

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "D", MUMBAI

Before Shri P K Bansal, Vice President &
Shri Ravish Sood, Judicial Member

ITA Nos. 682 & 683/Mum/2016
Assessment Years : 2007-08 & 2010-11

Regency Mahavir Properties 2418 East Street, Thakkar House, 1 st Wing, 2 nd Floor, Camp, Pune 411 001 PAN AAJFR6383G (Appellant)	Vs.	ACIT Cen Cir. 1 Thane (Respondent)
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Appellant By : Shri Sunil U Pathak & Smt Geetaa Guwalanii
Respondent By: Shri Awungshi Gimson

Date of Hearing : 29.11.2017

Date of Pronouncement : 04.01.2018

ORDER

Per P K Bansal, Vice-President:

Both these appeals have been filed by the assessee against the common order, dated 30.12.2015, of the CIT(A), Pune, for assessment years 2007-08 and 2010-11.

2. The assessee has taken following effective grounds of appeal for A.Y. 2007-08:

1] *The learned CIT(A) erred in holding that the search action u/s. 132 was conducted on the assessee firm and hence, the learned A.O. was justified in assuming jurisdiction u/s. 153A and completing the asst. accordingly.*

1.1] *The learned CIT(A) erred in not appreciating that the proceedings u/s 153A are wrongly initiated in the case of the assessee as there was no search conducted on the assessee firm and the provision u/s 153A were not applicable and hence, the asst. completed u/s. 153A was null and void.*

1.2] *The learned CIT(A) erred in holding that the name of the assessee was included in the warrant issued to search the premises at 111/112, Anil Complex, New Link Road, Near Regency Marriage Hall, Ulhasnagar- 2 and therefore, the learned A.O. was justified in completing the asst. u/s. 153A on the basis of the said authorization.*

1.3] *The learned CIT(A) failed to appreciate that -*

a. *The warrant issued to search the premises at 111/112, Anil Complex, New Link Road, Near Regency Marriage Hall, Ulhasnagar - 2 did not belong to the assessee firm nor the assessee conducted it's business from the said address and therefore, there was no search on the assessee firm and the assessment initiated and completed u/s. 153A was bad in law.*

b. *Conducting a search on the premises of the partner does not amount to conducting a search on the firm and thus, in this case, it cannot be held that the appellant firm was searched.*

c. *The additional grounds raised by the appellant ought to have been admitted and allowed as it was shown by the appellant that the business premises of the firm were not searched and the asst. u/s 153A is wand void. .*

2] *The learned CIT(A) erred in confirming an addition of Rs. 2,60,00,000/- in the hands of the appellant firm on the basis of the loose paper seized from third party.*

2.1] *The learned CIT(A) erred in holding that -*

a. *The appellant firm had paid total on money of Rs. 7,60,00,000/- to Ashray Premises Pvt. Ltd. for purchase of the property named Deccan Paper Mill property and part of the on money of Rs. 2,60,00,000/- was paid by the appellant firm in this year and therefore, the learned A.O. was justified in making the said addition in this year.*

b. The learned A.O. was justified in making the addition in the hands of the appellant firm on the basis of the loose papers found during the course of search on Panchsheel group.

c. The amount of Rs. 7,60,00,000/- has been taxed in the hands of the seller of the said property and therefore, the said amount should be taxed in the hands of the appellant firm who is the buyer of the said property.

2.2] The learned CIT(A) erred in not appreciating that the appellant firm had not paid any on money for purchase of Deccan Paper Mill property from M/s. Ashray Premises Pvt. Ltd. and therefore, the addition made of Rs. 2,60,00,000/- in this year was not justified at all.

2.3] The learned CIT(A) failed to appreciate that –

a. No addition could be made in the hands of the appellant firm on the basis of the document found with third party.

b. There is no corroborative evidence with the learned A.O. to indicate that the appellant firm had paid on money of Rs. 7,60,00,000/- for purchase of the said property from Ashray Premises Pvt. Ltd and hence, in the absence of any concrete evidence, no addition was justified in the hands of the appellant firm.

c. The impugned document was neither found with Atul Chordiya nor he was the author of same. Hence his statement could not be made basis of addition.

d. There were inconsistencies in the statement of Shri Atul Chordia and therefore, the reliance placed on his statement for making addition in the hands of the appellant firm was not justified at all.

e. The appellant firm was not granted proper opportunity to cross examine Shri Atul Chordia and therefore, the reliance placed on his statement for making addition in the hands of the appellant firm was not valid at all.”

Subsequently, the assessee filed abridged grounds of appeal which read as under:

"On the facts and in law,

1] The learned CIT(A) erred in holding that the search action u/s. 132 was conducted on the assessee firm and thus, the asst. order passed u/s 153A is valid in law.

1.1] The learned CIT(A) erred in holding that the name of the assessee was included in the warrant to search the premises at 111 / 112, Anil Complex, New Link Road, Near Regency Marriage Hall, Ulhasnagar 2 and therefore, the assessee was searched and the asst. u/s 153A was valid.

2] The Learned CIT (A) failed to appreciate that the assessment for A.Y.2007-08 was a non abated assessment and since no incriminating evidence was found relating to the impugned addition of Rs. 2,60,00,000/- during the course of alleged search on the appellant firm, no addition could be made in 153A assessment. The entire addition of Rs. 2,60,00,000/- may kindly be deleted.

3] Based on the loose papers found in the search on Atul Chordia Group and the statement of Shri Atul Chordia, the learned CIT(A) erred in holding that in total, the appellant had paid on money of Rs.7,60,00,000/- to M/s. Ashray Premises Pvt. Ltd. for purchase of the property named Deccan Paper Mill Property.

4] The learned CIT(A) erred in confirming an addition of Rs.2,60,00,000/- in the hands of the appellant firm for this year on the basis of the evidence seized during the search on Atul Chordia Group (third party)"

The assessee has taken following effective grounds of appeal for

A.Y. 2010-11:

"On facts and in law,

1] *The learned CIT(A) erred in confirming an addition of Rs. 5,00,00,000/- in the hands of the appellant firm on the basis of the loose paper seized from third party.*

1.1] *The learned CIT(A) erred in holding that -*

a. The appellant firm had paid total on money of Rs. 7,60,00,000/- to M/s. Ashray Premises Pvt. Ltd. for purchase of the property named Deccan Paper Mill property and part of the on money of Rs. 5,00,00,000/- was paid by the appellant firm in this year and therefore, the learned A.O. was justified in making the said addition in this year.

b. The learned A.O. was justified in making the addition in the hands of the appellant firm on the basis of the loose papers found during the course of search on Panchsheel group.

c. The amount of Rs. 7,60,00,000/- has been taxed in the hands of the seller of the said property and therefore, the said amount should be taxed in the hands of the appellant firm who is the buyer of the said property.

