IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'A', NEW DELHI

Before Sh. N. K. Saini, AM and Sh. Sudhanshu Srivastava, JM

ITA No. 1182/Del/2011 : Asstt. Year : 2005-06

Vijay Kumar Aggarwal, M-65, Jagat Ram Park, Laxmi Nagar, Delhi	Vs	ACIT, Central Circle-12, New Delhi-110055
(APPELLANT)		**(RESPONDENT)**
PAN No. AEXPA2040R		

Assessee by : Sh. Ved Jain, Adv., &
Sh. Ashish Chadha, CA
Revenue by : Sh. Ravi Jain, CIT DR

Date of Hearing : 17.02.2017		Date of Pronouncement : 12.05.2017

ORDER

Per N. K. Saini, AM:

This is an appeal by the assessee against the order dated 28.12.2010 of ld. CIT(A)-I, New Delhi

2. Following grounds have been raised in this appeal:

"1. On the facts and in circumstances of the case Ld. Commissioner of Income Tax (Appeals), has erred by sustaining addition of Rs.1,29,82,873/- in respect of unrecorded sales/unrecorded business transactions and unrecorded payments, ignoring that the documents on the basis of which the addition was made were dump documents.

2. On the facts and in circumstances of the case Ld. Commissioner of Income Tax (Appeals) has

erred in applying the provisions of section 292C of I.T. Act 1961.

3. On the facts and in circumstances of the case Ld. Commissioner of Income Tax (Appeals) has failed to appreciate that when the documents found in search are not related to the assessee provisions of section 292C of I.T. Act cannot be invoked.

4. On the facts and circumstance of the case. Ld. Commissioner of Income Tax (Appeals) has failed to appreciate that provisions of section 292C of I.T. Act are not applicable where the contents of documents are self-explanatory or dumb in nature.

5. On the facts and circumstances of the case Ld. Commissioner of Income Tax (Appeals) has failed to appreciate that Assessing Office could have invoked the provision of section 153C of I.T. Act in order to ascertain and assess the correct Assessee.

6. The Appellant craves leave to add, alter, amend or forgo any of the grounds of appeal at the time of hearing."

3. From the above grounds, it is gathered that only grievance of the assessee in this appeal relates to the sustenance of addition of Rs.1,29,82,283/- in respect of alleged unrecorded sales/unrecorded business transactions and unrecorded payments etc.

4. Facts of the case in brief are that a search and seizure operation u/s 132 of the Income Tax Act, 1961 (hereinafter referred to as the Act) was carried out on 09.12.2005 at the residence of the assessee and certain incriminating documents were found and seized. Thereafter, the notice u/s 153A of the Act was issued on 05.09.2007 requiring the assessee to file the return of income. In response the assessee filed the return of income on 12.10.2007 declaring an income of Rs.1,15,652/- in which the business income was declared at Rs.87,916/- and the income from other source at Rs.27,889/-. The AO on the basis of the seized documents asked the assessee to explain the unrecorded sales/business transactions and unrecorded payment in respect of business of purchase and sale of gold jewellery and to produce the books of account. The assessee vide letter dated 17.12.2007disowned the loose papers found from his residence and submitted that he had not made any noting on those papers and that some persons had noted them but somehow forget and left there and the assessee did not taken notice of it nor could he contacted the person concerned to hand it over loose papers belonging to him. It was further submitted that such papers continued to remain in the house of the assessee on the belief that the person concerned may turn up and may require the same to be

handed over to him. Therefore, the assessee could not make out head or tail in respect of the notings made in the loose sheets as the transactions noted in those papers would have nothing to deal with the assessee in view of his source of income from brokerage and his ill health from various ailments. The AO, however, was not satisfied from the submissions of the assessee and observed that the assessee had not furnished any explanation regarding the loose papers marked as Annexure A and as such there was no alternative except to estimate the income of the assessee on the basis of unrecorded sales/business transaction and unrecorded payments in respect of business of purchase and sale of goods. He pointed out that page nos. 31, 32 and 33 of Annexure A revealed that the payment of Rs.1,29,82,873/- was made to various parties as on 26.11.2004 and the assessee did not furnish information in this regard. He, therefore, treated the said amount as unexplained and added to the income of the assessee.

