन्सल को दिए गए चैकों की फोटो प्रति है। जो कि 281-282 के क्रय पेटे एवं निर्माण पेटे दिए गए चैकों की प्रति है जो कि मेरी बही खातों में दर्ज है। पृष्ठ संख्या 7 से 19 सुभाष चन्द्र बन्सल को इसी प्लॉट के खरीद से संबंधित कागजात है। यह प्लॉट मैंने 1,41,00,000/- श्री सुभाष चन्द्र बन्सल से खरीदा था। जिसकी रजिस्ट्री खाली भूखंड की 65,00,000/- में करवाई थी। इस प्रकार 76,00,000/- मैंने अतिरिक्त भुगतान किया जो कि मैं अपनी अघोषित अतिरिक्त आय के रूप में पहले भी स्वीकार कर चुका हूँ। इस प्रकार जो भी आयकर वित्त वर्ष 2008-09 के लिए बनेगा, मैं अदा कर दूँगा। इसे मैं पुनः स्वीकार करता हूँ। मुझे इसमें कोई आपत्ति नहीं है।

To sum up, the husband of the appellant who was managing her financial affairs was very clear and consistent about having paid an amount of Rs. 1.41 Cr. just three months before for purchase of this plot of land. Given the short duration between the purchase of this property and the date of the search it is not surprising that he remembered that exact details of the payment made for the purchase of this plot and so this amount of Rs. 76 lakh was surrendered. It cannot be said that the statement was taken under duress because the admissions made correspond with the incriminating documents found at the premises of the assessee. Moreover, he reiterated the details of the payment even 7 days after the search when he had sufficient time to recover from the tension of the search. Therefore, the admission made by the husband of the appellant u/s 132(4) is held to be reliable evidence.

v) During the course of search operation of the PO at the office of Sh. Ashok Agarwal on 12.10.2010 just two weeks after the statement on 29.09.2010 a simple paper dated 26.06.2008 signed by both Ashok Agarwal and Sh. Subhash Chand Bansal was found containing the following text:

हमारे और आपके मध्य दिनांक 15.05.2008 को खाली भूखण्ड बेचान का अनुबन्ध निष्पादित किया गया था। तत्पश्चात् दिनांक 25.06.2008 को निर्माण सहित एक अनुबन्ध और निष्पादित किया गया था।

इस दिनांक 25.06.2008 के अनुबन्ध के तहत जो निर्माण कार्य हमारे द्वारा करवाया जाना था, उसके गुणवत्ता (की मॉग को देखते हुये हम निर्माण कार्य करवाने में असमर्थ है।

अतः दिनांक 25.06.2008 को किया गया अनुबन्ध हम दोनों की सहमति से निरस्त किया जाता है। अतः अब दिनांक 15.05.2008 निष्पादित अनुबन्ध के तहत खाली भूखण्ड की रजिस्ट्री 15 दिवस के अन्दर करवा लें अन्यथा हमको मजबूरन अनुबन्ध दिनांक 15.05.2008 को निरस्त करना पड़ेगा।

It is pertinent to note that it is not on stamp paper to authenticate the actual date of the draft, secondly it has no signatures of independent witnesses.

vi) The AR of the appellant is relying on this document along with the affidavit of Sh. Ashok Kumar Agarwal to counter the agreement dated 25/06/2008. On perusal of this document it appears to be fabricated evidence. First of all, in the Agreement to Sale Dated 15.05.2008 there are no specific details regarding any construction activity to be under taken by the seller. As per the cancellation agreement the seller had to undertake construction between the 15.5.2008 to 25.06.2008. However none of these details are mentioned in Agreement to Sale dated 15.5.2008 nor was any correspondence found regarding the initiation or details of this construction work.

vii) Reliance is being placed by the AR on the term “मय निर्माण” .. in the Agreement to Sale dated 15.5.2008 to show that the said plot was vacant and the term. “मय निर्माण” implied that construction activity was required to be undertaken by the seller before transfer of the plot. An inquiry was conducted from the office of the Sub-registrar-1, Sanganer, Jaipur by the Investigation Wing. As per the report obtained, it was seen that in cases of sales where registered value exceeds Rs. 25 lakh the Sub-registrar is required to make a site inspection of that plot to evaluate its value for the purpose of stamp duty valuation before registration. As per the site inspection report prepared by the Sub-registrar the plot was not vacant and construction of 3700 sq. ft. was found existing on the date of inspection i.e. prior to the registry date. This construction was valued at Rs. 400 per sq. ft. and so an enhancement of evaluated value was made by Rs. 14.80 lakhs. This report of the Sub-registrar of Govt. Rajasthan is held to be sufficient evidence to rebut the evidence filed by way of the affidavit of Ashok Agarwal and the fabricated evidence of the cancellation

agreement. The term “मय निर्माण” meant the plot of land along with the building and did not imply any construction activity to be undertaken by the seller.

viii) The AR of the appellant has submitted that the Sub-registrar’s report did not have any date. The assessee had registered the conveyance deed on 27.8.2008 and immediately started construction. It was submitted that he had requested the AO to issue commission u/s 131 (d) to his neighbours to confirm his submissions that there was no construction prior to the registration of the sale deed.

I do not agree with this submission for the simple reason that the Sub-Registrar’s report was required to be prepared before the registry of the sale deed and it was on this basis that the value was enhanced for existing construction by Rs. 14.80 lakh. Once a government official has made a personal inspection in the course of his duty and submitted a report, I do not see why the Department should be required to conduct inquiries from the neighbours of the appellant, particularly when there is no evidence on record to show that the Sub-registrar while performing his mandatory duty was in any way biased against the appellant.

ix) The AR of the appellant has also submitted that addition could not be made merely on the statements of Sh. Ashok Kumar Agarwal particularly in view of the affidavit filed and relied on the finding of the Hon. ITAT in the case of Radhey Shyam Mittal, ITa No. 420/JP/2012 and other judicial authorities. However, I find that facts of the case of the assessee are distinct from the facts of the cases relied on by the AR. The Hon. Jurisdictional High Court has observed in the case of CIT vs. Ashok Kumar Soni 291 ITR 172 that the admissions made during the search u/s 132(4) are relevant and strong piece of evidence that may be used against the person making such admission but they are not conclusive proof because they can always be rebutted and explained. In the case of the appellant, the affidavit filed as a rebuttal to the admission made u/s 132(4) has already been held to be an unreliable piece of evidence above, since the Department was able to rebut the averments made in the affidavit by bringing on record the report of the Sub-registrar regarding the construction measuring 3700 sq. ft. already existing on the plot prior to the date of registry of conveyance deed on 27.06.2008. The words ‘.“मय निर्माण”.’ in the agreement to sale dated 15.05.2008 cannot be construed to imply that the seller was required to undertake any construction activity for the appellant prior to the registration of the Sale Deed. The word “मय

निर्माण” support the Sub-Registrar’s finding in his report that there was existing construction on the plot of land.