1.2] *The learned CIT(A) erred in not appreciating that the appellant firm had .not paid any on money for purchase of Deccan Paper Mill property from M/s. Ashray Premises Pvt. Ltd. and therefore, the addition made of Rs. 5,00,00,000/- in this year was not justified at all.*

1.3] *The learned CIT(A) failed to appreciate that -*

a. No addition could be made in the hands of the appellant firm on the basis of the document found with third party.

b. There is no corroborative evidence with the learned A.O. to indicate that the appellant firm had paid on money of Rs. 7,60,00,000/- for purchase of the said property from Ashray Premises Pvt. Ltd and hence, in the absence of any concrete evidence, no addition was justified in the hands of the appellant firm.

c. The impugned document was neither found with Atul Chordiya nor he was the author of same. Hence his statement could not be made basis of addition.

d. There were inconsistencies in the statement of Shri Atul Chordia and therefore, the reliance placed on his statement for making addition in the hands of the appellant firm was not justified at all.

e. The appellant firm was not granted proper opportunity to cross examine Shri Atul Chordia and therefore, the reliance placed on his statement for making addition in the hands of the appellant firm was not valid at all.

f. There was no concrete evidence that the appellant firm had paid Rs. 5,00,00,000/- as on money for purchase of the said property in this year and hence, the addition made of Rs. 5,00,00,000/- in this year was not justified at all.”

Subsequently, assessee filed abridged grounds of appeal for A.Y. 2010-11, as under:-

The following grounds are without prejudice to each other On the facts and in law,

1] Based on the loose papers found in the search on Atul Chordia Group and the statement of Shri Atul Chordia, the learned CIT(A) erred in holding that in total, the appellant had paid on money of Rs. 7,60,00,000/- to M/s. Ashray Premises Pvt. Ltd. for purchase of the property named Deccan Paper Mill Property.

2] The learned CIT(A) erred in confirming an addition of Rs.5,00,00,000/- in the hands of the appellant firm for this year on the basis of the evidence seized during the search on Atul Chordia Group (third party).

3] The appellant craves leave to add, alter, amend or delete any of the above grounds of appeal.

3. Both the parties agreed that first appeal for the A.Y. 2007-08 be decided. We therefore, decided to dispose of the appeal for A.Y. 2007-08.

4. The brief facts of the case are that the assessee is a partnership firm constituted on 26.08.2005. The details of principal place of business as per the partnership deeds are as under:

Sr No	Partnership Deed Date	Place of Business as per partnership deed
1	26.08.2005	2418, East Street, Thakkar House, 1 st
2	30.05.2006	Wing Camp, Pune
3	02.11.2006	5 th Avenue, Dhole Patil Road, Pune

The principal place of business as stated in the last partnership deed dated 2.11.2006 is as that appearing in I.T. Database i.e. PAN/TAN records. There has been search u/s. 132 of the Income tax Act on the assessee firm along with those of its partners at 111/112, Anil Complex, New Link Road, Near Regency Marriage Hall, Ulhasnagar-2 on 18.02.2010, although there had been survey u/s. 133A carried out at 2418, East Street, Thakkar House, 1st Wing, 2nd Floor, Camp Pune on the same date. The assessee contended that the said premises did not belong to the assessee and belonged to the Khairari Group and was occupied by various concerns controlled by them. The authorized warrant for search action conducted in the premises might be in respect of these concerns carrying on their activities. The assessee does not have any connection with these concerns and the address of the assessee's firm, vide partnership deed dated 2.11.2016, was 5th Avenue, Dhole Patil Road, Pune. During the course of the search carried out at M/s. Ashray Premises Pvt Ltd., loose papers i.e. computerized Profit & loss account of

Ashray Premises Pvt Ltd from 01.04.2006 to 3.8.2009 was found and seized and the copy of computerized ledger account of KLL in books of Ashray Premises Pvt Ltd. for the period from 01.04.2006 to 3.08.2009. The Assessing Officer on the basis of these documents took the view that the assessee has paid a sum of ₹ 7,60,00,000/- in cash to Ashray Premises Private Ltd., out of which ₹ 2.60 crores was paid in A.Y. 2007-08 and balance amount of ₹ 5 crores was paid in A.Y. 2010-11. The Assessing Officer accordingly, made the addition in each of the assessment years. When the matter went before the CIT(A), the assessee had challenged both the additions on legality as well as on merit. However, the CIT(A) dismissed the ground of the assessee and confirmed the action of the Assessing Officer.

5. The learned AR vehemently contended that no search action was carried out in either of the premises of the assessee firm situated in Pune i.e. 2418, East Street, Thakkar House, 1st Wing, 2nd Floor, Camp Pune. There had been a search u/s. 132 at 111/112, Anil Complex, New Link Road, Near Regency Marriage Hall, Ulhasnagar- 421 002 and for this our attention was drawn towards 1st para at page 2 of the assessment order. The place where search had taken place belongs to Khairari Group and was occupied by various concerns controlled by them. These places were the principal place of business of various other concerns. The assessee had nothing to do with this premises except that it is the office address of one of the company in

which one of its partner is interested i.e. Konark Project Ltd. The assessee does not have any connection whatever with this premises i.e. 111/112, Anil Complex, New Link Road, Near Regency Marriage Hall, Ulhasnagar- 421 002. The assessee is filing its return with ITO Ward 2(2), Pune and after the search action the case of the assessee was centralized and transferred to Central Circle Thane. The principal place of business of the assessee mentioned in the partnership deed dated 5.11.2006 is 5th Avenue, Dhole Patil Road, Pune, which is the address as per Income Tax Database. The premises covered by the search did not belong to the assessee. Although the premises 2418, East Street, Thakkar House, 1st Wing, 2nd Floor, Camp Pune, was covered under survey action carried out u/s. 133A, no search had taken place in the case of the assessee. The assessee never conducted any activity of whatsoever nature from the premises where the search has been carried out. The assessment u/s. 153A is to be made when valid search action is initiated u/s. 132 of the I T Act. Until and unless there is a valid search u/s. 132, the proceedings u/s. 153A cannot be initiated. In this regard our attention was drawn towards the provisions of section 153A and on that basis it was submitted that section 153A mandates to assess or re-assess that total income of the six assessment years immediately preceding the assessment year relevant to the previous year in which the search is conducted or requisition is made. The phrase "search is conducted" would mean the incidence of actual conduct of search. Where there is no

panchnama drawn in the name of the person searched, heavy burden would lie on the Revenue to prove by evidence or by leading any other evidence that in fact, search with respect to such person, was actually conducted by them. Merely showing search warrant cannot be treated as if search was conducted. The provisions of section 153B provide the time-limit for completion of assessment or reassessment under section 153A. Referring to section 153B(1)(a) it was contended that the assessing officer shall make an order of assessment or reassessment in respect of each assessment years falling within six assessment years referred to in clause (b) of section 153A, within a period of two years from the end of the financial year in which the last of the authorizations for search under section 132 or for requisition under section 132A is executed. On this basis, it was contended that for making assessment under section 153A, it is necessary that a search should have been validly initiated u/s. 132 after 31.05.2003. It should be conducted in a particular financial year so as to determine the six assessment years immediately preceding the assessment year relevant to financial in which search is conducted so as to assess or reassess the total income of such six assessment years. The provisions to section 153A(1)(b) will be redundant if a search is only initiated but not conducted against a person, as the initiation of search and conduct thereof are two distinct actions of two different Income Tax Authorities under the Act. A panchnama needs to be drawn in the name of the person against whom the provisions of section 153A are