5. Being aggrieved the assessee carried the matter to the ld. CIT(A) and submitted as under:

> *"1.1 It is submitted that the first addition of Rs.1,29,82,873/- was made on an assumption that seized material found during the search and annexed as annexure A were related to the assessee. Copies of the*

papers found vide Page No.31, 32, &33 are enclosed in the Paper Book Page No. 14, 15, & 16. It is submitted that the Ld Assessing Officer failed to appreciate that no statement of the assessee on the date of search was recorded by the revenue. From the very first day the assessee was pointing out that these papers are not related to him and the Assessing Officer could make enquiries from the persons whose names are appearing in those papers. It is relevant to mention here that on 08.10.2005 i.e. prior to 2 months of search, there was a family function at the house of assessee as is evident from the seized records and so many people were gathered and one of them could have left these documents at the house of assessee. It is submitted that Page No.46 & 47 of the seized material also prove that there was function in the family of assessee .These documents are annexed at Page No.22, 23 and 24 of the Paper Book. However, the AO without making any enquiry or issuing any summons u/s 131 of the Act, to the concerned persons has made the addition in the hands of the assessee without any basis.

1.2 Ld Assessing Officer has alleged that since the assessee failed to furnish any explanation in respect of these papers the addition is required to be made in the hands of the assessee. It is submitted that the Assessing Officer failed to appreciate that since the assessee did not know about any of the documents he had not furnished any explanation. It is submitted that furnishing of any explanation in respect of unrelated material would prove the stand of the assessee contradictory in as much as on one hand he was denying the ownership of the documents on the other hand the same is explained. In other words as, per the principle of human probabilities, how a person would explain the documents not related to him. It is submitted that mere possession of documents perse does

not warrant any addition. There are umpteen number of judgments where in it has been held that the presumption available in section 132(4A) is a rebuttable presumption and the AO cannot make any addition simply on the basis of this presumption. A reference can be made to the recent decision of the Supreme Court in the case of P. R. Metrani reported in 287 ITR 209(SC).

1.3 It is next submitted that nothing is found in search which shows that these payments were actually made by the assessee or were traveled from the coffers of the assessee. Further no evidence was found in search which shows that the assessee had infact incurred such huge expenses vis-à-vis some stock or some asset. More clearly it is submitted that the Assessing Officer has not brought any material on record which shows that the assessee had in fact deployed/invested his undisclosed income by way of these payments and expenses, in such and such asset or stock. Therefore, the denial of the assessee was acceptable vis-a-vis the ownerships of these documents. No such exercise was ever done by the Assessing Officer.

It is submitted that the assessing officer has passed the assessment order, in haste and hurried manner without application of mind, in as much as the search in this case was conducted on 9-12-2005 and the first notice of 153A was issued on 05-09-2007 and the questionnaire on the basis of seized documents was first issued to the assessee on 12-11-2007 just before few days when the assessment was going to be time barred. It is submitted that the undersigned has failed to understand as to what the AO was doing with the seized material through out the two years and what stops him to conduct the enquiries from the persons whose names were appearing on the papers. Further assessee seeks to rely on the judgment of

Allahabad High Court in the case of CIT Vs Ashok Kumar 286 ITR 541 (ALL).

1.4 It is submitted that the department has resorted to its last weapon i.e. search against the assessee and then too did not find any unaccounted asset or stock or any investment. Therefore, the returns of income filed by the assessee for the earlier years and for the impugned year are correct and reliable. It is true that the scope of the new assessment procedure u/s 153A is wide enough to include all kinds of income. However, it does not mean that the Assessing Officer can add anything on estimate basis. Reliance can be placed on the recent judgment of the ITAT Delhi Bench in the case of Anil Bhatia wherein the ITAT has discussed the scope of section 153A at length. Further reliance can be placed on the judgment of CIT Vs Girish Chaudhry 296 ITR 619 (Del). It is relevant to mention here that the facts of this case were similar to the facts of the case of the assessee's case. Their lordships have affirmed the following finding of the ITAT:

> *"In the present case, the Revenue has used its longest arm of search available to the Revenue to unearth unaccounted money or evidence thereof. Having taken above step and as per law, it has to be proved strictly that undisclosed income assessed in the hands of the assessee is undisclosed income beyond a reasonable doubt. As noted earlier in the first page, total of all the five figures is 57.50 but addition of Rs. 48 lakhs was made and not of Rs. 57.50 lakhs. Why figures mentioned at second place after some gap was not taken into consideration. How 48 have been made as Rs. 48 lakhs and that too undisclosed income of the assessee is absolutely not clear from the assessment order. It was stated that Rs. 9.50 lakhs is recorded to be received*

through cheque and therefore above amount was not added. It is correct that before 9.50 the word. "Ch" is written but there was nothing on record to show this amount was any way different from other figures/amounts. No attempt whatsoever was made to link any of the entry in the seized book with any transaction earned by the assessee in his capacity as director or by his wife or M/s. I.G. Builders and Promoters Ltd. to show the amount in figure as assessable undisclosed income. No proper use of seized material was made to establish that entries in the seized document relates to undisclosed income of Rs. 48 lakhs. Seized document has rightly been held to be a dumb-document. It was for the Revenue to put life into it by collecting other relevant and connected material. This has not been done to establish the case as per requirement of the statute."

1.5 It is next submitted that presumption available under section 132(4A) has a limited application it cannot be extended to section 69 as held by the Hon'ble Supreme Court in the case of P.R. Metarani Vs CIT reported in 287 ITR 209 (SC) wherein their lordships have held as under:-

Presumption under sub-section (4A) would not be available for the purpose of framing a regular assessment. There is nothing either in Section 132 or any other provision of the Act to indicate that the presumption provided under Section 132 which is a self contained code for search and seizure and retention of books etc. can be raised for the purposes of framing of the regular assessment as well. Wherever the legislature intended the presumption to continue, it has provided so. Reference may made to Section 278D of the Act which provides that where during the

course of any search under Section 132, any money, bullion, jewellery or other valuable articles or things or any books of account etc. are tendered by the prosecution in evidence against the person concerned, then the provisions of sub-section (4A) of Section 132 shall, so far as may be, apply in relation to such assets or books of account or other documents. This clearly spells out the intention of legislature that wherever the legislature intended to continue the presumption under sub- section (4A) of Section 132, it has provided so. It has not been provided that the presumption available under Section 132 (4A) would be available for framing the regular assessment under Section 143 as well.

This is also evident from the fact that whereas the legislature under Section 132 (4) has provided that the books of account, money, bullion, jewellery and other valuable articles or things and any statement made by such person during examination may thereafter be used as evidence in any other proceedings under the Act but has not provided so under sub-section (4A) of Section 132. It does not provide that the presumption under Section 134A would be available while framing the regular assessment or for that matter under any other proceeding under the Act except under Section 278D.

Section 132 being a complete code in itself cannot intrude into any other provision of the Act. Similarly, other provisions of the Act cannot interfere with the scheme or the working of Section 132 or its provisions.

Presumption under Section 132 (4A) is available only in regard to the proceedings for search and seizure and for the purpose of retaining the assets under Section

132(5) and their application under Section 132B. It is not available for any other proceeding, except where it is provided that the presumption under Section 132 (4A) would be available.

In our considered view, the High Court of Allahabad in Pushkar Narain Sarraf (supra) and the High Court of Delhi in Daya Chand (supra) have taken the correct view in holding that the presumption under Section 132(4A) is available only in regard to the proceedings for search and seizure under Section 132. Such presumption shall not be available for framing the regular assessment. The High Court of Karnataka in the impugned judgment has clearly erred in holding to the contrary. Consequently, question No.1 of the Revenue is answered in the affirmative, i.e. against the Revenue and in favour of the assessee."