It has been submitted that the statement of the appellant’s husband cannot be used against her. However, this is not an acceptable submission because it is seen that all the financial affairs of Smt. Renu Agarwal were being managed by her husband in fact even his son Ashish Agarwal did not have much knowledge about the complete financial transactions of the group. In his statement, he has admitted that his father Sh. Ashok Agarwal was managing all the financial affairs of the family. Considering that the financial affairs of the appellant were being managed by her husband his admission on her behalf has valid evidentiary value.

x) Finally, during the course of assessment proceedings, the seller Sh. Subhash Chand Bansal resident of Bharatpur was summoned and examined u/s 131. For obvious reasons he admitted to having received on Rs. 65 lakh. However, on perusal of his statement the relevant excerpts of which have been made part of the assessment order from pages 7 to 9 it is seen that he had no experience in construction business, in fact he has admitted that the only construction undertaken by him was of his house in June, 2008. Moreover, he lived in Bharatpur so it was not possible for him to have undertaken any kind of construction for the appellant long distance. He was unable to give the details of the high quality of construction that was expected from him. He did not have any correspondence with the appellant regarding the specification of the construction either.

On the basis of the above facts, as discussed in detail, it is held that the cancellation agreement dated 26.06.2008 was a colourable device and unreliable evidence prepared for tax evasion by the appellant. The addition of Rs. 76 lakh for the purpose of plot is confirmed u/s 69.”

3.3 During the course of hearing, the ld. AR of the assessee filed the following written submission praying therein to delete the addition of Rs. 76.00 lacs confirmed by the ld. CIT(A).

“ 3.2 Submission of the assessee: -

- 1) *Plot No. B-281, 10-B Scheme, Gopal Pura Bye Pass, Jaipur was purchased by assessee for Rs. 65,00,000/-.*

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- i) *The first agreement to sale of this plot was made on 15.05.2008 for Rs. 65,00,000/-. This agreement is under seizure of the department at Annexure AS-7 Page 10-12 (Seized from 281-282, 10-B Scheme, Gopal Pura Bye Pass, Jaipur). (Copy at PB Page 75-77). As per this agreement (Page 2 of agreement) the sale consideration included value of vacant land only.*
- ii) *Later on a fresh agreement to sale was executed on 25.06.2008 for a sum of Rs. 1,41,00,000/-, which is also under seizure of the department at Annexure AS-7 Page 7-9 (seized from 281-282, 10-B Scheme, Gopal Pura Bye Pass, Jaipur) (Copy at PB Page 78-80). As per terms of this second agreement the seller was required to make construction over the land, therefore the sale consideration was revised to Rs. 1,41,00,000/- as against original consideration of Rs. 65,00,000/- As per this agreement (Page 2 of agreement) the sale consideration included value of land and construction as agreed.*
- iii) *Later on the seller expressed his inability to make construction as agreed over the land, therefore, this agreement was also cancelled by executing a separate cancellation agreement. This cancellation agreement is also under seizure of the department vide Exhibit 4 of Annexure AS (seized from 1, Dayal Nagar, Gopalpura Bye Pass Road, Jaipur on 12.10.2010) (Copy at PB Page 81).*
- iv) *Thereafter, this plot was finally purchased by wife of the assessee Smt. Renu Agarwal in the form of vacant land only for Rs. 65,00,000/- (as originally agreed) as per sales deed registered on 27.06.2008. The registered sale deed is also under seizure of the department vide Annexure AS-7 Page 13-19 (seized from 281-282, 10-B Scheme, Gopal Pura Bye Pass, Jaipur) in which the sub-registrar has also assessed the value of this plot at same value of Rs. 65,00,000/- (Copy at PB Page 82-88).*

Thus, the agreement to sales for Rs. 1,41,00,000/- was inclusive of agreed construction but since the seller expressed his inability to make the construction, the assessee purchased the vacant plot as originally agreed upon for a consideration of Rs. 65,00,000/- .

Further, the ld AO has made inquiries from the seller of the plot. The seller of the plot on oath has confirmed that he has not received Rs. 1,41,00,000/- against the sale of the plot but he has received Rs. 65,00,000/- against the sale of the plot (PB page 113-117 kindly see answer to Q.no. 10, & 13). Therefore the ld AO has no material to

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presume that the plot was purchased for Rs. 1,41,00,000/- and on money of Rs. 76,00,000/- was passed to the seller of the plot. In fact the amount of Rs. 76,00,000/- was never passed on to the seller. The answer to following questions are very relevant to decide the genuineness of the cancellation agreement found in search.

- (i) *In answer to question no 8 (PB pg 115), the seller stated that he sold the vacate plot for Rs. 65.00 lacs to Smt Renu Agarwal.*
- (ii) *In answer to question no 10 (PB pg 115), the seller stated that he has not received Rs. 1.41 crore but he received only 65.00 lacs against the sale of plot.*
- (iii) *In answer to question no 11 (PB pg 116), the seller stated that no construction except the boundary wall was made by him on this plot.*
- (iv) *In answer to question no 12 (PB pg 116), the seller stated that the electric and water connection was not there in the plot.*
- (v) *In answer to question no 13 (PB pg 116), the seller stated that he executed first agreement for Rs. 65.00 lac and second agreement for Rs. 1.41 crore which was for constructed house in the plot. He stated that the second agreement was cancelled by executing cancellation agreement.*
- (vi) *In answer to question no 14 (PB pg 116), the seller explained the term “मय निर्माण” mentioned in second agreement.*
- (vii) *In answer to question no 18 (PB pg 117), the seller stated the reason for executing the cancellation agreement on plain papers.*

The lower authorities brushed aside all the factual replies made by the seller of the plot in the statement recorded by ld AO u/s 131 of Income Tax Act. The findings of lower authorities holding the cancellation agreement as not genuine, are not based on positive material but on surmises, conjectures possibilities and probabilities which cannot be sustained.