sought to be invoked and the absence of such panchnama shall firstly negate the facts and circumstances leading to the initiation of the search, secondly, disprove the fact of the conduct and conclusion of the search and, thirdly, also result in defeating the provisions of section 153A(1)(b). 153B(1)(a)& 153B(2) as the determination of the financial year in which the search was conducted will be impossible resulting into provisions of section 153A(1)(b) being non-starter. Further the time limit for completion of assessment u/s 153B will also not be workable in absence a last panchnama witnessing the execution of the last of the authorizations. Thus, it was stressed that the execution of the last of the authorizations for search under section 132 or for requisition under section 132A is important to decide the time limit to complete the assessments or reassessments for the fast previous six years. The date on which the last of the authorization is executed clearly refers to the actual execution of the warrant of authorization, which in turn refers to the conduct of physical search of the premises or the person. Thus, it was vehemently contended that both events i.e. initiation of search as well as conclusion of search are important. Therefore, in case the physical search is not conducted even after the issue of warrant of authorization, the conditions as specified in section 132 or 132A would not get satisfied and the assessment made in consequence thereof will not be valid as the Assessing Officer will not have a valid jurisdiction to frame assessment u/s. 153A. Thus, it was contended that the facts involved clearly proved that no

panchnama was ever drawn proving the conduct and conclusion of the search at the premises of the assessee firm on the date of search on 18.02.2010, although name of the assessee firm might have been included in one of the warrant of authorization. Mere initiation of search by mentioning the name of an assessee on any premises, is not enough to subject an assessee to assessment or reassessment u/s. 153A/153A(1)(b) on the basis of inclusion of a person/concern in the warrant of authorization. It was further contended that if it is assumed for the sake of the arguments that the name of the assessee has been included in one of the warrant of authorization issued and this warrant of authorization was executed on 18.02.2010 at the business premises of partners, the fact remains that no search was conducted in assessee's premises at 5th Avenue, Dhole Patil Road, Pune. The conduct of the search and drawing of the panchnama are the preconditions for issue of notice u/s. 153A and 153A(1)(b). In this regard reliance was placed on the decision of J M Trading Corporation vs. ACIT 20 SOT 489 (Mum); Dr. Mansukh Kanjibhai Shah v. ACIT 36(II) ITCL 62 (Ahmedabad 'D' Bench of the Tribunal); CIT vs. Wipro Finance Ltd. 323 ITR 467 (Kar) and CIT vs. Kurban Hussain Ibrahimji Mithiborwala 82 ITR 821 (SC). Thus, on the basis of these decisions, it was submitted that since the assessment u/s 153A is based on a invalid notice issued u/s. 153A the same must therefore be quashed.

6. The learned AR before us submitted that the assessee has taken this ground before the CIT(A) but the CIT(A) dismissed the ground mentioning that this ground does not emanate from the order of the Assessing Officer as the assessee has not taken this issue before the Assessing Officer. It was contended that this ground is a legal ground and has to be admitted. The learned DR, on the other hand, relied on the order of the CIT(A) and submitted that there has been search carried out in assessee's case at 111/112, Anil Complex, New Link Road, Near Regency Marriage Hall, Ulhasnagar- 2, which is the address and the business place of partner of the assessee firm. The law nowhere mentions that in case of a partnership firm search can be carried out only at the address mentioned in the partnership deed and in this regard our attention was drawn towards the assessment order where the address of the assessee is mentioned as 111/112, Anil Complex, New Link Road, Near Regency Marriage Hall, Ulhasnagar- 2, which was covered by the search conducted u/s. 132(1). The assessee had never objected with regard to the address mentioned by the Assessing Officer in the assessment order. In the appeal Memo, the address mentioned is 2418 East Street, Thakkar House, 1st Wing, 2nd Floor, Camp, Pune 411 001 and the same is mentioned in the power of attorney given in favour of the counsel. The appeal fees of ₹ 1000 has also been paid from the bank account at Ulhasnagar. The notice u/s. 143(2) sent to Ulhasnagar address was duly acknowledged by the assessee. The assessee itself is not using the address

5th Avenue, Dhole Patil Road, Pune for many purposes. This address has been used for the first time in the appellate proceedings in the letter filed on 10.02.2014. Whatever may be the assessee's registered address or correspondence address or address for any other purpose, the fact is admitted that the assessee's name was included in the warrant issued to search the premises at 111/112, Anil Complex, New Link Road, Near Regency Marriage Hall, Ulhasnagar-2. Besides the assessee, other persons to be searched as per this warrant of authorization were M/s. Konark Project Ltd., M/s Konark Infrastructure Pvt. Ltd., M/s. Regency Investment, M/s. Regency Realities, M/s. Regency Properties, M/s. Regency Nirman Pvt. Ltd. and M/s. Regency Ispat Pvt. Ltd. Referring to section 292CC of I.T Act inserted in the statute by the Finance Act 2012 with retrospective effect from 01.04.1976, it was submitted that where the authorization is issued in the name of more than one person, the assessment or reassessment shall be made separately in the name of each of persons mentioned in such authorization. Referring to the case law relied on by the assessee, reliance was placed on the decision of the CIT(A) in which the CIT(A) has duly distinguished these case laws.

7. We have heard the rival contentions and have carefully considered the same along with the orders of the authorities below. The question before us in ground no.1 taken by the assessee is whether in the facts and circumstances of the case, in the absence of search being conducted at the place of the business of the assessee, any assessment can be made by

issuing notice u/s. 153A of the Act. It is not denied that the search warrant on the basis of which the search has been conducted at the premises 111/112, Anil Complex, New Link Road, Near Regency Marriage Hall, Ulhasnagar-2, contained the name of the assessee but this premises where the search has been conducted does not belong to the assessee firm nor the assessee firm was carrying on any business from the said place. The premises where the search was conducted relate to Konark Project Ltd., in which one of the assessee's partner is interested. But this is not the address of the assessee firm. The assessee's firm is constituted on 26.08.2005 vide partnership deed dated 26.08.2005 and subsequently amended vide deed dated 30.06.2006 and 3.11.2006. The address in the partnership deed dated 26.08.2005 and 30.06.2006 is 2418, East Street, Thakkar House, 1st Wing Camp, Pune and in the deed dated 3.11.2006, the address is 5th Avenue, Dhole Patil Road, Pune. These are the address of principal place of business of the assessee is constituted. It is also not denied that in Income Tax database i.e. PAN/TIN record the address of the assessee from 2.11.2006 is appearing as 5th Avenue, Dhole Patil Road, Pune. In the notice issued on 5.12.2011 the address of the assessee is shown as 2418, East Street, Thakkar House, 1st Wing Camp, Pune. In the reply to the show cause notice dated 5.12.2011 the address of the assessee is the same. We also noted that in the ITR-5, filed by the assessee on 02.08.2007, the address of the assessee is appearing as 5th floor, 5th Avenue, Dhole Patil Road, Pune. The

Assessing Officer even though issued notice u/s. 153A to the assessee at the address 111/112, Anil Complex, New Link Road, Near Regency Marriage Hall, Ulhasnagar-2, on 29.10.2010, the assessee in reply thereto mentioned address as 5th Avenue, Dhole Patil Road, Pune. In the return filed for A.Y. 2010-11 also the assessee has been given as 5th Avenue, Dhole Patil Road, Pune. In the notice issued u/s. 143(2) although the Assessing Officer has given the address as 111/112, Anil Complex, New Link Road, Near Regency Marriage Hall, Ulhasnagar-2. In the notice dated 04.10.2011 issued by the Assessing Officer, we noted that the address of the assessee has been mentioned by hand as A3, 5th Avenue, Dhole Patil Road, Pune while in the notice dated 14.11.2010 issued u/s. 142(1) for A.Y. 2010-11 the address of the assessee has been given Thakkar House, 1st Wing Camp, 2nd Floor, East Street, Pune. In the notice issued on 5.12.2011 again the Assessing Officer has addressed the assessee at Thakkar House, 1st Wing Camp, 2nd Floor, East Street, Pune. We noted that in the notices dated 9.12.2011, 11,12,2011 and 21.12.2011, issued by the Assessing Officer, the address has been mentioned Thakkar House, 1st Wing, Camp, 2nd Floor, East Street, Pune. The same address was mentioned in the notice dated 15.2.2012 issued u/s. 220(6). In the recovery notice dated 27.11.2012 and in the order for attachment the address has been mentioned 5th floor, 5th Avenue, Dhole Patil Road, Pune. Not only this, we noted that although in the assessment order the Assessing Officer has mentioned the address of the assessee to be at 111/112, Anil