6. The ld. CIT(A) after considering the submissions of the assessee confirmed the addition by observing in para 6 of the impugned order as under:

"1. I have considered the observations of the Assessing Officer in the Assessment Order, while making various additions and have also considered the submissions made before me. I find that the additions of Rs. 1,29,82,873/- towards payment made to various parties and Rs.5,351,60/- on account of peak cash balances, have been made on basis of various loose papers found at Pages of Annexure of A-4. The additions have been made on the basis of presumption available u/s 132(4A) of the Act and in absence of no explanations coming from the appellant. In the submissions made before the Assessing Officer and before me, the appellant has disowned the loose papers found during search. Before me AR of the

appellant has taken shelter under the judgment of Hon'ble Supreme Court in the case of P.R. Metrani reported in 287 ITR 209. In the said judgment the Hon'ble Supreme Court of India had observed as under:

> *"Presumption under Section 132 (4A) is available only in regard to the proceedings for search and seizure and for the purpose of retaining the assets under Section 132(5) and their application under Section* 132B. *It is not available for any other proceeding, except where it is provided that the presumption under Section 132 (4A) would be available.*
>
> *In our considered view, the High Court of Allahabad in Pushkar Narain Sarraf (supra) and the High Court of Delhi in Daya Chand (supra) have taken the correct view in holding that the presumption under Section 132(4A) is available only in regard to the proceedings for search and seizure under Section 132. Such presumption shall not be available for framing the regular assessment. The High Court of Karnataka in the impugned judgment has clearly erred in holding to the contrary. Consequently, question No. 1 of the Revenue is answered in the affirmative, i.e. against the Revenue and in favour of the assessee.*
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> *It may be clarified that through the presumption under section 132(4A) is not available to the authorities while framing the regular assessment the material seized can be used as a piece of evidence in any other proceedings under the Act, all contentions are left open."*

The appellant had denied the ownership of the seized paper Annexure-A Page 31, 32 and 33 etc from the very beginning and stated that these paper were not related to

the assessee. No statement was recorded by the search party regarding the ownership of these papers and the content thereof at the time of search No enquiry was made either by the authorized officer or the AO from the parties whose names are appearing in the said documents- The AO had made the addition only on the presumption u/s 132(4A) that the documents found from the residence of the appellant must be presumed to be his documents. However, as per the judgment of the Hon'ble Supreme Court supra the presumption u/s 132(4A) would be available only for the purpose of retaining the assets u/s 132(5) and their application u/s 132B. Such presumption shall not be available for framing the regular assessment. In this view of the Hon'ble Supreme Court the papers / documents found at the residence of the appellant which have been denied from the very beginning and no other corroborative evidence have been found to connect these papers / documents to the appellant, cannot be presumed to belong to the assessee u/s 132(4A) as per the appellant.

However, in this connection proviso of section 292C is relevant for consideration. The content of the said provision is as under:

[Presumption** as to assets, **books of account, etc.
***292C.** —[(1)] Where any books of account, other documents, money, bullion, jewellery or other valuable article or thing are or is found in the possession or control of any person in the course of a search under section 132 [or survey under section 133A], it may, in any proceeding under this Act, be presumed- (i) that such books of account, other documents, money, bullion, jewellery or other valuable article or thing belong or belongs to such person:*

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

(iii) that the signature and every other part of such books of account and other documents which purport to be in the handwriting of any particular person or which may reasonably be assumed to have been signed by or to be in the handwriting of any particular person, are in that person's handwriting, and in the case of the document stamped, executed or attested that it was duly stamped and executed or attested by the person by whom it purports to have been so executed or attested.]

