

**IN THE INCOME TAX APPELLATE TRIBUNAL RAIPUR BENCH, RAIPUR  
BEFORE: SHRI N.S.SAINI, AM & SHRI PAVAN KUMAR GADALE, JM**

**ITA No.91&92/BLPR/2011**

(Assessment Year : 2006-2007 & 2007-2008)

ACIT, Circle-2(1), Bilaspur	vs	Shri Praveen Saluja, In front of Ghosh Nursing Home, Tikrapara, Bilaspur
<b>PAN No. : ACRPS 9820 K</b>		
<b>(Appellant)</b>	..	<b>Respondent</b>

Revenue by : Shri R.K.Singh, CITDR  
Assessee by : Shri R.B.Doshi, AR

**Date of Hearing : 10/01/2018  
Date of Pronouncement 17/01/2018**

**आदेश / O R D E R**

**Per Shri N.S.Saini, AM:**

These are the appeals filed by the Revenue against the common order of the CIT(A), Bilaspur, dated 31.01.2011 for the assessment years 2006-2007 & 2007-2008.

2. The Revenue in its appeal i.e. ITA No.91/BLPR/2011 (AY: 2006-2007) has raised the following grounds :-

- “1. (a) *That on the facts and in the circumstances of the case, the learned CIT (A) has erred in law and on facts in deleting the addition of Rs. 9.65 Crores made by the A.O. U/s 69A on account of un-explained money without appreciation of the facts properly.*
- (b) *That on the facts and in the circumstances of the case, the learned CIT (A) has erred in law and on facts in deleting the above addition and also failed to appreciate the meticulous findings of the A.O. which has been based on the facts collected during the assessment proceedings.*
- (c) *That on the facts and in the circumstances of the case, the learned CIT (A) has erred in law and on facts in deleting the above addition in spite of the facts on records that the Branch Manager of the P.N.B Budhwari Bazar Bilaspur has deposed on oath in a statement U/s 131.*

- (d) *The reliance by CIT(A) on the decision of MP High Court in the case of CIT V, Raja Ginning Udyog 268 ITR 383 (MP) is not justified as opportunity had been given to the assessee before making the addition .*
- (e) *The CIT(A) erred in holding that the appellant was not given opportunity to cross examine the persons whose statements were recorded as no such opportunity was asked for by the assessee and the appellant had been confronted with the statements and the appellant though was asked to produce Om Prakash Nema did not produce him .*
- (f) *The CIT(A) erred in appreciating the fact that as per section 106 of Evidence Act where any fact is within the knowledge of any person , the burden of proving that fact is upon him , thus when certain transactions are recorded by the assessee then primary onus of explaining the transactions lies on the assessee and not on the revenue.*
- (g) *The CIT(A) erred in not appreciating the fact that as per the decision of Delhi H.C, in CIT V. Motor General Finance Ltd-(254 1TR 449) for failure of the assessee to produce documents and facts, adverse inference can be drawn against the assessee .*
2. (a) *That on the facts and in the circumstances of the case, the learned CIT(A) erred in law and on facts in deleting the addition of Rs.1,91,133/- out of the total addition of Rs.2,12,333/- made U/s 69C on account of unexplained house hold expenses without properly appreciating the facts.*
- (b) *That on the facts and in the circumstances of the case, the learned CIT(A) erred in law and on facts in deleting the above addition which has been made on the basis of the facts collected during the search and seizure operation in the case of the assessee.*
3. *That the Ld. CIT (A)'s order being erroneous, perverse and contrary to the facts on record, the same may be reversed while that of the A.O.be restored.*
4. *That the appellant Assessing Officer reserves the right to amend, modify or add any of the grounds of appeal preferred.”*
3. The Revenue in its appeal i.e. ITA No.92/BLPR/2011 (AY: 2007-2008) has raised the following grounds :-
- 1.(a)*“That on the facts and in the circumstances of the case, the learned CIT (A) has erred in law and on facts in deleting the*

addition of Rs.90,92,969/- made by the A.O. on account of unexplained excess stock of gold and silver unearthed as a result of Search & Seizure action in the case of the assessee and without appreciation of the facts properly.

(b) That on the facts and in the circumstances of the case, the learned CIT (A) has erred in law and on facts in deleting the above addition and also failed to appreciate the meticulous findings of the A.O. which has been based on the facts and well confronted with the assessee.

(c) That on the facts and in the circumstances of the case, the learned CIT (A) has erred in law and on facts in deleting the above addition in spite of the facts on records that the assessee failed to prove that alleged excess stock of gold/silver belonged to the family members.

(d) The CIT(A) erred in appreciating the fact that as per section 106 of Evidence Act where any fact is within the knowledge of any person the burden of proving that fact is upon him, thus when certain transactions are recorded by the assessee then primary onus of explaining the transactions lies on the assessee and not on the revenue.

(e) The CIT(A) erred in not appreciating the fact that as per the decision of Delhi H.C. in CIT V. Motor General Finance Ltd. (254 ITR 449) for failure of the assessee to produce documents and facts, adverse inference can be drawn against the assessee .

2. (a) That on the facts and in the circumstances of the case, the learned CIT(A) erred in law and on facts in deleting the addition of Rs. 2,12,566/-made U/s 69C on account of unexplained house hold expenses without properly appreciating the facts.

(b) That on the facts and in the circumstances of the case, the learned CIT(A) erred in law and on facts in deleting the above addition which has been made on the basis of the facts collected during the search and seizure operation in the case of the assessee.

3. (a) That on the facts and in the circumstances of the case, the learned CIT (A) has erred in law and on facts in deleting the addition of Rs. 47,340/- and Rs. 6,10,223/- made by the A.O. U/s 69A on the basis of loose paper found and seized during search in the case of the assessee.

(b) That on the facts and in the circumstances of the case, the learned CIT (A) has erred in law and on facts in deleting the above addition and also failed to appreciate the meticulous findings of the A.O. who has allowed ample opportunity to the assessee to explain the same.

*That the Ld. CIT (A)'s order being erroneous, perverse and contrary to the facts on record, the same may be reversed while that of the A.O. be restored.*

*That the appellant Assessing Officer reserves the right to amend, modify or add any of the grounds of appeal preferred.”*

4. Since issues involved in both the appeals of the Revenue are common, except difference in figures, therefore, the appeals were heard and disposed off by this consolidated order. The facts mentioned in the appeal of Revenue i.e ITA No.92/BLPR/2011 (AY: 2006-2007) are taken into consideration for deciding the appeals.

5. Facts in brief relating to the ground No.1 raised by the revenue in its appeal for assessment year 2006-07 regarding deletion of addition of Rs.9.65 crores so made by the AO u/s.69A of the Act, are that there was a cash deposit in the bank a/c No.990 in Punjab National Bank, Budhawari Branch, Bilaspur by Mahendra Jewellers during the previous year relevant the assessment year 2006-07. This fact came to light on the basis of information received from the Branch Manager of that Bank. This information was compiled by Shri Sunil Shrivastav, clerk working in the said bank and duly signed and authenticated by the then Branch Manager Shri H.R. Yadav. There are 149 entries between the period 2.4.05 to 31.5.05. The total amount deposited was Rs.9.65 crores. All these cash deposits were transferred to Ahmedabad Branch of the said Bank. When confronted to explain the nature of these deposits, the assessee denied to have any connection and relation with the impugned deposits. This denial, according to the AO, was not acceptable in view of the categorical statement on oath given by Shri Sunil Shrivastav, bank official wherein it

was deposed that the aforementioned information, compiled on the basis of bank records was true and the same was duly verified and authenticated by the then Branch Manager viz. Shri H. R. Yadav. In his depositions on oath, the said bank official deposed that S/Shri Raju, Praveen and Mahendralal Saluja used to bring enormous cash in bags for depositing the same though deposit vouchers were always signed by servants. He further deposed that sons of Mahendralal Saluja threatened him for the consequences if this information is revealed. In response to summons u/s.131 of the Act, Shri O.K. Sharma, Branch Manager of the said bank attended and had not refuted the depositions given on oath by Shri Sunil Shrivastav. According to the AO, the assessee was confronted with these statements/depositions of the bank official-cum-cashier Shri Sunil Shrivastava and except denying the same, the assessee had not adduced any evidence substantiating such denial, photocopies of two letters from Shri Shyam Bullions (prop. Omprakash Nema) were filed. Since the said Omprakash Nema had not complied with the summons u/s.131 of the Act, for further verification of the facts and for arriving at right, and reasonable conclusions on the claimed crux of the issues, the assessee was specifically directed to produce the said Omprakash Nema with books of account of Shri Shyam Bullion, but there was no compliance from the assessee, except laying emphasis on the confirmation purported to have been given by the alleged Shri Shyam Bullion. The AO opined that mere denial by the assessee having any connection or relation with the aforementioned huge deposits of cash made by him in the said bank

a/c., was not sufficient to rebut the circumstantial evidence, available on record, which had necessarily to be considered along with the conduct of the assessee and the other alleged party, which led to the inescapable conclusion that the impugned cash deposits were made by the assessee relatable to his unrecorded dealings. The aforementioned vital facts found as a result of deep and intensive investigation constituted valid evidence in the eyes of law, since no evidence to prove the contrary, was adduced by the assessee, either before the search team or in the impugned assessment proceedings before the AO, although ample time and opportunity to prove the same, was afforded to the assessee. The AO, therefore, concluded that the impugned sums deposited by the assessee in the aforementioned bank accounts, constituted his undisclosed income and since the same were not flown from and accounted for by the assessee in his books of account, the same was assessed u/s. 69A of the Act added to the total income of the assessee.

6. The assessee carried the matter before the CIT(A) and submitted that the impugned bank account and the entries made therein did not belong to the assessee but the same belonged to Shree Shyam Bullion of Indore, a proprietary concern of Shri Omprakash Nema and no evidence whatsoever was brought on record to disprove the genuineness in the speaking confirmation obtained from that party and filed in proceedings before the AO. It was also submitted that the impugned statements of the bank employees, recorded behind the back of the assessee, having no evidentiary value, could not be used against the assessee, since the

assessee was not afforded opportunity to cross-examine the deponents. In support of this contention, reliance was placed on the decisions in *Kishinchand Iaram v CIT* (1980) 125 ITR 713 (SC); *CIT v Eastern Commercial*: 210 ITR 103 (Cal.); *Mukand Singh & Sons v. Presiding Officer* 107 STC page 300 (P&H); The MP HC in *Prakash Chand Mehta v CIT* 220 ITR 277, 279 and *CIT v Raja Ginning Udyog* (2004) 268 ITR 383 (MP).

7. The assessee further submitted that the facts in the case of *Mriganka Mohan Sur v. CIT* (1979)120 ITR 529 (Cal.), relied upon by the AO, are entirely different and distinguishable from that of the assessee's case for the following reasons :

- (i) In the case of *Mriganka Mohan Sur* (Supra), the assessee admitted that he had two accounts in the bank which were not disclosed in the original assessment. The pass book of only one of the said accounts was produced. From the copy of the accounts of Oriental Traders obtained by the ITO, he found that the sole proprietor of the business was one M, who was none other than the assessee

While in the case of the assessee, under consideration, the following are the facts obtaining from the record. In the case of *Praveen Kumar Saluja*, vide query letter dt. 04-12-08, referring to the deposits of above Rs. 50 Crores in A/c No. 990 in Punjab National Bank, Budhwari Bazar Branch, Bilaspur, the assessee was requested to produce *Shri Omprakash Nema*, Proprietor of *Shree Shyam Bullion*, Indore. When contacted, *Shri Omprakash Nema*, Proprietor of that concern had categorically affirmed that he is the sole owner of the said concern and is being assessed by ITO Ward -1(2) Indore under PAN No ACRPN2535N. *Shri Omprakash Nema* affirmed that in the

name of the above proprietary concern, he has business dealing in Bilaspur Region and for facilitating safe and secured depositing of the business cash collected towards sale proceeds from various customers of that area and for transferring the same to his bank account at Indore. ( i.e. to the business headquarters of this proprietary concern ), he had opened account in Punjab National Bank, Budhwari Bazar Branch, Bilaspur, Account No. 990. The business cash so collected from time to time is deposited in this account by the personnel deputed by him for the purpose and according to the business needs, the sums so required are transferred from this bank account to his bank account in Punjab National Bank at Ahemabad. Shri Omprakash Nema affirmed that all the deposits, debits and credits appearing in this bank account No. 990 in Punjab National Bank, Budhwari Bazar Branch, Bilaspur, absolutely and exclusively related to the business of his proprietary concern named above. None of the entries in this Bank Account No. 990 in Punjab National Bank, Bilaspur, have any connection or relation with either Shri Mahendralal Saluja, Tikrapara, Bilaspur or with any member or concern of that family group. Since the aforementioned Bank Account No. 990 in Punjab National Bank, Budhwari Bazar Branch, Bilaspur belongs to the business of his proprietary concern named above, all the entries made therein stood reflected and considered in the regular books of account of his proprietary concern on the basis of which return for the relevant assessment year was filed. On 18/12/2004 M/s Mahendra Jewellers purchased gold bullion worth Rs. 320000/- and this transaction stood reflected in the books of account of M/s Shee Shyam Bullion, Indore (Proprietary concern of Shri Omprakash Nema ) for that period. Excepting this he never had any business dealing with any of the member/ concern of that family group. Referring to the inference of the . Department that the deposit of Rs. 20 Crore in Account No. 990 and 10333 related to M/s Silver Gold Point ( Prop. Shri Nitesh Doshi) in

Punjab National Bank, Budhwari Bazar Branch, Bilaspur was made by Mahendralal Saluja, Shri Omprakash Nema clarified the correct facts in this regard by reiterating and reaffirming that all the deposits (including the aforementioned deposit of Rs.20 crore) deposited by personnel deputed by him for the purpose in the aforementioned bank accounts -being business cash collection (towards sale proceeds) absolutely and totally related to the business of his proprietary concern named above. In the confirmation given by him, Shri Omprakash Nema had verified the above stated facts to be true to the best of his knowledge and belief. Copy of the same was submitted before the AO in assessment proceedings. No evidence whatsoever was found during search nor thereafter to controvert the aforementioned affirmation of facts confirmed by Shri Omprakash Nema.

- (ii) In the case of Mriganka Mohan Sur (Supra), the ITO also found that the assessee had several accounts in the bank, was well known to the bank authorities and the assessee's cousin was a director of the bank. The ITO also found that the assessee had one-third share in the premises of Oriental Traders, and that there was no other person at the premises having the same name and surname as that of the assessee.

These are not the facts forthcoming in the assessee's case, under consideration, and hence no adversity should be held against the assessee.

- (iii) In the case of Mriganka Mohan Sur (Supra), the denial of the assessee that he had any connection with the Oriental Traders and its bank account was not accepted by the ITO who held that the bank account in the name of Oriental Traders was that of the assessee and the reassessment was made accordingly.

In the case of the assessee, under consideration, no evidence whatsoever was found during search nor brought on record

thereafter to conclusively prove that the impugned bank account is owned by the assessee. Even the bank authorities of the PNB. Budhawari Bajar Branch Bilaspur had categorically confirmed that the impugned bank account is owned by Shri Om Prakash Nema of Indore which is further corroborated by the confirmation from the latter filed before the AO which was not controverted nor proved as false by bringing rebuttal evidence against the assessee.

- (iv) In the case of Mriganka Mohan Sur (Supra), on appeal, the AAC held that complete records from the bank not being available and by reason of the specific denial of the assessee about having any connection with the Oriental Traders or with its bank account of the ITO had no positive material or conclusive evidence for holding that the business of Oriental Traders was carried on by the assessee and allowed the appeal in part.

In the case of the assessee, under consideration, records from the bank evidenced the fact that the impugned bank account is owned by Shri Om Prakash Nema of Indore and by reason of the specific denial of the assessee about having any connection with the aforementioned bank account and since the AO had not brought on record positive material or conclusive evidence for holding that the transactions in the said bank account belonged to the assessee, the impugned addition made by the AO, being without any evidence brought against the assessee, is unsustainable on facts and in law.

- (v) In the case of Mriganka Mohan Sur (Supra), on further appeal, the Tribunal confirmed the findings of the AO as mentioned in S. No.1 above and upheld the action of the AO. On a reference the HC upheld the conclusions arrived at by the Tribunal and decided the Reference against the assessee

8. Accordingly the assessee submitted that the factual position relating to the assessee's case under consideration enumerated above may kindly be taken note of which leads to an irresistible conclusion that the impugned bank account is owned by Shri Om Prakash Nema of Indore and hence the conclusions drawn by the AO against the assessee in this regard, having been based only on presumptions and surmises, are unsustainable on facts and in law. Therefore, in the light of the above, the assessee submitted that the impugned addition made by the AO, is unsustainable on facts and in law and hence the same be deleted."

9. The CIT(A) considering the submissions of assessee, deleted the addition.

10. We have heard rival submissions and perused the orders of lower authorities and materials available on record. The assessee is a proprietor of M/s. Mahendra Jewellers. A search and seizure operation was conducted in the case of the assessee on 31.01.2007 and 01.02.2007. Thereafter notice u/s.153A of the Act was issued and in pursuance of which the impugned order of assessment was made. The AO made addition of Rs.9.65 crores to the income of the assessee on the ground that the assessee has deposited the said amount in cash in Punjab National Bank, Budhwari Bazar Branch, Bilaspur(C.G.), Account No.990. According to the AO, an information was received from the bank that that during the period 02.04.2005 to 31.05.2005 the assessee deposited vide 149 entries of Rs.9.65 crores in account No.990 in the name of Shree

Shyam Bullion. On being confronted the assessee denied his making of said deposits.

11. Further the Branch Manager, Shri J.Ekka vide letter dated 10.12.2008 also informed the AO that the earlier information provided by the bank was erroneous.

12. After this, the Branch Manager and Shri Sunil Shrivastava (Cashier) were summoned by the AO. Shri Sunil Shrivastava in his deposition before the AO stated that the information earlier provided by the bank vide letter dated April, 2006 was correct. But Shri J.K.Sharma, the then Branch Manager stated that he cannot confirm the correctness or otherwise of the information contained in letter dated April, 2006. No documentary evidence could be collected by the AO to show the correctness or otherwise of the information contained in letter dated April, 2006 of the bank.

13. On the other hand, the assessee provided information to the AO that bank account No.990 maintained with Punjab National Bank, Budhwari Bazar Branch, Bilaspur(C.G.) was owned by Shri Om Prakash Nema, who was proprietor of Shree Shyam Bullion. The address, PAN etc. were also provided. Thereafter the assessee provided confirmation of said Shri Om Prakash Nema, wherein he stated that the cash deposits made in the bank account had no connection with the assessee.

14. However, the said Shri Om Prakash Nema made no compliance to the summons issued by the AO.

15. On the above facts, the AO disbelieved the statement of the assessee and made addition of Rs.9.65 crores.

16. On appeal, the CIT(A) deleted the addition by observing as under :-

*“2.3 The rival submissions have been carefully considered with reference to the facts obtaining from the record. Vide query letter dt. 04-12-08, (Query No. 158), referring to the deposits of above Rs.50 crores in A/c No. 990 in Punjab National Bank, Budhwari Bazar Branch, Bilaspur, the appellant was directed to produce Shri Omprakash Nema, proprietor of Shree Shyarn Bullion, Indore. In reply, confirmation obtained from Shri Omprakash Nema was filed before the AO wherein it was categorically affirmed that: (i) Shri Omprakash Nema, Proprietor of that concern, when contacted by the appellant, had categorically affirmed that he is the sole owner of the said concern and is being assessed by ITO Ward -1(2) Indore under PAN No, ACRPN2535N; (ii) Shri Omprakash Nema affirmed that in the name of the above proprietary concern, he has business dealing in Bilaspur Region and for facilitating safe and secured depositing of the business, cash collected towards sales proceeds from various customers of that area and for transferring the same to his bank account at Indore. (i.e. to the business headquarters of this proprietary concern), he had opened account with Punjab National Bank, Budhwari Bazar Branch, Bilaspur, Account No. 990; (iii) The business cash so collected from time to time is deposited in this account by the personnel deputed by him for the purpose and according to the business needs, the sums so required are transferred from this bank account to his bank account hi Punjab National Bank at Ahmedabad; (iv) Shri Omprakash Nema affirmed that all the deposits, debits and credits appearing in this bank account No. 990 in Punjab National Bank, Budhwari Bazar Branch, Bilaspur, absolutely and exclusively related to the business of his proprietary concern named above and none of the entries in this Bank Account No. 990 in Punjab National Bank, Bilaspur, have any connection or relation with either Shri Mahendralal Saluja,*

*Tikrapara, Bilaspur or with any member or concern of that family group; (v) Since the aforementioned Bank Account No. 990 in Punjab National Bank, Budhwari Bazar Branch, Bilaspur belongs to the business of his proprietary concern named above, all the entries made therein stood reflected and considered in the regular books of account of his proprietary concern on the basis of which, return for the relevant assessment year was filed; (vi) On 18/12/2004 M/s Mahendra Jewellers purchased gold bullion worth Rs.3,20,000/- and this transaction stood reflected in the books of account of M/s Shee Shyam Bullion, Indore (proprietary concern of Shri Omprakash Nema) for that period; and (vii) Excepting this, he never had any business dealing with any of the member / concern of this Saluja family group. The AO had not brought any evidence on record to prove falsity in the aforementioned facts confirmed by Shri Omprakash Nema, much less was any evidence brought on record by the AO to substantiate his assertion that the impugned sums deposited in the aforementioned bank account, were the undisclosed income of the appellant, earned during the relevant previous year.*

*2.4 Referring to the inference of the Department that the deposit of Rs. 20 Crore in Account No. 990 and 10333 related to M/s Silver Gold Point (Prop. Shri Nitesh Doshi) in Punjab National Bank, Budhwari Bazar Branch, Bilaspur was made by Mahendralal Saluja, Shri Omprakash Nema clarified the correct facts in this regard by reiterating and reaffirming that all the deposits (including the aforementioned deposit of Rs.20 crore), deposited by personnel deputed by him for the purpose, in the aforementioned bank accounts, being business cash collection (towards sales proceeds), absolutely and totally related to the business of his proprietary concern named above. In the confirmation given by him, Shri Omprakash Nema had verified the above stated facts to be true to the best of his knowledge and belief. For my perusal copy of the same, filed before the AO on 12-12-08, was submitted. In the event of any doubt or dispute, before any adversity was held against the*

*appellant, for arriving at right and reasonable conclusion on the crux of the issue, it was very much within the competence of the AO to have verified the verifiable facts from the AO assessing the aforementioned party at Indore. This was not done even in remand proceedings and no evidence was brought on record to prove the contrary.*