- 2) *Ld. CIT (A) perversely held that cancellation agreement was found in post search operations and is fabricated document. Factually, this document was seized by the income tax department vide Exhibit 4 of*

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Annexure AS from 1, Dayal Nagar, Gopalpura Bye Pass Jaipur during the course of search which started from 22-09-2010 and continued upto 12-10-2010. The search started on 22-09-2010 at office of the assessee which is situated at 1, Dayal Nagar, Jaipur, which continued upto 23-09-2010 (PB pg 211). However, the office premise was sealed under PO order u/s 132(3) of Income Tax Act in the presence of witnesses (PB pg 212). The search resumed on 12-10-2010 and sealed office of the assessee was opened in presence of witnesses (PB 213) and this document was found and seized as Annexure AS-4 (PB 214). The search party has also recorded statement of Shri Ashok Agarwal on this document u/s 132(4) of Income Tax Act which is at PB pg 62 (Answer to question no 11). Further in answer to question no 12, (PB pg 63) final tally was made against the amount surrendered, which does not include Rs. 76.00 lac originally surrendered by Shri Ashok Agarwal in his statement dated 22/09/2010 (PB 41) The ld CIT(A) perversely held that this document is fabricated without bringing any positive material on record. As per the provisions of section 132(4A) the seized document are presumed to be correct. Further, the ld AO made specific inquiries from the seller of the plot and recorded the statements of seller of the plot. The seller of the plot has stated on oath that he has executed the cancellation agreement. (Answer to question no 13 & 18 (PB pg 116; 117).

- 3). *The search party has seized three agreements in search alongwith the copy of registered sale deed. In first agreement the sale consideration of the plot was stated Rs. 65,00,000/-. In second agreement the sale consideration was stated Rs. 1,41,00,000/- and third agreement states the cancellation of second agreement and reiterates the sale consideration of Rs. 65,00,000/- In such circumstances the seized records should be read as whole. The ld AO is relying the second agreement but has rejected the first agreement and cancellation agreement and registered sale deed. The ld AO cannot pick and choose the documents at her will. The seized records clearly demonstrates that the second agreement was cancelled and the sale consideration of Rs. 65,00,000/- was passed to the seller of the plot. In the para 26 of the assessment order the ld. AO said that out of the three agreements made in respect of plot 281-B, Scheme 10-B, Gopalpura By-pass, Jaipur two were not authenticate and were just colorable device. The agreement that was made on 25.06.2008, which reflects total sale consideration if Rs. 1,41,00,000/- is the actual agreement which reflects that on money has been paid by the assessee for purchases the plot, The finding of the assessee against the provisions of section 134 (4A) and 292C of Income Tax Act, 196 which say that the contents of seized documents are presumed to be true.*

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4) *The onus u/s 69 is on the department to prove that the investment has been made by the assessee. This cannot be discharged on presumption and assumption. The assessing officer merely disbelieved the explanation/statements given by the assessee and has converted good proof into no proof. Hon'ble Justice Hidayatullah of the Supreme Court in the case of Sreelekha Banerjee Vs CIT [1963] 49 ITR 112 (SC); 120 observed that the Income Tax Department cannot by merely rejecting unreasonably a good explanation, convert good "proof into no proof" Hon'ble Supreme Court in the case of Uma Charan Shaw & Bros Co Vs CIT 37 ITR 271 has held that the surmises and conjectures, and the conclusion is the result of suspicion which cannot take the place of proof. Hon'ble Punjab & Haryana High Court in the case of CIT Vs Anupam Kapoor (2008) 299 ITR 179 (P & H) also held that suspicion, howsoever strong cannot take the place of legal proof. If the department considers on payment by the assessee for the land, it is burden on the department to prove the undisclosed investment of the Assessee. This burden is not discharged and therefore, no addition can be made. Reliance is placed on the following decisions:-*

(i) *Hon'ble Delhi High Court in the case of Commissioner of Income Tax Vs Dinesh Jain HUF (2013) 352 ITR 629 (Del) has held as under:-*

"11. Section 69B does not permit an inference to be drawn from the circumstances surrounding the transaction that the purchaser of the property must have paid more than what was actually recorded in his books of account for the simple reason that such an inference could be very subjective and could involve the dangerous consequence of a notional or fictional income being brought to tax contrary to the strict provisions of Article 265 of the Constitution of India and Entry 82 in List I of the seventh schedule thereto which deals with "Taxes on income other than agricultural income". This was one of the major considerations that weighed with the Supreme Court in K.P. Varghese (supra) in which case the provisions of sub-section (2) of section 52 fell for interpretation. It was observed that Parliament cannot choose to tax as income an item which in no rational sense can be regarded as a citizen's income or even receipt. Section 52(2) (which now stands omitted) applied to the transferor of property for a consideration that was lesser than the fair market value by 15 percent or more; in such a case, the Assessing Officer was conferred the power to adopt the fair market value of the property as the sale price and compute the capital gains accordingly. The Supreme Court held that it was the burden of the Assessing Officer to prove that there was understatement of consideration and once that burden was discharged it was not required of him to prove the precise extent of understatement and he could adopt the difference between the stated consideration and the fair market value of the property as the understatement. The sub-section was held to provide for a "statutory

best judgment" once actual understatement was proved; it obviated the need to prove the exact amount of understatement. Additional reasons for the result were (a) that the marginal note to the section referred to "cases of understatement"; (b) the speech of the Finance Minister while introducing the provision; and (c) the absurd or irrational results that would flow from a literal interpretation of the sub-section, which could not have been intended by the legislature.

12. While the omitted section 52(2) applied to the transferor of the property, section 69B applies to the transferee - the purchaser - of the property. It refers to the money "expended" by the assessee, but not recorded in his books of account, which is a clear reference to undisclosed income being used in the investment. Applying the logic and reasoning in K.P. Varghese (supra) it seems to us that even for the purposes of Section 69B it is the burden of the Assessing Officer to first prove that there was understatement of the consideration (investment) in the books of account. Once that undervaluation is established as a matter of fact, the Assessing Officer, in the absence of any satisfactory explanation from the assessee as to the source of the undisclosed portion of the investment, can proceed to adopt some dependable or reliable yardstick with which to measure the extent of understatement of the investment. One such yardstick can be the fair market value of the property determined in accordance with the Wealth Tax Act. We however clarify that this Court is not concluding that such yardstick is determinative; in view of the findings arrived at by us that the Assessing Officer did not gather foundational facts to point to undervaluation the adoption of the norms under the Wealth Tax Act is not commented upon by us.