[(2) Where the books of account, other documents or assets have been delivered lo the requisitioning officer in accordance with the provisions of section I32A. then, the provisions of sub-section (1) shall apply as if such books of account, other documents or assets which had been taken into custody from the person referred to in clause (a) or clause (b) or clause (c), as the case may be, of sub-section (1) of section 132A. had been found in the possession or control of that person in the course of a search under section 132]."

The said provision has been inserted by Finance Act 2007 w.e.f. 1.10.75. As per the said provision Where any books of account, other documents are found in the possession or control of any person in the course of search, it may, in any proceeding under this Act be presumed that such books of accounts / other document belongs to such person, the content of such documents are true etc.

In regard to the seized documents Annexure A-4 page 31, 32 and 33 the AO had not found any corroborative evidence during the course of search and assessment

> *proceedings. However, from the said seized documents the figure of Rs.12982873/- is clear. It was for the assessee to explain the noting in those seized documents but the assessee has only denied the ownership of those documents and no explanation have been filed about the notings. As per the provision of section 292C cited above these document has to be presumed to belong to the appellant as these were recovered from his control at the time of search and content of such documents are to be presumed to be true. In view of the above discussion in my considered opinion the AO has correctly treated this amount as unexplained expenditure in the assessment of the appellant during the year. Thus the appeal of the appellant on this ground is dismissed, and addition of Rs.1,29,82,873/- is confirmed."*

6. Now the assessee is in appeal. The ld. Counsel for the assessee reiterated the submissions made before the authorities below and further submitted that the ld. CIT(A) grossly erred in confirming the addition as the assessee from the very beginning denied that loose papers belonged to him and that the presumption u/s 292C of the Act is rebuttable presumption and does not lead to a conclusive evidence. The reliance was placed on the decision of the ITAT Delhi Bench in the case of DCIT Vs Delco India Pvt. Ltd. and Others in ITA Nos. 2453, 2925 & 2926/Del/2013 order dated 16.06.2015 (copy of the said order was furnished which is placed on record). It was stated that the said order has been confirmed by the Honøble Jurisdictional High Court vide order dated 10.02.2016 in ITA No. 116/2016, 917/2015 & 74/2016 moved by the department. It was further submitted that the

assessee from the very beginning denied that the documents belonged to him and the AO made no effort to find out the real truth. It was also submitted that during the course of search no books of accounts or documents belonging to the assessee were found. Therefore, the addition made by the AO on the basis of presumption was not justified and the ld. CIT(A) without appreciating the facts in right perspective wrongly sustained the addition made by the AO. The reliance was placed on the following case laws:

- *DCIT Vs Delco India Pvt. Ltd. and Others (2015) 7 TMI 47 (ITAT Del.)*
- *Pr. CIT Vs M/s Delco India Pvt. Ltd. (2016) 2 TMI 607 (Del.)*
- *CIT Vs M/s Khosla Ice & General Mills (2013) 1 TMI 451 (P&H)*
- *Sh. Pandoo P. Naig Vs ACIT in ITA Nos.7089 & 7364/Mum/2011 order dated 24.06.2016 (ITAT Mum.)*
- *ACIT, CC-32, Mumbai Vs Prakash B. Bandarkar, Parvin B. Bandarkar, Room in ITA Nos.6671 & 6672/Mum/2012 order dated 24.06.2016 (ITAT Mum.)*
- *CIT Vs S. M. Aggarwal (2007) 293 ITR 43 (Del.)*
- *CIT Vs Girish Chaudhary (2008) 296 ITR 619 (Del.)*
- *Jayanti Lal Patel Vs ACIT & Ors. (1998) 233 ITR 588 (Raj.)*
- *Mahaan Foods Ltd. Vs DCIT (2010) 123 ITD 590 (Del. C Bench)*
- *ACIT Vs Satyapal Wassan (2008) 5 DTR (Jab. Trib.) 202*
- *Rakesh Goyal Vs ACIT (2004) 87 TTJ 151 (Del.)*
- *N. K. Malhan Vs DCIT (2004) 91 TTJ 938 (Del.)*
- *Jagdamba Rice Mills Vs ACIT (2000) 67 TTJ 838 (Chd.)*
- *Ashwani Kumar Vs ITO (1992) 42 TTJ 644 (Del.)*