Complex, New Link Road, Near Regency Marriage Hall, Ulhasnagar-2, but in the notice of demand issued u/s. 156 the address has been generated on line and mentioned as 5th floor, A3, 5th Avenue, Dhole Patil Road, Pune. All these documents prove that the address of the assessee is not 111/112, Anil Complex, New Link Road, Near Regency Marriage Hall, Ulhasnagar-2. We also noted that the Panchnama has been drawn showing the search being conducted at the premises of the assessee. In our view, the Assessing Officer assumed the jurisdiction to issue notice u/s. 153A and made assessment in consequence of search action being taken u/s. 132 of the Income tax Act. Before deciding whether the Assessing Officer has validly assumed the jurisdiction u/s. 153A, it is necessary to analyze the provisions of section 132(1) as well as 153A. The provisions of section 153A, 153B and 132(1) are reproduced as under:

"153A. (1) Notwithstanding anything contained in section 139, section 147, section 148, section 149, section-15-1 and section 153, in the case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003, the Assessing Officer shall—

(a) issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years [and for the relevant assessment year or years] referred to in clause (b), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139;

(b) assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made.

153B. (1) Notwithstanding anything contained in section 153, the Assessing Officer shall make an order of assessment or reassessment,—

(a) in respect of each assessment year falling within six assessment years referred to in clause (b) of sub-section (1) of section 153A, within a period of twenty-one months from the end of the financial year in which the last of the authorisations for search under section 132 or for requisition under section 132A was executed;

(b) in respect of the assessment year relevant to the previous year in which search is conducted under section 132 or requisition is made under section 132A, within a period of twenty-one months from the end of the financial year in which the last of the authorisations for search under section 132 or for requisition under section 132A was executed :

(2) The authorisation referred to in clause (a) and clause (b) of sub-section (1) shall be deemed to have been executed, —

(a) in the case of search, on the conclusion of search as recorded in the last panchnama drawn in relation to any person in whose case the warrant of authorisation has been issued; or

(b) in the case of requisition under section 132A, on the actual receipt of the books of account or other documents or assets by the Authorised Officer.

Section 132(1)

132. (1) Where the Principal Director General or Director General or Principal Director or Director or the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner or Additional Director or Additional Commissioner or Joint Director or Joint Commissioner in consequence of information in his possession, has reason to believe that—

(a) any person to whom a summons under sub-section (1) of section 37 of the Indian Income-tax Act, 1922 (11 of 1922), or

under sub-section (1) of section 131 of this Act, or a notice under sub-section (4) of section 22 of the Indian Income-tax Act, 1922, or under sub-section (1) of section 142 of this Act was issued to produce, or cause to be produced, any books of account or other documents has omitted or failed to produce, or cause to be produced, such books of account or other documents as required by such summons or notice, or

(b) any person to whom a summons or notice as aforesaid has been or might be issued will not, or would not, produce or cause to be produced, any books of account or other documents which will be useful for, or relevant to, any proceeding under the Indian Income-tax Act, 1922 (11 of 1922), or under this Act, or

(c) any person is in possession of any money, bullion, jewellery or other valuable article or thing and such money, bullion, jewellery or other valuable article or thing represents either wholly or partly income or property which has not been, or would not be, disclosed for the purposes of the Indian Income-tax Act, 1922 (11 of 1922), or this Act (hereinafter in this section referred to as the undisclosed income or property),

From the reading of these provisions, it is clear that section 153A(a) of the Income tax Act authorized the Assessing Officer to issue notice in a case where search has been initiated and thus, it is only machinery section. Section 153A(b) of the Act also authorizes the Assessing Officer to assess or reassess the income of six assessment years immediately preceding assessment years relevant to the previous year in which the search has been conducted or requisition is made. The said subsection using the term "search is conducted" had also specified assessment year for which the re-assessment proceedings are triggered after search. It is clear from the above that the provisions of section 153A of the Act come into play only after search

has been conducted. The provisions of section 153B of the Act provides that authorization of warrant shall be deemed to be executed upon the conclusion of search as recorded in the last panchnama drawn in relation to the persons in whose case the warrant or authorization has been issued. So, in all the sections the term used is important that fresh panchnama drawn in relation to any person. Thus, in order to complete the search there is a initiation of proceedings u/s 132(1) of the Act, conduction of search in terms of search warrant issued which includes search in the premises of the assessee and other places and also the last stage panchnama which is conclusive proof of conclusion of search from which the period of limitation will be calculated as provided u/s 153B of the Act. The provisions of Act very clearly and unambiguously provide for initiation of search, conduct of search and conclusion of search and only then the Assessing Officer can assume jurisdiction u/s 153A of the Act. In the present case before us, we noted that the search has been initiated in the name of the assessee along with other assessees appearing on the warrant of authorization issued u/s 132(1) but did not mention the address of the premises from where the assessee conducts business. No incriminating material relating to the assessee was found in the premises where the search was carried out. The search was concluded but no panchnama was drawn in the name of the assessee. Therefore, the conditions as stipulated for assuming the jurisdiction u/s. 153A, in our view, have not been satisfied. We, do not agree with the CIT(A)

that merely mentioning the address of the premises where the search has been conducted in the assessment order will validate the action of the Assessing Officer that the assessee was carrying on the business from the same premises. The address mentioned in the notice issued u/s. 143(2) and the demand notice generated on line as well as the PAN/TIN, copies of which were filed before us, clearly prove that 111/112, Anil Complex, New Link Road, Near Regency Marriage Hall, Ulhasnagar-2. , where the search was conducted is not the business address of the assessee. In view of these facts, we are of the opinion that the conditions stipulated u/s. 153A, for the issue of notice, are not satisfied. Until and unless the Assessing Officer assumes the valid jurisdiction u/s. 153A the assessment made in consequence of the notice issued u/s. 153A, in our view is invalid and void ab initio. We accordingly quash the assessment made by the Assessing Officer.