13. The error committed by the income-tax authorities in the present case is to jump the first step in the process of applying section 69B - that of proving understatement of the investment - and apply the measure of understatement. If anything, the language employed in section 69B is in stricter terms than the erstwhile section 52(2). It does not even authorise the adoption of any yardstick to measure the precise extent of understatement. There can therefore be no compromise in the application of the section. It would seem to require the Assessing Officer even to show the exact extent of understatement of the investment; it does not even give the Assessing Officer the option of applying any reasonable yardstick to measure the precise extent of understatement of the investment once the fact of understatement is proved. It appears to us that the Assessing Officer is not only required to prove understatement of the purchase price, but also to show the precise extent of the understatement. There is no authority given by the section to adopt some reasonable yardstick to measure the extent of understatement. But since it may not be possible in all cases to prove the precise or exact amount of undisclosed investment, it is perhaps reasonable to permit the Assessing Officer to rely on some acceptable basis of ascertaining

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the market value of the property to assess the undisclosed investment. Whether the basis adopted by the Assessing Officer is an acceptable one or not may depend on the facts and circumstances of the particular case. That question may however arise only when actual understatement is first proved by the Assessing Officer. It is only to this extent that the rigour of the burden placed on the Assessing Officer may be relaxed in cases where there is evidence to show understatement of the investment, but evidence to show the precise extent thereof is lacking.

14. In Lalchand Bhagat Ambica Ram Vs. Commissioner of Income Tax, Bihar and Orissa (1959) 37 ITR 288, the Supreme Court disapproved the practice of making additions in the assessments on mere suspicion and surmise or by taking note of the notorious practices prevailing in trade circles. At page 299 of the report, it was observed as follows :

"Adverting to the various probabilities which weighed with the Income-tax Officer we may observe that the notoriety for smuggling food grains and other commodities to Bengal by country boats acquired by Sahibgunj and the notoriety achieved by Dhulian as a great receiving centre for such commodities were merely a background of suspicion and the appellant could not be tarred with the same brush as every arhatdar and grain merchant who might have been indulging in smuggling operations, without an iota of evidence in that behalf. "

This takes care of the argument of Mr. Sabharwal that judicial notice can be taken of the practice prevailing in the property market of not disclosing the full consideration for transfer of properties.

15. Since the entire case has proceeded on the assumption that there was understatement of the investment, without a finding that the assessee invested more than what was recorded in the books of account, we are unable to approve of the decision of the income-tax authorities. Section 69B was wrongly invoked. The order of the Tribunal is approved; the substantial question of law is answered in the negative, in favour of the assessee and against the CIT."

(ii) *Hon'ble Rajasthan High Court in the case of CIT Vs. Bhanwarlal Murwatiya reported in 215 CTR (Raj) 489 (2008) (2008)/ 3 DTR (Raj) 115 (copy at PB 228-230) has held as under :-*

"The question as to what was the price of the land at the relevant time, is a pure question of fact. Apart from the fact, that even if it were to be assumed, that the price of the land was different than the one, recited in the sale deed, unless it is established on record by the Department, that as a matter of

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fact, the consideration, as alleged by the Department, did pass to the seller from the purchase, it can not be said, that the Department had any right to make any additions.”

- iii) *Commissioner of Income Tax Vs. Naresh Khattar (HUF) High Court Of Delhi (2003) 261 ITR 664 (Del)*
- To invoke the provisions of s. 69B, the burden is on the Revenue to prove that the real investment exceeds the investment shown in the books of account*
- iv) *Lal Chand Agarwal Vs ACIT 21 Taxworld 213;231 ITAT Jaipur Bench*
- The initial burden u/s 69 of Income Tax Act is on department to prove the investment has been made by the assessee.*
- v) *ITAT Jaipur in Vishnu Prasad Maharwal Vs DCIT Central Circle-1, Jaipur in ITA No 867/JP/2013 order dated 31/03/2014 held that the onus u/s 69B is on department to prove investment. The addition u/s 69B cannot be made without bringing any positive material to show that the assessee has made undisclosed investment in purchases of plot.*
- vi) *ITAT Delhi Bench in Shri Ram Krishan Gupta Versus DCIT, Central Circle 4, New Delhi 2013 (8) TMI 329 - ITAT DELHI Held that:- When the document shows a fixed price, there will be a presumption that it is the correct price agreed upon by the parties. It is true that on the basis of the agreement the sale deed was executed. But it is not necessary that the price stated in the agreement will be the price shown in the sale deed. Sometimes, it may be higher and sometimes it may be lower. Sometimes intentionally a lesser value may be shown in the sale deed. Even if it is assumed to be so, unless it is proved that the agreement was acted upon and unless the amount stated in the agreement was paid for the sale one cannot come to the conclusion that the price mentioned in the sale deed is not correct -There is no rule that the amount shown in the receipt was the actual amount paid - Following decision of CIT vs. Smt. K.C. Agnes [1996 (4) TMI 76 - KERALA High Court] - Decided in favour of assessee.*
- 5) *The another dispute in between the assessee and department is that whether as on the date of purchases the plot was vacant or some construction was thereon? Although this issue is not relevant to show the payment of alleged undisclosed on money of Rs. 76,00,000/- to the seller of the plot particularly when the seller has confirmed before the*

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Sub Registrar, Jaipur as well as before the ld AO that he sold the plot to the assessee for Rs. 65,00,000/- and he has received only Rs. 65.00 lacs against the sale of the plot. The statements of the seller before the ld AO are corroborated with the seized cancellation agreement dt 26-06-2008 coupled with the seized first agreement dt 15-05-2008 and seized registered sale deed dated 27-06-2008. However, to rebut the contention of the ld AO that there was construction over the plot at the time of sale of the plot by the seller and to prove the claim of the assessee that the plot was vacate land at the time of purchase, the following documents/explanation were produced before the AO which were not rebutted by the AO: -

- a) *The copy of Google earth Map of 16.12.2007 wherein the plot is showing as vacant in the map (Copy at PB Page 105).*
- b) *Photograph of land submitted at the time of registry of sale deed of plot (Copy at PB Page 110) and assessee has submitted before the AO that the photograph can be verified from records of registrar. Further on the photo the user code and user name which mentioned on report of stamps and registration department is also mentioned.*
- c) *The photographs of “Bhoomi Poojan” did by the assessee and his family members while starting the construction (Copy at PB Page 106-109).*
- d) *Further as on the date of purchase there was no water and electricity connection on the plot, without which no one could live in the house.*
- e) *Copy of Municipal Tax Deposited against the plot (Copy at PB Page 112), wherein the status of the plot is mentioned as vacant land.*
- f) *In the statement of seller of the plot Shri Subhash chand Bansal recorded by assessing officer (Copy at PB Page 113-116) he also admitted that he sold the vacant plot to the assessee.*

Thus the assessee submitted the sufficient/ample documents to prove that as on the date of purchases the plot was a vacant plot and no construction was thereon as on the date of purchases.