- *ACIT Vs Ashok Kumar Vig. (2007) 106 TTJ 422 (Ranchi)*
- *Chander Mohan Mehta Vs ACIT (Inv.) (1999) 65 TTJ 327 (Pune)*
- *M.M. Financiers (P) Ltd. Vs DCIT (2007) 107 TTJ 2000 (Chennai)*
- *Hissaria Bros Vs ACIT 22 Taxworld 684 (ITAT Jaipur)*
- *ITO Vs Mannalal 22 Taxworld 551 (ITAT Jaipur)*
- *Ashwani Kumar Bhardwaj Vs DCIT 21 Taxworld 358 (ITAT Jaipur)*
- *Mohd. Lllias Choudhary Vs DCIT 25 Taxworld 394 (ITAT Jaipur)*
- *Moonga Metals Pvt. Ltd. Vs ACIT 67 TTJ 247 (All.)*

7. In his rival submissions the ld. DR supported the orders of the authorities below and further submitted that during the course of assessment proceedings, the assessee was asked to furnish the explanation relating to page nos. 31, 32 & 33 of Annexure A in respect of payments of Rs.1,29,82,873/- made to various parties as on 26.12.2004 and to explain the source of payment by furnishing the necessary evidence as to whether these payments had been recorded in the books of accounts but the assessee could not furnish any information in this regard. Therefore, the addition made by the AO and sustained by the ld. CIT(A) was fully justified. It was further submitted that the documents were found from the possession of the assessee, names, figures of amount were mentioned in those documents and there was a link between the assessee and documents. Therefore, the onus was on the assessee which was not discharged as

such the provision of Section 292C of the Act were applicable and it was to be presumed that the documents belonged to the assessee, particularly when, no evidence was brought on record that the documents did not belong to the assessee. It was accordingly submitted that the addition made by the AO and sustained by the ld. CIT(A) was fully justified.

8. We have considered the submissions of both the parties and carefully gone through the material available on the record. In the present case, the AO made the addition by invoking the provisions of Section 292C of the Act and considering the notings of page nos. 31, 32 & 33 of Annexure A found during the course of search in those documents, certain notings were there but name of the assessee was not mentioned, in some of the documents there were details of clothes like sari, suits and shirts etc. The claim of the assessee is that he was not engaged in the business of gold or jewellery. The assessee in the present case, from the very beginning stated that page nos. 31, 32 & 33 etc. of Annexure A did not relate to him. The AO did not make any inquiry from the parties whose names were appearing in the said documents but made the addition by invoking the provisions of Section 263 of the Act.

9. On a similar issue in the case of DCIT Vs Delco India Pvt. Ltd. and Others in ITA Nos. 2453, 2952 &

2926/Del/2013, the ITAT Delhi Bench vide order dated 16.06.2015 had held as under:

> *"A perusal of section 292C shows that a statutory presumption can be drawn where any documents is found in possession of a person in the course of a search or survey that it belongs to "such a person". A presumption is also drawn that the contents of such a document are true. The presumption having been drawn as per law is required to be confronted and the documents as per record have been confronted. Whether the onus placed upon the assessee in a given set of facts is discharged or not has to be seen from the replies of the assessee based on facts. However, the law is well settled that the presumption is rebuttable.*
>
> *In the facts of the present case, the assessee has denied having any transactions with M/s Smridhi Sponge and has also denied consequently the contents of the seized document as relatable to it; the denial as per the assessment order is also on an affidavit; the particulars available in the public domain procured through the internet searches from the ROC and the official income tax sites as per print outs of the downloads are relied upon. The fact that these were unimpeachable third party evidences that too from the official government sites goes without saying. In these facts, merely sending notices to the addresses provided on the ROC site cannot be said to be rebutting the evidence on record namely that M/s Smridhi Sponge, assessed to tax in a specific jurisdiction in Kolkata manufacturing M.S. Ingot*