8. Before concluding, we would like to discuss the case law as has been relied on before us:

J.M Trading Corporation vs. ACIT20SOT489 (MUM) In this case, premises owned by assessee were searched but these premises were not occupied by assessee but tenanted to someone else. It is held that search action was invalid and illegal, it is held (In para 24) that 'mere mentioning of name in the panchnama does not lead to the conclusion that a valid search has been conducted against the assessee'. The conclusion part is reproduced below:-

"CONCLUSION

Search of assessee's tenanted premises where assessee was not present could not be said to be valid search against the assessee

even though his name was mentioned in the panchnama, hence assessment of assessee u/s. 143(3) rws 153A In pursuance of such invalid search had to be declared as null and void

Dr. Mansukh Kanlibhai Shah v, AOT&OIOI 36 (HIITCL 62 (Ahet D-Trib)

Herein also the issue was regarding validity of assessment u/s 153 A when no Search action was conducted in assessee's premises. It is held as under ;-

"The mere Issue of warrant of authorization, without there being search of the premises mentioned in the warrant of authorization would be meaningless and would not serve the purpose of section 132 of the Act. It may also be added that in section 153A(b) it is specifically provided that the Assessing Officer shall assess or reassess the total income of six years immediately preceding the assessment years relevant to the previous year in which such search is conducted or requisition is made. It would, therefore, clarify that not only the warrant of authorization is to be issued in the name of the assessee but search shall have to be necessarily conducted or In case of requisition under section 132A, the requisition is to be made actually.

It is undisputed fact that though warrant of authorization was issued in the name of assessee being Managing Trustee of the Trust, however it was an admitted fact that no search operation was conducted in the premises of assessee. Even in the warrant of authorization, the address of the place to be searched was not the address of assessee individual. Admittedly, no Panchnama was also drawn in pursuance with the warrant of authorization in the case of assessee. No documents were seized or impounded as such during the course of search from assessee. The warrant of authorization in the name of the trust and assessee stands unexecuted in the case of assessee-individual. Since in this case only survey operation under section 133A was conducted in the premises of assessee's Trust, it would not satisfy the requirements of section 153A. As such, AO was not justified in initiating proceeding or assuming valid jurisdiction under section 153A against assessee. /actual search shall have to be earned out necessarily before proceedings under section."

CIT v/s Wioro Finance Ltd 323 ITR 467 (Kar)

Herein it was held that the search is initiated not on date of signing the warrant of authorities but on the date initial search was conducted.

Panchnama is a document prepared at the conclusion of search operation. It is a written record of what has been witnessed by panchas and it proves conduct of search.}

CIT vs. Kurban Hussain Ibrahimji Mithiborwala 82 ITR 821 *Wherein Hon'ble Supreme Court has held as below:*

It is well settled that the ITO's jurisdiction to reopen an assessment under s. 34 depends upon the issuance of a valid notice. If the notice issued by him is invalid for any reason the entire proceedings taken by him would become void for want of jurisdiction. In the notice issued under s. 34 the ITO sought to reopen the assessment of the assessee for the assessment year 1948-49 but in fact he reopened the assessment of the year 1949-50. Hence, in our opinion, the High Court was right in holding that the notice in question was invalid and as such the ITO had no jurisdiction to revise the assessment of the assessee for the year 1949-50.

These decisions support the view taken by us in the preceding paragraphs. Accordingly, we quash the assessment order passed u/s. 153A r.w.s. 143(3) of the Act.

9. Ground no.2 taken by the assessee relates to the addition of ₹ 2,60,00,000/-. In this regard, the leaned AR before us vehemently contended that even if it is assumed that there was a valid search in the case of the assessee, since no incriminating material relating the assessee was found during the course of the search, no addition u/s. 153A can be made as the assessment for the A.Y. 2007-08 has not been abetted. The return for

the said assessment year has been filed on 02.08.2007 declaring a total loss of ₹ 4687/-. Reliance in this regard was made on the decision of Special Bench of Tribunal, Mumbai Benches, in the case of All Cargo Global Logistics Ltd. vs. DCIT 137 ITD 287 (SB). It was pointed out that the said decision has been confirmed by the Hon'ble Jurisdictional High Court in the case of Continental Warehousing Corporation (Nhava Sheva) Ltd. [2015] 58 taxmann.com 78. The addition in the case of the assessee has been made by the Assessing Officer wholly on the basis of the material found during the course of the search on 11.09.2009 on Panchsheel Group i.e. Ashray Premises Pvt Ltd. The learned DR, on the other hand, relied on the orders of the authorities below.

10. We have heard the rival submissions and have carefully considered the same along with the orders of the authorities below. We noted that on the issue whether any addition can be made in the assessment made u/s. 153A when no incriminating documents are found during the course of the search, the Special Bench of the Tribunal, Mumbai Benches, in the case of All Cargo Global Logistics Ltd. vs. DCIT 137 ITD 287 (SB) has held as under: in para 58 of its order

"58. Thus, question No.1 before us is answered as under:

a) In assessments that are abated, the AO retains the original jurisdiction as well as jurisdiction conferred on him u/s 153A for which assessments shall be made for each of the six assessment years separately;

b) In other cases, in addition to the income that has already been assessed, the assessment u/s 153A will be made on the basis of incriminating material, which in the context of relevant provisions means - (i) books of account, other documents, found in the course of search but not produced in the course of original assessment, and (ii) undisclosed income or property discovered in the course of search."

It is a fact that the assessment for the impugned assessment year has not been abetted and no incriminating material regarding the addition made by the Assessing Officer was found during the course of the search in the case of the assessee. The said decision has been confirmed by the Hon'ble Jurisdictional High Court in the case of Continental Warehousing Corporation (Nhava Sheva) Ltd.(supra). Respectfully following the said decision, we delete the addition of ₹ 2,60,00,000/- and allow ground no. 2 taken by the assessee.

11. Ground nos.3 & 4 for A.Y. 2007-08 and Ground nos. 1 & 2 for A.Y. 2010-11 relate to the sustenance of addition of ₹ 2,60,00,000/- and ₹ 5,00,00,000/- for A.Ys. 2007-08 and 2010-11 respectively. Both the parties agreed that since the facts involved relating to these additions are common the issue may be decided on merit on the basis of the facts for A.Y. 2007-08. The facts relating to these additions are that there had been a search in the case on 11.09.2009 on Panchsheel Group i.e. Ashray Premises Pvt Ltd. During the course of the search, two documents viz. Page No.23 (P23) and Page No.26(P26) were found. P23 is the Profit & loss account from

01.04.2006 to 3.08.2009 of Ashray Premises Pvt. Ltd., while P26 contains the ledger account of K.L.L. for the period 01.04.2006 to 3.08.2009. The P & L A/c. in P23 shows that a sum of ₹ 7,60,00,000 has been credited on account of sale of Deccan Paper Mill while P26 is a computerized ledger account of K.L.L in the books of Ashray Premises Pvt. Ltd., for the aforementioned period, reflecting the following debit entries, totaling to ₹ 2,10,00,000/-, on three different dates:

"Date	Particulars	Vch type	Vch No	Debit
...				
26.07.2006	Cr M.C.M.G. <i>being amount received from dilip jain 1.00 to mr. K.L.L:- 50 debited thru mcmg : icd a/c refund".</i>	Payment	8	5,000,000
....				
23.09.2006	Cr M.C.M.G <i>being amount received from mr. dilip jain on deccan paper retained by mr. K.LL as per inst. from kll : a/c for"</i>	Payment	11	10,000,000
....				
22.10.2006	Cr. Mukesh Agarwal/Dilip Jain (6.25) <i>Being account closed by mr lunkad and last payment received by mr lunkad".</i>	Journal	11	6,000,000
..."				

The Assessing Officer has taken it incorrectly to ₹ 2,60,00,000/-. On the basis of these two documents, the Assessing Officer concluded that since the assessee has bought development rights of the land from Ashray Premises

Pvt Ltd. therefore, it had paid a sum of ₹ 7,60,00,000 to the Director, Ashray Premises Pvt Ltd., 'K.L.L.' which stands for Kantilal L Lunkad, by the partner of the assessee Shri Dilip Jain/Mukesh Agarwal and since the sum of ₹ 2,60,00,000/- (correct figure ₹ 2,10,00,000) were paid during the A.Y. 2007-08, the balance sum of ₹ 5 crores would have been paid in the assessment year 2010-11. The Assessing Officer therefore, added the sum of ₹ 2,60,00,000/- in A.Y. 2007-08 and ₹ 5 crores in A.Y. 2010-11. Subsequently, there had been a search in the case of Konark Group and its associate concerns on 18.02.2010. The residential premises of Mahesh Khairari and Dilip Oswal were also covered in the search. A Survey action u/. 133A was carried out at the office premises of the assessee at A3, 5th Avenue, Dhole Patil Road, Pune. The assessee submitted the return for A.Y. 2007-08 on 02.08.2007 declaring a total loss of ₹ 4,687/- while no return had been filed for A.Y. 2010-11. During the course of search at Konark Group, no incriminating material relating to the assessee was found. The assessee vide agreement, dated 20.05.2006, duly registered with Ashray Premises Pvt. Ltd., transferred the development rights in respect of plot no.96B, 96C and 96D at Village Mundhwa, admeasuring 3,51,541 sq. ft. at Pune, for a consideration of ₹ 9,12,60,000/- The consideration thereof was paid in the following manner:

"(a) Monetary consideration of Rs.3,11,00,000/- to be paid as under:

(i) Rs.75,00,000/- vide cheque dtd 01-09-2005 of Rs.55 lakhs & dtd 10-09- 2005 of Rs.20 lakhs

(ii)Rs.15 lakhs- after registered confirmation of deed with a consenting party latest by 15-06-2006.

(iii) Rs.2,21,00,000/- to be paid within two month after fulfillment of condition (ii) mentioned above.

(b) 60,100 sq.ft built-up area (cost evaluated at Rs. 1,000/- per sq.ft)along with additional pro-rata 30 open & 30 covered car parking.

The background of this property is that the property originally belonged to M/s Deccan Paper Mills Co. Ltd., who entered into an agreement dated 27.04.2002 on a stamp paper of ₹ 100/- with Ashray Premises Pvt. Ltd. for its development in consideration of handing over saleable built-up area of 63,600 sq. ft consisting of Row houses/Bungalow/offices/shops along with additional prorata open/covered car parking. Subsequently, a fresh agreement dated 22.04.2004 was executed and registered between Deccan Paper Mills Co. Ltd. and Ashray Premises Pvt. Ltd. in which there was a monetary consideration to be paid of ₹ 1,67,75,001/- as well as built-up area of 65,000 sq. ft. along with additional pro-rata open/covered car parking. These were to paid and provided by Ashray Premises Pvt. Ltd. to Deccan Paper Mills Co. Ltd. Subsequently, vide agreement dated 20.05.2006, Ashray Premises Pvt. Ltd. transferred its rights to the assessee for a consideration of

₹ 9,12,60,000/- and the consenting party to the said agreement was Deccan Paper Mills Co. Ltd. Further as per condition no.(ii) of the said agreement deed of confirmation was duly executed on 17.07.2006 between Ashray Premises Pvt. Ltd being transferor, the assessee being the developer and Deccan Paper Mills Co. Ltd., being the consenting parties to Article of Agreement dated 20.05.2006. The Assessing Officer noted from seized document P23 (profit & loss account) that the assessee had debited in the purchase account under the name Deccan Paper Mill :Purchase – ₹ 1,91,93,350 while it has credited Deccan Paper Mill : Sale ₹ 7,60,00,000/- while the purchase value as per the agreement dated 22.4.2004 was of ₹ 1,67,75,001/-. The search party on 12.09.2009 recorded the statement of Atul Chordia, who admitted the undisclosed income of ₹ 8.04 crores. The relevant portion of the statement of Shri Atul Chordia dated 12.09.2009, is reproduced as under:

Q.No.6: I am showing you pages No. 12 to 19, 22 to 27 of bundle No.6 of Annexure A of Panchnama Dated 12-09-2009. Please go through these pages and explain the content on it and also confirm whether these are accounted in the regular books of Mr KIL and Mr KLL accounts along with the documentary evidences.

Ans: The pages referred above pertain to the company named 'M/s Ashray Premises Pvt Ltd., of which I am one of the shareholder and a Director. These transactions are not recorded either, in the books of the said company or KLL or my books of accounts. Page A/o.23 is a Profit and Loss account for the period ending 3rd August 2009 and the gross profit is Rs.11,04,44,650/-. Page 15 to 19 and page no.22 have notings regarding the expenditure incurred for earning the said amount of Rs.11,04,44,650/-. The total expenditure incurred is about Rs.3 Crores, Therefore, the income earned by the

said company in the capacity is Rs.8.04 Crores which is pertaining to F.Y. 2009-10 in the hands of M/s.Ashray Premises Pvt Ltd over and above the regular income."

On the basis of the statement of Shri Atul Chordia, the Assessing Officer was of the view that the assessee has paid an amount of ₹ 7,60,00,000/- in cash towards purchase of the said land. In view of the copy of ledger account of K.L.L. in the books of Ashray Premises Pvt. Ltd, the Assessing Officer was of the view that during A.Y. 2007-08, the partner of the assessee firm paid a sum of ₹ 2,60,00,000/- to the assessee while the seized paper shows a debit of ₹ 2,10,00,000/-. During the course of the search at the premises of one of the partners Shri Dilip Oswal, when the said transaction was asked to be explained, he answered as under:

This transaction was entered in the year 2005-06, with Deccan Paper Mill and M/s. Ashray Premises Pvt Ltd. for plot of land admeasuring 3,52,000 Sq. Ft. approx at Mundhawa for which we had obtained development rights. As per the development agreement consideration of Rs.3,11,00,000/- was to be paid to M/s. Ashray Premises Pvt Ltd and 61,000 Sq.Ft. of built-up area was to be handed over to Deccan Paper Mill. For this we had paid deposit Rs.90 Lakhs(Rs. 5 Lakhs per month for 18 Months) to Deccan Paper Mill.

When Shri Dilip Oswal was shown the seized documents from the premises of Ashraya Premises Pvt. Ltd. i.e. P23 and P26, he replied as under:

Q3.Pl.explain the transaction of Deccan Paper Mill Land, Pune and your role in the same.

Ans. M/s.Ashray Premises Pvt IM had purchased the land from Deccan Paper Mills Ltd on 22/072004 on a development agreement. I was'one of the shareholder in M/s. Ashray Premises Pvt Ltd. The

land in question was subsequently sold to M/s. Regency Mahavir Properties on 20/05/2006. M/s.Ashray Premises Pvt Ltd received the amount of Rs.3.11 Crores.

Q.4. During the course of search and seizure action u/s. 132 in Panchsheel Group of Cases on 11/09/2009, loose papers bearing Nos.23 & 26 of Bundle No.6 of Party No.P-1 were seized. PI. go through it and confirm it.

Ans. I confirm that the pages were found during the search and the entry on Page No.23, 25& 26 shows an entry of 2.10 crores received by Shri Kantilal Lunkad from Shri Dilip Jain wherein in one entry it is mentioned on account of Deccan Paper Mill.

Q.5 During the course of Search your statement was recorded u/s. 132(4) on 12/09/2009, the relevant portion of the statement and your submission is reproduced as under:

Q.No.6:1 am showing you pages No.12 to 19, 22 to 27 of bundle No.6 of Annexure A of Panchnama Dated 12-09-2009. Please go through these pages and explain the content on it and also confirm whether these are accounted in the regular books of Mr KIL and Mr KLL accounts along with the documentary evidences.

Ans: The pages referred above pertain to the company named M/s.,Ashray Premises Pvt Ltd., of which I am one of the shareholder and a Director. These transactions are not recorded either in the books of the said company or KLL or my books of accounts. Page No.23 is a Profit and Loss account for the period ending 3rd August 2009 and the gross profit is Rs.11,04,44,650/-. Page 15 to 19 and page no.22 have notings regarding the expenditure incurred for earning the said amount of Rs.11,04,44,650/-. The total expenditure incurred is about Rs.3 Crores. Therefore,, the income earned by the said company in the capacity is Rs.8.04 Crores which is pertaining to F.Y.2009-10 in the hands of M/v.Ashray Premises Pvt Ltd over and above the regular income.

Even Shri Mahesh Khairari, partner of the assessee firm when confronted, also denied the involvement of cash component in the transaction. The Assessing Officer subsequently gave opportunity to the assessee to cross-examine Shri Atul Chordia on 19.12.2011 but on that date Shri Atul Chordia did not attend. He attended office of the AO only on 20.12.2011 and his statement was recorded. He confirmed that a sum of ₹ 2,10,00,000/- was received from Kantilal L Lunkad & Dilip Jain but no question in respect of the sum of ₹ 5 crore was asked. Ultimately, the Assessing Officer noted that income was declared under the name and style of Ashray Premises (AOP) consisting of Atul Chordia & Kantilal Lunkad in the following manner:

AY 2005-06	Rs. 01,68,75,000
AY 2006-07	Rs.03,18,28,400
AY 2007-08	Rs.00,65,00,000
AY 2009-10	Rs.00,42,00,000
AY 2010-11	Rs.16,35,00,000

The income relating to these transactions has not been disclosed by Ashray Premises Pvt Ltd. and in the disclosure Shri Atul Chordia made the following comment;

"During the search, to buy peace with the Department we admitted 55 crores as undisclosed income. Out of this 22 crores was admitted by Ashray (AOP) between myself and Mr.Kantilal Lunkad as two partners. The said amount ofRs.2.10 crores given by Dilip Jain to Kantilal Lunkad was part of the disclosure in the hands of Ahsray (AOP) as undisclosed income and thereafter we have filed the return and paid the taxes thereon."

The Assessing Officer on the this basis made the addition of ₹ 2,60,00,000 in the A.Y. 2007-08 and ₹ 5 crores in the A.Y. 2010-11, which was confirmed by the CIT(A).

12. We have heard the rival submissions and carefully considered the same along with the orders of the tax authorities below. We have also gone through the following decisions as relied on before us:

- CTT vs. Tirupati Oil Corporation 248 ITR 194
- Unique Star Developers vs. DCIT 50 CCH 25 Mum
- ACIT vs. MAB Finlease Ltd. 37 CCH 597 Del
- J.M.Trading Coprn. vs. ACIT 20 SOT 489
- Dr. Mansukh Shah vs. ACLT 18 ITR 80
- All Cargo Global Logistics Ltd. vs. DCIT 137 ITD 287
- Pradeep Runwal vs. TRO, Range-3, Pune in ITA No. 334/PN/2013
- Prathna Construction (P) Ltd vs. DCIT 70 TTJ 122
- T S Venkatesan vs ACIT 74 ITD 298
- Ketan Shah vs. ACIT, Central Circle - 11, Mumbai in ITA Nos. 2321 & 2322/Mum/2013
- Pavitra Real(W(P) Ltd vs. ACIT, Cen Cir-32, New Delhi/87 taxmann.com 142 (Delhi Trib)
- Addl. Comm. of Income Tax: vs. Lata Mangeshkar 97 ITR 696

We have also gone through the seized paper found during the course of the search in the case of Ashray Premises Pvt. Ltd., copies of which are available at pages 196 and 197A of the paper-book. At page 196 is the Profit & loss account of Ashray Premises Pvt. Ltd. for the period 01.04.2006 to 3.08.2009. We noted that a sum of ₹ 7,60,00,000/- has been credited on account of sale of Deccan Paper Mill while it has debited a sum of ₹ 1,91,93,350/- as purchase of Deccan Paper Mill. This paper is a computerized sheet. Since the director of Ashray Premises Pvt. Ltd accepted that this paper belonged to

them therefore, the natural inference will be that the amount mentioned in the paper represents the sales and purchase of Ashray Premises Pvt. Ltd. From the facts involved in this case, we noted that the assessee had entered into duly registered agreement, dated 20.05.2006, with Ashray Premises Pvt. Ltd., and transferred the development rights in respect of plot no.96B, 96C and 96D at Village Mundhwa, admeasuring 3,51,541 sq. ft. at Pune, for a consideration of ₹ 9,12,60,000/-. M/s. Ashray Premises Pvt. Ltd. got the development rights in the said property by virtue of an unregistered agreement, dated 27.04.2002, entered into on a stamp paper of ` 100 with Deccan Paper Mills Co. Ltd. by which it agreed to develop the said property by handing over saleable built-up area of 63,600 sq. ft consisting of Row houses/Bungalow/offices/shops along with additional prorata open/covered car parking. Subsequently, a fresh agreement dated 22.04.2004 was executed and registered between Deccan Paper Mills Co. Ltd. and Ashray Premises Pvt. Ltd. in which there was a monetary consideration to be paid of ₹ 1,67,75,001/- as well as built-up area of 65,000 sq. ft. along with additional pro-rata open/covered car parking. Subsequently, a deed of confirmation was duly executed on 13.07.2006 between Ashray Premises Pvt. Ltd being the transferor), the assessee being the developer and Deccan Paper Mills Pvt Ltd being the consenting party to the agreement dated 20.05.2006. During the course of the search at Ashray Properties Pvt .Ltd. two documents were seized (P23 and P26), on the basis of which the Assessing Officer made the

addition in the case of the assessee amounting to ₹ 2,60,00,000 in A.Y. 2007-8 and ₹ 5 crores in A.Y. 2010-11. We noted that the statement of one of the Directors of Ashray Premises Pvt Ltd. was recorded and subsequently questions were raised with regard to these papers and in reply thereto is reproduced as under:

Statement of Shri Atul Chordia

Q.No.6: I am showing you pages No. 12 to 19, 22 to 27 of bundle No.6 of Annexure A of Panchnama Dated 12-09-2009. Please go through these pages and explain the content on it and also confirm whether these are accounted in the regular books of Mr KIL and Mr KLL accounts along with the documentary evidences.

Ans: The pages referred above pertain to the company named 'M/s Ashray Premises Pvt Ltd., of which I am one of the shareholder and a Director. These transactions are not recorded either, in the books of the said company or KLL or my books of accounts. Page A/o.23 is a Profit and Loss account for the period ending 3rd August 2009 and the gross profit is Rs.11,04,44,650/-. Page 15 to 19 and page no.22 have notings regarding the expenditure incurred for earning the said amount of Rs.11,04,44,650/-. The total expenditure incurred is about Rs.3 Crores, Therefore, the income earned by the said company in the capacity is Rs.8.04 Crores which is pertaining to F.Y. 2009-10 in the hands of M/s.Ashray Premises Pvt Ltd over and above the regular income."

Statement of Shri Dilip Oswal

This transaction was entered in the year 2005-06, with Deccan Paper Mill and M/s. Ashray Premises Pvt Ltd. for plot of land admeasuring 3,52,000 Sq. Ft. approx at Mundhawa for which we had obtained development rights. As per the development agreement consideration of Rs.3,11,00,000/- was to be paid to M/s. Ashray Premises Pvt Ltd and 61,000 Sq.Ft. of built-up area was to be handed over to Deccan Paper Mill. For this we had paid deposit Rs.90 Lakhs(Rs. 5 Lakhs per month for 18 Months) to Deccan Paper Mill.

In the said reply, the Director has stated that the transactions in these pages are not recorded in the books of Ashray Premises Pvt. Ltd. but nowhere he had stated that the company Ashray Premises Pvt. Ltd. received a sum of ₹ 7,60,00,000 in cash from the assessee. The Assessing Officer calculated this by interpreting the entry appearing at page P26 [pg 197 of the paper-book]. In this page we noted that on 26.07.2006 a sum of ₹ 50 lacs has been credited to M.C.M.G. *"being amount received from dilip jain 1.00 to mr. K.I.I:- 50 debited thu mcmg : icd a/c refund"*. Similarly on 23.09.2006 against the entry of 10,000,000/- the description is *"M.C.M.G being amount received from mr. dilip jain on deccan paper retained by mr. K.LL as per inst. from kll : a/c for"* and against the sum of ₹ 60,00,000/- credited on 22.10.2006, it has been mentioned *"Mukesh Agarwal/Dilip Jain (6.25) Being account closed by mr lunkad and last payment received by mr lunkad"*. From these descriptions in this account, it is not clear that the payment has been made by the assessee in cash for getting the development rights in respect of plot no.96B, 96C and 96D at Village Mundhwa, admeasuring 3,51,541 sq. ft. at Pune. We noted that the development agreement has been registered on 20.05.2006 and the confirmation deed for the same was executed on 13.07.2006. If the assessee firm would have paid in cash naturally the seller would have received the payment in cash before signing and registering the said agreement. We also noted that during the course of the search at the

premises of Shri Dilip Oswal & Shri Mahesh Khairari, the search party had specifically asked for the question relating to the sum of ₹ 7,60,00,000 paid by the assessee to Ashray Premises Pvt Ltd. and, in reply thereto, each of them has categorically denied any cash payment by the assessee to Ashray Premises Pvt Ltd. Further we also noted that there was search in the case of Ashray Premises P Ltd, the ledger account reflects a debit of ₹ 2,10,00,000/- but a sum of ₹ 7,60,00,000. The payment of ₹ 5 crores have been presumed by the Assessing Officer as payment made by the assessee on the basis of the Profit & Loss Account of Ashray Premises P Ltd. We also noted from the profit & loss account that a sum of ₹ 1,91,93,350/- has also been shown as purchase of Deccan Paper Mills but no question regarding this amount has been ever asked by the Assessing Officer. Even from the statement of the Directors of Ashray Premises Pvt. Ltd recorded on 20.12.2011, the question relating to the sum of ₹ 2,10,00,000/- was asked while no question with regard to the sum of ₹ 5 crores was ever asked. This fact is apparent from the question and answer produced by the Assessing Officer at page 8 of the assessment order. We also noted that the Assessing Officer has not treated the income shown in the Profit & loss account as income of Ashray Premises Pvt. Ltd., but accepted the surrender made by the Director of Ashray Premises Pvt. Ltd. in the hands of AOP. If the amount has been paid to Ashray Premises Pvt. Ltd. in respect of procuring the development rights of the plot no.96B, 96C and 96D at Village Mundhwa, then the said amount

should have been treated as income of Ashray Premises Pvt. Ltd. accepting the surrender being made by one of its Directors as undisclosed income of Ashray Premises (AOP). It shall prove that the Assessing Officer is also not sure on the basis of the evidence found during the course of the search that the assessee has paid a sum of ₹ 7,60,00,000 i.e. ₹ 2,60,00,000/- in A.Y. 2007-08 and ₹ 5 crores in A.Y. 2010-11. There had been search in the case of the assessee but no cogent material or evidence have been found and brought to our notice which may prove that the assessee had paid of ₹ 7,60,00,000/- to Ashray Premises Pvt. Ltd. Even the payment of ₹ 2,10,00,000 has been assumed by the Assessing Officer appearing at page 26 relating to the said transaction has been debited only after the execution and registration of the agreement between the assessee and Ashray Premises Pvt Ltd. No seller will transfer his rights in favour of the buyer until and unless he has received the cash consideration, if any embedded there in. No addition can be sustained on the basis of assumption and presumptions, however, strong it may be. There is no material being brought on record for the A.Y. 2010-11 being found during the course of the search even in the case of Ashray Premises Pvt. Ltd. We, therefore, set aside the order of the CIT(A) in each of the assessment year and delete the addition of ₹ 2,60,00,000/- in A.Y. 2007-08 and ₹ 5 crores relating to A.Y. 2010-11.

13. From the profit & loss account seized from Ashray Premises Pvt. Ltd., we noted that neither there is any date nor the name of the assessee

mentioned, which may prove that the assessee has paid a sum of ₹ 7,60,00,000/- in cash to M/s. Ashray Premises Pvt Ltd. We also noted from the said Profit & loss account that nowhere in these documents it is mentioned that M./s Ashray Premises Pvt Ltd. received a sum of ₹ 7,60,00,000/- in cash. The addition has been made merely on the basis of the statement of one of the Director of Ashray Premises Pvt Ltd. When the assessee's partners were cross-examined in this regard, they categorically denied that they have paid any cash. In our opinion, in view of the decision of Hon'ble High Court in the case of Continental Warehousing Corporation (Nhava Sheva) Ltd. (supra), no addition can be made in the case of the assessee on the basis of documents being found from the premises of the third party where neither the name of the assessee nor the fact that the assessee has paid any cash of ₹ 7,60,00,000/-. Even otherwise also it is an undisputed fact that the said documents P23 and P26 on the basis of which the Assessing Officer has made the addition in the case of the assessee were found during the course of the search conducted at the premises of Ashray Premises Pvt. Ltd. Since these documents have been found during the course of search conducted in the case of Ashray Premises Pvt. Ltd., if the Assessing Officer wanted to make addition, the assessment should have been completed in the case of the assessee only u/s. 153C r.w.s. 143(3). No assessment has been completed u/s. 153 r.w.s. 143(3) neither any satisfaction that these documents belong to the assessee was brought on

record by the Assessing Officer of Ashray Premises Pvt. Ltd. Therefore, on this basis also the addition made in the case of the assessee cannot be sustained.

14. In the result, the appeals of the assessee are allowed.

Order pronounced in the open court on 4th day of January 2018

Sd/-

(Ravish Sood)

JUDICIAL MEMBER

Mumbai; Dated: 4th January 2018

SA

Sd/-

(P K Bansal)

VICE-PRESIDENT

Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. The CIT(A), Mumbai
4. The CIT
5. DR, 'D' Bench, ITAT, Mumbai

BY ORDER,

#True Copy #

Assistant Registrar
Income Tax Appellate Tribunal, Mumbai