- 6) *Further the assessee has submitted her explanation as under before the AO (PB pg 103-104) on the inspection report of Sub-Registrar-I, Sanganer, Jaipur stating therein that construction measuring 3700 sq.*

ft. was found existing on the said plot and the same was valued at Rs. 14,80,000/- by registrar authorities. (Copy of report at PB Page 101):

“Your honour enclosed the report of sub-registrar submitted after the site inspection of the plot and as per the site inspection report of the office of Sub-Registrar, there was some construction over the plot. In this regard, we submit that the inspection was carried out by the sub registrar authority is not in knowledge of the assessee and therefore requested kindly to provide the complete inspection report. In the report the date of inspection is not mentioned. The assessee purchased the plot on 27.06.2008 and immediately after purchasing the plot the construction was got started on the plot by the assessee, therefore there may be possibility that as on the date of inspection the construction work which was being get done by the assessee group at their own was found by the inspection authority and they reported the same as construction over the plot as on the date of inspection. However it is relevant to mention here that the registrar authority estimated the value of construction as on the date of inspection Rs. 14,80,000/- only while as per agreement executed by assessee with the seller of plot the value of construction was Rs. 76,00,000/, therefore there is no reason to assume that the assessee paid Rs. 76,00,000/- from construction of Rs. 14,80,000/-.”

Thus in view of the above submission made before the AO the inspection report issued by the registrar authority cannot be used against the assessee for making an opinion that as on the date of purchases there was some construction over the plot.

- 7) *During the course of assessment proceedings the assessee requested to ld. AO to issue commission u/s 131(d) of Income Tax Act, 1961 for making spot inquiry from neighbors etc. and also requested that the assessee is ready to pay cost of evidence in this regard in advance. But no such exercise was carried out by the AO. No any inquiries were carried out by the AO to disprove the claim of the assessee and she simply reply over the irrelevant evidence.*
- 8) *In para 15 to 16 of the assessment order the ld. AO mentioned that the word “with construction” appearing in the agreement for Rs. 1,41,00,000/- can be construed to be referring to the physical structure existing at the time of agreement. Further in the same para the ld. AO opined that other agreements, except to agreement of Rs. 1,41,00,000/-, is infect a colourable device to give an impression that the said plot was vacant at the time of agreement and also at the time of registration*

of sales. Similarly the cancellation deed made is on plain paper to save them and also not authentic and again a colourable device and made to show that only Rs. 65 lacs was paid for the plot.

In this regard, the assessee has explained that the agreement of Rs. 1,41,00,000/- was not original agreement and the original agreement to sale was executed for Rs. 65,00,000/- on 15.05.2008 and the agreement of Rs. 1,41,00,000/- was executed on 25.06.2008. Further in both the agreement no where it is admitted that there was some existing construction over the plot. The assessee has further submitted to lower authorities that all the agreements including cancellation agreement are part of seized record which was found and seized by the search party at the time of search, therefore there is no reason before to AO to believe some of the seized documents which are in favour of the department and disbelieve those seized documents which are in favour of the assessee. This attitude of the ld AO is against the principle of judicious approach.

Further these documents cannot be said to a colourable device as the same not created/produced later stage and the same were also found to the search party at the time of search. The ld. AO making the addition of Rs. 76,00,000/- by relying on the agreement of Rs. 1,41,00,000/- and rejected other seized agreements on surmises and conjectures.

- 9) *In the para 17 of the assessment order the ld. AO mentioned that the term “inclusive construction” written on the agreement dated 25.06.2008 is a very common term generally written in all the deeds where some amount of civil construction work on the plot has been done whether new or old even for boundary wall the term has been used. In this regard, the assessee has explained to lower authorities that the “inclusive construction” written on the agreement dated 25.06.2008 is not a very common term and will not find written in all the deeds; same is not found written in the first agreement dated 15.05.2008 and also not found in the final registered sale deed dated 27.06.2008. In these two document word “including construction” is not there but in agreement dated 25-06-2008 it has been specifically mentioned which creates a significant meaning of this word in the agreement dated 25.06.2008 and significance of this word became clear from the cancellation agreement dated 26.06.2008 wherein it has been clarified that word “inclusive construction” in agreement dated 25.06.2008 was used for construction to be carried out by the seller over the plot. Further, the seller of the plot has also explained the term “मय निर्माण” mentioned in agreement dated 25-06-2008 in his*

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statement u/s 131 of Income Tax Act dated 07-02-2013. He stated in answer to question no 14 (PB pg 116), term “मय निर्माण” means to construct the house on plot.

- 10) *In the para 18 to 21 the ld. AO discussed over the statement of seller Shri Subhash Chand Bansal which was recorded by the AO at the time of assessment proceedings and rejected by the ld AO by holding that Shri Subhash Chand Bansal was not having any experience in the work of construction and there was no specification given to him with regard to the construction of house and the agreement dated 25.06.2008 is the actual authentic document which refer the sales consideration as Rs. 1,41,00,000/-. The principal of preponderance of probabilities precludes the possibility of a scenario where this prominent builder would ask any other person to do construction work prior to selling who does not have any experience of construction. In this regard the assessee has explained as under: -*
- a) *In the reply of Q. No. 11 of the statement it was stated by the seller that at the time of sales only boundary wall was constructed over the plot and earth filing of plot was carried out. Except to this no construction work was carried out over the plot. It is relevant to mention here that on both these activities no major amount is required.*
 - b) *In reply to Q. No. 13 of the statement it was chain of agreements and their significance was explained. He also explained the reason for cancellation of agreement dated 25.06.2008.*
 - c) *In reply to Q. No. 14 to 17 of the statement the seller broadly stated the term of construction. He also stated that the construction work was to be carried out through a contractor who was the friend of seller and in Q. No. 17 he explained that what was the demand of the assessee group for which the agreement of construction was cancelled. As regard to the non submitting the detail of construction/quality demanded by the assessee on the plot from Shri Subhash Chand Bansal this is to submit that the same was initially verbally decided by the assessee and seller and written over a separate paper and after passing of about 5 years this much detail cannot be remembered more so when no construction was did by this person on that plot. Further the seller broadly explained that 7000 sq. feet construction of 3 floor was to be made and he also explain that what was the demands of the assessee group*

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for which the construction clause of agreement was cancelled.