and Sponge Iron, having specific address as per ROC site receiving payments in cash and cheque as per the seized documents qua which presumption u/s 292C operates towards their correctness; wherein two specific cheques were honoured by Punjab National Bank at Jamshedpur whose account number was "1021";, branch code and factum of the payments made on behalf of the M/s Galaxy Exports as the same "Galaxy" found mentioned at Paper Book page 47 (Seized documents) also dealing in "Iron Ore" were provided; where the names and addresses of the Directors of both the companies; their authorized share capital; details of their balance sheets as per ROC site; Auditor's, Reporters etc. are all given. The fact that these were relevant unimpeachable evidence has not been doubted. In these facts the reluctance of the tax authorities to address this issue and to carry the enquiries to the logical conclusion is a glaring fact of deliberate inaction. The repeated inactions speak louder then the half hearted actions undertaken. The evidences remains unrebutted on record. No effort to co-relate the assessee's alleged undisclosed transactions with M/s Smridhi Sponge appear to have been addressed so as to demolish the consistent claim on record that it had no dealings with the said concern. In such a background the departmental stand that the level of information available with the assessee proved that the assessee had interactions with the said concern is adding insult to injury.

The silence of inaction speaks much louder than the frenzy of the misdirected actions necessitating

a pro-active department to address the fest spreading malaise lest the tools of search and seizure are reduced to a farce. The repeated inactions speak louder than the half-hearted actions taken. We are of the view that as far as the assessee is concerned the onus to address the seized documents qua which a statutory presumption has been drawn stands fully discharged. - Decided in favour of assessee."

10. The aforesaid decision of the ITAT has been affirmed by the Honøble Jurisdictional High Court vide its order dated 10.02.2016 in the case of Pr. CIT Vs M/s Delco India Pvt. Ltd. reported at (2016) 2 TMI 607 (Del.) wherein it has been held as under:

"17. Section 292C of the Act, inter alia, provides that where any books of accounts or other documents are found in possession or control of any person in the course of search under Section 132 or survey under Section 133A of the Act, it may be presumed that such books or documents belong to such person. Undisputedly, such presumption is rebuttable. It is not disputed that the Assessee had clearly denied having any dealing with M/s Smridhi Sponge Limited and had also filed an affidavit to that effect. The ITAT found, as a matter of fact, that the Assessee on its part had made the necessary enquiries and also provided final accounts of M/s Smridhi Sponge Limited; confirmation from the Director of M/s Smridhi Sponge Limited; details of the bank accounts; final accounts; Director's Report; PAN Number etc. which sufficiently discharged the burden cast on the Assessee. The ITAT also found that the Assessee had provided the necessary information for

the AO to make the requisite enquiries from M/s Smridhi Sponge Limited as well as M/s Galaxy Exports Pvt. Ltd. In our view, no interference with the order of the ITAT is called for under Section 260A of the Act since the findings of the ITAT are essentially factual. Further, we find no infirmity with the findings returned by the ITAT and in any event the same cannot be held to be perverse by any stretch.

18. In the circumstances, no substantial question of law arises and the appeals are, accordingly, dismissed."

11. Similarly, the ITAT Mumbai Bench in the case of Sh. Pandoo P. Naig Vs ACIT and ACIT, CC-32, Mumbai Vs Prakash B. Bandarkar, Parvin B. Bandarkar, Room in ITA Nos. 7089 & 7364/Mum/2011 and ITA No. 6671 & 6672/Mum/2012 (supra) vide order dated 24.06.2016 held as under:

