

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

श्री विजय पाल रॉव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM AND SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 293, 408, 294 & 295/JP/2017
निर्धारण वर्ष/Assessment Years : 2007-08, 09-10, 10-11 & 11-12.

Shri Rajendra Kumar Jain, D 23-25, Prem Bhawan, Lal Bahadur Nagar, J.L.N. Marg, Jaipur.	बनाम Vs.	The ACIT, Central Circle-2, Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN No. AATPJ 5294 N		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

आयकर अपील सं./ITA No. 519, 520 & 521/JP/2017
निर्धारण वर्ष/Assessment Years : 2007-08, 09-10 & 10-11.

The ACIT, Central Circle-2, Jaipur.	बनाम Vs.	Shri Rajendra Kumar Jain, D 23-25, Prem Bhawan, Lal Bahadur Nagar, J.L.N. Marg, Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN No. AATPJ 5294 N		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri S.L. Poddar (Advocate)
राजस्व की ओर से / Revenue by : Shri Varinder Mehta (CIT)

सुनवाई की तारीख / Date of Hearing : 22.02.2018
घोषणा की तारीख / Date of Pronouncement : 28/03.2018.

आदेश / ORDER

PER BENCH :

These are three sets of cross appeals by the assessee and revenue for the assessment years 2007-08, 2009-10 and 2010-11 and appeal by the assessee for the assessment year 2011-12 are directed against the four separate orders of Id. CIT (A), Jaipur all dated 31st March, 2017. All these appeals were clubbed together for hearing and for the sake of convenience are being disposed off by this composite

order. First, we will take up the appeal for the assessment year 2007-08. The assessee has raised the following grounds in ITA No. 293/JP/2017 :-

- “ 1. Under the facts and circumstances of the case the learned Assessing Officer has erred in passing the order u/s 147/143(3) of the Income Tax Act, 1961.
2. Under the facts and circumstances of the case the learned Assessing Officer has erred in reopening the assessment of the assessee when there is no relation with the alleged land transaction of the assessee.
3. Under the facts and circumstances of the case the learned Assessing Officer has erred in enhancing the addition to Rs. 1,13,00,000/- on substantive basis from Rs. 1,24,99,000/- made by the learned Assessing Officer on protective basis without bringing any material on record only on the basis of statement of Shri Madan Mohan Gupta which was given only to save himself from the tax liability.
4. Under the facts and circumstances of the case the learned Assessing Officer has erred in giving the finding that the land deal was made by Shri Rajendra Kumar Jain and he is the person who purchased the land and sold to Navratan Kothari and Vimal Chand Surana and Shri Madan Mohan Gupta was only name lender.
5. The assessee craves your indulgence to add, amend or alter all or any grounds of appeal before or at the time of hearing.

Ground nos. 1 & 2 are regarding validity of reopening of assessment.

2. The assessee is an Individual and filed his return of income on 31.10.2007 declaring total income of Rs. 29,04,041/-. Subsequently, a search and seizure operation under section 132 of the I.T. Act was conducted on Rajendra Kumar Jain group and his associate group members on 23rd May, 2013. During the course of search and seizure operation various incriminating documents were found and seized

which were inventorized as Exhibit-1 to 5 of Annexure-AS. These documents were seized from the residence and business premises of one Shri Madan Mohan Gupta stated to be an associate of Shri Rajendra Kumar Jain. As per the seized documents Exhibit-1, 2 & 5, land transactions were found in respect of land at village Chainpura, behind EP land. The statement of Shri Madan Mohan Gupta was recorded under section 132(4) wherein he has stated that a sum of Rs. 96,00,000/- has been given by the assessee by cheque and further amount of Rs. 3-4 crores in cash for purchase of the said land during the period August, 2006 to November, 2006 pertaining to the assessment year 2007-08. The AO noted that as per the seized documents, a sum of Rs. 6,59,00,000/- is shown to have been received by Shri Madan Mohan Gupta from the assessee as well as a sum of Rs. 5,00,00,000/- has been shown as received by the assessee from certain persons. Since the assessment year 2007-08 is beyond 6 years from the date of search and, therefore, the AO apart from initiating the proceedings under section 153A in respect of other assessment years has proposed to reopen the assessment for the assessment year 2007-08 by issuing notice under section 148 on 25th March, 2014. The assessee raised objection against the notice issued under section 148 vide letter dated 8.12.2014. The AO disposed off the objections of the assessee vide order dated 05.01.2015 and thereafter completed the reassessment under section 147 read with section 143(3) on 30.03.2015. The assessee challenged the action of the AO before Id. CIT (A) and raised the objection against the reopening of the assessment but could not succeed.

3. Before us, the Id. A/R of the assessee has submitted that the reasons recorded by the AO for reopening of the assessment are vague, baseless and

without any credible tangible evidence or material to form the belief that income of Rs. 11.59 crores has escaped assessment. He has further submitted that the reasons recorded by the AO are based on presumption and surmises and the AO has finally made addition of Rs. 1,24,99,000/- on protective basis which shows that there was no material to arrive at a definite belief that the income of Rs. 11.59 crores has escaped assessment. The Id. A/R has further submitted that though the Id. CIT (A) has converted protective assessment into substantive but to the extent of Rs. 1,13,00,000/-. Therefore, the AO was having no reason to believe that an income of Rs. 11.59 crores has escaped assessment. The Id. A/R has further submitted that the land transaction alleged by the AO has no connection with the assessee as there was no such transaction between the assessee and Shri Madan Mohan Gupta or through Shri Madan Mohan Gupta. The seized material as referred by the AO does not show any such transaction between the assessee and Shri Madan Mohan Gupta or any transaction of purchase of land by the assessee otherwise. The AO has made addition on protective basis which has no relevance with the reasons recorded for reopening of the assessment. Thus when no addition was made with reference to the reasons recorded, then the AO is precluded in making any other addition while framing the reassessment. In support of his contention he has relied upon the decision of Hon'ble Madras High Court in case of Martech Peripherals Pvt. Ltd. vs. DCIT (2017) 151 DTR 313 (Madras) and submitted that the reassessment is not valid when no addition is made on the reasons recorded by the AO. He has also relied upon the judgment of Hon'ble Jurisdictional High Court in the case of CIT vs. Ram Singh 220 CTR 629 (Raj.). The Id. A/R has referred to the objections raised against the notice issued under section 148 and submitted that the assessee has

raised specific objection that the land in question was purchased in the name of M/s. Kalyan Buildmart Pvt. Ltd. through its director Shri Madan Mohan Gupta, who is the promoter, director and shareholder of the company along with his wife Smt. Shashi Kala Gupta. Therefore, the assessee has nothing to do with the said company or the transaction of purchase of Chainpura land as the same was purchased by the company M/s. Kalyan Buildmart Pvt. Ltd. Even thereafter the said company was transferred to Shri Navratan Kothari and Shri Prakash Chand Kothari by transfer of shares by Shri Madan Mohan Gupta and his wife. Therefore, at no point of time the assessee has any interest in the said company either before purchase of land or after purchase of land. The statement of Shri Madan Mohan Gupta was contrary to the actual facts of transaction of purchase and sale of land and the same was made only to save himself and to protect his own black money for the purchase and sale of land through M/s. Kalyan Buildmart Pvt. Ltd. which was finally transferred to Kothari Brothers. The Id. A/R has referred to the seized materials at pages 16-21 of the paper book and submitted that the date of transaction as per the seized documents do not fall in this assessment year and, therefore, even as per the seized materials the transaction do not pertain to the year under consideration and hence the reopening is without any basis but merely on the basis of presumption and assumption by the AO relying on the statement of Shri Madan Mohan Gupta. Even otherwise the seized materials do not specify any entry relating to the assessee and pertains to the year under consideration. No enquiry was conducted by the AO prior to issuing the notice under section 148 or initiating the proceedings for reopening of the assessment. Further, the addition on protective basis by the AO which corroborates the fact that the seized materials do not discharge any income escaped

assessment in the hands of the assessee. In support of his contention, he has relied upon the decision of Hon'ble Supreme Court in the case of Ganga Saran & Sons Pvt. Ltd. vs. ITO, 130 ITR 1 (SC) and submitted that the Hon'ble Supreme Court has held that action under section 148 is not warranted on mere suspicion or rumor. Similarly in the case of Phoolchand Bajrang Lal vs. CIT, 203 ITR 456 (SC), the Hon'ble Supreme Court has held that it is open to the assessee to establish that there in fact existed no belief and the belief was not bonafide one or based on vague, irrelevant and no specific information. Hence, the Id. A/R has submitted that the AO was unable to substantiate information/belief of escapement of income of Rs.11.59 crores as in the reassessment proceedings he has made an addition of Rs. 1.47 crore on protective basis. In support of his contention, he has relied upon the decision of Bangalore Bench of the Tribunal in the case of DCIT vs. Bullion Investments & Financial Services Pvt. Ltd. 29 DTR 325 as well as decision in the case of Smt. Farzana F. Desai vs. ACIT, 14 DTR 552 and submitted that when the AO has finally made the assessment on protective basis then in the absence of any positive or substantive satisfaction, the reopening of the assessment is bad.

3.1. On the other hand, the Id. D/R has submitted that the AO has analyzed the seized materials as per Annexure-AS and also considered the statement of Shri Madan Mohan Gupta wherein it was stated that the transactions recorded in the seized materials are land transaction at village Chainpura behind EP, Jaipur on behalf of the assessee and the assessee has provided the money for the transaction. Shri Madan Mohan Gupta has specifically stated that the deal was finalized at Rs. 12,43,27,000/-, out of which discount of 1% was allowed for registration of land.

Therefore, Rs. 12,30,84,000/- were net payable to the seller and the details of the same have been recorded on pages 15-18 of Exhibit-1 of Annexure-A found and seized from the residence of Shri Madan Mohan Gupta. This land was purchased during the assessment year 2006-07 and subsequently sold to Shri Navratan Kothari and Shri Vimal Chand Surana in the month of March, 2007. The details of the transaction has been recorded at pages 27 & 28 of Exhibit of Annexure-A. In the light of the statement of Shri Madan Mohan Gupta, statement of the assessee were also recorded on oath on 16.08.2013 and the assessee was confronted with the seized materials particularly pages 15 to 20 of Exhibit-1 of Annexure-A. Therefore, the AO conducted the enquiry before issuing the notice under section 148. The Id. D/R has further contended that to acquire the land in question, a company was formed on behalf of the assessee and entire purchase consideration was paid by the assessee. There is no dispute about the amount paid by the assessee through cheque through Shri Madan Mohan Gupta. However, the only dispute is regarding the cash payment for the said land transaction. Thus the Id. D/R has submitted that at the time of initiating the proceedings for reopening of the assessment what is required is to form a belief on prima facie basis that the income assessable to tax has escaped assessment and the AO is not required to prove the correctness of the reasons and material on the basis of which he has formed the belief. He has relied upon the orders of the authorities below.

4. We have considered the rival submissions as well as the relevant material on record. The AO has considered the seized material, the details of which are as under :-

Sr.	Annexure No. & Exhibit No.	Page No.	Found/Seized from
1.	Annexure A Exhibit -1	15 to 24, 27, 28, 43, 44 and 69 to 74	Residential premises
2.	Annexure-A Exhibit-2	47 and back side of 48, 50 to 54	Residential premises
3.	Annexure-A Exhibit-5	1 to 77	Residential premises
4.	Annexure0 AS Exhibit-1	1 to 3, 7, 9, 10	Office premises

During the search and seizure action under section 132 of the Act carried on 23rd May, 2013 statement of Shri Madan Mohan Gupta was recorded wherein he has explained the transactions as found in the seized material which is a diary maintained by Shri Madan Mohan Gupta. He has stated that the transactions as per these entries recorded in the seized material pertain to the land deal at village Chainpura behind EP Jaipur which was purchased by the assessee through Shri Madan Mohan Gupta. Thus Shri Madan Mohan Gupta has stated in the statement that the entire purchase consideration was given by the assessee to him for purchase of the said land. The AO accordingly proposed to reopen the assessment by recording reasons as under :-

“ During the course search and seizure operation in the case of Rajendre Jain Group DOS 23-05-2013 certain incrementing document were found and seized which were inventories as Exhibit 1 to 5 of annexure AS. Certain pages of Exhibit 1, 2 & 5 seized from the residential and office premise are related a land transaction at Chainpura behind EP. In respect of such land transaction, Shri Madan Mohan Gupta a close associate of the assessee has given a statement on record that a sum of Rs. 96 lacs had been given by the assessee by cheque and further amount of Rs. 3-4 crores in cash for purchase of the said land during the period August 2006 to Nov 2006 pertaining to AY 2007-08. Further as per the seized documents it is seen that a sum of Rs. 6,59,00,000/- is shown to have been received from the assessee by Shri Madan Mohan Gupta. In addition to this, a sum of Rs. 5,00,00,000/- has been shown as received by the assessee from certain persons. In the surrender of income made by the assessee such amount have not been included. I have thus reason to believe that income to the extent of Rs. 11,59,00,000/- has escaped assessment within the meaning of section 147 of the I.T. Act, 1961.”

Thus the AO has recorded the reasons that as per the seized material Exhibit 1-5 of Annexure-AS and particularly pages of Exhibit 1-5 seized from the residential and office premises of Shri Madan Mohan Gupta, a land transaction at village Chainpura behind EP was found as purchased by the assessee through Shri Madan Mohan Gupta. The AO has given the details of the amount as found recorded in the seized

material and formed the belief that the income of Rs. 11.59 crores has escaped assessment within the meaning of section 147 of the Act. There is no dispute that at the time of initiation of proceedings under section 147/148 what is required is a prima facie reason to believe that an income has escaped assessment and the AO is not required to establish the correctness of the reasons at that stage. However, the reason to belief must be based on some tangible material or information which has a direct and live connection with the income which has escaped assessment. The whole reason to belief that income has escaped assessment to the extent of Rs. 11.59 crores is based on the seized material as per pages of Exhibit-1, 2 & 5 and statement of Shri Madan Mohan Gupta. Thus it is relevant to see whether the seized material has a direct connection to indicate that an income assessable to tax has escaped assessment. The documents as referred by the AO in the reasons recorded are the pages of the diary in which various transactions are recorded in the name of different persons and against specific dates. The relevant pages as referred by the AO are placed at pages 16 to 21 of the paper book which are as under :-

13/10/25
2007-08

NOTES
 124327000
 - 124350000
 123084000
 Cheques 96,00,000/-

31/12/07 10,000 = 00 RPS

S. 64, 000 = 00
 96,000 = 00 ✓

6, 60, 000 = 00
 4/3/08 ✓ 25, 000 = 00 ✓
 12/5/08 2, 000 = 00 RPS
 21/5/08 ✓ 1, 00, 000 = 00 ✓
 4/6/08 ✓ 1, 00, 000 = 00 ✓
 5/6/08 70, 000 = 00 ✓
 6/6/08 ✓ 4, 00, 000 = 00 ✓
 24/12/08 ✓ 5, 00, 000 = 00 ✓ (2+3)
 5/1/08 ✓ 10, 000 = 00 ✓
 " ✓ 5, 00, 000 = 00 ✓
 15/1/08 ✓ 3, 00, 000 = 00 ✓
Important 2/1/08 ✓ 3, 00, 000 = 00 ✓
 30/1/08 ✓ 81, 00, 000 = 00 ✓
 3/2/08 ✓ 10, 00, 000 = 00 ✓
 13/2/08 ✓ 2, 00, 000 = 00 ✓
 50, 20, 000 = 00 ✓

242 RPS (16) 13/3/08

G.R.M. 1,000 = 00
 RP 50,000 = 00
 " 40,000 = 00
 31/1/08 G.R.M. 45,000 = 00
 30/1/08 RP 50,000 = 00
 15/1/08 RP 3,000 = 00
 15/1/08 10,000 = 00
 30/1/08 2,000 = 00
 5-6-12/08 50,000 = 00
 14/1/08 5,000 = 00
 9/3/08 13,000 = 00
 3/4/08 G.R.M. 1,50,000 = 00
 4/1/08 " 50,000 = 00
 2/5/08 RP 80,000 = 00
 8/6/08 RP 5,000 = 00
 4/7/08 RP 20,000 = 00
 14/7/08 RP 15,000 = 00
 25/7/08 R. 60,000 = 00

5/11/08 RP 4,00,000 = 00
 1/11/08 RP 10,00,000 = 00
 29/11/08 RP 10,00,000 = 00

Important

TRUE COPY
 PODDAR

NOTES

124337 ~ 250000000
87

(19)

1 = 52
1 = 08
1 = 47
1 = 66

4 = 73
81-5

Important

12 64-5 10-2-75
15 81.5
12-29.5 11-18.5
7-46

1 = 00
92
1 = 50
1 = 05
1 = 17

5 = 64
4 = 73

9 = 02
1 = 30
32
93
87
66

81.5
13 91.5
50

14.41.5

71-62
12-19.5

1 = 80
66
40
9.02
50

12 88
28

12 66
12 30
12 30

12 30
9 50
12 30

12 30
9 50

Important

TRUST CO
NOTES
S.L. POLICE
JAIPUR

(10)

NOTES

R.K.M

(25)

10,000/- 15/10 ✓ 5000/- 10/12 ✓
 15,000/- ✓ 15,000/- 23/12 ✓
 10,000/- 14/10 ✓ 65,000/- 23/12 ✓
 42,000/- 13/10 ✓ 10,000/- 5/11/09 ✓
 33,000/- 08/10 ✓ 45,000/- 12/11/09 ✓
 18,000/- 08/10 ✓ 50,000/- 13/11/09 ✓
 8,000/- 22/10 ✓ 19,000/- ✓
 10,000/- 23/10 ✓ 16,000/- 29/11/09 ✓
 14,000/- ✓ 7,000/- 3/12/09 ✓
 15,000/- 25/10/08 ✓ 1,000/- 25/12/08 ✓
 10,000/- 2/11/08 ✓ 50,000/- 12/3/09 ✓
 11,000/- 5/11/08 ✓ 60,000/- 14/3/09 ✓
 5,000/- 6/11/08 ✓ 6,000/- 20/3/09 ✓
 12,000/- 7/11/08 ✓ 13,000/- ✓
 40,000/- 11/11/08 ✓ 24,000/- 4/4/09 ✓
 23,000/- 15/11/08 ✓ 10,000/- 5/5/09 ✓
 10,000/- 29/11/08 ✓ 8,000/- 8/5/09 ✓
 11,000/- 4/12/08 ✓ 14,000/- ✓
 2,59,000/- ✓ 1,59,100 ✓
 21,831 ✓

(26)

R.K.M

15,000/- ✓
 15,000/- ✓
 15,000/- ✓
 45,000/- ✓
 25,000/- ✓ 1/7/08 ✓
 50,000/- ✓ 4/7/08 ✓
 35,000/- ✓ 5/7/08 ✓
 50,000/- ✓



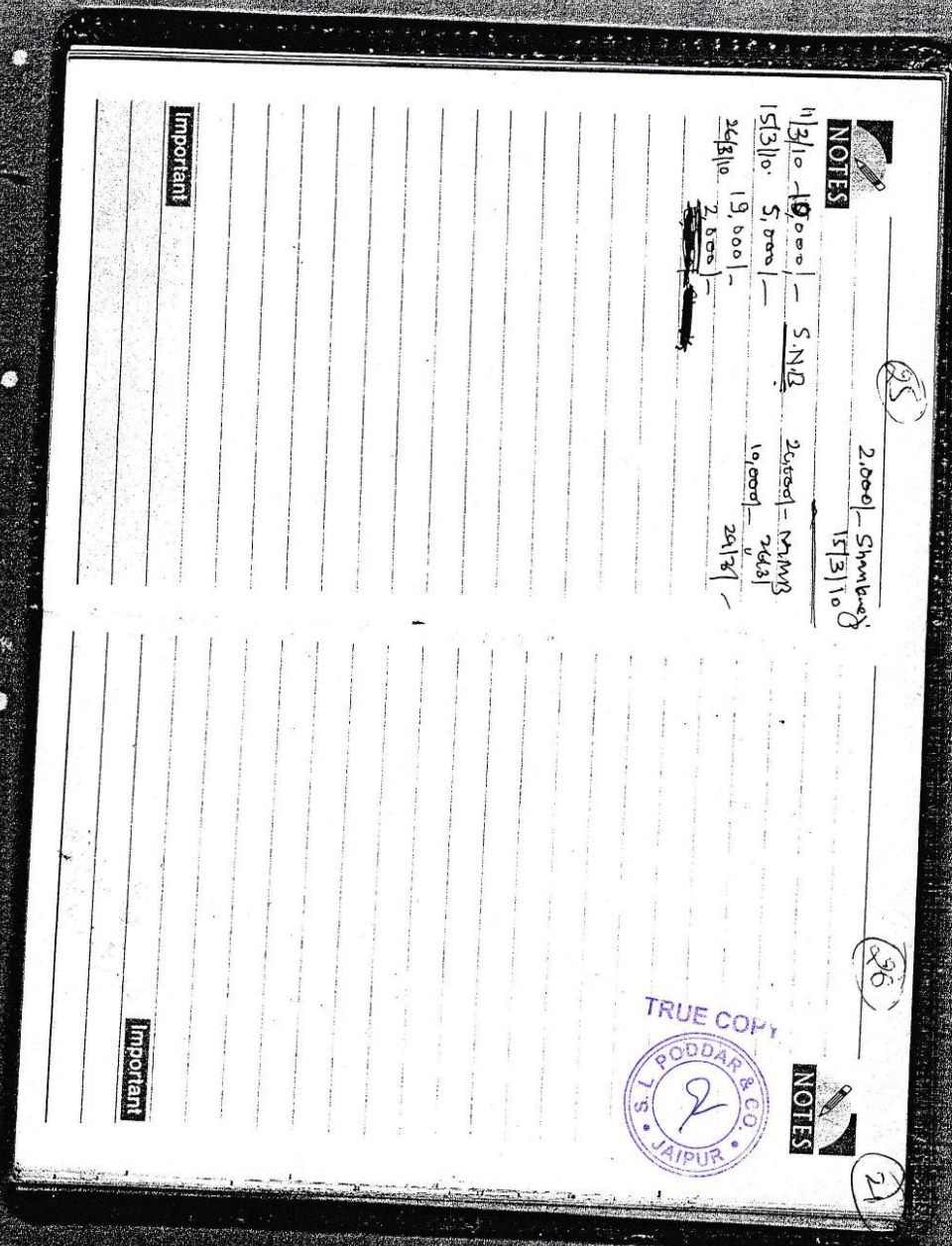
NOTES

23 &

(28)

10,000/- 28/5/08 ✓
 45,000/- 28/5/08 ✓
 6,000/- 12/6/08 ✓
 4,000/- 16/6/08 ✓
 4,000/- 24/6/08 ✓
 5,000/- 11/7/08 ✓
 5,000/- 6/7/08 ✓
 20,000/- 10/7/08 ✓
 5,000/- 2/11/08 ✓
 3,000/- 3/8/08 ✓
 10,000/- ✓
 30,000/- ✓
 5,000/- ✓
 10,000/- 24/11/08 ✓

16,000/- 13/8/08 ✓
 10,000/- 13/8/08 ✓
 13,350/- 24/8/08 ✓
 27,19 ✓
 8,12 ✓
 10/10 ✓
 27/19 ✓
 8/12 ✓
 10/10 ✓
 5,000/- 15/10/08 ✓
 1,000/- 15/10/08 ✓
 3,000/- 24/10/08 ✓



It is evident from the entries recorded in the seized material that all these entries are started from 31st December, 2007 onwards and subsequent entries in the year 2008, 2009 and 2010. In most of the entries specific name though the initials were mentioned and, therefore, these are not in the name of the assessee. Thus from the seized material which is referred by the AO in the reasons recorded, there is nothing to disclose any entry of payment of money by the assessee to Shri Madan Mohan Gupta during the year under consideration. Once the entries recorded in the seized material do not pertain to the year under consideration then the statement of Shri Madan Mohan Gupta cannot be relied upon without any corroborating evidence and specifically when the transaction of land is otherwise not in dispute as it was finally purchased by Shri Madan Mohan Gupta through his company, namely M/s. Kalyan Builtmart Pvt. Ltd. This fact is duly acknowledged by the AO even in the assessment order. It is pertinent to note that after the said land transaction at village Chainpura, Tehsil Sanganer, behind EP purchased in the name of M/s. Kalyan Builtmart Pvt. Ltd., Shri Madan Mohan Gupta and his wife Smt. Shashi Gupta sold the shares of the said company to Shri Navratan Kothari, Shri Vimal Chand Surana HUF and Shri Kaushal Chand Surana on 24.8.2006. Therefore, the entries recorded in the seized material do not match with the transaction of purchase with the land in question though in the name of M/s. Kalyan Builtmart Pvt. Ltd. as all these entries are in the subsequent years whereas the transaction of purchase of the said land in the name of M/s. Kalyan Builtmart Pvt. Ltd., the shares of the said company was subsequently sold to Shri Navratan Kothari, Shri Vimal Chand Surana HUF and Shri Kaushal Chand Surana. The transaction of purchase of the land in question by M/s.

Kalyan Builtmart Pvt. Ltd. and subsequent sale of the said company were completed much prior to the alleged transaction as recorded in the seized material. Therefore, without going into the issue whether these transactions are in the name of the assessee or not as recorded in the seized material, when these transactions do not match with the transaction of purchase and sale of land and further do not pertain to the year under consideration then there was no tangible material, rather the reason to belief that an income of Rs. 11.59 crores escaped assessment is contrary and inconsistent to the details as recorded in the seized material. The AO prior to issuing notice under section 148 has recorded the statement of the assessee and as per para 6 of the assessment order the AO has given the basis of the statement of the assessee wherein the assessee has specifically denied any land transaction as alleged by the AO. The assessee has also denied any relation with M/s. Kalyan Builtmart Pvt. Ltd. or has given any money or loan to the said company. The amount paid through cheque to Shri Madan Mohan Gupta also does not pertain to the year under consideration and, therefore, when the payment through cheque was at different point of time and is not a payment made to the land owners then on the basis of material which was available before the AO, it cannot be said that an income of Rs. 11.59 crores has escaped assessment for the year under consideration. Further, the AO while framing the assessment has made an addition of Rs. 1,24,99,000/- on protective basis which itself manifest and established the fact that the reasons to form the belief by the AO for reopening of the assessment is not based on any tangible material to show that the income assessable to tax has escaped assessment. Thus it is clear that the AO has formed the belief only on presumption and not on the basis of material as referred in the reasons. Therefore,

the reopening of the assessment merely on the basis of suspicion and presumption which is not supported by even the material as referred in the reasons recorded and available with the AO then the reopening of the assessment is not valid and liable to be quashed. We accordingly quash the reopening of the assessment as invalid and consequently the reassessment framed is also set aside being not sustainable. Since we have quashed the reopening of the assessment being not valid, therefore, the other grounds raised by the assessee as well as the cross appeal of the revenue have become infructuous and are dismissed.

5. In the result, appeal of the assessee is allowed and appeal of the revenue is dismissed.

ITA NO. 408/JP/2017 (ASSESSEE)

ITA NO. 520/JP/2017 (REVENUE)

6. The assessee as well as the revenue have raised the following grounds :

ITA NO. 408/JP/2017 (Assessee):

- " 1. Under the facts and circumstances of the case the learned CIT (A) has erred in confirming the action of the learned Assessing Officer in passing the order u/s 143(3)/153A of the Income Tax Act, 1961 which is void ab-initio deserves to be quashed.
2. Under the facts and circumstances of the case the learned CIT (A) has erred in making a separate addition to Rs. 50,00,000/- u/s 68 of the Income Tax Act, 1961 on substantive basis on the basis of same papers on which earlier protective addition was made.
3. Under the facts and circumstances of the case the learned CIT (A) has erred in giving the finding that the land deal was made by Shri Rajendra Kumar Jain and he is the person who purchased the land and sold to Navratan Kothari and Vimal

Chand Surana and Shri Madan Mohan Gupta was only name lender.

4. The assessee craves your indulgence to add, amend or alter all or any grounds of appeal before or at the time of hearing.

ITA NO. 520/JP/2017 (Revenue):

- “ 1. Whether on the facts and in the circumstances of the case, the CIT (A) was right in not sustaining the addition of Rs. 7,19,50,000/- made by the AO on protective basis or, addition of Rs. 5,55,84,000/- on substantive basis as recommended by the AO in the subsequent remand report.
2. The appellant craves, leave or reserves the right to amend modify, alter, add or forego any ground(s) of appeal at any time before or during the hearing of this appeal.”

Ground No. 1 of assessee's appeal is regarding validity of assessment framed under section 153A read with section 143(3) of the IT Act.

7. Pursuant to the search under section 132 in case of assessee and its associate group on 23rd May, 2013, the AO issued notice under section 153A on 30th September, 2014. In response to the notice issued under section 153A, the assessee filed his return of income on 15.11.2014 declaring total income of Rs. 2,53,87,070/- which is the same as declared in the original return of income filed under section 139 on 24.12.2009. The AO stated in the order that during the search and seizure action on 23rd May, 2013 incriminating materials were found in the shape of papers/bills/vouchers/diary/register which were seized and annexed as Annexure 'A' Exhibit 1-8. The AO further noted that as per the transactions recorded in the seized papers to the tune of Rs. 12,30,84,000/-, a sum of Rs. 7,19,50,000/-

relates to the assessment year 2009-10 and Rs. 3,86,35,000/- related to assessment year 2010-11. Since these transactions were not recorded in the books of the assessee but found in the papers and seized material, therefore, the AO issued a show cause to the assessee as to why the amount of Rs. 7,19,50,000/- should not be treated as income for the assessment year 2009-10. The assessee filed his reply and objected to the addition. The assessee denied having any connection with the alleged land transaction as found recorded in the diary seized from the premises of Shri Madan Mohan Gupta. Accordingly, the AO after considering the facts, substantive addition of the amount has been made in the hands of Shri Madan Mohan Gupta and protective addition was made in the hands of the assessee. On appeal, the Id. CIT (A) has converted the protective addition into substantive addition in the hands of the assessee.

8. Before us, the Id. A/R of the assessee has submitted that no incriminating material/document was found during the search from the assessee or his premises. The alleged seized material was found from the residential premises of Shri Madan Mohan Gupta and, therefore, the same cannot be a basis for making the reassessment under section 153A. He has further contended that there is no satisfaction recorded either by the AO having jurisdiction over Shri Madan Mohan Gupta or by the AO of the assessee for initiating the proceedings under section 153A. Thus the Id. A/R has submitted that the assessment framed under section 153A is invalid when there was no material either found or seized from the possession of the assessee and the material found and seized from the possession of Shri Madan Mohan Gupta is not related to the assessee or disclosed any undisclosed income belonging to the assessee. This fact is corroborated by the finding of the AO

in the assessment order when only a protective addition was made in the hands of the assessee. The Id. A/R has further submitted that the assessment for the year under consideration was not pending as on the date of search and therefore, in the absence of any incriminating material, no addition can be made in the reassessment proceedings under section 153A of the Act. The Id. A/R has further pointed out that though the Id. CIT (A) in his order finally decided the appeal of the assessee and deleted the protective addition made by the AO of Rs. 7,19,50,000/-, however, the Id. CIT (A) has finally sustained the addition of Rs. 50,00,000/- on substantive basis which has no basis when the addition made by the AO was not found to be sustainable. Thus the Id. A/R has submitted that the assessment order completed under section 153A is not sustainable in law and is liable to be quashed.

8.1. On the other hand, the Id. D/R has vehemently opposed the contention of the assessee and submitted that once a search is carried out in the case of the assessee under section 132 of the Act, the AO is bound to assess or reassess the income of the assessee for 6 assessment years immediately preceding to the year in which search is carried out. He has further contended that when the AO has referred various seized documents and particularly Exhibits and Annexures as referred in the assessment order then it is not the case of incriminating material found or seized during the search and seizure action. He has relied upon the order of the AO. He has further submitted that the Id. CIT (A) is not justified in deleting the addition made by the AO and sustaining only Rs. 50,00,000/-. He has further submitted that in the remand report, the AO has clearly made out an addition of Rs. 5,55,84,000/- and recommended the same for substantive basis.

9. We have considered the rival submissions as well as relevant material on record. There is no dispute that a search and seizure action under section 132 was carried out in the case of the assessee and group/associates of the assessee. Therefore, when the search action was taken in the case of the assessee, then as per the provisions of section 153A the AO is bound to assess or reassess the income of the assessee for 6 assessment years immediately preceding the assessment year relevant to the previous year in which search was conducted or requisition was made. There is no dispute that the assessment year under consideration is falling within the 6 assessment years as provided under section 153A and, therefore, the initiation of proceedings under section 153A are valid and proper. However, the question arises whether the AO is justified in making the addition in the reassessment proceedings in the absence of any incriminating material. We have discussed this issue of nature of incriminating material as alleged by the AO while deciding the cross appeals for the assessment year 2007-08 and found that the entire material found and seized from the residential and business premises of Shri Madan Mohan Gupta does not reveal any transaction by the assessee for purchase of land in question. Further the transaction as recorded in the seized material clearly reveals that there is no connection of these entries made in the diary found and seized during the course of search and seizure action and the actual transaction of purchase of land in the name of Shri Kalyan buildmart Pvt. Ltd. owned by Shri Madan Mohan Gupta and his wife Smt. Shashi Kala Gupta. While deciding these appeals for the assessment year 2007-08, we have considered all these details and facts as emerging from the record as well as from the seized material and found that there is no direct connection between the transactions found in the seized diary and

the transaction of purchase and sale of the land at village Chainpura behind EP, Tehsil Sanganer, Jaipur. Even the said company Shri Kalyan Buildmart Pvt. Ltd. was subsequently purchased by Shri Navratan Kothari, Shri Vimal Chand Surana HUF and Shri Kaushal Chand Surana by way of transfer of shares by Shri Madan Mohan Gupta and his wife. Therefore, from the seized material there is nothing to indicate or disclose any involvement of the assessee directly or indirectly in the transaction of purchase of the land in question and subsequently the company Shri Kalyan Buildmart Pvt. Ltd. was transferred to Shri Navratan Kothari, Shri Vimal Chand Surana HUF and Shri Kaushal Chand Surana. The ownership of the said company was not disputed as owned by Shri Madan Mohan Gupta and his wife and subsequently was transferred to these persons, namely, Shri Navratan Kothari and others. Even in the transaction of transfer of the said company, the role of the assessee was not visible and found much less the purchase and sale of the land in question. Therefore, in the absence of any incriminating material which led to disclosure of any undisclosed income belonging to the assessee, the AO cannot reassess the income of the assessee more than the income which was assessed on the original return of income. Accordingly, we will deal with this issue while considering the ground no. 2 of the assessee's appeal and the ground raised by the revenue in the cross appeal.

10. **Ground no. 2 & 3** of the assessee and ground of the revenue are regarding the addition of Rs. 50,00,000/- sustained by Id. CIT (A) under section 68 of the IT Act. This ground is common as the revenue has also challenged the impugned order of the Id. CIT (A) to the extent of the addition deleted by Id. CIT (A). The Id. A/R of the assessee has submitted that the additions sustained by Id. CIT (A) is based on

the wrong presumption and assumption of the fact as there was no such addition made by the AO in the assessment order whereas the addition made by the AO on protective basis has been deleted by the Id. CIT (A) and, therefore, the subsequent addition of Rs. 50,00,000/- is not sustainable as it is not based on any material or evidence. The Id. CIT (A) in the detailed discussion while deciding the issue has given the finding in favour of the assessee whereas only in a table as at page no. 63 of the impugned order the Id. CIT (A) has sustained an addition of Rs. 50,00,000/- under section 68. Thus the Id. A/R has submitted that the assessment framed under section 153A in the absence of any incriminating material is not sustainable when the addition made by the Id. CIT (A) is not supported or substantiated by any incriminating material.

10.1. On the other hand, the Id. D/R has relied upon the order of the AO as well as the remand report of the AO and submitted that the AO has clearly made out a case of addition of Rs. 5,55,84,000/- on substantive basis in the hands of the assessee.

11. At the outset, we note that the Id. CIT (A) has considered and decided this issue in para 3.2.3 at page 85 & 86 as under :-

" 3.2.3. I have duly considered assessee's submission and carefully gone through assessment order. I have also taken a note of factual matrix of the case as well as applicable case laws relied upon. On perusal of assessment order, it is seen that AO has made protective addition of Rs. 7,19,50,000/- on the basis of notings of following impugned seized documents pertaining to Chainpura land dealings and they were seized/impounded from the possession of Sh. Madan Mohan Gupta :

Details of incriminating documents: Land transaction of Chainpura behind EP Jaipur.

S.No.	Annexure and Exhibit No.	Pg No. of the seized document	Found/Seized from/impounded
1.	Annex-A Exhibit-1	15 to 24, 27, 28, 43, 44, 69 to 74	Residential premise
2.	Annex-A Exhibit-2	47 and back side of 48, 50 to 54	Residential premise
3.	Annex-A Exhibit-5	1 to 77	Residential premise
4.	Annex-AS Exhibit-1	1 to 3, 7, 9, 10	Impounded from Office premise during survey operation.

Further, it is pertinent to note that on the basis of notings recorded in the aforementioned seized documents, AO has made substantive addition of Rs. 7,19,50,000/- in the hands of Sh Madan Mohan Gupta.

In this group case, AO u/s 250(4) of the Act has been directed to carry out Inquiry/Investigation and AO submitted a detailed remand report on 20.03.2017. Pursuant to the receipt of remand report a detailed show cause letter dt. 21.03.2017 & enhancement notice u/s 251(2) of the Act vide letter dt. 22.03.2017 have been given to the assessee. In compliance assessee filed his detailed reply which have been duly considered. On perusal of assessment order it is seen that the said protective addition made by the AO, pertains to land dealings of chainpura behind EP. As per working given in para no. 2.1.8.5, following additions are required to be made in case of followings in AYs as under :

AY	Name	Addition required to be made	Under sec./nature of addition
2008-09	Navrattan Kothari	Rs. 15,87,19,309/-	Undisclosed investment made in cash u/s 68
2008-09	Vimal Chand Surana HUF	Rs. 2,64,66,445/-	Undisclosed investment made in cash u/s 68
2008-09	Kaushal Chand Surana*	Rs. 1,32,13,382/-	Undisclosed investment made in cash u/s 68
2008-09	Rajendra Kr Jain*	Rs. 3,20,00,000/-	Undisclosed investment made in cash u/s 68
2008-09	Rajendra Kr. Jain*	Rs. 8,32,55,232/-	Undisclosed business profit.
2007-08	Rajendra Kr Jain	Rs. 1,13,00,000/-	Undisclosed investment made in cash u/s 68

(Direction for AO u/s 150(1) of the Act to re-open u/s 147 of the of the case for Sh. Rajendra Kr. Jain and Sh Kaushal Chand Surana for AY 08-09)

In case of Chainpura land dealings, no addition either on substantive basis or protective basis has been proposed in the hands of Shri Madan Mohan Gupta & M/s. Shri Kalyan Buildmart Pvt. Ltd. Further, it is also pertinent to mention here that, no protective addition of Rs. 7,19,50,000/- has been proposed in the remand report. Further, as per detailed working given in para no. 2.1.8.5 for issue no. 1, 2, 3 & 4 where no separate addition of Rs. 7,19,50,000/- for the AY 2009-10 on protective basis in assessee hands has been proposed accordingly, the same is deleted. Assessee gets relief in Gr No. 2.

Thus it is clear that the Id. CIT (A) has given the finding that the AO has made protective addition of Rs. 7,19,50,000/- on the basis of notings in the diary pertaining to the Chainpura land dealing and the substantive addition of the said amount was made in the hands of Shri Madan Mohan Gupta. The Id. CIT (A) has since deleted the addition made on substantive basis in the hands of Shri Madan Mohan Gupta and M/s. Shri Kalyan Buildmart Pvt. Ltd., consequently the protective addition made in the hands of the assessee is deleted. However, the Id. CIT (A) has further proceeded to enhance the assessment on the basis of the remand report of the AO. It is pertinent to note that undisputedly the original assessment in the case of the assessee was completed under section 143(3) prior to the date of search and, therefore, the assessment was not pending as on the date of search. Hence no addition can be made in the proceedings under section 153A in the absence of any incriminating material found and seized during the search and seizure action under section 132. The addition proposed by the Id. CIT (A) as on the basis of the remand report in view of the fact that the Id. CIT (A) himself has not accepted the seized material which was the basis of the protective addition, the addition proposed by the Id. CIT (A) in the appellate proceedings is not permissible under the provisions of law. The Hon'ble Delhi High Court in the case of CIT vs. Kabul Chawla, 281 CTR 45

(Delhi) as well as the Hon'ble Jurisdictional High Court in the case of Jai Steel (India) vs. ACIT 259 CTR 281 (Raj.) has considered this issue of reassessment of income under section 153A in the absence of incriminating material. The Coordinate Bench of this Tribunal in the case of M/s. Gorbandh Marbles Pvt. Ltd. vs. DCIT in ITA No.605/JP/2017 vide order dated 27.12.2017 has considered and decided an identical issue in para 5 as under :-

" 5. We have considered the rival submissions as well as relevant material on record. The assessee filed its return of income for the year under consideration on 24.09.2010 and therefore, undisputedly the time limit for issuing the notice u/s 143(2) on the return of income filed u/s 139(1) expired on 30.09.2011. A search in the case of the assessee was conducted on 17.07.2013 and as on the date of search the assessment for the year under consideration was not pending. Thus, it is clear that the notice issued by the AO u/s 153A consequent to the search carried out u/s 132 is for reassessment of income of the assessee. We further note that in the course of assessment proceedings the Assessing Officer has accepted the income declared by the assessee in the original return of income except a disallowance of Rs. 26,183/- on account of employees contribution to ESI and PF. The entire assessment order is silent about any of the incriminating document found or seized during the course of search and seizure action and therefore, it is clear that the assessment framed by the Assessing Officer u/s 153A for the assessment year under consideration is not based on any document found or seized during the course of search or requisition made. This fact has not been disputed by the Revenue that the assessment for the year under consideration u/s 153A r.w.s. 143(3) is not based on any incriminating document found during the course of search. This issue has been considered in a series of decisions of the Hon'ble High Courts as relied upon by the

assessee. In the latest decision in case of Pr. CIT vs. Meeta Gutgutia (supra) the Hon'ble Delhi High Court has again considered and analyzed the relevant provisions of the Act as well all the decisions on this point in para 57 to 72 as under:-

"57. The question whether unearthing of incriminating material relating to any one of the AYs could justify the re-opening of the assessment for all the earlier AYs was considered both in Anil Kumar Bhatia (supra) and Chetan Das Lachman Das (supra). Incidentally, both these decisions were discussed threadbare in the decision of this Court in Kabul Chawla (supra). As far as Anil Kumar Bhatia (supra) was concerned, the Court in paragraph 24 of that decision noted that "we are not concerned with a case where no incriminating material was found during the search conducted under Section 132 of the Act. We therefore express no opinion as to whether Section 153A can be invoked even under such situation". That question was, therefore, left open. As far as Chetan Das Lachman Das (supra) is concerned, in para 11 of the decision it was observed:

"11. Section 153A (1) (b) provides for the assessment or reassessment of the total income of the six assessment years immediately preceding the assessment year relevant to the previous year in which the search took place. To repeat, there is no condition in this Section that additions should be strictly made on the basis of evidence found in the course of the search or other post-search material or Information available with the Assessing Officer which can be related to the evidence found. This, however, does not mean that the assessment under Section 153A can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."

58. *In Kabul Chawla (supra), the Court discussed the decision in Filatex India Ltd. (supra) as well as the above two decisions and observed as under:*

"31. What distinguishes the decisions both in CIT v. Chetan Das Lachman Das (supra), and Filatex India Ltd. v. CIT-IV (supra) in their application to the present case is that in both the said cases there was some material unearthed during the search, whereas in the present case there admittedly was none. Secondly, it is plain from a careful reading of the said two decisions that they do not hold that additions can be validly made to income forming the subject matter of completed assessments prior to the

search even if no incriminating material whatsoever was unearthed during the search.

32. Recently by its order dated 6th July 2015 in ITA No. 369 of 2015 (Pr. Commissioner of Income Tax v. Kurele Paper Mills P. Ltd.), this Court declined to frame a question of law in a case where, in the absence of any incriminating material being found during the search under Section 132 of the Act, the Revenue sought to justify initiation of proceedings under Section 153A of the Act and make an addition under Section 68 of the Act on bogus share capital gain. The order of the CIT (A), affirmed by the ITAT, deleting the addition, was not interfered with."

59. *In Kabul Chawla (supra), the Court referred to the decision of the Rajasthan High Court in Jai Steel (India) v. Asstt. CIT [2013] 36 taxmann.com 523/219 Taxman 223. The said part of the decision in Kabul Chawla (supra) in paras 33 and 34 reads as under:*

'33. The decision of the Rajasthan High Court in Jai Steel (India), Jodhpur v. ACIT (supra) involved a case where certain books of accounts and other documents that had not been produced in the course of original assessment were found in the course of search. It was held where undisclosed income or undisclosed property has been found as a consequence of the search, the same would also be taken into consideration while computing the total income under Section 153A of the Act. The Court then explained as under:

"22. In the firm opinion of this Court from a plain reading of the provision along with the purpose and purport of the said provision, which is intricately linked with search and requisition under Sections 132 and 132A of the Act, it is apparent that:

- (a) the assessments or reassessments, which stand abated in terms of II proviso to Section 153A of the Act, the AO acts under his original jurisdiction, for which, assessments have to be made;*
- (b) regarding other cases, the addition to the income that has already been assessed, the assessment will be made on the basis of incriminating material; and*
- (c) in absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made."*

34. The argument of the Revenue that the AO was free to disturb income de hors the incriminating material while making assessment under Section 153A of the Act was specifically rejected by the Court on the ground that it was "not borne out from the scheme of the said provision" which was in the context of search and/or requisition. The Court also explained the purport of the words "assess" and "reassess", which have been found at more than one place in Section 153A of the Act as under:

"26. The plea raised on behalf of the assessee that as the first proviso provides for assessment or reassessment of the total income in respect of each assessment year falling within the six assessment years, is merely reading the said provision in isolation and not in the context of the entire section. The words 'assess' or 'reassess'-have been used at more than one place in the Section and a harmonious construction of the entire provision would lead to an irresistible conclusion that the word assess has been used in the context of an abated proceedings and reassess has been used for completed assessment proceedings, which would not abate as they are not pending on the date of initiation of the search or making of requisition and which would also necessarily support the interpretation that for the completed assessments, the same can be tinkered only based on the incriminating material found during the course of search or requisition of documents."

60. In *Kabul Chawla (supra)*, the Court also took note of the decision of the Bombay High Court in *CIT v. Continental Warehousing Corpn (Nhava Sheva) Ltd.* [[2015\] 58 taxmann.com 78/232 Taxman 270/374 ITR 645 \(Bom.\)](#) which accepted the plea that if no incriminating material was found during the course of search in respect of an issue, then no additions in respect of any issue can be made to the assessment under Section 153A and 153C of the Act. The legal position was thereafter summarized in *Kabul Chawla (supra)* as under:

"37. On a conspectus of Section 153A(1) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:

- i. Once a search takes place under Section 132 of the Act, notice under Section 153 A (1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.

- ii. *Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise.*
- iii. *The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the 'total income' of the. aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".*
- iv. *Although Section 153 A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."*
- v. *In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to completed assessment proceedings.*
- vi. *Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.*
- vii. *Completed assessments can be interfered with by the AO while making the assessment under Section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment."*

61. *It appears that a number of High Courts have concurred with the decision of this Court in Kabul Chawla (supra) beginning with the Gujarat High Court in Saumya Construction (P.) Ltd. (supra). There, a search and seizure operation was carried out on 7th October, 2009 and an assessment came to be framed under Section 143(3) read with Section 153A(1)(b) in determining the total income of the Assessee of Rs. 14.5 crores against declared income of Rs. 3.44 crores. The ITAT deleted the additions on the ground that it was not based on any incriminating material found during the course of the search in respect of AYs under consideration i.e., AY 2006-07. The Gujarat High Court referred to the decision in Kabul Chawla(supra), of the Rajasthan High Court in Jai Steel (India) (supra) and one earlier decision of the Gujarat High Court itself. It explained in para 15 and 16 as under:*

'15. On a plain reading of section 153A of the Act, it is evident that the trigger point for exercise of powers thereunder is a search under section 132 or a requisition under section 132A of the Act. Once a search or requisition is made, a mandate is cast upon the Assessing Officer to issue notice under section 153A of the Act to the person, requiring him to furnish the return of income in respect of each assessment year falling within six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made and assess or reassess the same. Since the assessment under section 153A of the Act is linked with search and requisition under sections 132 and 132A of the Act, it is evident that the object of the section is to bring to tax the undisclosed income which is found during the course of or pursuant to the search or requisition. However, instead of the earlier regime of block assessment whereby, it was only the undisclosed income of the block period that was assessed, section 153A of the Act seeks to assess the total income for the assessment year, which is clear from the first proviso thereto which provides that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years. The second proviso makes the intention of the Legislature clear as the same provides that assessment or reassessment, if any, relating to the six assessment years referred to in the sub-section pending on the date of initiation of search under section 132 or requisition under section 132A, as the case may be, shall abate. Sub-section (2) of section 153A of the Act provides that if any proceeding or any order of assessment or reassessment made under sub-section (1) is annulled in appeal or any other legal provision, then the assessment or reassessment relating to any assessment year which had abated under the second proviso would stand revived. The proviso thereto says that such revival

shall cease to have effect if such order of annulment is set aside. Thus, any proceeding of assessment or reassessment falling within the six assessment years prior to the search or requisition stands abated and the total income of the assessee is required to be determined under section 153A of the Act. Similarly, sub-section (2) provides for revival of any assessment or reassessment which stood abated, if any proceeding or any order of assessment or reassessment made under section 153A of the Act is annulled in appeal or any other proceeding.

16. Section 153A bears the heading "Assessment in case of search or requisition". It is "well settled as held by the Supreme Court in a catena of decisions that the heading or the Section can be regarded as a key to the interpretation of the operative portion of the section and if there is no ambiguity in the language or if it is plain and clear, then the heading used in the section strengthens that meaning. From the heading of section 153. the intention of the Legislature is clear, viz., to provide for assessment in case of search and requisition. When the very purpose of the provision is to make assessment In case of search or requisition, it goes without saying that the assessment has to have relation to the search or requisition, in other words, the assessment should connected With something round during the search or requisition viz., incriminating material which reveals undisclosed income. Thus, while in view of the mandate of sub-section (1) of section 153A of the Act, in every case where there is a search or requisition, the Assessing Officer is obliged to issue notice to such person to furnish returns of income for the six years preceding the assessment year relevant to the previous year in which the search is conducted or requisition is made, any addition' or disallowance can be made only on the basis of material collected during the search or requisition, in case no incriminating material is found, as held by the Rajasthan High Court in the case of Jai Steel (India) v. Asst. CIT (supra), the earlier assessment would have to be reiterated, in case where pending assessments have abated, the Assessing Officer can pass assessment orders for each of the six years determining the total income of the assessee which would include income declared in the returns, if any, furnished by the assessee as well as undisclosed income, if any, unearthed during the search or requisition. In case where a pending reassessment under section 147 of the Act has abated, needless to state that the scope and ambit of the assessment would include any order which the Assessing Officer could have passed under section 147 of the Act as well as under section 153A of the Act.

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19. *On behalf of the appellant, it has been contended that if any incriminating material is found, notwithstanding that in relation to the year under consideration, no incriminating material is found, it would be permissible to make additions and disallowance in respect of an the six assessment years. In the opinion of this court, the said contention does not merit acceptance, inasmuch as. the assessment in respect of each of the six assessment years is a separate and distinct assessment. Under section 153A of the Act, assessment has to be made in relation to the search or requisition, namely, in relation to material disclosed during the search or requisition. If in relation to any assessment year, no incriminating material is found, no addition or disallowance can be made in relation to that assessment year in exercise of powers under section 153A of the Act and the earlier assessment shall have to be reiterated. In this regard, this court is in complete agreement with the view adopted by the Rajasthan High Court in the case of Jai Steel (India) v. Asst. CIT (supra). Besides, as rightly pointed out by the learned counsel for the respondent, the controversy involved in the present case stands concluded by the decision of this court In the case of CIT v. Jayaben Ratilal Sorathia (supra) wherein it has been held that while it cannot be disputed that considering section 153A of the Act, the Assessing Officer can reopen and/or assess the return with respect to six preceding years ; however, there must be some incriminating material available with the Assessing Officer with respect to the sale transactions in the particular assessment year.'*

62. *Subsequently, in Devangi alias Rupa (supra), another Bench of the Gujarat High Court reiterated the above legal position following its earlier decision in Saumya Construction (P.) Ltd. (supra) and of this Court in Kabul Chawla (supra). As far as Karnataka High Court is concerned, it has in IBC Knowledge Park (P.) Ltd. (supra) followed the decision of this Court in Kabul Chawla (supra) and held that there had to be incriminating material qua each of the AYs in which additions were sought to be made pursuant to search and seizure operation. The Calcutta High Court in Salasar Stock Broking Ltd. (supra), too, followed the decision of this Court in Kabul Chawla (supra). In Gurinder Singh Bawa (supra), the Bombay High Court held that:*

"6. once an assessment has attained finality for a particular year, i.e., it is not pending then the same cannot be subject to tax in proceedings under section 153A of the Act. This of course would not apply if incriminating materials are gathered in the course of search or during proceedings under section 153A of the Act which are contrary to and/or not disclosed during the regular assessment proceedings."

63. *Even this Court has in Mahesh Kumar Gupta (supra) and Ram Avtar Verma (supra) followed the decision in Kabul Chawla (supra). The decision of this Court in Kurele Paper Mills (P.) Ltd. (supra) which was referred to in Kabul Chawla (supra) has been affirmed by the Supreme Court by the dismissal of the Revenue's SLP on 7th December, 2015.*

The decision in Dayawanti Gupta

64. *That brings us to the decision in Smt. Dayawanti Gupta (supra). As rightly pointed out by Mr. Kaushik, learned counsel appearing for the Respondent, that there are several distinguishing features in that case which makes its ratio inapplicable to the facts of the present case. In the first place, the Assesseees there were engaged in the business of Pan Masala and Gutkha etc. The answers given to questions posed to the Assessee in the course of search and survey proceedings in that case bring out the points of distinction. In the first place, it was stated that the statement recorded was under Section 132(4) and not under Section 133A. It was a statement by the Assessee himself. In response to question no. 7 whether all the purchases made by the family firms, were entered in the regular books of account, the answer was:*

"We and our family firms namely M/s. Assam Supari Traders and M/s. Balaji Perfumes generally try to record the transactions made in respect of purchase, manufacturing and sales in our regular books of accounts but it is also fact that some time due to some factors like inability of accountant, our busy schedule and some family problems, various purchases and sales of Supari, Gutka and other items dealt by our firms is not entered and shown in the regular books of accounts maintained by our firms."

65. *Therefore, there was a clear admission by the Assesseees in Smt. Dayawanti Gupta (supra) there that they were not maintaining regular books of accounts and the transactions were not recorded therein.*

66. *Further, in answer to Question No. 11, the Assessee in Smt. Dayawanti Gupta (supra) was confronted with certain documents seized during the search. The answer was categorical and reads thus:*

"Ans:- I hereby admit that these papers also contend details of various transactions include purchase/sales/manufacturing trading of Gutkha, Supari made in cash outside Books of accounts and these are actually unaccounted transactions made by our two firms namely M/s. Asom Trading and M/s. Balaji Perfumes."

67. *By contrast, there is no such statement in the present case which can be said to constitute an admission by the Assessee of a failure to record any transaction in the accounts of the Assessee for the AYs in question. On the contrary, the Assessee herein stated that, he is regularly maintaining the books of accounts. The disclosure made in the sum of Rs. 1.10 crores was only for the year of search and not for the earlier years. As already noticed, the books of accounts maintained by the Assessee in the present case have been accepted by the AO. In response to question No. 16 posed to Mr. Pawan Gadia, he stated that there was no possibility of manipulation of the accounts. In Smt. Dayawanti Gupta (supra), by contrast, there was a chart prepared confirming that there had been a year-wise non-recording of transactions. In Smt. Dayawanti Gupta (supra), on the basis of material recovered during search, the additions which were made for all the years whereas additions in the present case were made by the AO only for AY 2004-05 and not any of the other years. Even the additions made for AYs 2004-05 were subsequently deleted by the CIT (A), which order was affirmed by the ITAT. Even the Revenue has challenged only two of such deletions in ITA No. 306/2017.*

68. *In para 23 of the decision in Smt. Dayawanti Gupta (supra), it was observed as under:*

"23. This court is of opinion that the ITAT's findings do not reveal any fundamental error, calling for correction. The inferences drawn in respect of undeclared income were premised on the materials found as well as the statements recorded by the assesseees. These additions therefore were not baseless. Given that the assessing authorities in such cases have to draw inferences, because of the nature of the materials - since they could be scanty (as one habitually concealing income or indulging in clandestine operations can hardly be expected to maintain meticulous books or records for long and in all probability be anxious to do away with such evidence at the shortest possibility) the element of guess work is to have some reasonable nexus with the statements recorded and documents seized. In tills case, the differences of opinion between the CIT (A) on the one hand and the AO and ITAT on the other cannot be the sole basis for disagreeing with what is essentially a factual surmise that is logical and plausible. These findings do not call for interference. The second question of law is answered again in favour of the revenue and against the assessee."

69. *What weighed with the Court in the above decision was the "habitual concealing of income and indulging in clandestine operations" and that a person indulging in such activities "can hardly be accepted to maintain*

meticulous books or records for long." These factors are absent in the present case. There was no justification at all for the AO to proceed on surmises and estimates without there being any incriminating material qua the AY for which he sought to make additions of franchisee commission.

70. *The above distinguishing factors in Smt. Dayawanti Gupta (supra), therefore, do not detract from the settled legal position in Kabul Chawla (supra) which has been followed not only by this Court in its subsequent decisions but also by several other High Courts.*

71. *For all of the aforementioned reasons, the Court is of the view that the ITAT was justified in holding that the invocation of Section 153A by the Revenue for the AYs 2000-01 to 2003-04 was without any legal basis as there was no incriminating material qua each of those AYs.*

Conclusion

72. *To conclude:*

- (i) Question (i) is answered in the negative i.e., in favour of the Assessee and against the Revenue. It is held that in the facts and circumstances, the Revenue was not justified in invoking Section 153A of the Act against the Assessee in relation to AYs 2000-01 to AYs 2003-04?*
- (ii) Question (ii) is answered in the affirmative i.e., in favour of the Assessee and against the Revenue. It is held that with reference to AY 2004-05, the ITAT was correct in confirming the orders of the CIT (A) to the extent it deleted the additions made by the AO to the taxable income of the Assessee of franchise commission in the sum of Rs. 88 lakhs and rent payment for the sum of Rs. 13.79 lakhs?"*

Accordingly, in view of the facts and circumstances of the case that the assessment in question was framed u/s 153A is not based on any incriminating material found or seized and therefore, the addition made by the AO of Rs. 26,183/- on account of employees Contribution to ESI and PF is not justified and the same is deleted by following decisions of Delhi High Court in case Pr. CIT vs. Meeta Gutgutia (supra)."

Therefore, when the addition is not based on the seized material then the Id. CIT (A) has no jurisdiction even having concurrence power of the AO to make any addition in the assessment framed under section 153A. Accordingly, the addition made by the Id. CIT (A) of Rs. 50,00,000/- is not sustainable and according deleted.

12. As regards the issue raised by the revenue in the cross appeal, there is no dispute that the AO made only a protective addition in the hands of the assessee and, therefore, the AO cannot go beyond the assessment order. The revenue is seeking the addition on the basis of the remand report which is not the case of the AO in the assessment passed under section 153A. Therefore, applying the same principle of addition without any incriminating material disclosing the income of the assessee, we do not find any merit or substance in the appeal filed by the revenue. The same is dismissed.

13. In the result, appeal of the assessee is partly allowed and appeal of the revenue is dismissed.

ITA NO. 294/JP/2017 (ASSESSEE)
ITA NO. 521/JP/2017 (REVENUE)

14. The assessee and the revenue has raised the respective grounds as under :-

ITA No. 294/JP/2017 (Assessee)

- “ 1. Under the facts and circumstances of the case the learned CIT (A) has erred confirming the order passed by the learned Assessing Officer u/s 143(3)/153A of the Income Tax Act, 1961 which is void ab-initio deserves to be quashed.
2. Under the facts and circumstances of the case the learned CIT (A) has erred in confirming the addition of Rs. 1,01,99,728/- (substantive basis) on the basis of page no. 57 pertains to Jamna Vihar, Teelawala property seized from residential premises of Shri Madan Mohan Gupta whereas the property belongs to M/s. Hemang Construction Pvt. Ltd.

3. Under the facts and circumstances of the case the learned CIT (A) has erred in confirming the addition of Rs. 9,00,000/ (substantive basis) on the basis of page no. 64 of annexure-A exhibit-1 pertains to Jamna Vihar, Teelawala property seized from residential premises of Shri Madan Mohan Gupta.
4. Under the facts and circumstances of the case the learned CIT (A) has erred in giving the finding that the land deal was made by Shri Rajendra Kumar Jain and he is the person who purchased the land and sold to Navratan Kothari and Vimal Chand Surana and Shri Madan Mohan Gupta was only name lender.
5. The assessee craves your indulgence to add, amend or alter all or any grounds of appeal before or at the time of hearing."

ITA No. 521/JP/2017 (Revenue) :

- " 1. Whether on the facts and in the circumstances of the case the CIT (A) was right in deleting the protective addition of Rs. 3,86,35,000/- made by the AO on account of undisclosed investment quantified on the basis of seized documents when the substantive addition made in the hands of Sh Madan Mohan Gupta has also been deleted by the Id. CIT (A) in a separate order.
2. The Appellant crave, leave or reserves the right to amend modify, alter, add or forego any ground(s) of appeal at any time before or during the hearing of this appeal.

15. **Ground No. 1** is regarding validity of assessment passed under section 153A read with section 143(3). This issue is common as raised by the assessee for the assessment year 2009-10. In view of our finding on this issue for the assessment year 2009-10, the same stands disposed off in terms of our finding for the assessment year 2009-10.

16. **Ground No. 2** is regarding the addition of Rs. 1,01,99,728/- sustained by Id. CIT (A). The AO in the assessment framed under section 153A read with section

143(3) has made an addition of Rs. 1,01,99,728/- with reference to pages no. 55 to 58 of Exhibit-1 found and seized from the residential premises of Shri Madan Mohan Gupta during the search carried on 23rd May, 2013. Shri Madan Mohan Gupta in his statement recorded during the search and seizure action has explained that these pages contain accounts of plots of Shri Rajendra Kumar Jain, the assessee before us, which was purchased through him. Accordingly the AO by considering the amounts recorded in pages 55-58 of Exhibit-1 and explanation given by Shri Madan Mohan Gupta treated the same as undisclosed income of the assessee and made the addition of the said amount of Rs. 1,01,99,728/-. The assessee challenged the action of the AO before the Id. CIT (A) and submitted that these seized material and particularly pages 55-58 of Annexure-1 do not disclose any transaction related to the assessee. The AO has not made any reference of contents of these seized materials and has made the addition only with reference to page no. 57 of Annexure-1 of the seized material. Thus the assessee contended that even the name of the assessee does not appear in any of the seized material and, therefore, the seized documents do not disclose any income or any connection of these transactions with the assessee. The order of the AO is based on the statement of Shri Madan Mohan Gupta who has made the same as self serving statement to protect himself. The Id. CIT (A) issued a remand order and after receiving the remand report from the AO has sustained the addition made by the AO.

17. Before us, the Id. A/R of the assessee has submitted that there is nothing in the seized material as referred by the AO which relates to the transaction of purchase of plot by the assessee. Further, there is no name, date against any of the transactions and, therefore, it is not clear from the seized material that which year

this transaction pertains to. The seized material was found from the possession of Shri Madan Mohan Gupta and the same can be considered for assessing the undisclosed income of Shri Madan Mohan Gupta and not in the hands of the assessee. These documents are dumb without mentioning dates, names or nature of transaction. Therefore, the same cannot be a basis for making the addition. In support of his contention, he has relied upon the decision of this Tribunal in the case of Shri Moolchand Kumawat & Sons vs. DCIT dated 20th February, 2009 in MA No. 93/JP/2008 arising out of ITSSA No. 24/JP/2005. The AO has not made out the case of linking these transactions with the business affairs of the assessee, thus the AO has failed to discharge his duty and making the addition in the hands of the assessee. Some of the transactions are having the dates which pertain to financial year 2008-09 and, therefore, are not related to the assessment year under consideration. The Id. A/R has referred to Annexure-A page 55 of the seized document and submitted that the transactions from date 30th July, 2008 to 7th February, 2009 do not pertain to the assessment year under consideration and, therefore, the AO has committed a gross error in taking all the amounts against this transaction as income of the assessee for the year under consideration. Further, except the statement of Shri Madan Mohan Gupta, there is nothing in the seized material that these transactions are related to the assessee. The Id. A/R has further submitted that the addition is based on the statement of Shri Madan Mohan Gupta whereas the assessee was not allowed to cross examine Shri Madan Mohan Gupta and, therefore, the assessment order based on the statement without giving the opportunity of cross examination is not sustainable in law. In support of his contention, he has relied upon the decision of Hon'ble Supreme Court in the case of

Andaman Timber Industries vs. Commission of Central Excise, 281 CTR 241 (SC) and submitted that the Hon'ble Supreme Court has held that not allowing assessee to cross examine the witness is a serious flaw which makes the order nullity in as much as it amounted to violation of principles of natural justice. The Id. A/R has also relied upon the decision of Hon'ble Orissa High Court in the case of CIT vs. Biju Patnaik, 190 ITR 396 (Ori.) and submitted that if an order is passed without giving reasonable opportunity to the assessee to rebut the statement of the witness, it is in violation of principles of natural justice. The Id. A/R has also relied upon various decisions on this point. In support of his contention that the document as relied upon by the AO for making the addition are dumb, not explaining any specific transaction or time of the transaction then no addition is required to be made on the basis of such rough and dumb papers. He has relied upon the decision of Delhi Bench of the Tribunal in the case of Mahaan Foods Ltd. vs. DCIT, 27 DTR 185 as well as the decision of the Hon'ble Jurisdictional High Court in the case of Jayanti Lal Patel vs. ACIT, 233 ITR 588 (Raj.).

17.1. On the other hand, the Id. D/R has submitted that the assessee is Director of the company and on money was paid for purchase of land. In the statement recorded under section 131, the assessee has admitted that Shri Madan Mohan Gupta was appointed as Director of M/s. Hemang Construction Pvt. Ltd. All the 12 plots were adjoining to the existing plot of M/s. Hemang Construction Pvt. Ltd which does not have any excess to the road. This fact has been explained by Shri Madan Mohan Gupta that these plots were purchased on behalf of the assessee and particularly on behalf of the company M/s. Hemang Construction Pvt. Ltd. He has relied upon the orders of the authorities below.

18. We have considered the rival submissions as well as relevant material on record. As per the pages 55-58 of Annexure-1 of seized material, the AO noted that there are total 18 plots purchased by M/s. Hemang Construction Pvt. Ltd. through the Director Shri Rajendra Kumar Jain, the assessee. The said action of purchase of land completed in the months of May and June, 2009. The AO further noted that as per the details of the plots given in the sale deed, 12 plots are matching as found in page 57. However, in the sale deed, numbers were not mentioned in respect of 2 plots. Therefore, the AO has taken all the 12 plots found recorded at page 57 of the seized material as the transaction in which on money of Rs. 1,01,99,728/- was paid by the assessee. The relevant details of plots and finding of the AO are given in para 6.6.4 and 6.6.5 as under :-

"6.6.4. On going through the page no. 57 as well as details produced by the assessee, it is gathered that there is a vital difference between sale price mentioned in the registries and the details mentioned on this page. The same is summarized as under :-

S. No.	Plot No.	Area (Sq.yds)	Rate (per sq.yds.) as mentioned on page no. 57.	Total amount as per details mentioned on page no. 57.	Sale consideration shown in sale deed	Difference
1	16	260.00	5800	15,08,000	5,43,456	9,65,535
2	17	260.00	4900	12,74,000	5,43,465	7,30,535
3	29	216.66	5800	12,56,628	4,52,873	8,03,755
4	32	216.66	5800	12,56,628	4,52,850	8,03,755
5	52	200.00	5100	10,20,000	4,18,050	6,01,950
6	53	200.00	5800	11,60,000	4,18,050	7,41,950
7	79	260.00	5800	15,08,000	5,43,465	9,64,535
8	80	260.00	5800	15,08,000	5,43,465	9,64,535
9	81	260.00	5800	15,08,000	5,43,465	9,64,535

10	82	260.00	4900	12,74,000	5,43,465	7,30,535
11	83	260.00	5800	15,08,000	5,43,465	9,65,535
12	84	260.00	5800	15,08,000	5,43,450	9,64,550
			Total :	1,62,89,256	60,89,528	1,01,99,728

6.6.5. From the above discussion, it is very much clear that there is substantial difference of Rs. 1,01,99,728/- between the transactions recorded in the books of accounts and the details mentioned on page no. 57 and the same is to be treated as undisclosed income of the assessee which he has invested for purchase of plots at Jamna Vihar, Teelawala in the name of his company M/s. Hemang Construction Pvt. Ltd. To protect the interest of revenue, protective addition in the hands of M/s. Hemang Construction Pvt. Ltd. is also being made as the purchases have been made in its name. Further, to protect the interest of revenue, Protective addition of this amount of Rs. 1,01,99,728/- is being made in the case of Shri Madan Mohan Gupta also for this assessment year because these papers were found from the premises of him and he is liable to explain these papers as per the provisions of section 292C of the Act. Thus, substantive addition of Rs. 1,01,99,728/- is hereby made in the total income of the assessee as unaccounted investment in purchase of plots. Therefore, penalty proceedings u/s 271(1)(c) of the Act for concealment of income/for furnishing inaccurate particulars of income are being initiated separately."

The AO has admitted this fact and it is also a matter of undisputed fact that these plots of land were purchased by M/s. Hemang Construction Pvt. Ltd. and assessee as well as Shri Madan Mohan Gupta were the directors of the said company. The details found recorded at page 57 of the Annexure-1 of seized material shows the difference between the amounts of purchase consideration shown in the sale deed and the actual sale consideration paid in respect of these plots. Without going into the controversy whether these two amounts as found in the seized material represent the on-money for purchase of the plot of land, we note that the transaction of purchase is in the name of M/s. Hemang Construction Pvt. Ltd. and not in the name of the assessee. Thus the AO has presumed that on money has

been paid by the assessee from his undisclosed income on the basis of statement of Shri Madan Mohan Gupta who has explained the difference amount as the cash consideration which was paid to the seller after receiving the same from the assessee. Prima facie if a transaction is carried out between two parties then any money received in the said transaction has to be considered as paid by the purchaser. In the case in hand when the land in question was purchased by M/s. Hemang Construction Pvt. Ltd. and not in the personal name of the assessee then in the absence of any material to show that the difference amount was paid by the assessee from unaccounted or undisclosed income of the assessee, the same cannot be considered as the undisclosed income of the assessee. Further, the AO has relied upon the statement of Shri Madan Mohan Gupta without allowing the assessee to cross examine Shri Madan Mohan Gupta. The AO has reproduced the reply of the assessee in para 6.5 and in the last part of the reply whereby the assessee has clearly demanded cross examination of Shri Madan Mohan Gupta as under :-

" Cross examination of Shri Madan Mohan Gupta :

It is further submitted that before completion of assessment you are requested to provide opportunity to cross examine of Shri Madan Mohan Gupta with respect to page no. 57 found and seized from him. Kindly also furnish a copy of page no. 57. We totally deny regarding the contents of the page no. 57."

Therefore, it is manifest from the assessment order that the assessee demanded the cross examination of Shri Madan Mohan Gupta as well as a copy of page 57 of the seized document. However, the AO has not allowed the assessee cross examination

of Shri Madan Mohan Gupta. It is settled position of law that if the assessment order is based on a statement of a witness without giving an opportunity to the assessee to cross examine then the said order suffers from a serious flaw and is invalid. The Hon'ble Supreme Court in the case of Andaman Timber Industries vs. CCE (supra) has held in para 6 as under :-

"6. According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them."

Thus it is clear that if an order is made on the basis of the statement of an witness without giving an opportunity of cross examination then the said order suffers from serious flaw which renders the order nullity in as much as it amounts to violation of principles of natural justice and adversely affecting the assessee. In the

case in hand the transactions recorded in the seized documents clearly pertain to the purchase of land in the name of the company and, therefore, the seized documents do not reveal who has paid on money in the said transaction. The AO has held that the on money is paid by the assessee whereas the transaction was in the name of the company M/s. Hemang Construction Pvt. Ltd. Further, when assessee as well as Shri Madan Mohan Gupta both were the directors of the said company then except the statement of Shri Madan Mohan Gupta there was no other material or record to establish that the said on money was paid only by the assessee and not by Shri Madan Mohan Gupta or by both or by the company. Therefore, this decision of the AO that the on money was paid by the assessee is absolutely based on the statement of Shri Madan Mohan Gupta and since Shri Madan Mohan Gupta was one of the Directors of the said company, therefore, the possibility of making a self serving statement cannot be ruled out. Accordingly, in the absence of giving an opportunity to the assessee to cross examine Shri Madan Mohan Gupta, the said finding of the AO is not sustainable in law and in view of the above discussion we hold that the addition made by the AO is not justified and the same is deleted.

19. **Ground No. 3** is regarding addition of Rs. 9,00,000/- being on money paid in respect of the land at Jamna Vihar, Teelawala. The AO has noted that as per page 64 of Exhibit -1 which was found and seized from the residential premises of Shri Madan Mohan Gupta during the course of search, on money of Rs. 9,00,000/- was paid in respect of the land transaction at Jamna Vihar, Teelawala. The AO noted that the total amount as recorded at page 64 of Annexure-A Exhibit-1 is Rs.

14,50,000/-, out of which Rs. 9,00,000/- relates to the assessment year 2010-11 and balance Rs. 5,50,000/- relates to assessment year 2011-12. The AO accordingly issued a show cause for making the addition of Rs. 9,00,000/-. In reply, the assessee submitted that the assessee has no connection with the said payment as recorded in the seized document to Shri Mool Chand. It was further contended that assessee has not purchased anything from Shri Mool Chand. However, the AO finally made the addition of Rs. 9,00,000/- in the hands of the assessee and a protective addition was made in the hands of Shri Madan Mohan Gupta. The assessee challenged the action of the AO before Id. CIT (A) but could not succeed.

20. We have heard the Id. A/R as well as the Id. D/R and has considered the relevant material on record. The page 64 of Annexure-A Exhibitg-1 of the seized material has been scanned by the AO at page 17 of his order as under :-

ATC of 7th Oct 10

(64)



7,00,000/- 28/3/10
श्री म च न्द
2,00,000/- 16/3/10

श्री म च न्द
2,00,000/- 13/4/10

3,00,000/- 28/4/10
श्री म च न्द

50,000/- 14/7/10
श्री म च न्द

Thus it is clear that these notings of the amount has been made on specific dates and in the name of Shri Mool Chand. The AO has treated the said payment as made by the assessee to Shri Mool Chand on the basis that in the past a group company of the assessee namely M/s. Moonstone Apartments Pvt. Ltd. has purchased land from Shri Mool Chand. However, the said transaction of purchase of land happened on 3rd June, 2005. However, the AO has not brought on record anything to show that there was any other transaction of purchase of land by the assessee or any group concern of the assessee during the year 2010 and, therefore, these notings in the diary can be related to the said transaction of purchase of land. The AO has considered this payment as the payment made by the assessee for purchase of land as held in para 7.6.3 as under :-

“ 7.6.3. In view of the above, the cash payment of Rs.9,00,000/- found recorded as paid to Moolchand during this AY are to be treated as undisclosed income of the assessee which he has invested for purchase of plots at Jamna Vihar, Teelawala in the name of his companies. However, to protect the interest of revenue, protective addition of an amount of Rs. 9,00,000/- has been made in the case of Shri Madan Mohan Gupta for this assessment year because these papers were found from the premises of him and he is liable to explain these papers as per the provisions of section 292C of the Act. Thus, addition of Rs. 9 lacs is hereby made in the total income of the assessee as unaccounted investment in purchase of plots. Therefore, penalty proceedings u/s 271(1)(c) of the Act for concealment of income/for furnishing inaccurate particulars of income are being initiated separately.”

The assessee denied to have entered any transaction of purchase of land from Shri Mool Chand. However, the AO without bringing anything on record to disclose any transaction of purchase of land as alleged either by the assessee or by any group company of the assessee has made the addition only on the presumption that when a group concern of the assessee has purchased land in the past then this payment must have been made by the assessee for purchase of land. It is pertinent to note that when the AO has treated this as a payment made by the assessee for purchase of land then in the absence of actual transaction of purchase of land during the year under consideration or even in the subsequent years or in the immediately preceding year, the addition made by the AO is absolutely based on assumption of facts without any material disclosing any transaction of purchase of land or payment made by the assessee. Therefore, when the document itself does not reveal the transaction of payment by the assessee then the presumption of this fact based on the statement of Shri Madan Mohan Gupta without affording an opportunity to the assessee to cross examine Shri Madan Mohan Gupta, the said addition made by the AO is not sustainable. We have discussed this issue of validity of decision of the AO based on the statement without allowing the assessee to cross examine while deciding the issue in ground no. 2. Accordingly the addition made by the AO is not sustainable and the same is deleted.

21. In the cross appeal the revenue has challenged the order of the Id. CIT (A) whereby the protective addition of Rs. 3,86,35,000/- made by the AO was deleted by the Id. CIT (A). This issue is common as the issue raised by the revenue for the assessment year 2009-10. Accordingly, in view of our finding for the assessment

year 2009-10, we do not find any merit or substance in the appeal of the revenue.

The same is dismissed.

ITA NO. 295/JP/2017 (ASSEESSEE) : A.Y. 2011-12 :

22. The assessee has raised the following grounds :-

- “ 1. Under the facts and circumstances of the case the learned CIT (A) has erred in confirming the action of the learned Assessing Officer in passing the order u/s 143(3)/153A of the Income Tax Act, 1961 which is void ab initio deserves to be quashed.
2. Under the facts and circumstances of the case the learned CIT (A) has erred in confirming the addition of Rs. 5,50,000/- on account of unaccounted investment in purchase of plot/on the basis of papers seized from residential premises of Shri Madan Mohan Gupta without bringing any new facts on record.
3. Under the facts and circumstances of the case the learned CIT (A) has erred in confirming the addition of Rs. 8,40,227/- u/s 50C of the Income Tax Act, 1961 without comparing the DLC rate, whereas the property has no DLC rate.
4. Under the facts and circumstances of the case the learned CIT (A) has erred in giving the finding that the payment made to Moolchand has been made out of books on the basis of documents seized from third party without examining Shri Moolchand.
5. The assessee craves your indulgence to add, amend or alter all or any grounds of appeal before or at the time of hearing.”

23. **Ground No. 1** is regarding validity of order passed under section 153A read with section 143(3) of the Act.

24. We have heard the Id. A/R as well as the Id. D/R and considered the relevant material on record. Since the assessment proceedings for the assessment year

under consideration were not concluded but pending as on the date of search, therefore, the same got abated by virtue of search and seizure action u/s 132. This issue is common as raised by the assessee for the assessment year 2010-11. Accordingly as far as initiation of proceedings for reassessment u/s 153A is concerned, the same was valid. The addition made by the AO while framing the assessment are to be dealt with separately in other grounds of appeal Accordingly, this ground is decided against the assessee.

25. **Ground No. 2** is regarding the addition of Rs. 5,50,000/- on account of unaccounted investment in purchase of plot. The AO has made an addition of Rs. 5,50,000/- on account of undisclosed investment in purchase of plot from one Shri Moolchand. This addition is based on page 64 of Exhibit-1 wherein the total transaction recorded of Rs. 14,50,000/-, out of which Rs. 9,00,000/- was added for the assessment year 2010-11 and balance of Rs. 5,50,000/- was added for the assessment year under consideration. Thus this issue is common to the issue raised by the assessee for the assessment year 2010-11.

26. We have heard the Id. A/R as well as the Id. D/R and considered the relevant material on record. An identical issue of addition of Rs. 9,00,000/- on account of unaccounted investment in purchase of plot as per page 64 of Exhibit-1 has been considered by us for the assessment year 2010-11. Accordingly in view of our finding on this issue for the assessment year 2010-11, the ground no. 2 stands adjudicated in favour of the assessee. The addition made by the AO is accordingly deleted.

27. **Ground No. 3** is regarding an addition of Rs.8,40,227/- by invoking the provisions of section 50C of the IT Act. The assessee sold a plot No. D-10, Kesav Vihar, Jaipur on 21st April, 2010 for a sum of Rs. 6,25,000/- and paid capital gain

tax. The AO in the assessment completed under section 153A has adopted the full value consideration at Rs. 14,65,227/- on the basis of a report of Sub-Registrar Stamps, Jaipur. The assessee challenged the action of the AO before the Id. CIT (A) and contended that when DLC rates were not available for the area in which the plot of land in question is situated, was sold by the assessee then the provisions of section 50C cannot be applied. Further, the value adopted by the AO is not based on the Stamp Valuation for the plot in question but the Sub-Registrar Stamps has given the DLC rates of Siddharth Nagar 'A' block and has clearly stated that DLC rates for Kesav Vihar were not fixed by the authorities. The Id. CIT (A) did not accept the contention of the assessee and confirmed the addition made by the AO.

28. Before us, the Id. A/R of the assessee has submitted that the AO has adopted a short cut method for making the addition on this account on the basis of a letter from the Sub Registrar Stamps which has clearly stated that the DLC rates for Kesav Vihar are not fixed. He has further submitted that no opportunity was provided to the assessee before the DLC rates of another area was adopted by the AO. Hence, the addition made by the AO is not sustainable. The Id. A/R has submitted that when the DLC rates were not available then in the absence of any valuation by DVO, the AO is not justified to adopt the rates of another area.

28.1. On the other hand, the Id. D/R has relied upon the orders of the authorities below.

29. We have considered the rival submissions as well as relevant material on record. At the outset, we note that despite the objections raised by the assessee against the adoption of the DLC rates of adjoining area, namely, Siddharth Nagar, the Id. CIT (A) has confirmed the action of the AO in para 3.3.2. as under :-

“ 3.3.2. I have duly considered assessee’s submission and carefully gone through assessment order. I have also taken a note of factual matrix of the case as well as applicable case laws relied upon. The addition of Rs. 8,40,227/- on a/c pertains to STCG on sale of property at Plot D-10 Keshav Vihar Jaipur on the basis of information called u/s 133(6) of the Act from Sub-Registrar Stamps Jaipur-1 dt. 26.03.2016. On perusal of assessment order pg 5, it is seen that AO has given the reference of information received from Sub-Registrar Stamps-1 Jaipur on pg 5 of the assessment order which is very relevant also for taking value u/s 56C for the Act for the computation of STCG. Assessee has failed to controvert this finding. Accordingly, in view of facts & circumstances of the case, addition made of Rs. 8,40,227/- is hereby sustained. Assessee’s fails in Gr No. 3.”

Since undisputedly the DLC rates for the Keshav Vihar, Jaipur were not fixed and, therefore, not available for the purpose of adopting the same as full value consideration under section 50C of the Act, therefore, the AO has adopted the DLC rates of adjoining area, namely, Siddharth Nagar without giving the assessee an opportunity of hearing and defend its case against such adoption of full value consideration. Once the assessee has raised the objection against the adoption of the DLC rates of an adjoining area instead of the area in which the plot in question situated, the AO and Id. CIT (A) ought to have referred the matter to the DVO for determination of fair market value of the plot in question which could be taken as full value consideration. Accordingly, in the facts and circumstances of the case, we set aside the issue to the record of the AO for re-adjudication of the same after making the reference to the DVO regarding determination of fair market value of the

plot in question and thereafter after considering the objection, if any, of the assessee to decide the issue as per law. Appeal of the assessee is partly allowed.

30. In the result, appeals of the assessee in ITA No. 293/JP/2017 is allowed, ITA No. 408/JP/2017, 294/JP/2017 and 295/JP/2017 are partly allowed and appeals of the revenue in ITA No. 519/JP/2017, 520/JP/2017 & 521/JP/2017 are dismissed.

Order is pronounced in the open court on 28/03/2018.

Sd/-
(विक्रम सिंह यादव)
(VIKRAM SINGH YADAV)
लेखा सदस्य / Accountant Member

Sd/-
(विजय पाल रॉव)
(VIJAY PAL RAO)
न्यायिक सदस्य / Judicial Member

Jaipur
Dated:- 28/03/2018.
Das/

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

1. The Appellant- Shri Rajendra Kumar Jain, Jaipur.
2. The Respondent –The ACIT, Central Circle-1, Jaipur.
3. The CIT(A).
4. The CIT,
5. The DR, ITAT, Jaipur
6. Guard File (ITA No. 293(7) /JP/2017)

आदेशानुसार / By order,

सहायक पंजीकार / Assistant. Registrar