2.5 *The impugned addition was made by the AO solely placing reliance on the statements of the aforementioned persons, recorded by him. There is no dispute with regard to the fact that these statements were recorded behind the back of the appellant and the appellant was not given opportunity to cross-examine them. Despite specific request, it was vehemently urged that the appellant was not supplied with copies of the same. In the given circumstances, such statements, recorded behind the back of the appellant, in my considered view, had no evidentiary value. In *Kishinchand Chellaram v CIT (1980) 125 1TR 713 (SC)* it was held that since the IT Authorities propose to rely on the statements of a witness obtained behind the back of the appellant, they are bound to produce the same before the appellant so that he can controvert the statements by asking for an opportunity to cross examine the said witness with reference to the statements made by him. In *CIT v Eastern Commercial: 210 ITR 103 (Cal.)* it was held that: "As a matter of fact, the right to cross-examine a witness adverse to the appellant is an indispensable right and the opportunity of such cross examination is one of the corner stones of natural justice. It is the necessary requirement of the process of taking evidence that the examination-in-chief is followed by cross-examination and re-examination if necessary. It is not just a question of form or a question of giving an adverse party its privilege but a necessity of the process of testing the truth of oral evidence of a witness. Without the truth being tested, no oral assertion can be admissible as evidence and could not form the basis for any adverse inference against the affected parties. It is trite law that cross examination is the sine qua non of the due process of taking evidence and no adverse inference can be drawn against the party unless the party*

is put on notice of the case made out against him. He must be supplied the contents of all such evidence, both oral and documentary so that he can prepare to meet the case against him. This necessarily also postulates that he should cross examine the witness hostile to him. In *Mukand Singh & Sons v. Presiding Officer* 107 STC page 300 (P&H) it was held that the AO had acted illegally in refusing the request of the appellant for summoning the concerned party for cross examination. In *Kalra Glue Factory v Sales Tax Tribunal* (1987) 66 STC 292 the SC had reversed the order of Sales Tax Tribunal solely on the ground of violation of principles of natural justice. According to the SC statement of the party hostile to the appellant was not allowed to be tested by cross examination and hence the same having no evidentiary value could not be used against the appellant. The MP HC in *Prakash Chand Mehta v CIT* 220 ITR 277, 279 held that : " True, if statement of any person has been recorded without producing him in the witness box, the authority should not act upon that statement without affording the appellant an opportunity to cross examine the witness. In *Sona Electric Company v CIT* 152 ITR 507, the Del. HC observed that it seems that the ITO recorded the statement in the absence of the appellant thus excluding cross examination by the appellant. This shows that the statement of Shri Sardarilal has to be excluded from consideration. The MP HC in its recent decision in *CIT v Raja Ginning Udyog* (2004) 268 ITR 383 (MP) held that where the addition was made on the basis of enquiry conducted by the AO behind back of the appellant, as this violated the principles of natural justice, the addition was to be deleted. This is more so because the extensive search did not unearth any incriminating evidence to substantiate the impugned presumptive addition.

2.6 There is not even remotest link established to prove any undisclosed sources of income. The extensive search had not unearthed any incriminating evidence to prove the case against the appellant in this regard. The AO had also not placed on record any incriminating evidence to substantiate his allegations against the appellant in this regard. The AO had simply proceeded arbitrarily in

*finalizing the assessment, by treating the impugned deposits in bank account of somebody else, as undisclosed income of the appellant. Before resorting to such arbitrary conclusions against the appellant, it was incumbent upon the AO to have brought evidence to substantiate that the appellant in fact earned the aforementioned sum during the relevant previous year from undisclosed sources. This was not done. Hence the impugned addition made on presumptions and suspicions is unsustainable on facts and in law. It is settled position of law that in the scrutiny assessments that too completed as a result of extensive search operations, the AO was not empowered to base his conclusions on presumptions and surmises as he held by the SC in Dhakeshwari Cotton Mills Ltd. v. CIT (1954) 26 ITR 775, 782 (SC): In CIT v Bhayana (2008) 296 ITR 101 (P&H) it was held that in case the explanation of the appellant was .to be disbelieved, the AO should have some material to rebut the same. Mere conjectures and surmises could not form the basis for making additions. In the given facts and circumstances of the case, the impugned addition made by the AO u/s. 69A, vide Para No. 26/ Page No. 17 of the order appealed against, in the absence of corroborative evidence - is unsustainable on facts and in law. Hence the same is deleted.*

*The appellant, accordingly, gets relief of Rs.9.65 crores for the AY 2006-07.”*

17. The DR supported the order of AO and submitted that the addition was made on the basis of statement of Shri Sunil Shrivastava. He also pointed out that the assessee was requested to produce Shri Om Prakash Nema, which the assessee failed to do. Therefore, according to the DR the CIT(A) was not justified in deleting the addition.

18. We find that no specific error in the order of the CIT(A) could be pointed out by the DR. The DR could not controvert the finding of the CIT(A) that copy of the statement of Shri Sunil Shrivastava was not

supplied to the assessee before placing reliance on the same. We find that the CIT(A) was justified in the above circumstances on holding that the said statement is inadmissible.

19. Further, the inability of the assessee to produce Shri Om Prakash Nema before the AO cannot be read against the assessee under law. No authority has been conferred upon the assessee by exercise of which he can compel Shri Om Prakash Nema to appear before the AO. The power has been conferred upon the AO under the law by exercise of which he could have made the necessary enquiry or investigation. It is also observed that the Revenue could not controvert the finding of the CIT(A) that even during the search no material was found to link up the assessee with the aforesaid deposit of Rs.9.65 crores in the bank account of M/s Shree Bullion.

20. We find that the CIT(A) had properly appreciated the entire facts of the case and passed the order, which requires no interference by us and, therefore, this ground of appeal of the Revenue is dismissed.

21. Ground No.2 raised by the revenue in the appeal for assessment year 2006-07 regarding deleting the of addition of Rs.1,91,133/- out of the total addition of Rs.2,12,333/- and Rs.2,12,566/- for the assessment year 2007-08 made by the AO u/s.69C of the Act on account of unexplained house hold expenses.

22. Brief facts relating to the above ground are that the AO during the course of search u/s. 132(1) of the Act in residential premises of the assessee, the search team found air-conditions, televisions and other

luxury goods which, prima facie indicate that the assessee was enjoying luxurious life whereas the household withdrawal shown in IT returns, were meager. The AO further noted that the family of the assessee consists of 28 members, which comprised of 18 adult and 10 children. The total withdrawal shown by the family members were Rs.3,20,900/- (about Rs.31/- per day per person) and Rs.3,70,300/- (about Rs.36/- per day per person) respectively for the two assessment years, under consideration, summarized at page No. 28 by the AO. The AO found the withdrawal ridiculously low in view of the facts that they have three cars, five two wheelers, two Alsatian pet dogs. The AO has also taken on record some telephone and electricity bills. In spite of specific query, the assessee had not furnished complete breakup of household expenses, viz. milk consumed, cloth purchased, ration purchased, school fee and other incidental expenses. In absence thereof, the AO estimated the household expenditure per day per person @ Rs.100/- for AY 2007-08 keeping in view the minimum daily wages rate notified by the District Collector, After considering inflationary trend, the AO has given rebate of 5% for the AY 2006-07. Accordingly the annual household expenditure for each assessment year vis-a-vis expenditure shown by the assessee and the resultant unexplained expenditure was worked out by the AO as under;

AY	HH Exp. Estimated	HH. Exp. Shown	Resultant unexplained expenditure added u/s.69C of the Act
2006-07	Rs.9,57,600/-	Rs.3,20,900/-	Rs.6,36,700/3 = <b>Rs.2,12,233/-</b>
2007-08	Rs.10,08,000/-	Rs.3,70,300/-	Rs.6,37,700/3 = <b>Rs.2,12,566/-</b>

As the resultant unexplained expenditure was equally divided by the AO amongst three main persons namely Shri Mahendra Lal Saluja, Shri Praveen Saluja and Shri Satish Saluja and on this basis, therefore, the AO added Rs.2,12,233/- for the AY 2006-07 and Rs.2,12,566/- for the AY 2007-08.

23. Against this order of AO, the assessee carried the matter before the CIT(A) and submitted that the family consist of only 10 members and not 28 members as held by the AO. The AO has considered the family members of brothers of Shri Mahendni Lal Saluja whereas resides separately. Another objection raised by the assessee was that the agricultural income, was also spent for household expenses. Since no evidence whatsoever was adduced to prove this assertion, the AO had denied this claim. Finally the assessee contended that no incriminating documents were found during the course of search suggesting expenditure over and above shown by the family of the assessee and, therefore, the addition made by the AO, being based on surmises and conjectures, is unsustainable. In support, the assessee relied on the decisions in Narain Singh Bhati v. ACIT 40 TTJ 381; Rohitas Yadaw v. ITO 114 TTJ 973; ACIT v. H M Satyanarayana Setty 71 TTJ 186; ITO v. Rajendra Kumar Taparia 106 TTJ 712 and LMJ International Ltd v. DCIT 22 SOT 315.

24. The CIT(A) after considering the submissions of the assessee deleted the addition of Rs.1,91,133/- for the assessment year 2006-07

and Rs.2,12,566/- for the assessment year 2007-08 after observing as under :-

*“5.3 I have carefully considered the submissions made on behalf of the appellant with reference to the facts obtaining from the record. The appellant has claimed the withdrawals and the agrl. income as source of family expenditure. On verification of capital account, it was noticed that the agrl. income has been credited in accounts and therefore, the same could not be the source of household withdrawal. Otherwise also, since no evidence was adduced to prove earning of agrl. income, action of the AO in assessing the returned agrl. income, as income from undisclosed sources, was upheld. Thus, the withdrawals shown in books were only the source for meeting household expenses. Another fact noticed is that the appellant claimed that Shri Mahendra Lal Saluja is residing with his sons; and the brothers of Shri Mahendra Lal Saluja are residing separately and, therefore, size of family is of 10 members and not 28 members as erroneously considered by the AO. **On this basis, for the AY 2006-07 the addition to be sustained u/s. 69C of the Act, works out to Rs.21,100/- resulting in relief of Rs.1,91,133/-. Since the withdrawals shown for the AY 2007-08 were more than estimated on the above basis, the addition of Rs.2,12,566/- was unwarranted and hence, the same is deleted.***

*Accordingly the appellant gets relief of Rs.1,91,133/- for AY 2006-07 and Rs.2,12,566/- for A.Y.2007-08.”*

25. The DR though supported the order of AO but could not bring any material on record to controvert the finding of the CIT(A) that the AO has estimated the household expenses on the basis that family consists of 28 members, which comprised 18 adult and 10 children. But the CIT(A) held that the family members of brother of Shri Mahendra Lal Saluja resides

separately and that family consists of only 10 members and not 28 members as held by the AO.

26. In absence of the same, we find no good reason to interfere with the order of CIT(A), which is confirmed and this ground of appeal of Revenue for assessment year 2006-07 and 2007-08 is dismissed.

27. Ground No.1 in appeal for assessment year 2007-08, the grievance of the Revenue is that the CIT(A) erred in deleting the addition of Rs.90,92,969/- on account of un-explained excess stock of gold and silver unearthed as a result of Search & Seizure action in the case of the assessee.

28. Facts giving rise to this ground of the Revenue are that the AO observed that in the preliminary statements, recorded at the time of search, none of the family members stated that any of their jewellerys were kept in the stock of M/s. Mahendra Jewellers. Even if it is assumed that assessee's contention that jewellery belonging to various family members was kept with M/s. Mahendra Jewellers is true, the following facts do not lend any support to it. Despite opportunity at the time of search, assessee failed to identify as to which jewellery belongs to whom. This stock was nowhere reflected in books of account. To specific query, vide question "No.9 in statement recorded on oath as on 31.01.2007, Shri Praveen Saluja accepted that this fact was not reflected anywhere in information submitted to IT Deptt. The text of question and answer in statement was reproduced in the assessment order. The AO also observed that the claim of the assessee that some of this excess jewellery

was purchased, by selling of the diamond jewellery declared in VDIS scheme, was not substantiated by any evidence. Letters written to purchaser to these diamonds remained uncomplished. In the given circumstances, the AO concluded that the link between VDIS disclosure and excess jewellery found in the premises of M/s. Mahendra Jewellers, was not established and the explanation given by the assessee was only self serving evidence and hence, the AO observed that no credence could be given to it. On this premise, the entire excess stock of gold weighing 7.697 kg, valued at Rs.47,79,969 and excess stock of silver of 227 kg, valued at Rs.43.13 lakh, was treated as amount of investment not fully disclosed in books of account and the same was added to the income of the assessee.

29. On appeal before the CIT(A), the assessee submitted that when confronted to explain the alleged excess stock of gold/silver, it was explained, in proceedings before the AO, that there was no such difference as alleged since Mahendra Lal Saluja and other members of the family are having gold and silver jewellery in sufficient quantity as per their status. Apart from the old jewellery owned by them, almost all the members including assessee had further filed VDIS declarations, disclosing sizable volume of gold, silver-and diamond jewellery.

30. The CIT(A) after considering the submissions of AR of the assessee deleted the addition after observing as under :-

*“5.6 I have carefully considered the submissions made on behalf of the appellant with reference to the facts obtaining from the record. Detailed chart indicating the old jewellery owned by them and further details of jewellery disclosed in VDIS, duly accepted by the*

*designated authority of the IT Deptt., submitted before the AO, was produced in appeal proceedings before me. With this chart, submitted in proceedings before the AO, photocopies of VDIS petitions, certificate of VDIS, relevant purchase/sale bills, running in 80 pages in the spiral bound, produced were also perused. In proceedings before the AO, it was submitted on behalf of the appellant that the declarations made under VDIS, in respect of gold and silver, was accepted by the Designated Authority viz. by the Id. CIT, Raipur and the appellant was immuned under the Scheme in respect of the assets declared and covered by that Scheme. The gold and silver declared under that Scheme, was kept in the business premises of the appellant and stood duly reflected in the books of a/c. viz. on the last page of the ledger of Mahendra Jewellers for the AY 2007-08. Copy of the same produced in proceedings before me, was verified from the relevant books of account. The total gold and silver covered by that Scheme were 12.274kg. and 244.64 kg. respectively. When confronted to explain 8 kg. gold and 227 kg. silver, it was explained both before the AO and also in proceedings before me, that these are very well covered by the total gold and silver declared under VDIS and lying in the shop premises. Detailed working of all the above, in nutshell, was submitted and is available from Page No. 251 to 330 of Paper Book - Vol.2 in the case of Mahendralal Saluja, Bilaspur.*

*5,7 None of the aforementioned evidences and reconciliation, were proved as false, by bringing rebuttal evidence on record. The impugned addition made on presumptions, in my considered view, is opposed to the immunity granted under the VDIS and in total disregard to the factual position which stood accepted in the past. Nothing incriminating was found/recovered either during extensive search operation or thereafter to prove that the aforementioned items, disclosed and stood accepted earlier, were assessable as undisclosed income. The AO had not brought any evidence on record to substantiate his presumption in this regard. It is settled position of law that in the scrutiny assessments that too completed*

*as a result of extensive search operations, the AO was not empowered to base his conclusions on presumptions and surmises as held by the SC in Dhakeshwari Cotton Mills Ltd. v. CIT (1954) 26 JTR 775 (SC). In CIT v Bhayana (2008) 296 ITR 101 (P&H) it was held that in case the explanation of the appellant was to be disbelieved, the AO should have some material to rebut the same. Mere conjectures and surmises cannot form the basis for making additions. To the extent of income and assets, entered in the current books, there is no question of any allegation for concealment of income. In order to reduce the rigours of new procedure, it is essential that the additions should be made only in relation to such income in respect of which some incriminating material has been found during the course of search. There should be no estimation of income and additions thereof merely on the basis of circumstantial evidence and in any case, not on the basis of mere speculation germane to half baked discussion of facts or un-corroborative piece of evidence. Courts have uniformly taken the view that, post-search assessment should be with reference to the seized assets and material gathered during search. It may possibly include the result of further enquiry with reference to such materials but it cannot provide an occasion for overall review of assessment already made. In CIT v Rajendra Prasad Gupta [2001] 248 ITR 350 (Raj), the HC pointed out that assessment to be framed as a consequence of search, should be with reference of undisclosed income. In other words, the estimate is not lightly made in every case of assessment framed as a result of search, except on a clear finding giving justification for the same, with reference to the return filed on the one hand and the materials found on the other. If the letters written to the purchasers were remained uncomplished with, as asserted by the AO, it was all the more incumbent upon the AO to have got the needed enquiries and investigation conducted through the officers of the Deptt. at the purchaser's place, before any adversity was held against the appellant. But then, this needed exercise was not carried out by the AO and hence the impugned addition, made on unverified facts, in*

*my considered view, is unsustainable on facts and in law. Having given thoughtful consideration to the facts obtaining from the record and the reconciliation submitted by the appellant, the impugned addition made by the AO in the manner in which it was done, is opposed to all factual and legal standards and hence the same is deleted.”*

31. On the above stated facts, we find that the DR supported the order of AO. He could not point out any specific error in the order of the CIT(A). No positive material could be brought on record to controvert the finding of CIT(A) that gold and silver declared under the VDIS Scheme, was kept in the business premises of the assessee and stood duly reflected in the books of account, which on the last page of the ledger of Mahendra Jewellers for the AY 2007-08. Copies of which were produced before the CIT(A) and verified from the relevant books of account. Further, no material was brought on record to controvert the finding of CIT(A) that nothing incriminating was found/recovered either during extensive search operation or thereafter to prove that the aforementioned items, disclosed and stood accepted earlier, were assessable as undisclosed income. In absence of the same, we do not find any good reason to interfere with the order of CIT(A), which is confirmed and this ground of appeal of Revenue is dismissed.

32. In Ground No.3 in appeal for assessment year 2007-08, the grievance of the Revenue is that the CIT(A) erred in deleting the addition of Rs.47,340/- and Rs. 6,10,223/- made by the A.O. U/s 69A on the basis of loose paper found and seized during search in the case of the assessee.

33. Brief facts to the above ground are that the during the course of assessment proceedings the assessee was equired to explain loose paper No. A-2/33- Page No.14 which is a receipt of Rs.47,340/- dated 27.10.2006 by M/s. Mahendra Jewellers and not found recorded anywhere. Since the assessee failed to submit any plausible explanation, this sum of Rs.47,340/- was presumed as unexplained money received by the assessee and added to the income u/s. 69 A of the IT Act, 1.961, The AO also noted that Page No. 35 to 38 of the loose paper bundle No. A-2/33, seized during search, were the sale of ornaments. The weights involved along with date in each loose sheet were as under:

Page No.35	1934 Grams	Date 28.07.06
Page No.36	3868 Grams	Date 14.06.06
Page No.37	8767 Grams	Date 10.05.06
Page No.38	17548 Grams	Date 21.08.06

The AO held that these unrecorded transactions pertained to sale of silver and in absence of any plausible explanation, these unrecorded sales computed at Rs,6,10,223/- were added to the income of the assessee, u/s. 69A of IT Act, 1961.

34. On appeal before the CIT(A), the assessee submitted that the AO confronted the assessee, to explain the jottings/scribblings on the loose papers found during search. In response, it was submitted in categorical terms that the same were only rough jottings/scribblings, representing unmaterialised proposals and they neither proved the incomings or outgoings. In any event, it was requested that evidence to prove the contrary, if any, be communicated to the assessee for submitting further defence in the matter. "Without communicating same, the AO, vide Para

No.28-29/Page No.21-22 of the order appealed against, concluded that the sum of Rs.903163/- was held to be added to the income of the assessee as unexplained money. Although no such addition was made in the computation of total income made on Para No.29/Page No.22 of the order appealed against, since these conclusions of the AO, unsubstantiated on the strength of any evidence, were unsustainable on facts and in law, therefore, the assessee submitted that the additions should be deleted.

35. The CIT(A) after considering the submissions of assessee deleted the addition after observing as under :-

*"I have gone through the relevant scribblings /jottings noted on the impugned seized documents and I find that the rough jottings, neither represent purchases nor sales, much less they represent any investment or receipt in respect of any dealings finalized. Such dump documents, in my considered view, have no evidentiary value for the purpose of resorting to deeming provisions u/s.68, 69, 69A to 69C and no addition could be made, on account of undisclosed income, merely by arithmetically totaling various figures jotted therein, particularly when no evidence whatsoever was brought on record to prove the nature and ownership of the impugned jottings. If they were unrecorded sales, as assumed by the AO, then the name of the purchaser should have appeared therein. Prime facie, there is no evidence on record to conclusively prove that the impugned jottings represented the transactions in fact materialized. No doubt, u/s. 132(4A), there is a presumption against the appellant that such loose papers pertained to the appellant and its contents were correct. However, such presumption is rebuttable. Loose papers, in question, contained scribblings or rough notes and do not mean anything. Hence income should not be estimated by applying multiplier of thousand or even lac. Over the course of time, the courts have held*

*that the AO has no such authority and unless meaningful data could be culled out, which could be corroborated from other material, no addition is called for on the basis of such dump documents. It is for the AO to supply language to dump documents, substantiated on the strength of evidence. In the absence of any evidence, about the nature of figures noted on the impugned loose papers seized, date, name of the party etc., no addition could be made merely on suspicion. (ACIT v Shailesh S. Shah (1997) 63 ITR 153 (Bom.). In the instant case, the only known facts are that certain papers were found in the business premises of the appellants and they contained certain calculations, (origin and connection of which is not known) and no intelligible inference therefrom can be drawn. No sensible inference of any fact can be drawn from such known facts. In this view of the matter, the additions made were held imaginary as a result of suspicion. (Brinjal Rupchand v ITO (1991) 40 TTJ 668 (Indore). It is trite law that, if an income not admitted by an appellant is to be assessed in the hands of the appellant, the burden to establish that there is such income chargeable to tax, is on the AO. With a view to assist the AO and to reduce the rigour of the burden that lay upon the AO, provisions of Sec.68, 69,69A to 69C have provided for certain deeming provisions, where an assumption of income is raised, in the absence of satisfactory explanation from the appellant. As these are deeming provisions, the conditions precedent for invoking such provisions, are required to be strictly construed. The facts and circumstances giving rise to the presumptions have to be established, with reasonable certainty. The AO cannot first make certain, conjectures and surmises and thereafter apply the deeming' provisions based on such conjectures and surmises. In the absence of adequate material as to the nature and ownership of the impugned transactions, undisclosed income could not be assessed in the hands of the appellant, merely by arithmetically totaling various figures jotted down on the impugned loose documents. In other words, for the purpose of resorting to deeming provisions, dump documents or documents, with no certainly, have*

*no evidentiary value. For the reasons aforementioned, the impugned presumptive addition, unsubstantiated on the strength of any evidence brought against the appellant, in my considered view, is unsustainable on facts and in law and hence the same is deleted.”*

36. On the above facts of the case, though the DR supported the order of AO but could not point out any specific error in the order of the CIT(A). No material was brought on record to controvert the finding of CIT(A) that loose papers, in question, contained scribbings or rough notes and do not mean anything. No material was also brought on record to controvert the finding of CIT(A) that the nature of figures noted on the impugned loose papers seized and that there was no date, name of the party etc., on the said loose papers, and, hence, the same cannot be the basis for making addition but at best could a suspicion. No corroborative material was brought on record by the revenue to show that the figures mentioned in the impugned loose sheets were, in fact, the undisclosed income of the assessee. In absence of the same, we do not find any reason to interfere with the order of CIT(A), which is confirmed and this ground of appeal of Revenue is dismissed.

37. In the result, appeal filed by Revenue is dismissed.

Order pronounced in the Court on Wednesday, the 17<sup>th</sup> Day of January,2018 at Raipur.

**Sd/-**

**(PAVAN KUMAR GADALE)**

न्यायिक सदस्य / JUDICIAL MEMBER

Raipur; दिनांक Dated 18/01/2018

प्र.कु.मि/PKM, Senior Private Secretary

**Sd/-**

**(N. S. SAINI)**

लेखा सदस्य / ACCOUNTANT MEMBER

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

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

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

**(Senior Private Secretary)**  
Income Tax Appellate Tribunal, Raipur