

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'C' अहमदाबाद ।
IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH, AHMEDABAD

BEFORE SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER
& SHRI MAHAVIR PRASAD, JUDICIAL MEMBER

आयकर अपील सं./I.T.A. Nos. 401/Ahd/2014 & 3188/Ahd/2015
(निर्धारण वर्ष / Assessment Year : 2011-12)

M/s. Savaliya Buildcon 702, Surmount Complex, Iscon Temple, S. G. Highway, Ahmedabad	बनाम/ Vs.	The DCIT Central Circle 2(1) / Circle -3(3), Ahmedabad
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

&

आयकर अपील सं./I.T.A. Nos. 410/Ahd/2014 & 3544/Ahd/2015

WITH

CROSS OBJECTION Nos. 117/Ahd/2014 & 14/ahd/2016
(निर्धारण वर्ष / Assessment Year : 2011-12)

Deputy Commissioner of Income-tax, Central Circle 2(1) / Circle -3(3), Ahmedabad	बनाम/ Vs.	M/s. Savaliya Buildcon 702, Surmount Complex, Iscon Temple, S. G. Highway, Ahmedabad
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : ABIFS6955M		
(Appellant / Respondent)	..	(Respondent / Cross Objector)

&

आयकर अपील सं./I.T.A. No. 402/Ahd/2014
(निर्धारण वर्ष / Assessment Year : 2011-12)

Savaliya Developers Pvt. Ltd. 702, Surmount Complex, Iscon Temple, S. G. Highway, Ahmedabad	बनाम/ Vs.	The DCIT Central Circle 2(1), Ahmedabad
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

&

आयकर अपील सं./I.T.A. No. 411/Ahd/2014

WITH

CROSS OBJECTION No. 118/Ahd/2014
(निर्धारण वर्ष / Assessment Year : 2011-12)

Deputy Commissioner of Income-tax, Central Circle 2(1)	बनाम/ Vs.	M/s. Savaliya Developers Pvt. Ltd. 702, Surmount Complex, Opp. Iscon Temple, S. G. Highway, Ahmedabad 380015
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAGCS4048B		
(Appellant / Respondent)	..	(Respondent / Cross Objector)

अपीलार्थी ओर से /Assessee by :	Shri Dhiren Shah, A.R.
राजस्व की ओर से/Revenue by :	Shri Surendra Kumar, CIT.DR & Shri L. P. Jain, Sr. DR

सुनवाई की तारीख / Date of Hearing	09/04/2019
घोषणा की तारीख /Date of Pronouncement	30/04/2019

आदेश/ORDER

PER PRADIP KUMAR KEDIA - AM:

The captioned appeals at the instance of assessee & Revenue arise from the respective orders of the Commissioner of Income Tax (Appeals)-III, Ahmedabad ('CIT(A)') against respective assessment orders / penalty orders for same assessment year as tabulated below:

ITA Nos.	Name of assessee	AY	CIT(A)'s order dated	AO's order dated	AO's order under Section
401 & 410/Ahd/14	M/s. Savaliya Buildcon	2011-12	28.11.2013	26.03.2013	143(3) of the Income Tax Act, 1961
3188 & 3544 /Ahd/15	-Do-	-Do-	13.10.2015	23.01.2015	271AAA of the Act

402 & 411/Ahd/14	M/s. Savaliya Developers Pvt. Ltd.	-Do-	28.11.2013	26.03.2013	143(3) of the Act
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2. The grounds of appeal raised by the assessee (in case of M/s. Savaliya Buildcon) in ITA No. 401/Ahd/2014 read as under:

I. ADDITION ON ACCOUNT OF ON-MONEY RECEIPT - RS. 14,10,000/-

1. *The Ld. CIT(A) has erred in law and on facts while confirming the addition of Rs.14,10,000/- on the basis of statement of two members recorded behind the back of the appellant, copy of which was not provided to the appellant during the course of assessment proceedings as well as in absence of granting the opportunity of cross examination of these two members.*

2. *The Ld. CIT(A) has erred in law and on facts while considering the alternative ground of the appellant that the addition of Rs.14,10,000/- as made by the Ld. A.O. on account of 'on-money' received from two members is required to be telescoped against the disclosure of Rs.2 Crores made by the appellant firm for the financial year 2010-11 relevant to A.Y. 2011-12.*

3. *The Ld. CIT(A) has erred in law and on facts while failing to consider the fact that voluntary and suo-motto disclosure of unaccounted booking receipts from the members of the scheme amounting to Rs.2.00 crores by the appellant firm for F.Y. 2010-11 relevant to A.Y. 2011-12 is more than sufficient to cover up the addition of Rs.14,10,000/- confirmed by him in respect of on money received from two members and therefore, no separate addition is required as directed by him."*

2.1 The grounds of appeal raised by the Revenue (in case of M/s. Savaliya Buildcon) in ITA No. 410/Ahd/2014 read as under:

“(i) On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law and on facts in restricting the addition to Rs. 14,10,000/- out of total addition of Rs. 3,28,13,355/- made on account of on-money receipts by the A.O. on the basis of evidence of reliable nature.

(ii) On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law and on facts in holding that extrapolation of on-money receipts cannot be made and thereby deleting the addition as above in (i).

iii) The Ld. CIT(A) has erred in allowing relief without considering the fact that 83 flats were sold during the year, before the date of search and without appreciating that the estimation made by the

A.O. in respect of such sale cannot be equated with the rate of 4 flats made after the search.”

2.2 The grounds of appeal raised by the assessee (in case of M/s. Savaliya Buildcon) in CO No. 117/Ahd/2014 read as under:

“1. The Ld. CIT(A) has erred in law and on facts in confirming the addition of Rs.14,10,000/- out of total addition of Rs.3,28,13,355/- made on account of alleged on-money receipts by the Ld. A.O. The Ld. CIT(A) ought to have deleted the entire addition made by the Ld.A.O.

2. The Ld. CIT(A) has rightly held that extrapolation theory of on-money receipts cannot be made and has correctly deleted the addition made by the Ld.A.O. on account of extrapolation theory of on-money receipts.”

3. Briefly stated, the assessee firm is engaged in the business of construction and development of residential flats and commercial shops in the name and style of ‘Krish Avenue’. A search action was carried out in group cases of Savaliya Group under s.132 of the Act on 06.01.2011. In the course of search, a statement was recorded under s.132(4) of the Act of the key persons (Shri Kantibhai T. Savaliya & Shri Sanjaybhai K. Savaliya) of the group. The group disclosed an amount of Rs.25 Crores in aggregate. A case was made out by the assessee before the AO that such disclosures made *suo motu* for F.Y. 2010-11 relevant to AY 2011-12 were voluntary. An amount of Rs.2 Crore was disclosed by the group in relation to captioned assessee firm to cover up any deficiency. The assessee, at the time of filing the return of income subsequent to search, duly included the aforesaid disclosure of Rs.2 Crore towards unaccounted booking receipts from its Krish Residency 1 & 2 project and paid the taxes thereon. In the course of the scrutiny proceedings as a consequence of search, the AO observed that in the course of post search inquiry statement of two members/purchasers (namely; Surekhaben M. Bhavsar & Shri Hasmukhbhai M. Solanki) of Krish Residency Housing Project were recorded on oath under s.131 of the Act. The AO noted that as per the statement so recorded of the two purchasers that one of the purchasers

namely Smt. Surekhaben M. Bhavsar has admitted cash/onmoney payment of Rs.9Lakhs towards purchase of residential flat in Krish Residency-1. Similarly, another purchaser Shri Hasmukhbhai M. Solanki also admitted on-money payment of Rs.5,10,000/- in cash towards purchase of his flat. Placing reliance upon the statement of aforesaid two members of Krish Residency-1 recorded under s. 131 of the Act in the course of post search inquiry, the AO took a view that similar on-money amount must have been received in all other bookings made during the year. The AO accordingly applied the theory of extrapolation on the basis of admission made by the two purchasers of the residential flats and extended this in respect of all other sales having regard to the area sold. The AO computed estimated on-money amounting of Rs.5,28,13,355/- to be undisclosed cash component in the sale of flats. Having regard to the disclosure of Rs.2Crore already made in the search proceedings by way of statement under s.132(4) of the Act, the remaining amount of Rs.3,28,13,355/- was added to the total income of the assessee.

4. Aggrieved by the aforesaid action of the AO, the assessee preferred the appeal before the CIT(A).

4.1 Before the CIT(A), the assessee once again reiterated that no incriminating material was identified from the appellant firm premises or from the firms' partners' residential premises as regard to the unaccounted booking receipts and/or unaccounted extra work receipts from any purchaser in the project. It was further submitted that AO did not provide the so called statement of the two members namely one Smt. Surekhaben M. Bhavsar & Shri Hasmukhbhai M. Solanki recorded behind the back of the assessee firm in the post search inquiry despite several requests in writing vide letter dated 07.01.2013, 17.01.2013, 11.02.2013 & 25.03.2013 to provide the zerox

copies of the so called statements of the two persons as well as cross examination of such persons. It was contended that the AO has neither provided the copies of the statement nor granted opportunity of cross examination and therefore adverse inference drawn by the AO on the basis of statement recorded of third party behind the back of the assessee is totally unjustified and bad in law.

4.2 The assessee also propounded alternative contention earlier placed before the AO and submitted that estimate of extra booking /extra work receipt from some of the purchasers of the flat in its project cannot be made on gross basis and only certain estimated profit margin therefrom could possibly be taxed in the alternative. It was further pointed out that the assessee itself has declared a lump sum amount of Rs.2 Crore to cover unaccounted cash component without there being any incriminating material found in this regard and the alleged cash component admitted by the two purchasers are far lower than the amount already declared. It was contended on behalf of the assessee before the CIT(A) that extrapolation theory adopted in the assessment order for making an addition of presumption basis is not permissible in law in the absence of any tangible material in corroboration.

4.3 The CIT(A) took note of the detailed submissions made on behalf of the assessee and found considerable merit therein. The CIT(A) accordingly observed that the AO was not justified in making extrapolation on basis of statement of two purchasers and estimation of probable on-money receipts from remaining other flat byers. The CIT(A) accordingly deleted the addition on account of on-money receipt of Rs.3,28,13,355/- made by the AO. However, it sustained Rs.14,10,000/- being aggregate of the confessional amount from two purchasers whose statements were actually recorded. In short, the

CIT(A) sustained addition of Rs.14,10,000/- out of total addition of Rs.3,28,13,355/- made by the AO. It would be apt to reproduce the relevant operative para of the order of the CIT(A) hereunder:

“8. Before taking a decision in this case, it will be worthwhile to go through the relevant judicial decisions in this regard:

- (a) It was held by Hon'ble High Court of Bombay in the case of CIT vs. C. J. Shah & Co. (246 ITR 671) that estimation of undisclosed profit made by AO for the entire block period on the basis of seized loose papers which indicated undisclosed sales for three months was not justified.*
- (b) In the case of Dolphin Builders Pvt. Ltd (356 ITR 420), Hon'ble High Court of Madhya Pradesh held that making addition merely on the basis of seized documents without cogent evidence that excess amount mentioned in seized document was actually passed on to the assessee was not sustainable where books of account of assessee were duly audited.*
- (c) It was held by Hon'ble ITAT Pune Bench in the case of Samrat Beer Bar (75 ITD 19) that in the absence of any other evidence, AO is not empowered to estimate the suppression of sales for a larger period on the basis of the diary found in search showing suppression of sales for a particular period.*
- (d) In the case of D. N. Kamani HUF (70 ITD 77) Hon'ble ITAT Patna Bench held that documents regarding receipt of on-money by assessee having been found in respect of sale of flats to one party, addition could not be made in respect of all the parties to whom assessee sold flats merely on the basis of presumption.*
- (e) In the case of Fort Projects Pvt. Ltd (63 DTR 145) Hon'ble ITAT Kolkata Bench held that AO was not justified in extrapolating few notings in a seized diary to balance flats in three projects given that no incriminating evidence pertaining thereto was found in the course of search.*
- (f) In the case of Or. K. M, L. Mehrotra (64 TTJ 259) Hon'ble ITAT Allahabad Bench held that estimation of undisclosed income for block assessment cannot be made on the basis of multiplication formula derived from suppression percentage of a few days.*
- (g) In the case of Rajdeep Builders (52 SOT 62) Hon'ble ITAT Chandigarh Bench held that AO was not justified to make addition on the basis of statement of one of the purchaser who subsequently retracted his statement in cross-examination.*
- (h) In the case of Jawaharbhair Atmaram Hathiwala [128 TTJ 36] addition on account of on money was made for purchase of flat. In this case, during the course of search documents were seized from developer firm which indicated that assessee has made payment of on money for purchase of a flat. It was held by Hon'ble ITAT,*

Ahmedabad 'C' Bench that no evidence was brought on record by revenue to show that appellant had actually paid the on money. It was further held that assessee's denial cannot be brushed aside without bringing any positive material on record. The addition was held not be justified in such a case.

- (i) A similar view was held in the case of Bharat A Mehta [86 TTJ 369] by Hon'ble ITAT, 'B' Bench. In this case addition u/s. 69 was made on account of on money paid on purchase of bungalow on the basis of admission made by builder during the search. However, no document was recovered during the search regarding on money paid by assessee. In. such a case, the addition was directed to be deleted by Hon'ble ITAT.*
- (j) In the case of CIT vs. D Kanta [205 Taxman 115(Kar)], addition was made u/s. 69B r.w.s. 147 on account of unexplained investment in purchase of land. Search was conducted in the case of son of vendor from whom the land was purchased. During the course of search, son of vendor stated that assessee had received consideration of Rs.75 lakhs. AO reopened assessment and made addition on the basis of this information. It was held by Hon'ble High Court that finding of AO was not based upon material found during the search and it was based on statement of son of vendor. Therefore, addition was not justified and the same was directed to be deleted.*
- (k) In the case of Prarthana Construction Pvt. Ltd., it was held by Hon'ble jurisdictional High Court that revenue is not justified in resting its case on the loose papers and documents found from the residence of a third party, even if such documents contain narration of transactions with the assessee. It was also held that such loose papers cannot be construed as books of accounts regularly kept in the course of business and therefore such evidence would be outside the purview of section 34 of the Evidence Act, 1872 in view of decision of Hon'ble Apex Court in the case of CBI v/s V.C. Shukla & Others (1998) 3 SCC 410.*
- (l) Similar view has been held by the Hon'ble ITAT Jaipur Bench in the case of Sunita Dhaddha in ITA No. 751/JP/2011. In that case, during search in the case of a builders, certain documents were found reflecting payments of 'on money' in cash to the assessee. AO made addition in the case of assessee, which was deleted by Hon'ble ITAT. It was observed by Hon'ble ITAT that secondary evidence cannot be relied on as neither the witness nor the person who prepared the documents were produced. Therefore, sale consideration as shown in the documents is to be accepted.*

9. *When the present case is examined in view of this legal position, it is found that the entire addition in respect of on-money payment has been made by AO on the basis of statement of two members of the scheme i.e. Smt. Surekhaben Bhavsar and Shri Hasmukhbhai Solanki. Moreover, the addition was made by AO without allowing opportunity of cross-examination of these members to the appellant. No corroborative evidence was found from premises of appellant during the course of search regarding receipt of on-money by him. There is no reference in assessment*

order of any document seized during the course of search which record or indicate receipt of on-money by appellant. Appellant firm made disclosure of Rs. 2 crore as unaccounted booking receipt from project Krish Residency-I & II. This amount was duly included in return of income as mentioned by AO in the assessment order. In view of all these facts, I hold that AO is not justified in making extrapolation on the basis of statement of Smt. Surekhaben Bhavsar and Shri Hasmukhbhai Solanki and estimating total on-money receipt in respect of 87 flats at Rs. 528,13,355/-. Merely on the basis of statement of two members, it cannot be presumed that appellant received similar amount from each and every client. It is a well established principle that suspicion; however, strong can never take the place of evidence. In this case, AO could have made addition of Rs. 900,000/- which was admitted by Smt. Surekhaben Bhavsar and Rs. 510,000/- which was admitted by Shri Hasmukhbhai Solanki. I, therefore hold that addition on account of on-money receipt is to be restricted to Rs. 14,10,000/- as against Rs. 3,28,13,355/- made by AO. The AO is therefore directed to restrict addition on this account to Rs. 14,10,000/-. Ground no. 1 of the appeal is thus partly allowed."

The CIT(A) accordingly granted partial relief to the assessee as noted above.

5. Aggrieved by the relief granted by the CIT(A) deleting Rs.3,14,03,355/- so granted by the CIT(A) out of total addition of Rs.3,28,13,355/- made by the AO towards unaccounted receipt, revenue has preferred the appeal before the Tribunal as per captioned ITA No. 410/Ahd/2014, whereas the assessee has also challenged the action of the CIT(A) in partly sustaining the addition to the extent of Rs.14.10 Lakhs by the CIT(A) as per captioned appeal of the assessee in ITA No. 401/Ahd/2014 & cross objection of assessee in CO No. 117/Ahd/2014 captioned above.

6. When the matter was called for hearing, the learned AR for the assessee pointed out that in the course of search proceedings initiated under s.132 of the Act, the assessee group made a voluntary and *suo moto* disclosure made in statement of key persons recorded under s.132(4) of the Act dated 07.01.2011 wherein *inter alia* the disclosure of Rs.2 Crores was made attributable to assessee firm. The learned AR submitted that the disclosure was made on lump sum basis for

which no incriminating material/documents were found from the premises searched to corroborate such statements. The assessee however honored its statement and filed the return of income wherein aforesaid disclosure was duly accounted for. The assessee also paid taxes thereon despite absence of any adverse material. The AO claims to have made inquiry with two of its purchasers of residential flat wherein such purchasers have allegedly made confession to the effect that they have also paid on-money / cash towards purchase of flats aggregate to Rs.14,10,000/-. The statement was neither provided nor the deponents of alleged statement were permitted to be cross examined to unearth truth despite several written requests made in this regard. The AO has eventually imagined illusory cash receipt on all sales of residential flats made by the assessee applying the results of the statement of two purchasers notwithstanding total absence of any corroboration in this regard.

6.1 The learned AR for the assessee referred to various submissions made before the lower authorities as reproduced by the CIT(A) in its appellate order and submitted that the disclosure was made for a lump sum amount for the entire F.Y. 2010-11 by the partners of the firm. The Authorized Officer has not raised any dispute on such disclosure for the whole of the year. The learned AR contended that if the Revenue seeks to discard the statement given by the partner and go beyond the assertions made in the statement recorded under s.132(4) of the Act making disclosure for entire financial year then in that circumstances any addition can be made only on the basis of cogent material and evidences against the assessee and consequently no addition can possibly survive in the absence of any adverse material brought on record. The learned AR contended that the assessee has already disclosed a lump sum amount of Rs.2 crores in respect of extra booking etc. from some of the members of the project which will

naturally include any amount allegedly confessed by two of the purchasers which confession remains unverified and unilateral nevertheless. The learned AR submitted that the appellant firm had declared additional income of Rs.2 Crore merely to buy peace, save time and costs and to avoid protracted litigation and also to co-operate with the department as a goodwill gesture without any substantive evidences in possession of the Revenue. In the circumstances, estimation of income for the remaining period post search between 06.01.2011 to 31.03.2011 merely on surmises and conjunctures' is totally uncalled for.

6.2 Without prejudice and in alternative, the learned AR for the assessee submitted that the entire estimated cash receipt on the basis of extrapolation cannot be added over and above what has been declared *suo motu*. The Revenue at best can assess a reasonable profit margin of 10% to 15% of the estimated cash receipts and in that circumstances, disclosure made by the assessee cannot be reckoned. In such eventuality, the assessed income will be far lower than the returned income already filed by the assessee in pursuance of the search. The learned AR thus submitted that the so called unverified statement of two of the purchasers cannot lead to estimation for remaining flats more particularly when the statement were recorded behind the back without any cross examination despite several requests and also in the backdrop of lump sum declaration already made by the assessee. The learned AR referred to several judicial precedents to prop up its case and submitted that the action of the AO resorting to estimated additions by way of extrapolation over and above income already offered cannot be countenanced by any means.

6.3 The learned AR also assailed the action of the CIT(A) in retaining the aggregate amount of Rs.14,10,000/- towards on-money on the basis of unverified statement of two purchasers over and above

amount already declared in the search proceedings as misconceived. The learned AR submitted that on the face of unsupported voluntary disclosure of whopping amount of Rs.2 Crore, it was not legitimate for the CIT(A) to flippantly sustain the addition of Rs.14,10,000/- while deleting the remaining addition out of Rs.3,28,13,355/- estimated by the AO. The learned AR accordingly submitted that the relief prayed on behalf of the Revenue is opposed to the law having regard to the facts of the case and therefore totally unsustainable. Similarly, it was also urged on behalf of the assessee that the additions sustained by the CIT(A) to the extent of Rs.14.10 lakh challenged by the assessee in its grounds of appeal in ITA No. 401/Ahd/2014 as well as as per its memorandum of cross objection requires to be allowed and the addition sustained requires to be deleted being not sustainable.

7. The learned DR for the Revenue, on the other hand, relied upon the order of the AO and submitted that where two of the purchasers have unequivocally confessed payments of cash money to the assessee in the posts search inquiry, a natural and logical inference would arise against the assessee in respect of remaining flats sold. The AO was accordingly justified in estimating the cash component in respect of all the flats. It was further submitted that the AO was quite fair in granting relief in respect of amount already declared in the confessional statement recorded under s.132(4) of the Act and only the balance amount in excess of what was declared has been added in the hands of the assessee firm. In the circumstances, it was contended that there was no justification for the CIT(A) to cancel the additions so made.

8. We have carefully considered the rival submissions. Both assessee as well as the Revenue are aggrieved by the order of the CIT(A). The addition on account of alleged on money receipt towards

sale of residential flat by the assessee is subject matter of controversy. While it is the case of the assessee that in view of the voluntary declaration made by the assessee in its own record to the tune of Rs.2 Crore which sufficiently covers any remotely possible on money receipt on sale of flats, separate addition over and above which is volunteered not plausible. The Revenue, on the other hand, seeks to contend that quantification of on-money receipt actually works out to Rs.5,28,13,355/- and therefore addition of Rs.3,28,13,355/- over and above Rs.2 Crore declared is fully justified. In the course of search conducted under s.132 of the Act, the partners of the assessee are stated to have voluntarily disclosed an amount of Rs.25 Crore in aggregate as undisclosed income for and on behalf of the Savaliya Group concerns for F.Y. 2010-11 relevant to AY 2011-12. The disclosure of Rs.2 Crore out of aggregate disclosure of Rs.25 Crores pertains to the assessee firm herein. It appears that after the post search inquiry, two of the purchasers of the residential flats in the housing projects of the assessee have confessed to have given Rs.9Lakhs and Rs.5.10 Lakhs to assessee in a statement recorded under s.131 of the Act. The AO on the basis of such statements at its command, proceeded to make estimation of probable unaccounted receipt from sale of residential flats in respect of all the flats sold during the year. Applying the theory of extrapolation to remaining 87 flats on the basis of statement recorded in respect of the two flats, the AO arrived at an estimated on-money receipt of Rs.5,28,13,355/- in the hands of the assessee. After giving credit for the amount already disclosed in the search proceedings amounting to Rs.2 Crore, the AO made an addition of remaining amount of Rs.3,28,13,355/- in the hands of the assessee.

8.1 In the first appeal, the CIT(A) found merit in the plea of the assessee that *suo motu* disclosure conceded in the course of search

proceedings was without any incriminating material towards any clandestine income. The disclosure was made to buy peace and avoid protracted litigation. The CIT(A) also opined that extrapolation of such confession to the remaining flats is not possible on the basis of statement of two purchasers. The CIT(A) accordingly deleted the additions measured on the basis of extrapolation theory but however retained the additions to the extent of admission actually made by two purchasers over and above the disclosure made. While the Revenue seeks addition for on account of on-money receipt for all the flats applying extrapolation theory, the assessee seeks to challenge the addition of Rs.14.10Lakhs sustained by the CIT(A) on the basis of statements of two purchasers on the fact of generic declaration already made.

8.2 The statement of two purchasers is the bedrock for additions in controversy. It is an admitted position that the statements of two purchasers allegedly claiming to have paid cash money of Rs.14.10 Lakhs in aggregate, were obtained behind the back of the assessee. The copy of the statement was not provided to the assessee at all. The cross examination of the purchasers were also not provided by the Revenue authorities despite several requests made by the assessee. Such overwhelming facts remain unrebutted on behalf of the Revenue. This being so, the action of the AO in placing reliance upon statement of third party to crucify the assessee is clearly in negation of overriding principles of natural justice which is supposed to be guiding factor in an adjudication process. Needless to say, the appropriate opportunity to an affected party is not a gift but an absolute and salutary right which cannot be simply bypassed. The infringement of basic principles of natural justice has thus vitiated the order of the AO to the core. The legitimate expectation of the assessee to seek cross examination of a person making adverse comments

against the assessee to enable it to traverse the assertions cannot be shunned in sub-version of judicial propriety while weighing an issue. The right to fair hearing is a guaranteed right. Every person affected by the statement of third party has indispensable right to know the evidence used against him. The AO as well as the CIT(A) has violated this cardinal principle as squarely underscored in *Kishanchand Chellaram vs. CIT 125 ITR 713 (SC)* and host of other decisions. Apart from a bald statement of third party loaded against the assessee which was never confronted, the Revenue has not adduced any material which could expose the falsehood in the records of the assessee despite drastic action of search. Therefore, we are unable to subscribe to the view taken by the AO for exercise of the power in a manner most beneficial to the Revenue and consequently most adverse to the assessee in total disregard of fairness in its action. From its submissions before lower authorities, the assessee has clearly demonstrated that it has repeatedly asked for cross examination of the witnesses against him. The department was thus duty bound to produce its witness for cross examination more particularly when no other tangible material is shown to be available to implicate the assessee. In the absence of any corroborating evidence and in the absence of cross examination offered, the statement of third party cannot be taken cognizance of, as it will apparently lead to miscarriage of justice. Therefore, we find total justification in the action of the CIT(A) in directing the AO to delete the estimated additions towards unaccounted receipt in respect of flats sold on the basis of some unverified and bald statement. Once such statements of the purchasers are taken out of reckoning, the edifice of estimated additions towards sale of residential flats would crumble down.

8.3 Besides, estimated cash receipts on-money of sale of all flats merely on the basis of statement of two purchasers without any

tangible corroboration clearly falls in the realm of conjunctures and surmises. It is obvious that driven by misplaced suspicion, the AO has presumed the presence of on-money in respect of each of the residential flat sold. The action of the AO is a mere *ipse dixit* which is not objectively justifiable by some inculpatory evidence. It is only elementary to say that estimation of unaccounted money cannot be made only on the basis of contemplation. The order of the AO in making additions of Rs.3.28 Crores is thus clearly arbitrary and unsustainable in law. It is well settled that the Revenue authorities cannot base its findings on suspicions, conjunctures or surmises nor should it act on no evidence at all or on vague considerations partly on evidence and partly on suspicion, conjunctures or surmises. The Revenue could not demonstrate any material except unsupported statements of two persons. Such unverified statements without any proof towards its assertions are not a good evidence and do not raise any estoppel against the assessee. Therefore, the addition made by the AO is in the realm of speculation without any basis whatsoever. Hence, we decline to interfere with the order of the CIT(A) in so far as appeal of the Revenue is concerned.

8.3 We shall now advert to the maintainability of addition of Rs.14.10 Lakhs confirmed by the CIT(A) on the basis of statement of two purchasers. As emphatically noted above, the statement of two persons cannot be recognized to the prejudice of assessee in the absence of corroboration and/or cross examination thereof. The addition sustained on the basis of a bald admission of third party against the assessee has no probative value and thus unsustainable in law. We find potency in the plea of the assessee that despite search, no reference to any incriminating material recovered from assessee is found in the assessment order and the basis of addition is some post search enquiry from purchasers alone subsequent to search.

Significantly, the assessee has repeatedly pointed out the absence of contemporaneous material before the lower authorities. Such assertions on behalf of the assessee remain un rebutted. The onus was always on the Revenue to support the statement recorded behind the back of the assessee in some realistic manner particularly when the cross examination was deprived despite having been specifically demanded. The onus is clearly not discharged by Revenue. The additions towards unaccounted cash receipt cannot be hypothetically attributed. Hence the addition sustained by the CIT(A) solely on the basis of oral evidence of third party without its vindication is clearly without any legal foundation. Therefore, the action of the CIT(A) in sustaining part addition requires to be struck down.

9. In the light of the aforesaid discussion, the appeal of the Revenue in ITA No. 410/Ahd/2014 is dismissed and appeal of the assessee in ITA No. 401/Ahd/2014 and cross objection in CO No. 117/Ahd/2014 is allowed.

10. The grounds of appeal raised by the Revenue (in case of M/s. Savaliya Buildcon) in ITA No. 3544/Ahd/2015 read as under:

- “1. *The Ld. CIT(A) has erred in law and on facts in deleting the penalty of Rs.20,00,000/- levied u/s.271AAA of the Act.*
2. *The Ld. CIT(A) has erred in law and on facts by not appreciating the facts that the assessee had failed to substantiate the manner in which undisclosed income of Rs.2,00,00,000/- was earned and therefore he was not eligible for any immunity for penalty u/s.271AAA.”*

10.1 The assessee has moved memorandum of cross objection in the aforesaid Revenue's appeal. The grounds of appeal raised by the assessee (in case of M/s. Savaliya Buildcon) in CO No. 14/Ahd/2016 read as under:

“1. The Ld. CIT(A) has erred in law and on facts in confirming the penalty levied u/s. 271AAA of the Act of Rs.1,41,000/- out of total penalty levied of Rs.21,41,000/-. On the facts and circumstances of the case, the assessee has neither concealed the income nor has submitted any inaccurate particulars of income. In view of this, the Ld. CIT(A) ought to have deleted the entire penalty levied u/s. 271AAA of the Act of Rs.21,41,000/-.”

10.2 Apart from CO noted above, the assessee has also filed cross appeal reiterating the grievance raised as per CO. The grounds of appeal raised by the assessee (in case of M/s. Savaliya Buildcon) in ITA No. 3188/Ahd/2015 read as under:

I. LEVY OF PENALTY U/S. 271AAA OF THE ACT

1. The Ld. CIT(A) has erred in law and on facts in confirming the penalty levied u/s. 271AAA of the Act of Rs.1,41,000/- out of total penalty levied by the Ld. A.O. of Rs.21,41,000/-.

2. The Ld. CIT(A) has erred in law and on facts while not considering the fact that no penalty can be levied on the addition of Rs.14,10,000/- on account of ‘on-money’ received from two members as the same is required to be telescoped against the disclosure of Rs.2 Crores made by the appellant firm for the financial year 2010-11 relevant to A.Y. 2011-12.”

11. The captioned appeals filed by the Revenue and the assessee against the order of the CIT(A) arises from the penalty order passed by the AO under s.271AAA of the Act concerning AY 2011-12. As noted above, the assessee has also filed cross objection against the appeal of the Revenue raising grievance for partial confirmation of the penalty similar to its cross appeal in ITA No. 3188/Ahd/2015 (supra).

12. The cause of grievance in all the captioned appeals/cross objection is common. In view of similarity of the facts and solitary grievance towards levy of penalty under s.271AAA of the Act, all the three matters concerning imposition of penalty are being disposed of by this common order.

13. We shall first record facts in brief to adjudicate the issue as noted in the quantum appeal. A search action was carried out in the

group cases of Savaliya group under s. 132 of the Act on 06.01.2011. The statements of key persons of the group were recorded under s.132(4) of the Act in the course of search. The assessee firm *inter alia* declared Rs.2 Crore by way of *suo motu* disclosure to cover any possible undisclosed income of the firm. A case was repeatedly made out by the assessee before the Revenue authorities in the quantum proceedings that no incriminating material was found in the course of search to establish any evasion of undisclosed income independently, *suo motu* disclosure by way of statement under s.132(4) of the Act notwithstanding. Consequent upon search, the assessee filed return of income which included the aforesaid disclosure of Rs.2 Crores made in the statement deposited under s.132(4) of the Act. The AO framed assessment under s.143(3) r.w.s. 153A of the Act and made further addition of Rs.3,28,13,355/- to the returned income towards unaccounted on-money receipts over and above the disclosure of Rs.2 Crore made by the assessee. The assessment so framed was challenged by the assessee before the CIT(A). The CIT(A) retained the addition of Rs.14,10,000/- representing on-money received from two members found as a result of post search inquiries and held that the assessee has failed to disclose the aforesaid amount. The remaining addition i.e. Rs.3,14,03,355/- was deleted in the quantum proceedings.

13.1 As a sequel to the assessment made by the AO and partially confirmed by the CIT(A), the AO invoked the provisions of Section 271AAA of the Act and imposed penalty @10% on Rs.2,14,10,000/- sustained by CIT(A) in quantum being aggregate of Rs.2 Crore disclosed by the assessee in the statement under s.132(4) of the Act and Rs.14,10,000/- confirmed by the CIT(A). A penalty of Rs.21,41,000/- was accordingly imposed on the assessee vide order dated 23.01.2015 passed under s.271AAA of the Act.

13.2 Aggrieved, the assessee preferred appeal before the CIT(A).

13.3 On reappraisal of facts and circumstances of the case, the CIT(A) deleted penalty to the extent of Rs.20Lakhs levied @ 10% in respect of disclosure made of Rs.2 Crores in the statement under s.132(4) of the Act and in the return of income. The CIT(A) however confirmed the penalty @ 10% as per the provisions of Section 271AAA of the Act on remaining addition of Rs.14,10,000/- upheld in the quantum proceedings by the first appellate authority. In the result, the CIT(A) deleted the penalty of Rs.20 Lakhs and confirmed the remaining penalty of Rs.1,41,000/- out of total penalty of Rs.21,41,000/- imposed by the AO under s.271AAA of the Act. The relevant operative portion of the CIT(A)'s order is reproduced hereunder:

“3.1 I have considered the facts of the case, order of the A.O., submissions of the appellant and statement of the partner Shri Sanjaybhai Savaliya and Shri Kantibhai Savaliya recorded u/s.132(4) of the Act on 07-1-2011 and letter of the appellant firm filed before ITO(Inv.) affirming the disclosure statement u/s. 132(4) of the Act given by the partners of the firm filed on 06.04.2011 respectively during the course of search proceedings and the return of income filed by the appellant firm compiled in the paper book.

3.2 It is seen that during the course of search, the partner of the appellant firm Shri Sanjaybhai Savaliya and Shri Kantibhai Savaliya in his statement recorded u/s.132(4) dated 07-01-2011 in answer to question No.28, had suo-motto and voluntarily disclosed a sum of Rs.25,00,00,000/- for the F.Y. 2010-11 relevant to A.Y.2011-12 over and above regular books of accounts pertaining to himself and his business concern. It was also stated that the final break-up of the voluntarily disclosed additional income amongst different assesseees of this family and business concern, the manner of earning the additional income disclosed and its assets identification would be submitted subsequently as a part and parcel of my statement recorded u/s. 132 (4) of the Act. Subsequently he filed a letter with ITO (Inv.) Unit-1, Ahmedabad dated 21.01.2011, wherein he stated the break-up of the disclosure of Rs.25,00,00,000/- wherein he has also bifurcated the disclosure made of Rs.2,00,00,000/- in the case of the appellant firm being unaccounted booking receipts / extra receipts from some (few) members of the scheme known as "Krish Residency", for which no incriminating material was found during the course of search proceedings. The partner of the appellant firm also requested in his statement that no penalty should be levied in respect of the said disclosure in pursuance of provisions of section 132 (4) r.w.s,271AAA of

the Act. It is further seen that after obtaining the said disclosure statement with a request of not levying penalty, the statement u/s. 132 (4) has been concluded by the Authorized Officer and no further specific question as regards the manner of earning the undisclosed income or substantiation thereof was put forth by the Authorized Officer.

3.3 During the post search proceedings, when the appellant firm in pursuance of the statement of the partner's statement u/s. 132(4) of the Act submitted a letter to the ITO (Inv.) Unit-1, Ahmedabad vide letter dated 06-04-2011 confirming the disclosure statements given by the partner for and on behalf of the appellant firm for an amount of undisclosed income of Rs.2,00,00,000/- in respect of unaccounted booking receipts/extra receipts from some (few) members of the scheme known as "Krish Residency" in its letter dated 06-04-2011 for which no records have been maintained and in the search proceedings, no incriminating material/records have been found.

3.4 It is further seen that on the basis of the statement of partner recorded u/s.132(4) of the Act, the appellant firm has offered the income of Rs.2,00,00,000/- in the return of income of the current financial year 2010-11 relevant to A.Y. 2011-12 in its return of income filed on 30-09-2011 u/s.139 and even paid the tax thereon along with interest In the present case of appellant firm, the search took place on 06/07-01-2011 and therefore, for F.Y.2010-11 relevant to A.Y. 2011-12, date of filing the return of income was due on the date subsequent to the date of search. Hence, in the case of the appellant firm, the provisions of section 271AAA of the Act are applicable.

3.5 The facts of appellant firm's case have been examined in the light of provisions of section 271AAA(2) of the Act. The partner of the appellant firm has disclosed the undisclosed income while giving the statement u/s.132(4) of the Act during the course of search for and on behalf of the appellant firm. The appellant firm has paid the tax thereon alongwith interest and shown the undisclosed income in the return of income under the head "income from business" and in the notes forming part of statement of total income also stated in detail the manner of earning the income and gave the identification of assets. The A.O has accepted the return of income of the appellant and has accordingly passed the assessment order u/s. 153A r.w.s.143(3) of the Act accepting the undisclosed income offered by the appellant firm under the head "income from business" being unaccounted booking-receipts / extra receipts from some (few) members of the scheme known as "Krish Bungalows".

3.6 To claim exemption from penalty u/s.271AAA, the appellant firm is required to fulfil the three conditions of provisions of section 271AAA(2)viz :-

- (i) In the course of search, in a statement under sub-section (4) of section 132, admits the undisclosed income and specifies the manner in which such income has been derived.*
- (ii) Substantiates the manner in which the undisclosed income was derived; and*

(iii) Pays the tax together with interest, if any, in respect of the undisclosed income.

Clause (i) lays down the first condition that undisclosed income should have been admitted by the assessee in the statement u/s.132(4) and the assessee should have specified the manner in which it has been derived. In the present case of the appellant firm, in the statement of the partner of the appellant firm, Shri Sanjaybhai Savaliya, recorded u/s. 132(4) (in answer to question No.28 of the statement recorded u/s.132(4) dated 07-01-2011) during the course of search proceedings, the Shri Sanjaybhai Savaliya and Kantibhai Savaliya has made a disclosure for an amount of Rs.25,00,00,000/- for the F.Y.2010-11 relevant to A.Y.2011-12 over and above regular books of accounts pertaining to himself and his business concern. It was also stated that the final break-up of the voluntarily disclosed additional income amongst different assessee's of his family and business concern, the manner of earning the additional income disclosed and its assets identification will be submitted subsequently as a part and parcel of his statement recorded u/s.132(4) of the Act. and further he filed a letter with ITO (Inv.) Unit-1, Ahmedabad wherein dated 21.01.2011, wherein he has stated the breakup of the disclosure of Rs.25,00,00,000/- wherein he has bifurcated the disclosure made of Rs.2,00,00,000/- in respect of income earned by the appellant firm being accounted booking receipts/extra receipts from some (few) members of the scheme known as "Krish Residency", for which no incriminating material was found during the course of search proceedings.

3.6.1 Clause (ii) lays down the second condition that assessee should have substantiated the manner in which undisclosed income has been derived. In the present case of the appellant firm, after the partner of the appellant firm made the disclosure in his statement u/s. 132(4) of the Act for and on behalf of the appellant firm for an amount of Rs.2,00,00,000/- for the F.Y.2010-11 relevant to A.Y.2011-12 being unaccounted booking receipts/extra receipts from some (few) members of the scheme known as Krish Residency" no further question was asked by the Authorized Officer of the search. When the appellant firm also filed its letter dated 06-04-2011 to the ITO (Inv.) Unit-1, Ahmedabad, confirming the disclosure made by the partner of the firm, for and on behalf of the appellant firm by stating the manner of earning the income, the search in charge officer did not raise any further question to the appellant firm.

3.7 It is further clear that The principles laid down by the Hon'ble High Courts in the cases of CIT v. Mahendra C. Shah [2008] 299 ITR 305 (Guj.) CIT v. Radha Krishna Goel [2005], 278 ITR 4547(2006), and 152 Taxman 290 (All.), are also squarely applicable to the facts and circumstances of the appellant's case. In the case of CIT V. Mahendra C. Shah, Hon'ble jurisdictional High Court has observed that

"When the statement is being recorded by the authorized Officer, it is incumbent upon the authorized officer to explain the provision of explanation 5 in entirety to the assessee concerned and the authorized officer cannot stop short at a particular stage so as to permit the revenue to take advantage of such lapse in the statement. The reason is not far to seek, in the first instance, the statement is being recorded in the question and answer form and there would be, no occasion for an assessee to state and make averments in the exact format stipulated by the provisions

considering the setting in which such statement is being recorded. Secondly, considering the social environment it is not possible to expect from an assessee, whether literate or illiterate, to be specific and to the point regarding the conditions stipulated by the second exception while making statement under section. Even "if the statement does not specify the manner in which the income is compliance not derived), if the income is declared and tax thereon paid, there would be substantial warranting any further denial of the benefit".

In the case of C/T V. Radha Krishna Goel [2005] 278 ITR 454, the Hon'ble Allahabad High Court gave similar findings and laid down similar principles as under .-

"From a perusal of Explan. 5 it is evident that in circumstances which otherwise did not attract the penalty provisions of s. 271(1)(c), a deeming provision was introduced as to attract the penalty provisions to those cases as well. But an exception is provided in cl. (2) of Explan. 5 where the deeming provision will not apply if during the course of search the assessee makes the statement under sub-s. (4) of s. 132 that the money, bullion, jewellery, etc., found in his possession has been acquired out of his income which has not been disclosed so far in his return of income to be furnished before the expiry of time specified in s. 139 and also specifies in the statement the manner in which such income has been derived and pays the tax together with interest, if any, in respect of such income. The exception appears to be to provide an opportunity to the assessee to make a clean and fair confession and to surrender his income and also to deposit the tax and interest thereon which may result in an agreed assessment. The paramount intention appears to be that in the case of fair and clean confession and surrender of his income, during the course of search further litigation may be avoided and the Revenue may get the tax and interest, etc., at an earliest and the assessee may be saved from further litigation. Under s. 132(4), it is the authorised officer, who examines on oath any person, who is found to be in possession or control of any books of account, documents, money, bullion, jewellery or other valuable article or thing, therefore, it is for the authorised officer to record the statement in his own way. Therefore, it is not expected from the person to state those things, which are not asked by the authorised officer. During the course of search person is so tortured, harassed and put to a mental agony that he loses his normal mental state of mind and at that stage it cannot be expected from a person to pre-empt the statement required to be given in law as a part of his defence. Under s. 132(4), unless the authorised officer puts a specific question with regard to the manner in which income has been derived, it is not expected from the person to make a statement in this regard and in case in the statement the manner in which income has been derived has not been stated but has been stated subsequently, that amounts to the compliance with Explan. 5(2). In case, there is nothing to the contrary in the statement recorded under s. 132(4), in the absence of any specific statement about the manner in which such income has been derived, it can be inferred that such undisclosed income was derived from the business which he was carrying on or from other sources. The object of the provision is achieved by making the statement admitting the non-disclosure of money, bullion, jewellery, etc. Thus, much importance should not be attached to the statement about the manner in which such income has been derived. It can be inferred on the facts and circumstances of the case, in the absence of

anything to the contrary. Therefore, mere non-statement of the manner in which such income was derived would not make Explan. 5(2) inapplicable. For the reasons stated above, there is no error in the order of the Tribunal and the same is upheld".

3.8 After going through the statement of the partner under section 132(4) of the Act and the appellant firm's letter dated 06-04-2011 filed with the ITO (inv.) Unit-1, Ahmedabad, A.O has assessed the undisclosed income in the Assessment Order on the basis of statement of the partner u/s.132(4) of the Act and on the basis of undisclosed income disclosed by the appellant firm in the Return as income from business, it is observed that the Honorable Courts have laid down the principles that the authorized officer has to explain the provisions to the assessee and ask the relevant questions on the manner in which the undisclosed income was earned. In the present case and as per section 271AAA, the statement of the partner recorded u/s. 132 (4) in the search proceedings, the authorized officer was satisfied with the manner in which the income was earned by the assessee and was satisfied about the substantiating the manner in which undisclosed income was earned.

Clause (iii) lays down the third condition regarding the payment of tax alongwith interest on undisclosed income admitted in the course of search. It is an undisputed fact that the tax and interest has been paid by the appellant firm on the undisclosed income admitted in the course of search proceedings by disclosing in the return of income.

3.9 On the basis of the principles and ratio laid down by the Honorable jurisdictional High Court and by the Allahabad High Court cited supra and other courts have also given similar verdicts in cases such as (i) decision of Honorable ITAT in the case of DCIT vs. Smt. Sulochanadevi A. Agarwal, ITA No.1052/Ahd/2012, A.Y.2009-10, dated 20-07-2012,) (ii) ITO vs. Shilpa V. Gupta, ITA No.1784/Ahd/2012 & Co.179/Ahd/2012 A.Y.2009-10, dated 14-12-2012, (iii) Rajendra Prasad Dokania, ITA No. 525/Ahd/2012 dated 4-5-2012, (iv) DCIT, Central, Surat vs. Rivva Exports Ltd., (v) DCIT, Central, Surat vs. Shri Harikishan S. Virmani (ITA No.2718 & 2719/Ahd/2012) dated 7-6-2013, and in view of facts of case as mentioned above, it can be stated that all the three conditions laid down, in the provisions of section 271AAA (2) of the Act on the basis of which the appellant can be eligible for immunity from penalty has been fulfilled in appellant's case. The appellant can be said to have substantially discharged the onus of substantiating the manner of earning undisclosed income. The Assessing Officer made the assessment on the basis of the disclosure made by the partner of the appellant firm in his statement u/s.132(4) of the Act and income disclosed by the appellant firm in its return of income and the A.O has accepted the income declared by the appellant firm in the assessment order without making any further addition to the income. This shows that the A.O himself was satisfied about the income disclosed in the return of income.

3.10 I am of the considered view that all the exemption conditions available u/s.271AAA to the appellant, have been fulfilled including the payment of taxes. In this background, no penalty can be levied u/s.271AAA of the Act in the case of appellant in respect of disclosure of Rs.2 Crores already shown in the return of income filed by the appellant firm u/s. 139(1) of the Act along with tax and interest thereon and the A.O. has

directed to delete the penalty of Rs.20,00,000/- levied @ 10% in respect of disclosed amount of Rs.2 Crores in the return of income as per provisions of section 271AAA(2) of the IT Act, 1961.

3.11 Further with regards to the penalty levied on the addition of Rs.14,10,000/- upheld by the CIT(A) on the basis of the statement of two members, I held that the penalty @ 10% as per the provisions of section 271AAA of the Act is correctly levied by the A.O and I hereby confirm the levy of penalty @ 10% of addition confirmed by the CIT(A) in the appellate order for an amount of Rs.1,41,000/-. In the result out of the total penalty of Rs.21,41,000/-, the appellant gets relief of Rs.20 lacs and the penalty of Rs. 1,41,000 is hereby confirmed u/s.271AAA of the IT Act, 1961.”

14. Aggrieved by the modification made by the CIT(A) in the quantum of penalty imposed under s.271AAA of the Act, the Revenue has preferred appeal before the Tribunal as per ITA No. 3544/Ahd/2015 (supra). The assessee has filed cross objection in the Revenue's appeal in CO No. 14/Ahd/2016 (supra). The assessee has also filed separate cross appeal in ITA No. 3188/Ahd/2015 whereby it seeks to challenge the action of the CIT(A) in confirming the remaining penalty of Rs.1,41,000/- on additions made and sustained by the CIT(A) on the basis of statement of two purchasers in the housing project of the assessee builder. The cross objection has also been filed on the same footing.

14.1 The learned AR for the assessee relied upon the order of the CIT(A) to the extent of relief granted by the first appellate authority and submitted in reiteration that in the search action under s.132 of the Act carried out in the premises of the assessee on 06.01.2011, no unaccounted money/asset/investment etc. were recovered. No reference in this regard has been made in the assessment order either. Likewise, no document or any inculpatory evidence has been referred in the quantum proceedings to lend credence to any alleged undisclosed income. The learned AR submitted that the sole basis of taxation of Rs.2 Crores and consequent imposition of penalty thereon is the statement of the partner of the firm. It was submitted that

except the stand alone oral evidence in the form of statement under s.132(4) of the Act, the Revenue has not brought out any material on record to establish the existence of any 'undisclosed income' which expression has been statutorily defined in Section 271AAA of the Act itself. The learned AR submitted that neither does the scope of Section 271AAA of the Act extends beyond 'undisclosed income' as defined nor does a standalone statement can be treated as document/transaction found in the course of search. The learned AR accordingly submitted that the CIT(A) rightly concluded the issue in favour of the assessee and deleted penalty under s.271AAA of the Act to the extent of disclosure made in the statement under s.132(4) of the Act and already included in the return of income.

14.2 The learned AR also pointed out that the assessee has satisfied the conditions provided in sub-section 2 of Section 271AAA of the Act in as much as the assessee has paid taxes on the amount disclosed under s.132(4) of the Act. The learned AR also pointed out that in the absence of any specific inquiry on the manner of deriving alleged undisclosed income and substantiation thereof in the course of recording statement, no obligation in this regard could be fastened on the assessee as held in several judicial pronouncements. The learned AR also observed that the authorized officer was satisfied with the answers provided in response to the questions framed and therefore the failure of the authorized officer, if any, in probing the matter further cannot operate to the prejudice to the assessee. The learned AR thus submitted that the action of the CIT(A) in deleting the penalty on the amount on disclosure made is in consonance with law as judicially interpreted and therefore no interference with such approach of the CIT(A) is called for.

14.3 Adverting to its cross appeal as well as cross objection seeking to impinge maintainability of remaining penalty of Rs.1,41,000/-

sustained by the CIT(A), the learned AR pointed out that the addition has been sustained in the quantum proceedings merely on the basis of unverified statement of third parties i.e. two purchasers in the project. It was contended that such third parties' statements are fragile and have no evidentiary value in the absence of cross examination and in the absence of any credible material in corroboration. The learned AR reiterated that the quantum addition itself is not justified having regard to the total absence of any credibility of the statements and therefore penalty under s.271AAA of the Act cannot be resorted for such additions. The learned AR accordingly submitted that the remaining penalty of Rs.1,41,000/- or additions made solely based on unvouched statement requires to be deleted and consequently, appeal as well as cross objection of the assessee deserves to be allowed.

14.3 The learned DR for the Revenue, on the other hand, relied upon the order of the AO and submitted in furtherance that where the assessee himself has admitted existence of certain undisclosed income in the course of search and included the same as part of return, the consequences of penalty under s.271AAA of the Act cannot be escaped as wrongly adjudicated by CIT(A). It was further submitted that the AO has also rightly imposed penalty of Rs.1,41,000/- on the excess undisclosed income found over and above income offered under s.132(4) of the Act.

15. We have carefully considered the rival submissions and perused the orders of the authorities below and material referred to and relied upon.

15.1 One of the significant plea raised on behalf of the assessee is that the income declared in the return of income arises out of regular stream of income from various sources and also *ad hoc* declaration

combinedly made for group concern and included in the return of income towards its share and such disclosure *per se* does not tantamount to 'undisclosed income' has codified in Explanation (a) below Section 271AAA of the Act.

15.2 To paddle its point of view, the assessee has relied upon the statutory definition of undisclosed income to contend that declaration made in statement made under s.132(4) of the Act would be *ipso facto* reckoned to be 'undisclosed income'. We observe that the issue is no longer *res integra*. We find that identical issue came up for consideration in the case of Jasubhai Arjanbhai Vaghasia vs. ACIT, ITA No. 58/Rjt/2017 order dated 17.05.2018 in the context of section 271AAA of the Act. Therefore, it is considered expedient to reproduce the relevant operative para of the decision of the Co-ordinate Bench on the issue:-

"8. We have carefully considered the rival submissions and perused the orders of the authorities below and material placed on record. The core controversy involved in the present appeal is towards maintainability of imposition of penalty under section 271AAA in the facts and circumstances of the case.

8.1 The case of the assessee is two fold (i) The income declared in the return of income amounting to Rs. 2,25,61,020/- arises out of the regular stream of income from various sources including Rs. 90 lakhs towards ad-hoc declaration and therefore there is no element of 'undisclosed income' as defined in the Explanation below section 271AAA of the Act. (ii) In the alternative, in any event, the incidence of penalty under section 271AAA cannot exceed Rs. 9 lakhs (10% of Rs. 90 lakhs) attributable to ad-hoc income.

8.2 To buttress its point of view, the assessee has strongly harped on the statutory definition of "undisclosed income". It would therefore be apposite to reproduce section 271AAA of the Act for ready reference:-

'271AAA. Penalty where search has been initiated.—(1) The Assessing Officer may, notwithstanding anything contained in any other provisions of this Act, direct that, in a case where search has been initiated under section 132 on or after the 1st day of June, 2007, the assessee shall pay by way of penalty, in addition to tax, if any, payable by him, a sum computed at the rate of ten per cent of the undisclosed income of the specified previous year.

(2) Nothing contained in sub-section (1) shall apply if the assessee,—

- (i) in the course of the search, in a statement under sub-section (4) of section 132, admits the undisclosed income and specifies the manner in which such income has been derived;*
- (ii) substantiates the manner in which the undisclosed income was derived; and*
- (iii) pays the tax, together with interest, if any, in respect of the undisclosed income.*

(3) No penalty under the provisions of clause (c) of sub-section (1) of section 271 shall be imposed upon the assessee in respect of the undisclosed income referred to in sub-section (1).

(4) The provisions of sections 274 and 275 shall, so far as may be, apply in relation to the penalty referred to in this section.

Explanation.—For the purposes of this section,—

(a) "undisclosed income" means—

(i) any income of the specified previous year represented, either wholly or partly, by any money, bullion, jewellery or other valuable article or thing or any entry in the books of account or other documents or transactions found in the course of a search under section 132, which has—

(A) not been recorded on or before the date of search in the books of account or other documents maintained in the normal course relating to such previous year; or

(B) otherwise not been disclosed to the Chief Commissioner or Commissioner before the date of the search; or

(ii) any income of the specified previous year represented, either wholly or partly, by any entry in respect of an expense recorded in the books of account or other documents maintained in the normal course relating to the specified previous year which is found to be false and would not have been found to be so had the search not been conducted;

(b) "specified previous year" means the previous year—

(i) which has ended before the date of search, but the date of filing the return of income under sub-section (1) of section 139 for such year has not expired before the date of search and the assessee has not furnished the return of income for the previous year before the said date; or

(ii) in which search was conducted.

8.3 A perusal of special provisions of section 271AAA, concerning search cases show that it is applicable in respect of "undisclosed income" in contrast to "concealed income" relevant for the purposes of penalty proceedings under normal provisions of section 271(1)(c) of the Act. The applicability of penalty under section 271AAA thus revolves within the sphere of "undisclosed income".

8.4. A plane reading of the aforesaid definition of 'undisclosed income' clearly shows that the undisclosed income should be represented by money, bullion jewellery or other valuable articles or things or any unrecorded

entry as per documents found or any false entry recorded in the books of account etc. No such reference or nexus of disclosure to such specified items were made in the assessment order or in the penalty order. In view of the statutory definition of undisclosed income, a disclosure made merely to buy peace does not tantamount to 'undisclosed income' per se. The applicability of section 271AAA is dependent upon the income falling within the sweet of clear and express definition of expression "undisclosed income". An ad-hoc and lumpsum declaration as a consequent of search without any reference made by A.O towards any money, bullion, jewellery or other valuable articles or thing or any entry in the books of account etc. cannot be deemed to be automatically an undisclosed income for the purposes of imposition of penalty under section 271AAA of the Act. The onus is on A.O to bring on record material which points to 'undisclosed income' as defined under section 271AAA of the Act. As noted, no reference to underlying material is found in the orders of lower authorities. A simple disclosure made in the course of search under section 132(4) in itself cannot be deemed to be 'undisclosed income' in view of the limitations placed in the definition thereof.

9. Therefore we are of the considered view that in the absence of any incriminating material referred for the purposes of assessing alleged undisclosed income, the imposition of penalty under section 271AAA is without any legal foundation and thus not permissible.

10. In view of the aforesaid discussion, we do not consider it necessary to advert to the alternative plea of the assessee for imposition of penalty with reference to ad-hoc amount of declaration alone.

11. The order of the Assessing Officer towards imposition of penalty under section 271AAA is therefore set aside and the Assessing Officer is directed to delete the penalty so imposed.

12. In the result appeal of the assessee is allowed."

15.3 As noted above, the Co-ordinate Bench has dealt with identical issue and held that in the absence of any reference to tangible material, mere act of acquiescence of *ad hoc* income under section 132(4) of the Act cannot automatically be covered within the sweep of 'undisclosed income' for the purposes of imposition of penalty under section 271AAA of the Act. Therefore, the plea of the assessee that in the absence of reference to any incriminating material imposition of penalty under s. 271AAB of the Act to be without any legal foundation gets categorical support from the decision of co-ordinate bench. In the absence of any reference made in the penalty order or the assessment order towards presence of any incriminating document or any income found by way of money, bullion, jewellery etc. to cover

the declaration within the sphere of 'undisclosed income', the imposition of penalty under s. 271AAA of the Act does not meet the requirement of law.

15.4 We thus find force in the plea of the assessee for affirming the conclusion of the CIT(A) towards deletion of penalty on this score.

16. This apart, we also find considerable force in the second plea raised on behalf of the assessee that once the taxes have been paid on the amount disclosed, the penalty cannot be imposed under s.271AAA of the Act in the absence of any specific query raised to probe manner/substantiation thereof with respect to disclosure towards undisclosed income. The CIT(A) has rightly appreciated the facts and the circumstances of the case in perspective and deleted the penalty on the disclosure so in the absence of such query made having regard to the plethora of judicial precedent available on this premise. The conclusion drawn by the CIT(A) on this score thus resonates with the judicial view available in this regard and cannot be faulted.

17. Therefore, the grievance of the Revenue for deletion of penalty by CIT(A) on income offered by way of oral evidence under s.132(4) of the Act is bereft of any merit on variety of reasons noted above.

18. The appeal of the Revenue in ITA No.3544/Ahd/2015 is therefore dismissed.

19. We now advert to the grievance of the assessee for remaining penalty of Rs.1,41,000/- sustained by the CIT(A). The penalty so sustained arises out of quantum additions of Rs.14,10,000/- sustained by the first appellate authority in quantum on the ground that two purchasers have given statement on oath in the proceedings under

s.131 of the Act against the assessee and confessed that they have given on-money of Rs.14,10,000/- in aggregate to the assessee for purchase of residential flat in the housing project.

19.1 The penalty so imposed and confirmed by the CIT(A) is not sustainable under s.271AAA of the Act for two reasons; (i) the quantum addition of Rs.14,10,000/- itself has been deleted by us in the preceding para no. 9 with reference to ITA No.401/Ahd/2014 (supra) and (ii) the additions were made on the basis of post search inquiries and do not relate to 'undisclosed income' as defined under s.271AAA of the Act. The quantum addition so made was not discovered or found *per se* in course of search under s.132 of the Act. The additions were made on the basis of post search inquiry. Such addition cannot be subject matter of Section 271AAA of the Act having regard to the narrower scope of definition of undisclosed income as provided therein. Therefore, we find merit in the plea of the assessee for deletion of penalty of Rs.1,41,000/- under s.271AAA of the Act. The order of the CIT(A) is accordingly set aside to this extent and the AO is directed to delete the penalty.

19.2 In the result, the cross appeal of the assessee in ITA No.3188/Ahd/2015 and cross objection of the assessee in CO No. 14/Ahd/2016 are allowed.

20. The grounds of appeal raised by the assessee (in case of M/s. Savaliya Developers) in ITA No. 402/Ahd/2014 read as under:

I. ADDITION ON ACCOUNT OF ON-MONEY RECEIPT - RS. 8,55,000/-

1. The Ld. CIT(A) has erred in law and on facts while confirming the addition of Rs.8,55,000/- on the basis of statement of one member recorded behind the back of the appellant, copy of which was not provided to the appellant during the course of assessment proceedings as well as in absence of granting the opportunity of cross examination of said member.

2. *The Ld. CIT(A) has erred in law and on facts while considering the alternative ground of the appellant that the addition of Rs.8,55,000/- as made by the Ld. A.O. on account of 'on-money' received from one member is required to be telescoped against the disclosure of Rs.2 Crores made by the appellant company for the financial year 2010-11 relevant to A.Y. 2011-12.*

3. *The Ld. CIT(A) has erred in law and on facts while failing to consider the fact that voluntary and suo-motto disclosure of unaccounted booking receipts from the members of the scheme amounting to Rs.2.00 crores by the appellant company for F.Y. 2010-11 relevant to A.Y. 2011-12 is more than sufficient to cover up the addition of Rs.8,55,000/- confirmed by him in respect of on money received from one member and therefore, no separate addition is required as directed by him."*

20.1 The grounds of appeal raised by the Revenue (in case of M/s. Savaliya Developers) in ITA No. 411/Ahd/2014 read as under:

- "(i) On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law and on facts in restricting the addition to Rs.8,55,000/- out of total addition of Rs. 3,68,42,425/- made on account of on-money receipts by the A.O. on the basis of evidence of reliable nature.*
- (ii) On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law and on facts in holding that extrapolation of on-money receipts cannot be made and thereby deleting the addition as above in (i).*
- iii) The Ld. CIT(A) has erred in allowing relief without considering the fact that 42 flats were sold during the year, before the date of search and without appreciating that the estimation made by the A.O. in respect of such sale cannot be equated with the rate of 31 flats made after the search."*

20.2 The grounds of appeal raised by the assessee (in case of M/s. Savaliya Developers) in CO No. 118/Ahd/2014 read as under:

"1. The Ld. CIT(A) has erred in law and on facts in confirming the addition of Rs.8,55,000/- out of total addition of Rs. 3,68,42,425/- made on account of alleged on-money receipts by the Ld. A.O. The Ld. CIT(A) ought to have deleted the entire addition made by the Ld.A.O.

2. The Ld. CIT(A) has rightly held that extrapolation theory of on-money receipts cannot be made and has correctly deleted the addition made by the Ld.A.O. on account of extrapolation theory of on-money receipts."

21. The facts and issue concerning the addition made in the case of above referred assessee are identical group assessee - Savaliya

Buildcon. Thus, without delineating on the issue again, the appeal of the assessee and cross objection of the assessee deserves to be allowed and appeal of the Revenue deserves to be dismissed in the light of our conclusion in ITA No. 401/Ahd/2014, 410/Ahd/2014 & CO No.117/Ahd/2014 in respect of other group concern of the same group.

22. In the light of the aforesaid discussion, the appeal of the Revenue in ITA No. 411/Ahd/2014 is dismissed and appeal of the assessee in ITA No. 402/Ahd/2014 and cross objection in CO No. 118/Ahd/2014 is allowed.

23. In the combined result, all three Revenue's appeals are dismissed whereas assessee's three appeals and three cross objections are allowed.

This Order pronounced in Open Court on 30/04/2019

Sd/-
(MAHAVIR PRASAD)
JUDICIAL MEMBER

Ahmedabad: Dated 30/04/2019

Sd/-
(PRADIP KUMAR KEDIA)
ACCOUNTANT MEMBER

True Copy

S. K. SINHA

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद /
DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, अहमदाबाद ।