As regarding observation of the ld. AO that the assessee and her family in the business of real estate and colonizer and it is quite surprising the she would ask any other person to do construction work this is to submit that the assessee group is engaged in the business of real estate and business of the assessee group is to sell the plots after doing plotting over agriculture land. The assessee group has not done the housing projects individually and the same only carry out under joint venture agreement, therefore the assessee group does not have much more experience in construction line. The assessee was willing to get construction of residential house over the plot, therefore the seller of the plot gave a proposal to assessee that his friend is good contractor and he will get done the construction of the house for the assessee over the plot, therefore the assessee group agreed to purchases the plot with construction from the seller and for that purpose the agreement dated 25.06.2008 was executed but later on the seller refused to do construction of house as demanded by the assessee, therefore the agreement dated 25.06.2008 was cancelled and the assessee purchased the vacant land on the terms and condition of original agreement dated 15.05.2009.

Therefore the statement of the seller of the plot cannot be rejected on surmises, conjectures, probabilities and possibilities without having any concrete material against the contents of the statements.

- 11) *The ratio laid down in the case relied upon by the AO in para 28 of the assessment order either not applicable to the facts of the case or supports the assessee's contentions. The assessee's has cited several decisions in this regard in forgoing paras.*

Thus from the above discussion it is clear that there is nothing with the department to show that the assessee has paid Rs. 76.00 lacs on account of on money against the plot.

- 12) *However, the husband of the assessee Shri Ashok Agarwal in his statement recorded on 22.09.2010 (Copy at PB Page 25-27) admitted that the payment of Rs. 76,00,000/- was made out of books and he surrendered the same as additional income but the surrender was not*

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willful surrender of Shri Ashok Agarwal. The same was recorded by the search party at their own without saying the same by the Shri Ashok Agarwal and under pressure of search party Shri Ashok Agarwal had to sign the statement. The pressure of the search team was apparent as they kept the entire office of the assessee under seal and under PO order u/s 132(3) from 23/09/2010 to 12-10-2010 and forced Shri Ashok Agarwal to close his business operations for more than 15 days. This was nothing but harassment and pressure technique of search team to get unwarranted surrender of income. The search statement was recording in the hand writing of the search team and Shri Ashok Agarwal had to sign this statement under the pressure of the search team. It is also very important to mention here that the search party has not recorded any statement of the assessee particularly when the owner of the plot was assessee not Shri Ashok Agarwal and she was present at the time of search. Shri Ashok Agarwal requested the Dy Director of Income Tax to provide the copy of the statements but the same was not provided to him. Therefore, Shri Ashok Agarwal was unable to see what has been recorded by the search team and therefore, immediate retraction was not possible. However upon receiving the copies of statement from the AO, Shri Ashok Agarwal found several things and averments in his statement, which he never said to the search party, therefore he clarified the inconsistency in the search statements recorded by the search party by filing an affidavit before assessing officer immediately after the receipt of copy of statement from AO. The copy of affidavit is at (PB Page 65-69).

No evidence was brought on record by the ld. AO to show that the contents of the affidavit are incorrect. No any further statement of assessee was recorded by the ld AO to rebut the contents of the affidavit. Further there is nothing contra with AO to prove that the contents of the affidavit are wrong and false. The contents of affidavits, which are not vague, should be accepted correct. Reliance is placed on the following decisions:-

- (i) *Mehta Parikh & Co v CIT [1958] 30 ITR 181 (SC)*
- (ii) *Dilip Kumar Rao Vs CIT (1974) 94 ITR 1 (Bom);*
- (iii) *Malwa Knitting Works Vs CIT (1977) 107 ITR 379, 381 MP and*
- (iv) *Sri Krishna Vs CIT (1983) 142 ITR 618 (All).*

- 13) *The Board of direct taxes issued instruction to the All Chief Commissioners of Income Tax, (Cadre Contra) & All Directors General of Income Tax Inv. vide letter F. No. 286/2/2003-IT (Inv) dated 10.03.2003 in regard of confiscatory statement in the course of search and seizer as under:*

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

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

The Hon'ble Supreme Court in case of Tanna And Modi vs. CIT, 292 ITR 209 (SC) has held that a fortiori, clarificatory circulars issued by the Central Board of Direct Taxes may also be taken into consideration for the purpose of construction of the statute. The Hon'ble Supreme Court in case of Kerala State Industrial Dev. Corporation Ltd., 259 ITR 51 (SC) has also held that Finance Minister's speech before Parliament while introducing bill can be relied on to throw light on object and purpose of provisions. In case of Durgesh Oil Mills, 273 ITR 305 (All.), the Hon'ble Allahabad High Court has held that it is well settled that the circular issued by the Central Board of Direct Taxes is binding on authorities.

Therefore, merely on the basis of statement addition cannot be made.

Further Reliance is placed on the following decisions:-

- (i) Hon'ble Apex Court in the case of Pullangode Rubber Produce Co Ltd v/s State of Kerala & Anothers (1973) 91 ITR 18 (SC) has held that admission is an extremely important piece of evidence but it can't be said that it is conclusive. It is upon to the assessee to show that it is incorrect.*

(ii) *Hon'ble Rajasthan High Court in the case of CIT v/s Ashok Kumar Soni 291 ITR 172 (Raj.) has held that admission in statement during search is not conclusive proof of fact and can always be explained*

(iii) *Addition merely on the basis of statement cannot be made. Reliance is placed on following decisions:-*

a) *CIT v/s G.Krishnan (1994) 210 ITR 707 Mad.*

Held, that additions cannot be made merely on the basis of statements.

b) *Gargidin Jwala Prasad v/s CIT (1974) 96 ITR 97 (All)*

Held, that the additions merely based on statement of witnesses cannot be made.

c) *Chitra Devi v/s ACIT (2002) 28 Tax-world 454 (ITAT JP)*

No addition can be made in block assessment on the basis of statement recorded during the search unless it is relatable and connected with the material found during the search.

d) *Jagdish Narain Ratan Kumar V/s ACIT 22 TW 209 (JP)*

Statement recorded during search are generally influenced by extraneous circumstances & cannot be termed as free from all ambiguity.

e) *CIT vs. Bhanwar Lal Murwatiya (Rajasthan High Court, Jodhpur) 39 TW 214 whether department has to bring on record sufficient evidence before making an addition u/s 69 of the Act? - Held yes. Whether a retracted statement can be made the sole basis for addition? - Held no, since it cannot be said to be conclusive.*

f) *The Jodhpur ITAT Bench in Maheshwari Industries v. Asstt. CIT [2005] 148 Taxman 74 (Jodh) (Mag.) has held that additions should be considered on merits rather than on the basis of the fact that the amount was surrendered by the assessee. It is settled legal position that unless the provision of statute warrant or there is a necessary implication on reading of section that the principles of natural justice are excluded, the provision of section should be construed in manner incorporating principles of natural justice and quasi judicial bodies should generally read in the provision relevant section a requirement of giving a reasonable opportunity of being*

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heard before an order is made which will have adverse civil consequences for parties effected.

- g) *Rajesh Jain Vs. DCIT 100 TTJ 929 (ITAT, Delhi 'A' Bench) Search and seizure - Block assessment - Retraction of statement - Addition of Rs.25 lacs made solely on the basis of confessional statement of assessee that he earned the said amount in the last ten years was not justified - Confessional statement should be corroborated with some material to show that assessment made is just and fair.*
- h) *KRISHNA TERINE (P) LTD. vs. ASSISTANT COMMISSIONER OF INCOME TAX, ITAT, AHMEDABAD 'D' BENCH 56 DTR, ITAT 395*

Held that it appears that both the additions have been made by the AO because the assessee in the statement under s. 132(4) of the IT Act made surrender of the above amounts but later on did not disclose the same in the return of income filed for the block period. However, on consideration of the orders of the authorities below, we are of the view that no evidence or material is discussed to show any incriminating material recovered during the course of search to make the above additions. The Tribunal in the first round of proceedings has already directed to examine the case on the basis of material seized, material available on record and books of account. In the absence of any specific findings as per the direction of the Tribunal dt. 31st May, 2005 and as per law for the block assessment noted above, before making the addition on the above issue the AO and the learned CIT(A) should have specified as to what material was found during the course of search to make the above additions. In the absence of any proper explanation and finding in the above grounds, we set aside the orders of the authorities below and restore these two grounds of appeal to the file of the AO with direction to re-decide both the grounds afresh on the basis of material seized, material available on record and the books of accounts as is directed by the Tribunal earlier vide order dt. 31st May, 2005 and in accordance with law for the block assessment as noted above.

- i) *In the case of Jyotichand Bhaichand Saraf & Sons (P) Ltd. Vs. Deputy Commissioner of Income-tax, Circle 11(1) in appeal No. 08(PN) of 2011 (Block period 1996-97 to 2002-03) the I.T.A.T. Pune Bench 'A' vide order dated 27-07-2012 has held*

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that the statement recorded under section 132(4) of the Income-tax Act, 1961 can be retracted.

- j) *In the case of ACIT Vs Ravi Agricultural Industries the I.T.A.T., Agra Bench, Agra (3rd Member) in appeal Not. ITA No. 145/AGR/2006 judgment dated 26-12-2008 has held that when the assessee has retracted statement an addition should be supported by enough material in possession of the department.*
- k) *The Mumbai Tribunal in an unreported judgment (Shri Suresh Chandra Agarwal, ITA No. 7900/Bom./92, order dated 12-8-1996), held that the statement recorded during the search by exercising powers rested with the authorised officer u/s.132(4) could not be said to be a voluntary statement, rather a statement as a result of assessee's examination on oath.*
- l) *The law relating to retraction is well-settled by Supreme Court in Sri Krihna V. Kurukshetra University, AIR 1976 SC 376, wherein it is held that if the original statement suffers from any defects, the person is entitled to go back on the statement already made by making correct statement. The Supreme Court have laid down the ratio, after considering S. 18 of the Evidence Act, 1872 that any admission made in the ignorance of the legal rights or under duress, cannot bind the maker of the admission. This right has been tested under Income-tax Act and the same has been upheld by Punjab & Haryana High Court in Kisan Lal Shivchand Rai v. CIT, (88 ITR 293).*
- m) *Hon'ble Rajasthan High Court in the case of CIT Vs. Bhanwarlal Murwatiya reported in 215 CTR (Raj) 489 (2008) (2008)/ 3 DTR (Raj) 115 has held as under :-*
"A retracted statement of any person cannot be made the sole basis for addition because an admission is an extremely important piece of evidence. But it cannot be stated that it is conclusive. It is open to the person who made the admission to show that it is incorrect. Needless to say that this is the law laid by the Highest Court of this country in the case of Pullangode Rubber Produce Co. Ltd. vs. State of Kerala & Ors. (1973) 91 ITR 18 (SC)....."
- 16) *Further the search statement of Shri Ashok Agarwal is not binding for the assessee. The search team has not recorded any statement of the assessee. The assessee is owner of the plot and she was present at the time of search but nothing was asked from her about the impugned sale agreement or cost of the plot by the search party. Binding nature of the*

statements is for the persons who have made the statements. The statements will not be binding on other persons in absence of necessary opportunity and confirmation.

In view of above submission the humble assessee prays that the addition of Rs. 76,00,000/- made in total income of the assessee is without any basis, without bringing any positive material on record and only on the basis of presumption/assumption, therefore the order of Ld CIT(A) deserves to be set aside and the addition deserves to be deleted. "

3.4 The Id. DR during the course of hearing relied on the orders of the Id. CIT(A).

3.5 We have heard the rival contentions and perused the materials available on record. The assessee is an individual. The assessee is in the business of colonization. The assessee purchases agricultural land from farmers and then the formalities of the Rajasthan Land Revenue Act and JDA Act is completed for conversion of land from agricultural to non agricultural use and further colony is planned and map is got approved from JDA. Subsequently, the plots of different size are sold to the customers and development work like construction of road, providing electric line water supply etc are done by the assessee as per the norms of JDA. The assessee filed regular return u/s 139(1) of Income Tax Act on 29-09-2009 in Circle-6, Jaipur declaring total income of Rs. 2,86,24,330/- (Copy at PB Page 1-3). The department carried out search & seizure operations on 22-09-2010 (Copy of Panchnama at PB Page 25-27). The

case of assessee was centralized at Central Circle-3, Jaipur. In pursuance to notice issued u/s 153A of Income Tax Act, 1961 the assessee filed her return on 06-12-2011 (Copy ay PB Page 70-74) declaring the same income which she declared in original return. The assessment was completed by AO vide his order dated 31.03.2013 assessing the total income at Rs. 3,62,24,330/- as against returned income Rs. 2,86,24,330/- by making following addition in total income: -

S.No	Particulars	Amount (Rs.)
1.	Unexplained investment in purchases of plot	76,00,000/-

Aggrieved by the aforesaid addition of Rs. 76,00,000/- made by the AO, the assessee filed appeal before Id CIT(A) who for the reasons given at page 15-20 of her order, upheld the findings of AO and confirmed the addition made by AO. After going through available records before us, the facts emerges that during the year under consideration the assessee purchased a plot No. B-281, 10B Scheme, Gopal Pura Bye Pass, Jaipur. This was a vacant plot which was purchased by the assessee for Rs. 65,00,000/- vide registered sales deed dated 27.06.2008. (Copy at PB Page 82-88). The department found and seized the following documents in respect to purchase of this plot: -

(i) *The first agreement to sale of this plot was made on 15.05.2008 for Rs. 65,00,000/-. Which was seized by department at Annexure AS-7 Page 10-12 (Copy at PB Page 75-77).*

(ii) *Later on another agreement dated 25.06.2008 was executed for a sum of Rs. 1,41,00,000/-, which was also under seizure of the department at Annexure AS-7 Page 7-9 (seized from 281-282, 10-B Scheme, Gopal Pura Bye Pass, Jaipur) (Copy at PB Page 78-80), wherein the term of agreed construction over the land was included, therefore the sale consideration was revised to Rs. 1,41,00,000/- as against original consideration of Rs. 65,00,000/-.*

(iii) *Cancellation Agreement dated 26-06-2008 seized by department vide Exhibit 4 of Annexure AS (seized from 1, Dayal Nagar, Gopalpura Bye Pass Road, Jaipur on 12.10.2010) (Copy at PB Page 81); wherein the seller expressed his inability to make construction as agreed over the land vide agreement dated 25-06-2008, and therefore agreed to cancel the agreement dated 25/06/08 and agreed to execute the sale deed as per the terms settled vide agreement dated 15/05/08.*

(iv) *Registered Sale Deed dated 27/06/2008, this plot was finally purchased by assessee in the form of vacant plot for Rs. 65,00,000/- (as originally agreed) (Copy at PB Page 82-88). Seized by department vide Annexure AS-7 Page 13-19 (seized from 281-282, 10-B Scheme, Gopal Pura Bye Pass, Jaipur)*

It is further noted that no statement of owner of the plot i.e. assessee was recorded by the search party. However during the course of search the statement of husband of assessee Shri Ashok Agarwal was recorded on

22.09.2010 (Copy at PB Page 28-45) wherein in reply of Q. No. 24 of the statement he surrendered the amount of Rs. 76,00,000/- as income. It is also noted that the copy of statements was provided by the AO on 10-03-2011. Shri Ashok Agarwal retracted from search statement in respect to surrender of Rs. 76,00,000/- by filing sworn affidavit dated 10.03.2011 before the AO on 11.03.2011 immediately after the receipt of copy of statement on 10-03-2011. (copy at PB page 65-69). During the course of assessment proceedings, the AO made inquiries from the seller of the plot Shri Subhash Chand Bansal and recorded his statements on 07-02-2013 (copy at PB page 113-117), wherein he stated on oath that he has received only Rs. 65.00 lacs against the sale of the plot. The inspection report issued by the Sub-Registrar-I, Sanganer, Jaipur wherein it has been reported that the construction measuring 3700 sq. ft. was found on the said plot and the same was valued at Rs. 14,80,000/- by registrar authorities. (Copy at PB Page 101-102). The assessee also filed evidence like Google map and photographs in support of his contention that the land was vacant land at the time of purchase. (copy at PB page 105 to 110. From the photographs it is observed that the land was vacant land at the time of purchase by the assessee. The AO made addition of Rs. 76,00,000/- in total income of the assessee which has been confirmed by the

ld. CIT(A) in first appeal. The seller Shri Subhash Chand Bansal had given a statement on oath that he had received Rs. 65 lacs only. The agreement with construction was cancelled and the cancellation agreement was also seized during the search operation. The seller stated that there was no construction and no water and electric connection which is also established by Google earth Maps and photographs placed in the paper book. There is no evidence of payment of any money on the purchase of the vacant plot. No statement of assessee was recorded during search operation while she was present at the time of search. The cancellation agreement was found and seized during search operation itself. Therefore, its authenticity cannot be doubted when the Revenue had not been able to establish otherwise. Therefore, looking to the present facts, circumstances of the case and the case laws relied on by the assessee (supra), we find that the lower authorities have erred in confirming the addition of Rs 76.00 lacs on account of unexplained investment in purchase of Plot No. 281, 10B, Gopal Pura Bye Pass, Jaipur. Thus we do not concur with the findings of the ld. CIT(A). Hence, the ground nos. 1 to 3 raised by the assessee are allowed.

4.0 In the result, the appeal of the assessee is partly allowed.

The order is pronounced in the open Court on 14 -02-2017.

Sd/-
(कुल भारत)
(KUL BHARAT)
न्यायिक सदस्य /Judicial Member

Sd/-
(भागचन्द)
(Bhagchand)
लेखा सदस्य /Accountant Member

जयपुर /Jaipur

दिनांक /Dated:- 14 /02/ 2017

*Mishra

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

1. अपीलार्थी /The Appellant- Smt. Renu Agarwal, Jaipur
2. प्रत्यर्थी / The Respondent- The ACIT,Central Circle- 3, Jaipur
3. आयकर आयुक्त(अपील) / CIT(A).
4. आयकर आयुक्त / CIT,
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर /DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 746/JP/2014)

आदेशानुसार / By order,

सहायक पंजीकार / Assistant. Registrar