"14. We find that the wording of the section 292C which supposes the presumption to be taken is qualified with the words 'may be', hence, it may or may not be presumed that such documents belong to the person searched. Firstly, the section uses the word 'may presume' and not 'shall presume', hence the presumption of facts under section 292C is not a mandatory or compulsory presumption, but, a discretionary presumption; secondly, such a presumption is not a conclusive presumption but is a rebuttable presumption because it is a presumption of fact not a presumption of law. Under the circumstances, it is to be examined by the competent authorities as to whether the presumption under the section is attracted owing to the nature of the documents and the contents of such documents found during search/survey action. Such a presumption, thus, is not an absolute or conclusive presumption, but, it has to be taken in

the light of any corroborative, correlating or circumstantial evidence found during the search or survey action. It has been held time and again by various courts of law that where, the Revenue Authorities are vested with any discretionary power, the same is to be exercised judicially. The assessee Shri Pandoo P. Naig, in this case, has, from the very beginning, denied his link or relation with the seized document or with any of the transaction made therein. As observed above, no corroborative, correlating or circumstantial evidence has been found either during the survey action or during post survey investigations which may make a connection or in any manner relate the assessee-Shri Pandoo P. Naig with the said document or the transactions mentioned therein. Hence the nature of document seized does not point any strong/reliable or stanalone presumption under section 292C of the Act against the assessee Shri Pandoo P. Naig."

12. From the observations made in the aforesaid referred to orders, it is clear that the presumption of facts u/s 292C of the Act is not a mandatory or compulsory presumption but a discretionary presumption. Since, the word used in the said Section is õ may beö and not õshallö. Secondly, such a presumption is rebuttable presumption and not a conclusive presumption because it is a presumption of fact not a presumption of law. In the present case, the assessee from the very beginning stated that the documents found during the course of search did not belong to him. The documents relied by the AO i.e. to page nos. 31, 32 & 33 of Annexure A are placed at page nos. 9 to 11 of the assesseeøs paper book, in those documents nowhere name of the assessee is mentioned. The assessee is earning his income mainly from commission and interest which is

evident from the copy of acknowledgment of ITR placed at page no. 1 of the assesseeøs paper book. In the present case, it is not brought on record that the assessee was engaged in the business of gold or jewellery and earning the income from said business, the addition has been made by the AO by presuming that the assessee had made payments to the certain parties but in those documents which had been relied by the AO nowhere it is mentioned that the assessee purchased the gold and even the nature of the transaction is not clear because against certain payments, some quantity of gold has been written and against the others nothing is mentioned. Therefore, the addition made by the AO is only on the basis of surmises and conjecture without bringing any cogent material on record to substantiate that the assessee was engaged in the business of gold and jewellery and the AO had not brought any material on record to substantiate that the denial of the assessee was false.

13. In the present case, the contention of the assessee that there was a family function two months prior to the search and somebody has forgotten the documents found during the course of search has not been rebutted. It is also noticed that the ld. CIT(A) also at page no. 13 of the impugned order mentioned as under:

> *"In regard to the seized documents Annexure A-4 page 31, 32 and 33, the AO had not found any corroborative evidence during the course of search and assessment proceedings."*

In the instant case, it is also an admitted fact that during the course of search no unaccounted stock or assets were found. It is also noticed that in the assesseeøs case search took place on 09.12.2005 and the seized material was with the AO who issued notice u/s 153A of the Act on 05.09.2007 but he did not make any enquiry during that period i.e. between 09.12.2005 and 05.09.2007, to ascertain as to whom the payments, if any, were made and how the assessee was related to those payments. On the contrary, the assessee denied the ownership of the document from the very beginning. We, therefore, considering the totality of the facts and by keeping in view the ratio laid down by the Honøble Jurisdictional High Court in the aforesaid referred to decision of Pr. CIT Vs M/s Delco India Pvt. Ltd. (supra) are of the view that the addition made by the AO and sustained by the ld. CIT(A) was not justified. Accordingly, the same is deleted.

14. In the result, the appeal of the assessee is allowed.

(Order Pronounced in the Court on 12/05/2017)

Sd/-	Sd/-
(Sudhanshu Srivastava)	**(N. K. Saini)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 12/05/2017

Subodh

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR