आयकर अपीलीय अधिकरण, पुणे न्यायपीठ "बी" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE

श्री डी. करुणाकरा राव , लेखा सदस्य
एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष

BEFORE SHRI D.KARUNAKARA RAO, AM
AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No.570/PUN/2015
निर्धारण वर्ष / Assessment Year : 2011-12

M/s. Shraddha Energy &
Infraprojects Pvt. Ltd.,
(Formerly Known as M/s. Shraddha
Construction & Power Generation Pvt. Ltd.),
Shraddha House, A-1,
Plot No.887A, Shirole Road,
CTS No1206, Pune – 411 001
PAN : AAICS6691L .... अपीलार्थी/Appellant

Vs.

DCIT, Central Circle-2(1),
Pune .... प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No.461/PUN/2015
निर्धारण वर्ष / Assessment Year : 2011-12

DCIT, Central Circle-2(1),
Pune .... अपीलार्थी/Appellant

Vs.

M/s. Shraddha Energy &
Infraprojects Pvt. Ltd.,
(Formerly Known as M/s. Shraddha
Construction & Power Generation Pvt. Ltd.),
Shraddha House, A-1,
Plot No.887A, Shirole Road,
CTS No1206, Pune – 411 001
PAN : AAICS6691L .... प्रत्यर्थी / Respondent

Assessee by : Shri Kishor Phadke
Revenue by : Dr. Vivek Aggarwal

सुनवाई की तारीख / **Date of Hearing : 25.04.2018**		घोषणा की तारीख / **Date of Pronouncement: 09.05.2018**

आदेश / ORDER

PER D. KARUNAKARA RAO, AM :

These are the cross appeals filed by the parties against the order of CIT(A)-12, Pune, dated 30-01-2015 for the A.Y. 2011-12.

We shall take up the appeal of the Revenue first.

ITA No.461/PUN/2015 – By Revenue
A.Y. 2011-12

2. Grounds raised by the Revenue are extracted as under :

"1. On the facts and circumstances of case and in law, the Ld.CIT(A) was not justified in allowing ***rent paid to Raj Infrastructure*** *on account of machinery hired as it is clearly noticeable that* ***excessive payment*** *was made by the assessee company.*

2. On the facts and circumstances of case and in law, the Ld.CIT(A) erred in allowing ***interest on borrowed funds*** *which were utilised by the assessee for non-business purpose, i.e. investment in agricultural land. The Ld.CIT(A) also failed to appreciate that the assessee is in the business of contracting and hence corresponding interest on borrowed funds which were utilised for non-business purpose was rightly disallowed by the AO.*

3. On the facts and circumstances of case and in law, the Ld.CIT(A) erred in allowing ***interest on borrowed funds*** *which were utilised by the assessee for non-business purpose, i.e. giving loans to some business concerns having no business nexus with the assessee company. The Ld.CIT(A) also failed to appreciate that the assessee is in the business of contracting and hence corresponding interest on borrowed funds which were utilised for non-business purpose was rightly disallowed by the AO.*

4. On the facts and circumstances of case and in law, the Ld.CIT(A) erred in deleting the addition made by the AO amounting to ***Rs.50,00,000/- disclosed by the assessee company at the time of search action.*** *The Ld.CIT(A) failed to appreciate that this amount was disclosed by the assessee company in the statement recorded u/s.132(4) of the Act, which itself is a good piece of evidence. The Ld.CIT(A) also lost sight by not considering that retraction on this undisclosed income was made by the assessee company almost an year after the search action.*

5. The order of Ld.CIT(A) may be vacated and that of the Assessing Officer be restored.

6. The appellant craves leave to add, alter, amend and modify any of the above grounds of appeal."

3. Briefly stated relevant facts are that the assessee is engaged in the business of execution of irrigation contracts and generation of energy from the windmills. There was search and seizure action u/s.132 of the Act on the Shraddha Group of cases on 08-09-2010. Mr.Shivajirao Bagwan Jadhav is a Managing person for this group. Search resulted in disclosure of unaccounted income of Rs.10.99 crores on account of on-money payments in purchase of lands, suppression of

closing stock etc. Assessment was completed on the assessed income of Rs.6.68 crores (rounded off). Apart from other additions, AO made various additions and they include the addition of Rs.1,61,94,464/- on account of unpaid commission as well as the buffer disclosure of Rs.50 lakhs and others. Grounds raised by the assessee in this appeal revolves around this addition of Rs.1,61,94,464/-. Further, the Revenue raised the issue relating to rent paid to M/s. Raj Infrastructure, disallowance of interest, buffer disclosure of Rs.50 lakhs.

4. Ld. DR for the Revenue relied on the order of the AO dutifully.

5. Per Contra, Ld. Counsel for the assessee submitted that the issues raised in Ground Nos. 1 to 3 by the Revenue appeal stands covered and therefore, they are required to be dismissed. In this regard, Ld. Counsel filed a copy of the order of Tribunal in assessee's own case vide the order of the Tribunal in ITA No.495/PUN/2015, dated 11-04-2018 for the A.Y.2009-10.

6. After hearing both the parties, we find these issues raised by the Revenue vide Ground No. 1 as well as 2 and 3 are identical to the grounds raised by the Revenue in the group concern vide ITA No.459/PUN/2015 for the A.Yrs. 2009-10, dated 11-04-2018. Ground-wise adjudication is taken up in the following paragraphs.

7. Regarding the issue raised in Ground No.1 relating to excess rentals paid to M/s.Raj Infrastructure Developers, the Tribunal while dealing with the same issue in the case of its sister concern - Shraddha Constructions & Power Generation Pvt. Ltd., dismissed the appeal of the Revenue and in favour of the assessee. Relevant finding of the Tribunal (supra) is extracted here as under for the sake of completeness :

"8. On hearing both the sides on this issue, we find the undisputed facts include that the assessee hired 2 excavators for the business purpose of the assessee, the payment made by the assessee by way of banking channels to M/s. Raj Infrastructure Developers, taxability of the same in both the hands etc. It is the suspicion of the AO that the rental payments qua the cost of acquisition of the assets by the owner of the assets are on higher side. However, no information is brought on to the record that the payment of rent of Rs.2,50,000/- per vehicle is excessive or unreasonable. Infact, there is an evidence from the assessee's side to demonstrate that there are cases of obtaining a quotation of A.K. Constructions and Manisha Infrastructure Pvt. Ltd. to the tune of Rs.3,25,000/- and 3,40,000/- respectively per Ex-300 excavator per month (pages 64A, 64B and 64C of the paper book are relevant). Letter dt. 26-03-2013 addressed by the Ld. AR to the DCIT, Circle-2(1) constitutes forwarding of the quotations received from A.K. Constructions and Manisha Infrastructure Pvt. Ltd. for comparison of reasonableness of rent paid by assessee to M/s. Raj Infrastructure Developers. Therefore, in our view, no case is made out by the AO to demonstrate that the payments made by the assessee constitutes excessive and unreasonable. Further, we examined the applicability of the decision of jurisdictional High Court in the case of CIT Vs. Salitho Ores (supra) and find the same is relevant for the following proposition :

> *"As long as expenditure is incurred bona fide in pursuit of a business and not by way of diversion of funds, it has to be allowed as a deduction' entire lease rent paid by the assessee for hiring the dozers for using them in its business was allowable as a business expenditure even though assessee did not actually use 3 out of the 4 hired dozers."*

9. From the above, the spirit of the legal proposition is amply clear that the onus is on the AO to demonstrate that that the payments made by the assessee are excessive which constitute a case of diversion of funds. In the present case, AO merely opined the excessiveness of the payments against the assessee without having strength of any incriminating material, leave-alone third party information. As such, no case is made out about the in-genuineness of the transaction, i.e. payment of rent to M/s. Raj Infrastructure Developers of hiring of 2 Ex-300 Excavators. Considering the same, we are of the opinion that the order of CIT(A) on this issue is fair and reasonable and does not call for any interference. Accordingly, Ground No.1 raised by the Revenue is dismissed.

Following the same reasoning, we dismiss the ground raised by the Revenue holding of the order of CIT(A) as fair and reasonable. Accordingly, Ground No.1 raised by the Revenue is dismissed.

8. Regarding the second issue raised by the Revenue vide Ground Nos. 2 and 3 relating to claim of interest disallowance, we find this issue is also identical to the grounds raised by the Revenue in No.459/PUN/2015 for the A.Yrs. 2009-10, dated 11-04-2018. The

Tribunal dismissed the appeal of the Revenue following the decision of the Tribunal in assessee's own case for the A.Yrs. 2006-07 & 2008-09. The said finding is extracted here as under for the sake of completeness:

> *11. After hearing both the sides on these issues, we find the Revenue in assessee's own case filed appeals for the A.Yrs. 2006-07 and 2008-09 on similar grounds and the Tribunal vide ITA Nos. 457 & 258/PUN/2015, dated 28-11-2007 dismissed the said grounds and in favour of the assessee. We find it relevant to extract the said findings of the Tribunal given at Para Nos. 10 to 14 of the same. The said paras are reproduced here as under :*
>
> > *"10. Referring to Ground Nos. 2 and 3 raised by the Revenue, Ld. Counsel for the assessee submitted that there is no dispute about the absence of any incriminating material on these two items of disallowance. Therefore, the CIT(A) is justified in deleting the additions for this legal reason also.*
> >
> > *11. Ld. Counsel for the assessee, deviating from the above line of arguments, submitted that similar disallowances were made by the AO in the regular assessment u/s.143(3) of the Act and the adjudication is now pending before the CIT(A). For bringing finality early on these issues, Ld. Counsel for the assessee submitted that he shall have no objection if the findings of CIT(A) are reversed and the Ground Nos. 2 & 3 of the Revenue are allowed notwithstanding the strong case the assessee has on all these issues. Ld. Counsel for the assessee gives concession in this regard only in view of early finality on the issues. He conceded the same in these appeals and opined to a request to the Ld.CIT(A) with appropriate request for granting relief in the appeals pending with him on the similar additions. In this regard, Ld. Counsel filed written submissions and relied on the contents of Para Nos. 4 and 5 of his synopsis. For the sake of completeness, the same are extracted as under :*
> >
> > *"As such, the regular assessment order dated 26-11-2008 (and the appeal filed against the same filed in year 2008) does not abate. In other words, the said appeal ought to continue as such, and the relief (if any) against the said appeal ought to be reaped in the said appeal only. It is submitted, an assessee ought not to get relief against the regular assessment in the search based appeal for such year, since such a year is not pending before the assessing authority.*
> >
> > ***5. Conclusion** – As such, the assessee feels, the grounds of appeal No.3 of the revenue for A.Y. 2006-07, challenging relief of Rs.4,09,201/- ought to be allowed and be decided as such."*
> >
> > *12. On hearing both the parties on the issues discussed above, we find that the Revenue is aggrieved with the relief granted by the CIT(A) with regard to (1) the disallowance of rent paid by the assessee to M/s. Raj Infrastructure Developers vide Ground No.1 as well as (2) the disallowance of interest received by the assessee on borrowed funds when utilized for non-business purposes vide Ground Nos. 2 & 3 of appeal of Revenue. During the proceedings before us, assessee raised an oral ground supported by the written synopsis relating to the disallowability of*

additions on legal reasoning relating to absence of any incriminating material and unsustainability of such additions not supported by any incriminating material. As such, it is an admitted fact that the blank letter heads are the only seized material pertaining to this issue. We have already held that such blank letter heads do not amount to the incriminating material. Therefore, we are of the opinion that Ground No.1 of Revenue needs to be dismissed on this legal reasoning.

13. Regarding the Ground Nos. 2 & 3 of the Revenue, we find the CIT(A) granted relief on finding the existence of excess own funds of the assessee. Notwithstanding the above, Ld. Counsel for the assessee submitted that assessee has conceded and requested for reversal of the finding of the CIT(A) on this issue and decide the issue against the assessee. We find the said concession is not in tune with the settled legal position on the issue. Therefore, we dismiss the same.

14. On perusal of the above written submissions filed by the assessee on these issues qua the disallowance of interest on part borrowed capital, we are of the view that the finding of the CIT(A) is fair and reasonable as the said decision has the backing of the jurisdictional High Court judgment in the case of CIT Vs. Reliance Utilities and Power Ltd. reported in 313 ITR 340 and CIT Vs. HDFC Ltd. reported in 366 ITR 505. Thus, the decision given by the CIT(A) stands confirmed. Thus, Ground Nos. 2 & 3 raised by the Revenue are dismissed."

12. Considering the above settled nature of the issues in the assessee's own case, we dismiss the ground Nos. 2 and 3 raised by the Revenue.

9. Since the grounds raised by the Revenue are identical to the grounds raised by the Revenue for A.Y. 2009-10, Therefore, following the same reasoning given by the Tribunal, we hold that the order of CIT(A) is fair and reasonable. Accordingly, the Ground Nos. 2 and 3 raised by the Revenue are dismissed.

10. Ground No.4 by the Revenue relates to the buffer disclosure of Rs.50 lakhs reflected by the assessee subsequently. CIT(A) granted relief on this issue. Therefore, the Revenue is in appeal.

11. It is the submission of the assessee that the only left over issue that requires detailed analysis in the revenue appeal relates to the deletion of addition of Rs.50 lakhs disclosed by the assessee towards omissions or commissions if any during the search action. Ld. Counsel

for the assessee submitted that this is a case where the Revenue could have examined all the details before assessment is made. Infact AO has sufficient time after retraction for scanning the seized material for want of discovery of omissions and commissions. Further, it is the case of the assessee that there is no incriminating material to demand the additional disclosure of Rs.50 lakhs from the assessee. The disclosure of Rs.50 lakhs offered by the assessee during search action is purely a adhoc declaration on account of pressures of the investigating officer during search action. He also submitted that in the absence of any incriminating material the investigating officer should not have taken disclosures in view of the CBDT Circular No.286/2/2003, dated 10-03-2003. Considering the same, he submitted that the decision of CIT(A) is fair and reasonable and does not call for any interference.

Alternatively, it is the submission of the Ld. Counsel that matter can be remanded to the file of AO for applying the following decisions :

(a) DCIT Vs. Shri Shivaji Bhagwanrao Jadhav – ITA Nos. 680 to 682/PUN/2015, ITA No.699/PUN/2015 and CO No.10/PUN/2018, dated 25-04-2018

(b) ACIT Vs. Jayant Hiralal Shah – ITA No.546/PN/2012, dated 25-06-2013

(c) DCIT Vs. Sanmukhdas Wadhwani 85 ITD 734 (Nagpur Tribunal)

(d) Poonawalla Investments and Industries Pvt. Ltd. – ITA No.1685/PUN/2015, dated 18-04-2018

12. After hearing both the sides on this issue and on perusing the orders of the Revenue, we find this issue also stands decided in favour of the assessee by virtue of order of Tribunal in the case of Serum Institute of India Ltd. Vs. DCIT in ITA Nos. 985 & 986/PUN/2015 dated 28-11-2017 for A.Yrs. 2006-07 & 2007-08. In this regard, we find it

relevant to extract the finding given by the Tribunal from Para Nos. 28 to 41 here as under :

> *"28. Ground no.5 relates to inclusion of income of an amount of Rs.1 crore which was offered as contingency in the statement u/s.132(4) of the act. Relevant facts are that the assessee was covered u/s.132 of the Act and the same resulted in disclosure of undisclosed income. Details are given in Para nos. 13 and 13.1 (pages 55 to 60) of the order of CIT(A). Accordingly, Rs. 1 crore was offered against the contingencies if any to be set off against the discrepancies/omissions. While filing the return of income, and adhering to the said statement u/s.132(4) of the Act, said amount of Rs. 1 crore was offered as undisclosed income of the assessee for the year. Accordingly, the same was taxed although no specific discrepancies/omissions were brought to the notice of the assessee. Assessee did not raise any issue before the AO. However, before the CIT(A), assessee submits that said contingency of Rs.1 crore should not be taxed and the same is required to be excluded from the undisclosed income offered by the assessee. CIT(A) rejected the said demand of the assessee as per the discussion given in para 13.2 of his order. Thus, CIT(A) decided this issue against the assessee.*
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> *29. To sum up his finding, in the said para, the CIT(A) held that the claim made by the assessee that such income of Rs.1 crore may be excluded from the total income assessed by the assessee as no discrepancies were found during the assessment proceedings, cannot be accepted as the said additional income was offered voluntarily in the return of income. If accepted, the assessed income shall be lower than the returned income. The alternative claim of the assessee for set off of such contingencies against other disallowances u/s.14A of the Act made by the AO was also rejected despite the existence of the favourable decision of the Tribunal in the group cases of the assessee (M/s. Adurjee Brothers Pvt. Ltd.). Aggrieved with the order of CIT(A) the assessee is in appeal before us.*
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> *30. Before us, Ld. Counsel for the assessee submitted that similar issue with some variance came up for adjudication before the Tribunal in a case belonging to the same group named M/s. Adurjee Brothers Pvt. Ltd. (supra). In this case, the demand of the assessee was for set off of the other disallowances made u/s.14A of the Act against such contingency disclosure. The Tribunal allowed the argument of the assessee on this issue of set off. Contents of Para No.12 of the order of the Tribunal in ITA No.1067/PN/2014 dated 13-06-2014 are relevant and therefore we proceed to extract the same as under :*
>
> > *"12. We find merit in the alternate contention of the Ld. Counsel for the assessee that the amount of Rs.75 lakhs offered to tax in the statement recorded u/s.132(4) be set off against the disallowance calculated under the provisions of section 14A r.w. Rule 8D. Admittedly, the assessee had made disclosure of Rs.75 lakhs voluntarily as additional income under the head "Contingencies" to cover any other errors, omissions or discrepancies. The submission of the Ld. Counsel for the assessee that the amount of Rs.75 lakhs was voluntarily offered and there was no detection of any incriminating material or undisclosed income could not be controverted by the Ld. Departmental Representative. We, therefore, find merit in the submission of the Ld. Counsel for the assessee that the amount of Rs.75 lakhs offered by the assessee as undisclosed income to cover any errors, omissions or discrepancies in computing the*

taxable income should be set off against the disallowance made u/s.14A r.w. Rule 8D of the I.T. Act. ***We, therefore, set aside the order of the CIT(A) and direct the AO to restrict the disallowance u/s.14A r.w. Rule 8D to Rs.18,19,294/- i****.e. (Rs.93,24,674 – Rs.75,00,000/-). Grounds of appeal No.1 to 3 by the assessee are accordingly partly allowed.*

31. From the above, we find the Tribunal permitted for setting off the disallowance of expenditure u/s.14A of the Act against the said buffer disclosure of income. In that case, Rs. 75 lakhs was offered as buffer and the issue of disclosure u/s.14A of the Act created the additional income exceeding the said buffer disclosure of Rs.75 lakhs. Further, in the said decision, the income assessed never fell below the returned income. However, there is no discussion or decision of the Tribunal on the issue of reduction of the disclosed returned income. Therefore, we shall proceed to analyse the legal scope on this issue.

Legal scope on the sanctity of returned income – if the assessed income be less than the returned income.

32. On this issue, Ld. Counsel for the assessee submitted that it is a settled legal proposition in favour of the Assessee and against the Revenue. For this, Ld counsel relied on various binding judgments of Apex Courts and others. We shall now proceed to analyse each of them here as under.

33. To start with, we will take up the Apex Court's judgment in the case of Commissioner of Income-tax v. Shelly Products [2003] 261 ITR 367 (SC), the Apex Court held in favour of refunding of the excess taxes paid (of advance tax as well as self-assessment tax) out of ***abundant*** *caution or owing to error or non taxability. Held portion of this judgment is extracted as under :*

> *"However, failure or inability of the Revenue to frame a fresh assessment should not place the assessee in a more dis-advantageous position than he would have been in if a fresh assessment were made. In a case where the assessee chooses to deposit,* ***by way of abundant caution****, advance tax or tax on self assessment which is in excess of his liability on the basis of the return furnished or, if there is an arithmetical error or inaccuracy, it is open to the assessee to claim refund of the excess tax paid in the course of the assessment proceedings. He can certainly make such a claim before the concerned authority calculating the refund. Similarly, if the assessee has, by mistake or* ***inadvertence*** *or on account of ignorance, included in his income* ***any amount which is exempted from payment of income-tax, or is not income within the contemplation of law,*** *he may likewise bring this to the notice of the assessing authority, which,* ***if satisfied,*** *may grant him relief and refund the tax paid in excess, if any. Such matters can be brought to the notice of the concerned authority in a case where a refund is due and payable, and the authority concerned, on being satisfied, shall grant appropriate relief."*

34. In the case of Gujarat Gas Company Ltd. Vs. JCIT (245 ITR 84) the Hon'ble Gujarat High Court held that the instruction of the CBDT Circular No.549 (Para No.5.12 dated 31-10-1989 is ultra-vires when the said instruction mandates the AO against making the scrutiny assessments ***at the figure less than that returned*** *by the assessee. Relevant held portion of this judgment reads as under :*

"Held, that the circular in question refers to assessments which are to be made u/s.143(3) of the Act. The circular directs that in a particular type of cases, i.e. in scrutiny cases u/s.143(3) of the Act, the income can neither be assessed at a figure lower than the returned income nor the loss assessed at a figure higher than the loss nor further refund given except what was due on the basis of the returned income. Thus, by issuance of the circular, the quasi-judicial officer is directed to assess cases of particular nature in a particular manner. The Assessing Officer being bound by it had abdicated his function and did not act independently and, therefore, there was no question of alternative remedy which was a futile remedy. In fact, the jurisdiction had been exercised by the Central Board of Direct Taxes by issuing the circular and, therefore, the order of the Assessing Officer was without jurisdiction. The court had to exercise its jurisdiction under article 226. The order of the Assessing Officer to the extent it stated that the total income would be the returned income, was to be set aside, ***with a direction to the Assessing Officer to make assessment without keeping in mind the Central Board of Direct Taxes Circular dated 31-10-1989."***

35. The same Hon'ble Gujarat High Court again in the case of CIT Vs. Milton Laminates Ltd. vide Tax Appeal No.1022 of 2010 dated 24-01-2012 held the issue in favour of the Assessee and against the Revenue. Revenue took the issue to the Hon'ble High Court on the issue, if the Tribunal's direction to the AO to allow complete effect to the order of the CIT(A) without restricting the income to the returned income. In this case, after giving effect to the order of the CIT(A), the income assessed has fallen below the returned income of the assessee. The Hon'ble High Court upheld the order of the Tribunal. Relevant lines from this judgment also are extracted as under :

"7. In view of the above, we do not find any reason to interfere with the Tribunal's ultimate conclusion in allowing the assessee's appeal. Though some of the observations may not appeal to us, nevertheless, for the reasons somewhat different from those recorded by the Tribunal we come to the same conclusion. Decision of the Apex Court in case of ***Shelly Products & Others*** *(supra), was rendered in very different background. It was a case where the assessee had filed return. Assessee had paid self assessment tax on the income disclosed in the return. Tribunal on appeal by the assessee held that the order of the assessment passed by the Assessing Officer was ab-initio void since he had no jurisdiction to deal with such proceedings. Revenue sought reference before the High Court. When such reference was pending, the assessee applied to the department for refund of the tax paid. It was in this background the Apex Court expressed the opinion that liability to pay income tax does not depend on assessment being made and failure or inability to frame fresh assessment after earlier assessment is set aside or nullified in appropriate proceedings, does not disentitle the assessee to claim refund of the advance tax and tax paid on self assessment because to that extent the assessee had admitted his liability to pay tax in accordance with law. Facts of the present case are therefore, different. In case of hand, the assessment was not rendered null. In fact such assessment, which according to the order of CIT(Appeals) had become final tax liability of the assessee, came lower than that declared by him in the return filed."*

(1) To sum up, from the above, it is obvious that the fetters imposed by the CBDT, on the AOs, when it comes to assessing the income of assessee lower than the returned income, are held ultra vires. Further, the Hon'ble Apex Court also held that the taxes paid by the assessee as a matter of abundant caution, i.e. by way of Advance or Self Assessment Taxes, needs to be refunded after due verification of the claims.

(2) Ld. Counsel for the assessee filed various decisions of the Tribunal demonstrating that the 'contingency' disclosure are entitled to refund after due verification. In this regard, Ld. Counsel for the assessee filed written note on 'Contingency issue' stating that the return of income filed by the assessee constitutes a notional undisclosed income as part of the total income. The same should not become an impediment for assessing the income of the assessee based on the principles relating to the Real Income theory. According to him, the income offered by the assessee in the return of income is not sacrosanct and what matters is the AO's finding on the assessed income of the assessee. The assessed income can be lower than the returned income. Relying on the decision of Nagpur Bench of the Tribunal in the case of DCIT Vs. ***Sanmukhdas Wadhwani*** *85 ITD 734, Shri R.S. Abhyankar, Ld. Counsel for the assessee submitted that where the assessee himself returned his undisclosed income on adhoc basis without giving any break-up for the same and when the subsequent working submitted by him reveals that the undisclosed income actually assessable in the hands of the assessee is lower than the returned income, the same has to be assessed at such lower income based on the concept of Real Income. Only condition specified in the said decision relates to the verification and correctness of the statements so submitted giving the detailed working before the AO. Relevant portion is extracted as under :*

> *"12. It is observed that a similar issue in the context of regular assessment arose for consideration before the Hon'ble Delhi High Court in the case of CIT v. Bharat General Insurance Co. Ltd. [1971] 81 ITR 303 wherein it was held by their Lordships that even if an assessee declares an income in the return, the Assessing Officer cannot assess it merely on that basis and he has to consider its taxability in the light of other circumstances de hors the admission made in the return. In the case of Narayanan v. Gopal AIR 1960 SC 235, the Hon'ble Supreme Court has held that an admission in the return is not conclusive and it would be decisive only if not subsequently withdrawn or proved to be erroneous. It is well- established that the object of an assessment is to determine the correct income and consequently the correct tax liability. In our opinion, this settled position equally holds good in the matter of block assessment also since the scope of undisclosed income assessable in the block assessment is specifically provided and the procedure for determination of such income is also clearly laid down. In these circumstances, any amount which is not assessable as undisclosed income for the block period cannot be assessed as such merely for the reason that the same was declared by the Assessee in the return for block period and* ***there cannot be such estoppel against the statute. It, therefore, follows that if the assessee commits a patent mistake of fact or law while filing his return of undisclosed income under section 158BC, he cannot be assessed on such incorrect income merely on the basis of admission made in the return.***
>
> *13. . . . . .In such circumstances, when a detailed working made subsequently by the assessee of undisclosed income revealed that the total undisclosed income assessable in the hands of the Assessee was lower than the returned income, we*

are of the opinion that the same has to be assessed at such lower amount going by the concept of real income especially when the said working was verified and found to be correct by the Assessing Officer."

36. Similar proposition was affirmed by the Hon'ble Delhi High Court in the case of CIT Vs. Bharat General Insurance Company Ltd. 81 ITR 303 wherein it is held that when the assessee declares income in the return, the AO cannot assess merely on that basis and has to consider its liability in the light of other circumstances de hors the admission made by him in the return. Ld. Counsel for the assessee also referred to the other judgment in the case of Ester Industries Ltd. Vs. CIT 316 ITR 260 (Delhi). According to this judgment, suo moto disallowance leading to increased returned income can always be verified by the AO in the assessment and decrease the returned income, even if it falls below the amount of total income returned by the assessee in the return of income. In this case, the Hon'ble High Court restored the matter for such verification. Relevant portion of the judgment are extracted as under :

"11. According to us, the Tribunal ought to have examined the issue as to whether the fact that assessee had made an admission with respect to an addition / disallowance in its original return or in the revised return would ipso facto bar the assessee from claiming an expense or disputing an addition if it is otherwise permissible under law. This is so especially in view of the circumstances, that the Assessing Officer while making the additions /disallowances did not call upon the assessee to furnish any explanation. The upshot of the submission made by the learned counsel for the assessee, is that, had the assessee been given an opportunity by the Assessing Officer it could have demonstrated that no additions or disallowances were called for, in view of the binding precedents of Courts and/or Tribunal in respect of each of the addition/disallowance. The observations made in the Tax Audit Report could not have formed the basis of additions/ allowances by the Assessing Officer. On this aspect of the matter the observations in the judgment of the Supreme Court in the case of Pullangode Rubber Produce Co. Ltd. v. State of Kerala [1973] 91 ITR 18 being apposite are extracted hereinbelow:

It is no doubt true that entries in the account books of the assessee amount to an admission that the amount in question was laid out or expended for the cultivation, upkeep or maintenance of immature plants from which no agricultural income was derived during the previous year. An admission is an extremely important piece of evidence but it cannot be said that it is conclusive. It is open to the person who made the admission to show that it is incorrect. (p. 20).

11.1 We find that the Tribunal instead of examining the matter from this angle has repeated the order passed in the first round without due application of mind to the issues which called for adjudication.

37. The Nagpur Bench of the Tribunal in the case of DCIT Vs. Sanmukhdas Wadhwani (supra) held categorically that the "income not assessable as undisclosed income of the assessee cannot be assessed as such" merely because assessee declared the same through a statement in search action. Admission made by the assessee in the return of income is no sacrosanct. AO is under statutory obligation to make

assessment of assessee based on the facts of case and as per the provisions of Act. In other words, coming to the facts of the assessee, if the said sum of Rs. 1 crore is not assessable to tax as income of the assessee, the same ought not be assessed even if the assessed income comes to a lower figure qua the returned income.

38. We have considered the above legal scope of the principle relating to the lower figure of assessed income qua the returned income. Further, we have heard the parties and perused the written submissions of the Ld. Counsel for the assessee. Further also, we perused the reasoning given by the CIT(A) while dismissing the claim of the assessee. We find the contents of Para No.12 of his order are relevant. For the sake of completeness of this order, we proceed to extract Para No.13.2 of the CIT(A) :

> *"13.2 . . . . . To sum up, the fresh claim made by the appellant during the present proceedings that such income of Rs.1,00,00,000/- may be excluded from the total income assessed by the Assessing Officer as no discrepancies were found during the assessment proceedings cannot be accepted as the additional income was offered voluntarily in the return of income. The alternate claim of the appellant for set off of such contingencies against other statutory disallowance made by the AO also cannot be accepted as discussed above. Ground of appeal No.8 stands rejected."*

The CIT(A) denied the claim of the assessee ignoring the settled legal propositions on the topic. The reasons given above by the CIT(A) are artificial and not supported by the legal precedents.

39. The CBDT issued a Circular No.549 dated 31-10-1989 imposing fetters on the AOs for not determining the assessed income at a lower figure than the returned income. The said Circular was held ultra vires by the higher judiciary in the case of Gujarat Gas Company Ltd. (supra). Infact, it is the duty of the AO to make an assessment basing on the facts of the case and as per the provisions of the I.T. Act. In the case of Shelly Products (supra), the Hon'ble Apex Court held that the advance tax/self assessment tax paid as part of an abundant caution are required to be refunded on verification of the claim of the assessee. The Nagpur Coordinate Bench of the Tribunal in the case of DCIT Vs. Sanmukhdas Wadhwani (supra) held that the assessed income can be lower qua the returned income of the assessee. Further, the Tribunal held in this case, any amount which is not assessable as undisclosed income of the assessee cannot be assessed merely for the reason assessee declared in the return of income. There cannot be such estoppels against the statute if the assessee itself finds a patent mistake of fact while filing the return of income assessee cannot be assessed on such incorrect income merely on the basis of admission made by him in the return of income.'

40. In the instant case, considering the above settled legal propositions, we proceed to examine availability of facts relating to the present case. In the return of income, assessee merely offered an amount of Rs.1 crore towards contingency. Meaning thereby that incase the AO makes certain additions basing on same facts or legal issues, the said disclosure amount of Rs.1 crore should be considered for set off/adjustment etc. In case AO failed to make such additions, the said amount of Rs.1 crore is not required to be assessed as income of the assessee. It is an admitted fact that the AO made addition u/s.14A of the Act in the assessment u/s.153A of the Act in the absence of any incriminating material. This addition is made over and above the said contingency amount of Rs.1 crore. However, we find while discussing in the preceding paragraph this disallowance u/s.14A is unsustainable in

this assessment as the same does not have strength of any incriminating material. In other words, the AO made an unsustainable addition u/s.14A of the Act and taxed the said amount of Rs.1 crore-contingency income without making adjustment the said amount of Rs.1 crore. In any case, we deleted said disallowance u/s.14A of the Act. Therefore, the question of adjustment is only an academic exercise. Ignoring the same, we now have to decide that the said amount of Rs. 1 crore is assessable to tax in the light of the above legal scope relating to this addition.

41. The AO has not brought any issue or facts relating to the undisclosed income specific to the said sum of Rs.1 crore. In such circumstances, we are of the opinion that the decision of the Nagpur Bench of the Tribunal in the case of DCIT Vs. Sanmukhdas Wadhwani (supra) becomes relevant to the facts of the present case. As such, we proceed to dismiss the voluntary-centric reasoning given by the CIT(A) for denying the claim of the assessee regarding the issue of taxation of the said amount of Rs.1 crore. Considering the above, we are of the opinion that the AO is directed to verify the working of total undisclosed income assessable in the hands of the assessee going by the concept of real income. He shall grant reasonable opportunity of being heard to the assessee. AO is directed to apply the ratio laid down by the above referred judgments in general and the ratio laid down by the Nagpur Bench of the Tribunal in the case of DCIT Vs. Sanmukhdas Wadhwani (supra) while arriving at the assessed income of the assessee. AO shall not consider the so-called voluntary disclosure of the said amount of Rs. 1 crore as the same does not amount to any voluntary disclosure in a real sense. Had it been really voluntary, the assessee would not have raised this issue before us. It is the requirement of the statute that the AO shall make assessment strictly as per the provisions of the law and determine the assessed income accordingly. For applying the said legal principles as well as the judgments and the order of the Nagpur Bench of the Tribunal, we remand this issue to the file of the AO for the limited purpose of adjudication of the issue relating to taxability of the contingency amount of Rs.1 crore. Accordingly, this ground by the assessee is allowed pro tanto.

13. From the above, it is evident that the onus is on the AO to establish the omissions and commissions before he proceeds to tax the said buffer disclosure of Rs.50 lakhs. As such, AO did not examine this aspect of the issue from this point of view. CIT(A)/AO are of the opinion that the assessed income may not be less than the returned income. AO mechanically taxed the same relying on the admission on the sworn statements. The main arguments raised by the assessee's counsel are rejected and the alternate prayer for remanding the issue to the file of AO is considered favourably. Therefore, with similar directions to the AO, we remand the issue to the file of AO. Accordingly, this issue is adjudicated pro tanto.

14. In the result, appeal of the Revenue is partly allowed for statistical purposes.

ITA No.570/PUN/2015 – By Assessee
A.Y. 2011-12

15. Grounds raised by the assessee are as under :

"1. The Ld. CIT(A)-12, Pune erred in law and on facts in affirming addition of Rs. 1,61,94,464, alleging that payment of brokerage / commission relating to acquisition of land in AMBI & KADVE villages, merely based on incorrect statement given by Mr. Biradar (the then Liasioning Manager of the appellant). The learned CIT(A)-12, Pune and learned AO ought to have appreciated that the claim of said alleged brokerage / commission payment conflicts directly with the relevant papers found during the course of search u/s 132 of the ITA, 1961.

2. The Ld. CIT(A)-12, Pune and learned AO further erred in law and facts in keeping too much reliance on the incorrect information provided by Mr. Biradar during the course of search and especially drawing conclusions thereon without providing opportunity of his cross examination to the appellant company.

3. The Ld. CIT(A)-12, Pune and learned AO erred in placing reliance on incorrect statement of Mr. Biradar recorded during the course of search, without considering the statement of Mr. Shivajirao Jadhav, MD of the appellant company which was also recorded during the course of search.

4. The Ld. CIT(A)-12, Pune erred in law and on facts in affirming addition of Rs.1,61,94,464/- made by learned AO on the presumption that unpaid commission related to the acquisition of land in AMBI & KADVE villages have been paid in cash and has not been accounted for in the books of accounts irrespective of the fact that only Rs. 39,84,474/- was paid subsequently by cheque and as per agreement dated 22/02/2013."

At the outset it is brought to our notice that there is delay of 16 days in filing the appeal. On considering the affidavit and the contents therein, we find the delay is condonable considering the small delay of only 16 days and admit the appeal for adjudication.

16. Brief facts include that the search team noticed during the search & seizure action that the assessee purchased 472 Acres of land at Village Ambi and Kadve. The purchases were done involving the brokers. The search team seized some documents, copies of which are placed at pages 7, 19, 20 of the paper book No.1 which stands translated into English which are placed at pages 2 to 45 of the paper

book No.2. During the search action, on these papers, there was recording of sworn statement from Mr.Biradar, the Manager, the incharge of the Land Acquisition. According to Mr. Biradar, the assessee made total cash payments amounting to Rs.3,54,48,750/- in connection with the purchase of the said lands of 472 acres outside the books of account. Thereafter, the statement of Mr. Shivajirao B. Jadhav, MD of the company was also recorded. When the above statement of Mr.Biradar was confronted, Mr. Shivajirao B. Jadhav disagreed with the assertion made in the statement of Mr. Biradar. However, Mr. Shivajirao B. Jadhav agreed that the total unaccounted cash payments works out to Rs.1,82,54,286/- only and not Rs.3,54,48,750/-. Considering the differences, an amount of Rs.1,61,94,464/- was added in the assessment. The details are summarised as under :

a. Cash payments as per Mr. Biradar's statement - Rs.3,54,48,750/-
b. Less : Cash payment admitted by Mr. Jadhav -Rs.1,82,54,286/-
c. Less : CHQ payment as observed in seized papers-Rs. 10,00,000/-
d. Balance (i.e. amount of addition) - Rs.1,61,94,464/-

17. During the First Appellate proceedings the assessee could not improve his case. Therefore, the assessee is in appeal before the Tribunal with the grounds raised above.

18. Before us, on this issue, Ld. Counsel for the assessee argued stating that the entire amount needs to be deleted as the said addition was made at the back of the assessee without granting any opportunity to the assessee to rebut the same. Referring to the statement given by Mr. Biradar, assessee submitted that the statement dated 09-09-2010 is not sacrosanct as the same was not put to cross examination by Mr. Shivajirao B. Jadhav or any other concerned person before addition is

made. Asking for deletion of the said addition fully, Ld. Counsel relied on the following judgments/decisions :

a. *Andaman Timber Industries Vs. CIT - Civil Appeal No. 4228/2006, dated 02-09-2015*
b. *ITO Vs. M. Pirai Choodi 334 ITR 262 (SC)*
c. *Anita Agarwal Vs. ITO – ITA No.2622/PN/2016*

19. Ld. Counsel submitted that the entire addition made by the AO on this issue should be deleted. Further referring to seized papers, Ld. Counsel submitted that the payments of cash made to the farmers for buying 472 acres are evidenced by the vouchers and the same amounts for only Rs.1,82,54,286/- and no evidence whatsoever is available in support of the payments of cash of Rs.1,61,94,464/-. Referring to pages 42, 44 of Paper Book No.2 and page 20 of Paper book No.1, Ld. Counsel for the assessee submitted that there are contrary facts in which case these documents constitutes dumb documents. Therefore, the addition is illegal. He also mentioned that the AO's observations are confusing and the additions made on surmises are not sustainable. Assessee made following prayer in the written submissions

> *"Prayer : Appellant submits, entire process of making addition of Rs.1,61,94,464/- was an imaginary exercise of the learned I.T. authorities which was concluded in an unfair manner, i.e. without recording appellant's SAY on the matter and without granting CROSS of Mr. Biradar. In any case, the seized documents themselves demonstrate beyond doubt, the folly in making the said addition. As such, the Honourable ITAT may please delete the said addition and allow appellant's appeal."*

20. Elaborating the same, Ld. Counsel brought our attention to the written agreements signed between the assessee and the broker/agents dated 22-02-2013 (subsequent to the search action), assessee submitted that unpaid brokerage is only Rs.39,84,474/-. He also gave following submissions in this regard giving commission details :

"e. Total commission comes to (RS.23,000 x 495 Acre = Rs.1,13,85,000/-) (i.e. One Crore Thirteen Lakh Eighty Five Thousand Only). Out of above, Rs.74,00,526/- (i.e. Seventy Four Lakhs Five Hundred and Twenty Six only) has been paid in cash to party of the Second Part for increased purchase rate by farmers and other expenses from time to time. Balance Rs.39,84,474/- is to be paid in cheque described as follows :

Sr.No.	*Name*	*Commission Amount*
1	*Shri Nivangune Lahy Nivrutti*	*15,00,000*
2	*Shri Satpute Shrihari Genu*	*12,42,237*
3	*Shri Amrale Bhanudas Balu*	*12,42,237*
	Total	*39,84,474*

21. Further, bringing our attention to page 42, Ld. Counsel submitted that assessee purchased agricultural lands of 472 acres and 26R for a sum of Rs.7,08,97,500 @ Rs.1.50 lakhs per acre on 20-07-2010. The total expenditure incurred works out to Rs.3,67,71,120/-. For acquiring the above, 189 Hectares of land assessee paid cash of Rs. 1,05,10,625/- to the farmers and cash of Rs.74,00,526/- was paid to the brokers out of payable amount of Rs.2,36,32,500/- Remaining payable to the works as per page 43 works out to Rs.1,62,31,974/-. As per page 42 and 43 of the paper book No.2, the total cash paid works out to Rs.1,82,54,286/- and the remaining amount payable to the brokers works out to Rs.1,62,31,974/-. Further, bringing our attention to page 44 of the paper book, Ld. Counsel for the assessee submitted that broadly the entries are similar to the ones available on page 42 and 43 with minor deviations. According to these papers, total cash incurred is around Rs.1,92,67,027/- and the cash remaining payable to the brokers works out to Rs.1,52,31,974/-. This is the position as on 20-07-2010. The date is appearing on the 5th column of the paper provided in page 44 of the paper book.

22. From the above facts, it is the summary of the argument of Ld. Counsel that there is no evidence for entire cash payment of Rs.2,36,32,500/- to the brokers. Therefore, the addition of Rs.1,61,94,464/- made by the AO in the assessment is unsustainable as the same lacks support of proof of payment of cash by the assessee to the brokers. Further, he submitted that this is a case where additions were made without granting opportunity as well as the cross-examination benefit to the assessee. Further, the statement of Mr.Biradar was not confronted by the assessee by way of cross examination. He also mentioned that the matter can be remanded to the file of AO and grant an opportunity of being heard to the assessee on this issue as per the set principles of natural justice. For this proposal, assessee's counsel relied on various decisions.

23. In reply, Ld DR for the Revenue relied heavily on the orders of the AO and the CIT(A). He also relied on seized papers placed at pages 40 to 45 of the paper book No.2 stating that the translated pages 19,20, 37, 39 and 7 demonstrates the fact of payable of commission to the brokers amounting to Rs.2,36,32,500/- at the fixed rate per acre. Assessee has already paid sum of Rs.74,00,526/- is evident from the expression " Cash given" and an amount of Rs.1,52,37,374/- was also quantified as appearing with the description "Remaining" (Page 45 of the paper book No.2)

24. Ld. DR for the Revenue concluded based on page 43 and 45 that the cash payable is Rs.1,52,31,973/- after giving credit to the payment of cash of Rs.74,00,526/- and cheque payments of Rs.10 lakhs.

25. On the issue of request of cross examination with remanding, Ld. DR for the Revenue submitted that the Supreme Court judgment in the

case of Andaman Timber (supra) is entirely different fats and is inapplicable to the facts of the present case. This is the case where search and seizure action u/s.132 was conducted and documents are seized. The onus is on the assessee to discharge. Referring to the statement of Mr. Biradar, Ld. DR for the Revenue submitted that the said statement corroborates to the findings of the seized documents and the contents mentioned on the seized documents and the pages 42 to 45 are relevant.

26. We heard both the parties on this issue of addition of Rs. 1,61,94,464/- and perused the orders of the Revenue as well as the other documents placed before us. The following issues arise from the same :

(1) If the seized papers indicate unpaid commission of Rs.1,61,94,464/- to the brokers that requires addition in the assessment.

(2) Is there any violation to the principles of natural justice by not providing the opportunity of cross examination of Mr. Biradar to Mr. Shivajirao B. Jadhav.

27. Regarding the first issue, we perused the seized papers which are translated copies placed in the paper book and find the same are relevant for extraction. Accordingly, the same is extracted here as under :

A – Extract from Page 42 of the paper book :

Mauje Ambi, Tal – Haveli, District – Pune
Description of Agricultural land is as under

Purchase of land		
Ambi	*- 185 Hectors 51R*	*(464 Acres 17R)*
Kadve	*- 3 Hectors 29 R*	*(8 Acres 9 R)*
Total	*189 Hectors 6 R*	*(472 Acres 26R)*

Total Amount - Rs.7,08,97,500/-
(472 ares 26 R X Rs.1,50,000/- acres)

I. Cheque – Ambi + Kadve

Sr No	*Name of the Purchaser*	*Measure of land Hec. R. Pau.*	*Total expen-ditures*	*Expenditures upto Date 20.07.2010*	*Remaining*
1	*Amit Jadhav*	*16=03=54*	*31,20,035*	*31,20,035*	*0*
2	*M S Jadhav*	*00=89=66*	*1,76,525*	*1,76,525*	*0*
3	*Shraddha Energy*	*32=08=60*	*61,76,167*	*59,94,917*	*1,81,250*
4	*Sachin Gaikwad*	*20=46=83*	*40,81,327*	*39,98,077*	*83,250*
5	*Madhukar Jadhav*	*21=88=09*	*42,49,100*	*42,49,100*	*0*
6	*Dnyaneshwar Deshmukh*	*21=78=92*	*42,89,384*	*42,89,384*	*0*
7	*Sunder Rao Deshmukh*	*21=31=92*	*42,03,160*	*42,03,160*	*0*
8	*K G Gaikwad*	*21=90=17*	*42,40,817*	*42,40,817*	*0*
9	*B B Jadhav*	*22=29=00*	*43,91,877*	*43,91,877*	*0*
10	*S V Katle*	*10=40=00*	*28,35,228*	*21,07,228*	*7,28,000*
	Total	*189=06=71*	*3,77,63,620*	*3,67,71,120*	*9,92,500*

II. Cheque – Other expenses and development expenses

A) Development expenses – Rs.14,13,749

Total - Rs.14,13,749

B – Extract from Page 43 of the paper book :

III. Cash – Farmers and Commission
A) Farmers expenses —- Rs.1,05,10,625 - (79,28,750 + 21,81,875)
B) Commission – Rs.74,00,526 - (Total – 2,36,32,500)
(Paid – 74,00, 526)

(Remaining – 1,62,31,974)

C) Other expenses – Rs,3,43,135 (Registration, Zone etc)

Total Rs.1,82,54,286

C- Extract from Page 44 of the paper book :

Mauje Ambi, Tal – Haveli, District – Pune
Description of Agricultural land is as under

Purchase of land
Ambi - 185 Hectors 51R (464 Acres 17R)
Kadve - 3 Hectors 29 R (8 Acres 9 R)

Total 189 Hectors 6 R (472 Acres 26R)

Total Amount - Rs.7,08,97,500/- (472 Acres 26 R X Rs.1,50,000/- acres)

I. Cheque – Ambi + Kadve

Sr No	*Name of the Purchaser*	*Measure of land Hec. R. Pau.*	*Total expen-ditures*	*Expenditures upto Date 20.07.2010*	*Remaining*
1	*Amit Jadhav*	*16=03=54*	*31,20,035*	*31,20,035*	*0*

2	*M S Jadhav*	*00=89=66*	*1,76,525*	*1,76,525*	*0*
3	*Shraddha Energy*	*32=08=60*	*61,76,167*	*59,94,917*	*1,81,250*
4	*Sachin Gaikwad*	*20=46=83*	*40,81,327*	*39,98,077*	*83,250*
5	*Madhukar Jadhav*	*21=88=09*	*42,49,100*	*42,49,100*	*0*
6	*Dnyaneshwar Deshmukh*	*21=78=92*	*42,89,384*	*42,89,384*	*0*
7	*Sunder Rao Deshmukh*	*21=31=92*	*42,03,160*	*42,03,160*	*0*
8	*K G Gaikwad*	*21=90=17*	*42,40,817*	*42,40,817*	*0*
9	*B B Jadhav*	*22=29=00*	*43,91,877*	*43,91,877*	*0*
10	*S V Katle*	*10=40=00*	*28,35,228*	*21,07,228*	*7,28,000*
	Total	*189=06=71*	*3,77,63,620*	*3,67,71,120*	*9,92,500*

II. Cheque – Other expenses and development expenses

A) Development expenses – Rs.14,13,749
B) Agreement to sale – Shraddha - Rs.11,15,125
C) Agreement to sale – Amit - Rs. 50,000

Total - Rs.25,78,874

D-Extract from Page 45 of the paper book :

III. Cash – Farmers and Commission
D) Farmers expenses —- Rs.1,05,10,625 - (79,28,750 + 21,81,875)
E) Commission – Rs.84,00,526 - (Total – 2,36,32,500)
(Cash given – 74,00,526)
(Cheque – 10,00,000)

(Remaining – 1,52,31,974)

C) Other expenses – Rs,5,55,876 (Registration, Zone etc)

Total Rs.1,92,67,027

Summary –

- *Value of land - Rs.7,08,97,500 (Farmers expenses + commission)*
- *Stamp duty and other – Rs.17,42,995*
- *Development expenses – Rs.14,13,749*
- *Agreement to sale (Shraddha + Amit) – Rs.11,65,125*
- *Other Expenses - Rs.5,55,876*
-

The above documents suggest that undisputedly there is cash payment to the brokers for land purchase. The payable total sum of Rs.2,36,32,500/- is the undisputed figure. Payment of cash of Rs.74,00,526/- is also uniformly mentioned in all these seized papers repeatedly. After considering the cheque payment of Rs.10 lakhs, the remaining cash payable of Rs.1,52,31,976/- is also evident from the pages of the paper book. Whether the same is paid subsequently or not is a matter of debate. Assessee's counsel argues that the said amount was not paid by the assessee in view of change in the terms and

conditions relating to the payment of commission to the brokers. In support of the same, assessee relied on the documents dated 22-02-2013 granted after the date of search, i.e. 08-09-2010. These agreements came into operation after the lapse of more than 2 years. Revenue rejects the same stating that it is a case of an afterthought aimed at defeating the evidentiary value of the seized papers. However, it is a fact that the contents of this agreement were not thoroughly examined by the AO. Brokers were not put to test under the provisions of the Income-tax Act. The onus is on the assessee to demonstrate that the contents are genuine. It is not mentioned as to whether the cash paid amounting to Rs.74,00,526/- to the three brokers was offered to tax in their returns or not. We cannot appreciate how the payments made to the brokers prior to search are the facts and the remaining payable amount to brokers after the search action are not real. How and why the brokers backed out in not claiming their dues. There is need for the assessee and the brokers to demonstrate the genuineness of the said agreement dated 22-02-2013. Considering all these factors, there is enough evidence to establish that the cash paid to the brokers in connection with the purchase of lands appears to be Rs.2,36,32,500/-. As such, assessee has not discharged the onus which is cast on him as it is a search action u/s.132 of the Act and the seized documents are obtained from the premises of the assessee.

28. Regarding the second issue of remanding the issue to the file of AO in view of the failure of the AO in issuing show cause notice before making addition of Rs.1,61,94,464/- without granting the benefit of cross-examination of Mr. Biradar, we find there is lapse on the part of the AO in issuance of final show cause notice before the addition of Rs.1,61,94,464/- is made. AO should not make any addition without

informing the specific details of the addition proposed to be made in the assessment order. It is also worth mentioning that the issue as a whole is in the knowledge of the assessee but certainly not the specific issue of making addition of Rs.1,61,94,464/-. The same is not approved. The order of the AO, being judicial order, is expected to be made as per the requirement of the law. The assessee has the right to know the mind of the AO before making any addition in the assessment. Thus, the AO shall examine the applicability of the cited Supreme Court judgment in the case of Andaman Timber Industries (supra) and others. Accordingly, we are of the opinion that the matter should be remanded to the file of the AO. Ground Nos. 1 to 5 raised by the assessee are allowed for statistical purposes.

29. In the result, appeal of the assessee is allowed for statistical purposes.

30. To sum up, appeal of the Revenue is partly allowed for statistical purposes and appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on this 09th the day of May, 2018.

Sd/-	Sd/-
(VIKAS AWASTHY)	**(D. KARUNAKARA RAO)**
न्यायिक सदस्य /JUDICIAL MEMBER	**लेखा सदस्य / ACCOUNTANT MEMBER**

पुणे Pune; दिनांक Dated : 09th May, 2018
सतीश

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. CIT(A)-12, Pune
4. CIT-12, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "B Bench" Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune