

आयकर अपीलिय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES "A", JAIPUR

श्री रमेश सी शर्मा, लेखा सदस्य एवं श्री विजय पाल राव, न्यायिक सदस्य के समक्ष
BEFORE: SHRI RAMESH C SHARMA, AM & SHRI VIJAY PAL RAO, JM

आयकर अपील सं./ ITA No. 128/JP/2019
निर्धारण वर्ष / Assessment Year :2015-16

Nitin Kedia, Shop No. 10-11, Ganesh Nagar-VIA, Near Nadi Ka Phatak, Benad Road, Jhotwara, Jaipur.	बनाम Vs.	The Deputy Commissioner of Income Tax, Central Circle-3, Room No. NA-102, New Central Revenue Building, Statute Circle, Jaipur.
स्थायी लेखा सं./ जीआईआर सं./ PAN/GIR No.: AMGPK 4040 A		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

आयकर अपील सं./ ITA No. 285/JP/2019
निर्धारण वर्ष / Assessment Year :2015-16

Assistant Commissioner of Income Tax, Central Circle-3, Jaipur.	बनाम Vs.	Sh. Nitin Kedia, Shop No. 10-11, Ganesh Nagar-VIA, Near Nadi Ka Phatak, Benad Road, Jhotwara, Jaipur, Rajasthan.
स्थायी लेखा सं./ जीआईआर सं./ PAN/GIR No.: AMGPK 4040 A		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

आयकर अपील सं./ ITA No. 127/JP/2019
निर्धारण वर्ष / Assessment Year: 2017-18

Kedia Real Estate LLP, Shop No. 10-11, Nadi Ka Phatak, Ganesh Nagar 6 th , Murlipura, Jaipur.	बनाम Vs.	The Deputy Commissioner of Income Tax, Central Circle-3, Room No. NA-102, New Central Revenue Building, Statute Circle, Jaipur.
स्थायी लेखा सं./ जीआईआर सं./ PAN/GIR No.: AAOFK 5012 C		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No. 289/JP/2019
निर्धारण वर्ष / Assessment Year :2017-18

Assistant Commissioner of Income Tax, Central Circle-3, Jaipur.	बनाम Vs.	M/s Kedia Real Estate LLP, Shop No. 10-11, Nadi Ka Phatak, Ganesh Nagar-1, Murlipura, Jaipur.
स्थायी लेखा सं. / जीआईआर सं. / PAN/GIR No.: AAOFK 5012 C		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by: Shri Vijay Goyal (FCA) &
Shri Gulshan Agarwal (CA)
राजस्व की ओर से / Revenue by : Shri Varinder Mehta (CIT-DR)

सुनवाई की तारीख / Date of Hearing : 24/05/2019
उदघोषणा की तारीख / Date of Pronouncement : 03/06/2019

आदेश / ORDER

PER: R.C. SHARMA, A.M.

These are the cross appeals filed by the assessee and the Revenue against the separate orders of Id. CIT(A)-IV, Jaipur dated 31/12/2018 for the A.Ys. 2015-16 and 2017-18 in the matter of order passed U/s 143(3) read with Section 153A of the Income Tax Act, 1961 (in short, the Act).

2. In all these appeals, common issues are involved, therefore, for the sake of convenience and brevity, a consolidated order is being passed.

3. **Firstly we take assessee's appeal being ITA No. 128/JP/2019 and Revenue's appeal being ITA No. 285/JP/2019 (A.Y. 2015-16).**

In these cross appeals, the assessee and the revenue have taken following grounds of appeal:

Grounds of assessee's appeal:

- “1. On the facts and in the circumstances of the case and in law the Id. CIT (A) erred in confirming the addition of Rs. 6,29,260/- on a/c of brokerage @ 4% alleged to be earned on sales of plots noted on page No. 1 to 6 of exhibit 9 of Annexure AS seized from Shop No. 8,9,10, Ganesh Nagar-VIA, Murlipura, Jaipur without establishing the fact that such brokerage was actually received or receivable to the assessee. It is contended that Id AO made the addition more so when the plots mentioned in the seized documents do not pertain to the assessee as the assessee is neither buyer nor seller of such plots.
2. The appellant prays for leave to add, to amend, to delete, or modify the all or any grounds of appeal on or before the hearing of appeal.”

Grounds of revenue's appeal:

- “1. Whether on the facts and in the circumstances of the case and in law the CIT(A) is justified in deleting the addition of Rs. 86,81,500/- made by the A.O. on account of unaccounted business income.
2. The appellant craves, leave or reserving the right to amend modify, alter add or forego any ground(s) of appeal at any time before or during the hearing of this appeal.”

4. Rival contentions have been heard and record perused. Facts in brief are that the assessee is an individual and during the year under

consideration derived income from house property, business of property developers, capital gain on sale of plots, interest and other income. Search and seizure operations u/s 132(1) of Income Tax Act, 1961 were carried out by Income Tax department over the assessee group on 19.11.2016. Notice U/s 153A of the Act was issued in response to notice issued u/s 153A of the Act, the assessee filed his return of total income on 21.04.2017 declaring total income of Rs. 1,17,30,470/- which was completed by the A.O. at an income of Rs. 2,08,91,970/-. In the assessment order the addition of Rs. 91,61,500/- was made by the AO being alleged unaccounted business income alleged to be earned on sales of plot at Ganesh Vihar Scheme computed on the basis of noting found on Page 1 to 6 of exhibit-9, Annexure-AS seized from Shop No. 8,9,10, Ganesh Nagar-VIA, Murlipura, Jaipur.

5. By the impugned order, the Id. CIT(A) has deleted the addition of Rs. 85,32,240/- and upheld the addition of Rs. 6,29,260/- after having a following observation:

“8. I have perused the written submissions submitted by the Ld. A/R and the order of AO. I have also gone through various judgments cited by the Ld. A/R and those contained in the order of AO. I have also gone through the copies of seized material, pages on the basis of which the AO has proceeded to make an addition of Rs.91,61,500/- being the entire cash

component evident from the seized material being the on money received by the appellant hence was taxed in the hands of appellant.

8.2 I am not in agreement with stand taken by the appellant that these documents are dumb document as such document are email found from the office premises of appellant and subsequently statement of Nirmal Kedia was recorded u/s 131 of the act main portion of which is scanned on page 3 of the order. Since the documents are systematically written and have correlation elsewhere and also there is a statement of partner these cannot be termed as dumb document.

Further I am also not inclined to admit the inference of AO that entire cash component is to be taxed in the hand of appellant for the following reasons:

- 1. That in the statement itself Shri Nirmal kedia has indicated that appellant is not the buyer or seller in these documents. Infact there are buyers and seller who are well identifiable. The mere presence of sale deed does not conclude that these are plot which are owned by appellant. Fact of ownership as per sale deed and the persons who have purchased is established by appellant by filing the allotment letters and also the necessary affidavit of the seller to whom the plot were sold.*
- 2. That the name of each plot owner and buyer of such plot is mentioned at page 1-3 (APB 70-72). On the main page the sale price of each plot is mentioned. Perusal of these papers reveals all the plot were sold at similar rate irrespective to*

the fact whether the plot is sold in cash or cheque. On page 1-3(refer APB page 70-72) the word remitted (bank)' and remitted (cash) and total remitted has been mentioned which implies whatever amount is received it has been given to the seller of plot

3. *That the AO has not taxed the cheque transaction evident from such seized document in the hand of appellant. It is the cash component which is assumed to be undisclosed income of the appellant. It is a trite law that transaction from the seized document cannot be interpreted differently. If the cheque transaction is taxed in the hand of seller, in this case different individual sellers, then cash as evident from the seized document can only be attributable to respective individual sellers.*

8.3 *Considering the above I am of the view entire cash cannot be taxed in the hands of appellant especially when the cheque undisputedly has gone into different seller as listed. It is only the brokerage which can be taxed, same was admitted by the AO also in the order. The total remittance (cash and cheque as per these pages is as under*

Cheque remittance	Cash remittance	Total	Refer page of APB
8470000	1290000	9760000	Pg 70 & 71
2150000	3821500	5971500	Page 71 & 72
10620000	5111500	15731500	

I have consistently taken a view that brokerage of 4% is to be applied. Thus, an addition of Rs.6,29,260/- is made. I may make it clear that appellant contention that brokerage

of Rs.4,80,000/- is to be considered is rejected as seized material does not establish that it is brokerage paid. The ground is decided accordingly.

8.4 Considering the above, the A.O.is directed to sustain the addition to the extent of Rs. 4,80,000/-. On the facts and in the circumstances of the case, balance of Rs. 86,81,500/- is deleted. The appeal is partly allowed as indicated.”

6. Against the order of the Id. CIT(A), both the assessee and the revenue are in further appeals before the ITAT.

7. We have considered the rival contentions and carefully gone through the orders of the authorities below. From the record we found that the A.O. has made addition of Rs. 91,61,500/- on account of alleged unaccounted business income earned on sale of plot at Ganesh Nagar Scheme. The addition was made by ignoring the fact the plots mentioned in the seized documents do not pertain to the assessee as the assessee is neither buyer nor seller of plots mentioned in the seized paper. Further the addition was made by ignoring the fact that the figure mentioned in page No. 4-6 is included in the figure mentioned in page No. 1-3 and the AO made the addition of both the amount treating as separate transaction.

8. By the impugned order, the Id. CIT(A) has deleted the addition of Rs. 85,32,240/- and upheld the addition of Rs. 6,29,260/- in this regard

we observe that during the course of assessment proceedings the assessee in letter dated 05.03.2018 submitted to the AO as under: -

“4. Explanation regarding page No. 1 to 3 of Annexure 9 found and seized from Shop No. 8 to 11, Ganesh Nagar, 6A, Nadi Ka Phatak, Murlipura, Sikar Road, Jaipur

The detail explanation on this account has been submitted in the case of brother of assessee Shri Nirmal Kumar Kedia and the same may kindly be considered here also. For the sake of convenience the submission given on this issue in the case of Shri Nirmal Kumar Kedia is reproduced as under: -

“The explanation and documents in this regard has already been submitted along with our submission dated 07.02.2018 and 28.02.2018. As explained in such submission this is an excel sheet send by Sub-broker in mail id of assessee group. The sheet consists the details of plot sold of various persons in the scheme naming "Ganesh Vihar Vistar" through Shri Nirmal & Nitin Kedia on which the brokerage of Rs. 4,80,000/- was receivable but due to disputes the sub-broker/party refused to pay brokerage. Ganesh Vihar scheme does not belong to assessee but this scheme was developed by M/s Ganpati Grah Nirman Sahakari Samiti Ltd in 1995 and earlier and none of the plots mentioned in the sheet belongs to assessee and his family members. The copy of allotment letter of the society to prove that these plots does not belong to assessee group has been submitted along with our submission dated 07.02.2018.

Further the copies of registered sales deeds of such plots, which are readily available with the assessee group, to prove that in dealing of such plots the assessee group was neither buyer nor seller were also submitted along with our submission dated 28.02.2018.”

5. Explanation regarding page No. 4 to 6 of Annexure 9 found and seized from Shop No. 8 to 11, Ganesh Nagar, 6A, Nadi Ka Phatak, Murlipura, Sikar Road, Jaipur

The detail explanation on this account has been submitted in the case of brother of assessee Shri Nirmal Kumar Kedia and the same may kindly be considered here also. For the sake of convenience the submission given on this issue in the case of Shri Nirmal Kumar Kedia is reproduced as under: -

“The explanation and documents in this regard has already been submitted along with our submission dated 07.02.2018 and 28.02.2018. As explained in such submission this is an excel sheet send by Sub-broker in mail id of assessee group. The sheet consists the details of plot sold of various persons in the scheme naming "Ganesh Vihar Vistar" through Shri Nirmal & Nitin Kedia on which the brokerage of Rs. 4,80,000/- was receivable but due to disputes the sub-broker/party refused to pay brokerage. Ganesh Vihar scheme does not belong to assessee but this scheme was developed by M/s Ganpati Grah Nirman Sahakari Samiti Ltd in 1995 and earlier and none of the plots mentioned in the sheet belongs to assessee and his family members. The copy of allotment letter of the society to prove that these plots does not belong to assessee group has been submitted along with our submission dated 07.02.2018. Further the amount mentioned on these papers is included in the amount written on page No. 1 to 3 of Annexure 9 found and seized from Shop No. 8 to 11, Ganesh Nagar, 6A, Nadi Ka Phatak, Murlipura, Sikar Road, Jaipur.

Further the copies of registered sales deeds of such plots, which are readily available with the assessee group, to prove that in dealing of such plots the assessee group was neither buyer nor seller were also submitted along with our submission dated 28.02.2018.”

Proof of ownership of the plots filed before Id AO:-

During the course of the assessment proceedings the assessee submitted the copies of allotment letter of the plots by the society to the actual plot owner mentioned in the list and the copies of registered sales deeds of such plots sold by the actual plot owner, (to the extent which were available with the assessee), to prove that such plots were not belonging/owned by the assessee. From perusal of these documents, it is apparent that the assessee is neither buyer nor seller of these plots. Such evidences and detail are summarized in the table as below: -

Plot No.	Name of plot owner as per impounded document	Name of allottee i.e. buyer as per impounded document	Documents submitted during assessment proceedings
1	Suryaprakash Saini	Sarashree Suvhadarshini	<ul style="list-style-type: none"> ➤ Copy of allotment letter of plot on the name of owner of year 1995 (Copy at PB Page 107-108) ➤ Copy of registered sales

			deed dated 28.10.14 between owner and buyer (Copy at PB Page 109-116)
2	Manoj Kumar Saini	Manoj Kumar Jaiswal	<ul style="list-style-type: none"> ➤ Copy of allotment letter of plot on the name of owner of year 1995 (Copy at PB Page 117-118) ➤ Copy of registered sales deed dated 19.10.14 between owner and buyer (Copy at PB Page 119-126)
4	Satyanarayan Saini (Babulal)	Shweta Jain	<ul style="list-style-type: none"> ➤ Copy of allotment letter of plot on the name of owner of year 1995 (Copy at PB Page 127-130) ➤ Copy of registered sales deed dated 28.10.14 between owner and buyer (Copy at PB Page 131-138)
5	Arvind Saini	Jagdish Kumar Koli	<ul style="list-style-type: none"> ➤ Copy of allotment letter of plot on the name of owner of year 1995 (Copy at PB Page 139-140)
6	Chittar Meena	B M Gupta	<ul style="list-style-type: none"> ➤ Copy of allotment letter of plot on the name of owner of year 1995 (Copy at PB Page 141-144) ➤ Copy of registered sales deed dated 19.10.14 between owner and buyer (Copy at PB Page 145-153)
15	Ankur Patni	Manjuly Uppal	<ul style="list-style-type: none"> ➤ Copy of allotment letter of plot on the name of owner of year 1995 (Copy at PB Page 154-157) ➤ Copy of registered sales deed dated 09.04.14 between owner and buyer (Copy at PB Page 158-165)
16	Vikrant	Manjuly Uppal	<ul style="list-style-type: none"> ➤ Copy of allotment letter of plot on the name of owner of year 1995 (Copy at PB Page 166-169) ➤ Copy of registered sales deed dated 28.10.14 between owner and buyer (Copy at PB Page 170-177)

19	Sunil Jain	Sunita Sharma	<ul style="list-style-type: none"> ➤ Copy of allotment letter of plot on the name of owner of year 1995 (Copy at PB Page 178-181) ➤ Copy of registered sales deed dated 11.04.14 between owner and buyer (Copy at PB Page 182-189)
20	Satyanarayan	Sunita Sharma	<ul style="list-style-type: none"> ➤ Copy of allotment letter of plot on the name of owner of year 1995 (Copy at PB Page 190-193) ➤ Copy of registered sales deed dated 11.04.14 between owner and buyer (Copy at PB Page 194-201)
25	Ankit Choudhary	Ritu Chhabra	<ul style="list-style-type: none"> ➤ Copy of allotment letter of plot on the name of owner of year 1995 (Copy at PB Page 202-203) ➤ Copy of registered sales deed dated 19.10.14 between owner and buyer (Copy at PB Page 204-211)
26	Rakesh Kumar Meena	Ritu Chhabra	Documents of this plot were not available with assessee so the same did not submitted.
33	Pratap Singh Rathore	Kundan Lal	<ul style="list-style-type: none"> ➤ Copy of allotment letter of plot on the name of owner of year 1995 (Copy at PB Page 212-214) ➤ Copy of registered sales deed dated 04.04.14 between owner and buyer (Copy at PB Page 215-222)
34	Krishan Kumar	Kundan Lal	<ul style="list-style-type: none"> ➤ Copy of allotment letter of plot on the name of owner of year 1995 (Copy at PB Page 223-225) ➤ Copy of registered sales deed dated 04.04.14 between owner and buyer (Copy at PB Page 226-233)
35	Mukesh Kumar Sharma	Vimlesh Kumar	<ul style="list-style-type: none"> ➤ Copy of allotment letter of plot on the name of owner of year 1995 (Copy at PB

			<p>Page 234-235)</p> <ul style="list-style-type: none"> ➤ Copy of registered sales deed dated 19.10.14 between owner and buyer (Copy at PB Page 236-242)
36	Hanuman Sharma	Rajendra Singh	<ul style="list-style-type: none"> ➤ Copy of allotment letter of plot on the name of owner of year 1995 (Copy at PB Page 243-244) ➤ Copy of registered sales deed dated 19.10.14 between owner and buyer (Copy at PB Page 245-253)
37	Ankur Patni	Sandeep Kumar Jassal	<ul style="list-style-type: none"> ➤ Copy of allotment letter of plot on the name of owner of year 1995 (Copy at PB Page 254-255) ➤ Copy of registered sales deed dated 19.10.14 between owner and buyer (Copy at PB Page 256-263)
38	Vikrant	Narendra Kumar	<ul style="list-style-type: none"> ➤ Copy of allotment letter of plot on the name of owner of year 1995 (Copy at PB Page 264-267) ➤ Copy of registered sales deed dated 28.10.14 between owner and buyer (Copy at PB Page 268-274)
41	Sunil Jain	Keshari lal Meena	Documents of this plot were not available with assessee so the same did not submitted.
42	Satyanarayan Saini (Babulal)	Mohit Sharma	<ul style="list-style-type: none"> ➤ Copy of allotment letter of plot on the name of owner of year 1995 (Copy at PB Page 275-278) ➤ Copy of registered sales deed dated 19.10.14 between owner and buyer (Copy at PB Page 279-286)
43	Ankit Choudhary	Mohit Sharma	<ul style="list-style-type: none"> ➤ Copy of allotment letter of plot on the name of owner of year 1995 (Copy at PB Page 287-288) ➤ Copy of registered sales deed dated 19.10.14

			between owner and buyer (Copy at PB Page 289-295)
44	Ashok Saini	Ram Singh Rajput	<ul style="list-style-type: none"> ➤ Copy of allotment letter of plot on the name of owner of year 1995 (Copy at PB Page 296-297) ➤ Copy of registered sales deed dated 19.10.14 between owner and buyer (Copy at PB Page 298-305)
50	Arvind Saini	Mukesh Chand Goswami	<ul style="list-style-type: none"> ➤ Copy of allotment letter of plot on the name of owner of year 1995 (Copy at PB Page 306-309) ➤ Copy of registered sales deed dated 11.04.14 between owner and buyer (Copy at PB Page 310-317)
51	Chhitar Meena	Brij Mohan Singh	<ul style="list-style-type: none"> ➤ Copy of allotment letter of plot on the name of owner of year 1995 (Copy at PB Page 318-321) ➤ Copy of registered sales deed dated 04.04.14 between owner and buyer (Copy at PB Page 322-329)
53	Jitendra Kumar Meena	Sandhya Bhatnagar & Sachendra Mohan Bhatnagar	<ul style="list-style-type: none"> ➤ Copy of allotment letter of plot on the name of owner of year 1995 (Copy at PB Page 330-331) ➤ Copy of registered sales deed dated 19.10.14 between owner and buyer (Copy at PB Page 332-339)
55	Pratap Singh Rathore	Sunder Singh	<ul style="list-style-type: none"> ➤ Copy of allotment letter of plot on the name of owner of year 1995 (Copy at PB Page 340-342) ➤ Copy of registered sales deed dated 04.04.14 between owner and buyer (Copy at PB Page 343-350)
1A	Goverdhan	Vijay Kumar Choudhary	<ul style="list-style-type: none"> ➤ Copy of allotment letter of plot on the name of owner of year 1995 (Copy at PB Page 351-353) ➤ Copy of registered sales

			deed dated 19.10.14 between owner and buyer (Copy at PB Page 354-361)
3	Rakesh Kumar	Manish Kumar (Meena Ji)	<ul style="list-style-type: none"> ➤ Copy of allotment letter of plot on the name of owner of year 1995 (Copy at PB Page 362-363) ➤ Copy of registered sales deed dated 19.10.14 between owner and buyer (Copy at PB Page 364-371)
7	Pankaj Saini	Savita Biji	<ul style="list-style-type: none"> ➤ Copy of allotment letter of plot on the name of owner of year 1995 (Copy at PB Page 372-375) ➤ Copy of registered sales deed dated 19.10.14 between owner and buyer (Copy at PB Page 376-383)
8	Jitendra Kumar Meena	Savita Biji	<ul style="list-style-type: none"> ➤ Copy of allotment letter of plot on the name of owner of year 1995 (Copy at PB Page 384-387) ➤ Copy of registered sales deed dated 19.10.14 between owner and buyer (Copy at PB Page 388-395)
10	Pratap Singh	Narendra Kumar Aggarwal	<ul style="list-style-type: none"> ➤ Copy of allotment letter of plot on the name of owner of year 1995 (Copy at PB Page 396-399) ➤ Copy of registered sales deed dated 19.10.14 between owner and buyer (Copy at PB Page 400-408)
17	Sonu	Direct (Finance)	Documents of this plot were not available with assessee so the same did not submitted.
18	Vishal Mittal	Direct (Finance)	Documents of this plot were not available with assessee so the same did not submitted.
21	Sunil Jain	Pranav Kumar Mishra	<ul style="list-style-type: none"> ➤ Copy of allotment letter of plot on the name of owner of year 1995 (Copy at PB Page 409-410)

			➤ Copy of registered sales deed dated 19.10.14 between owner and buyer (Copy at PB Page 411-419)
22	Ashok Saini	Pranav Kumar Mishra	➤ Copy of allotment letter of plot on the name of owner of year 1995 (Copy at PB Page 420-421) ➤ Copy of registered sales deed dated 19.10.14 between owner and buyer (Copy at PB Page 422-429)
23	Goverdhan	Kiran Meena	➤ Copy of allotment letter of plot on the name of owner of year 1995 (Copy at PB Page 430-431) ➤ Copy of registered sales deed dated 19.10.14 between owner and buyer (Copy at PB Page 432-439)
31	Jitendra Kumar	Samrendra Kumar	➤ Copy of allotment letter of plot on the name of owner of year 1995 (Copy at PB Page 440-441) ➤ Copy of registered sales deed dated 19.10.14 between owner and buyer (Copy at PB Page 442-449)
40	Vishal Mittal	Jagmohan Meena, Kuldeep	➤ Copy of allotment letter of plot on the name of owner of year 1995 (Copy at PB Page 450-453) ➤ Copy of registered sales deed dated 28.10.14 between owner and buyer (Copy at PB Page 454-461)
47	Manoj Kumar Saini	Shaileldra Nath	Documents of this plot were not available with assessee so the same could not be submitted.
49	Satyanarayan Saini (Babulal)	Vipin Jain	➤ Copy of allotment letter of plot on the name of owner of year 1995 (Copy at PB Page 462-465) ➤ Copy of registered sales deed dated 19.10.14

			between owner and buyer (Copy at PB Page 466-474)
54	Mukesh Kumar Sharma	Bhatnagar Ji	<ul style="list-style-type: none"> ➤ Copy of allotment letter of plot on the name of owner of year 1995 (Copy at PB Page 483-486) ➤ Copy of registered sales deed dated 19.10.14 between owner and buyer (Copy at PB Page 475-482)

9. We have gone through the seized material and found that the seized page No. 1 to 5 are prepared in relation to transactions of sales of plots in the scheme named "Ganesh Vihar Vistar". The owner of these plots is not assessee but these were owned by various other persons.

The name of each plot owner and buyer of such plot is mentioned at Page No. 1 to 3. On the same paper the sales price of each plot is mentioned. From verification of these papers your honour will find that all the plots were sold at similar rate irrespective of fact that whether sales consideration realized in cash or through cheque.

10. We further observe with respect to page 1 to 3 the word "remitted (bank)" and "remitted (cash)" and "Total remitted" has been mentioned against each plot which means that whatever amount has been received against sales of plots was remitted to the owner of the plots. The assessee group is neither buyer of the plots nor the sellers. The assessee have no connection with the plots mentioned in the seized documents and the interest of the assessee was limited to acting as a

broker in the sales of such plots. The same fact is verifiable from the documents regarding ownership of plots and its sales submitted by the assessee.

11. We also observe that on page 4 to 5 the summary of the transactions mentioned at Page 1 to 3 is mentioned for the purpose of reconciliation of transactions. Thus, the noting made on page No. 4 to 5 is not different but the same is summary of page 1 to 3 and the transactions noted on these papers are not separate transaction.

12. We also observe that from the seized documents as well as documents submitted by assessee during the course of assessee proceedings its well proved that the assessee was neither owner/seller and nor buyer of the plot. These plots were being owned by the respective owners of plot since 1995 and the same were sold by them through registered sales deeds during the year under consideration. In this regard it is relevant to mentioned here that all the plots mentioned in these sheets were sold by the uniform rate. The sales consideration in some of the cases were received entirely through a/c payee cheque, and in some cases partly through cheque and partly through cash and in some cases entirely in cash. The AO has not brought any material to prove that these plots were owned by the assessee or the assessee was

beneficial owner of these plots. The AO herself has accepted the taxability of the cheque receipt in the hands of the actual plot owner as the same not taxed in the hands of the assessee. The action of AO shows that the assessee was not the beneficial owner of such plots.

13. It is also pertinent to mention here that the A.O. has only taxed the cash component of alleged sale proceed and not the amount received through cheque. The A.O. has taxed the cheque consideration in the hands of the actual plot owner whereas with respect to the very same transaction of sale, the A.O. has taxed cash component in assessee's hand. How a single transaction can be taxed in the hands of two different persons. Once it has been proved that the assessee was not the owner of such plots than how it can be presumed that no consideration would be paid to the actual owner of such plot against sales of such plots. Examples of such cases are Plot No. 26, 41, 17, 18, 21,40,49.

14. We also observe that all the plots mentioned in the seized documents were sold at uniform rate. From examination of the seized document we find that there are several parties in the list which were owing more than one plot. In such cases the payment of one or more plot was received entirely through cheque and for the remaining plots

the consideration was either received partly or entirely in cash. In such cases how it can be presumed that such party was not having the knowledge about the market value of his plot and one plot is sold by him at higher rate and another at lower rate. Further as stated earlier where the entire sales consideration is received in cash how it can be presumed that the party did not take sales consideration of his plot from the assessee.

15. There was no material before the A.O. to presume that the cash component for the sale transaction was kept by the assessee and was not passed to the owner of the plots more so when it is proved that the owner of these plots are other third persons.

16. Page 1 to 3 and 4-5 of Exhibit -9 are in relation to same transaction but the AO made addition treating the same as separate transaction. However, the facts remain that the figure written at Page No. 4 to 5 are not in respect of separate transaction but the same is summary of transactions noted on page 1 to 3. The page No. 4 to 5 is reconciliation statement of the transaction mentioned at Page 1 to 3 thus the same tantamount to the double addition.

17. In the case of the assessee there is no positive material available on record to form a reasonable belief that the cash component in sale

consideration of plots which were owned by third party was income of the assessee. In this regard reliance is placed on the decision of Hon'ble Gujarat High Court in the case of Vinodbhai Samjibhai Ravani v/s Deputy Commissioner of Income Tax, Central Circle-1 2017(3) TMI 114 (Copy at PB Page 496-500) wherein in para 7.2 of the order the court observed as under: -

“7.2. However, it is required to be noted that the respective petitioners assessee were never owners of the land in question. It is also required to be noted that in fact the subsequently sale deeds are executed by the original land owners in favour of one Shri Popatbhai Kakadia. It is an admitted position that the respective petitioners assessee have never executed any sale deeds. Therefore, nothing is on record that any sale consideration was received by the respective petitioners assessee. Therefore, merely on the basis of the sauda chitthi dated 12.03.2008 signed by the respective petitioners assessee (signed and executed though admittedly they were not owners of land for which the sauda chitthi was executed / signed), it cannot be said that any amount is received by the petitioners assessee.”

The department filed SLP in Hon'ble Supreme Court against the above order which was rejected by the Hon'ble Supreme Court by its order dated 16.05.2016.

18. In the case of the assessee also no documents were found from the possession of assessee or from the other one to prove that any consideration was received/receivable to assessee. On the contrary, we find that the detailed finding has been recorded by the Id. CIT(A) in this

regard at para 8 to 8.4 of his appellate order which has not been controverted by the Id DR by bringing any contrary material, accordingly, we do not find any reason to interfere to hold that no cash component transaction was received by the assessee.

19. Now coming to the addition upheld by the Id. CIT(A) by presuming of brokerage @ 4% earned on sale of plots. With regard to these transactions, the Id. CIT (A) sustained the addition of Rs. 6,29,260/- presuming that the brokerage @ 4% was received to the assessee on the transaction recorded on the document.

20. It was argued by the Id AR of the assessee that for sustaining the addition on account of brokerage the Id. CIT (A) did not give any cogent reason or did not refer any evidence/material/document to prove that the assessee actually received any brokerage in these dealing or any brokerage was receivable to the assessee. It is admitted position of law that the assessments made in consequence to search are specific assessments and the addition in such assessment can only be made on the basis of documents/evidence found as a result of such or any evidence gathered during the course of assessment. In the case of assessee in support of addition so sustained neither there is any evidence/material/document was found as a result of search which show

that any brokerage was received/receivable to the assessee on these transactions nor during the course of assessment proceeding this fact could be proved. The complete detail of buyers/sellers was available with the AO and in case of any doubt the direct inquiries could be made from the respective parties in this regard but the same was not made.

21. As per the Id AR, the addition so sustained by Id. CIT (A) is based only on the basis of presumption and assumption without considering the seized documents in the right & judicial perspective. From examination of the assessment order as well as order of CIT (A) it will reveal that the entire addition was made on the basis of presumptions, assumption, without having any material to prove the same to be correct. The submission and documents submitted by the assessee completed ignored and rejected without any cogent reason.

22. Our attention was invited to the statement of Shri Nirmal Kumar Kedia (whereon consent was given by the assessee too) recorded by the AO during the course of assessment proceedings on 23.02.2018, relevant question No. 22, and in such statement, it was categorically denied of receiving any brokerage on dealing of these plots. However, these statements have not considered and additions was sustained solely on the basis of presumption and assumption and without having

any material. Ld. AR has further contended that admittedly the assessee was acting as a broker in the transactions but as stated in the reply submitted to the AO as well as CIT (A) due to dispute arose with sub-brokers/plot holders no brokerage was received to the assessee. Since after dispute the assessee was not expecting any brokerage against the deal, therefore no brokerage income could not include in the Income Tax return.

23. On the other hand, the Id DR has supported the order passed by the A.O. upholding the addition of 4% on account of brokerage earned by the assessee.

24. We have considered the rival contentions and carefully gone through the orders of the authorities below and found that no documentary evidence was found during the course of search to substantiate that the assessee has earned brokerage at 4% on these transactions. However, keeping in view the nature of business in which the assessee was engaged, it is reasonable to presume that the assessee must have earned some commission on the transactions routed through him. Keeping in view the entirety and facts and circumstances of the case wherein normal part commission is earned by brokerage of seller and part commission is earned by the brokerage of buyer, it is

reasonable to presume that the assessee has earned commission @ 2% on the alleged transactions. Accordingly, the A.O. is directed to restrict the addition to the extent of 2% of the brokerage on the alleged transaction of sale of plots. We direct accordingly.

25. In the result, appeal of the revenue is dismissed whereas appeal of the assessee is allowed in part.

26. **Now we take assessee's appeal being ITA No. 127/JP/2019 and Revenue's appeal being ITA No.289/JP/2019 (A.Y. 2017-18)**

In these cross appeals, the assessee and the revenue have taken following grounds of appeal:

Grounds of assessee's appeal:

- “1. On the facts and in the circumstances of the case and in law the Id. CIT(A) erred in determining unaccounted receipts of Rs. 1,03,52,000/- against sales and confirming the addition of Rs. 32,09,120/- by applying the GP rate of 31% of total amount of Rs 1,03,52,000/- noted on Page No. 18 & 19 of AS-9 seized from 1, Gayatri Nagar, Main Tonk Road, Sanganer Flyover, Jaipur by holding the same as undisclosed business transaction of the assessee. The Id. CIT (A) further erred in rejecting the submission of the assessee that the seized document is a deaf and dump paper and no addition can be made on the basis of these paper.
2. The appellant prays for leave to add, to amend, to delete, or modify the all or any grounds of appeal on or before the hearing of appeal.”

Grounds of revenue's appeal:

- “1. Whether on the facts and in the circumstances of the case and in law the CIT(A) is justified in deleting the addition of Rs. 5,00,00,000/- made by A.O. on account of undisclosed income.
2. Whether on the facts and in the circumstances of the case and in law the CIT(A) is justified in deleting the addition of Rs. 71,42,880/- by applying GP rate on account of unaccounted business income.
3. Whether on the facts and in the circumstances of the case and in law the CIT(A) is justified in deleting the addition of Rs. 2,81,506/- made by A.O. on account of unaccounted business income.
4. Whether on the facts and in the circumstances of the case and in law the CIT(A) is justified in deleting the addition of Rs.6,99,000/- made by A.O. on account of unaccounted income from sale transactions.
5. Whether on the facts and in the circumstances of the case and in law the CIT(A) is justified in deleting the addition of Rs. 8,03,001/- made by A.O. on account of unaccounted income from sale transactions.
6. Whether on the facts and in the circumstances of the case and in law the. CIT(A) is justified in deleting the addition of Rs.42,07,083/- made by A.O. on account of unaccounted business income from sale of plots.
7. Whether on the facts and in the circumstances of the case and in law the CIT(A) is justified in deleting the addition of Rs.33,14,580/- made by A.O. on account of unexplained expenditure u/s 69C of the I.T. Act, 1961.
8. The appellant craves, leave or reserving the right to amend modify, alter add or forego any ground(s) of appeal at any time before or during the hearing of this appeal.”

27. Rival contentions have been heard and record perused. The facts in brief are that the assessee is limited liability partnership (LLP) incorporated on 31-07-2004. Search and seizure operations u/s 132(1) of

Income Tax Act, 1961 and survey u/s 133A were carried out by Income Tax department over the assessee Group on 19.11.2016. During the course of search, statement of Shri Nirmal Kumar Kedia and Shri Nitin Kedia were recorded U/s 132(4) of the Act. Thereafter post search statement was recorded U/s 131 of the Act on 02/12/2016 wherein they confirmed the surrender made in the search/survey. However, even at this stage, the assessee could not give personwise/yearwise bifurcation of undisclosed income. The assessee made several requests to provide the copy of statement. However, the assessee could get the copy of statement on 19/01/2018 (Friday). The assessee and his brother Shri Nitin Kedia retracted from the admission of undisclosed income in the statements recorded during the course of survey/search by filing an affidavit before AO on 22/01/2018. Thereafter, the AO recorded the statement of assessee on 23/02/2018 on the retraction of admission made by the assessee and his brother.

28. In compliance to notice issued U/s 153A of the Act, the assessee filed return of income declaring income of Rs.1,54,61,050/- which was assessed by the A.O. at Rs. 6,96,57,170/-. While framing the assessment U/s 143(3) read with Section 153A of the Act, the A.O. made addition of Rs. 5.00 crores on account of alleged undisclosed income for making payment for purchase of agricultural land to Shri Jai

Singh Yadav. The A.O. has made addition of Rs. 2,81,506/- on account of alleged income as per page No. 1 of AS-5 seized from 1, Gayatri Nagar, Main Tonk Road, Sanganer Flyover, Jaipur. An addition of Rs. 1,03,52,000/- was also made on the basis of page No. 18 and 19 seized from the very same premises.

29. Addition of Rs. 6,99,000/- was made as per page No. 26 of AS-1, addition of Rs. 8,03,001/- was made on the basis of page No. 28 & 29 of AS-6 and page No. 7 of annexure-8, addition of Rs. 42,07,086/- was made as per notings found on page No. 10-12 of AS-1. The A.O. has also made addition of Rs. 33,14,580/- on account of alleged unexplained expenditure as per page No. 54-56 of Annexure-10. Thus, out of total addition of Rs. 6,96,57,173/-, the Id. CIT(A) has deleted the addition of Rs. 6,64,48,053/- whereas he has upheld the addition of Rs.32,09,120/-. Against the said order of the Id. CIT(A), both the revenue and the assessee are in further appeals before the ITAT.

30. It was vehemently argued by the Id CIT-DR that after considering all the facts and circumstances, the assessee has recorded his statement U/s 132(4) of the Act and surrendered the amount in respect of income earned by him. Since the statement was recorded under oath, there is no reason for retraction without bringing any supporting evidence for the

same. He further relied on the detailed observation made by the A.O. and the investigation team while recording the statement U/s 132(4) of the Act.

31. On the other hand, the Id AR has pointed out various discrepancies in the statement so recorded and contended that the statement was recorded under fear and duress and there were serious irregularities and discrepancies in recording the statement. The detailed submissions of the Id AR of the assessee was as under:

"Nitin Kedia's Statements were recorded under fear & duress and serious other discrepancies in recording of the Statement of Shri Nitin Kedia:-

- (a) If we see the copy of statement Shri Nitin Kedia recorded at F-110 Evershine Tower, Vaisali Nagar, Jaipur (APB 85-92), we find that here the statements were commenced at 5.30 PM on 19/11/2016, which remained continued up to 21-11-2016 except a small break for rest on 20-11-2016 (APB 89).

Inhumanity is apparent. Shri Nitin Kedia was not allowed for break for dinner, sleep, breakfast, rest etc. as the statement at Evershine Tower started at 5.30 PM on 19/11/2016 which remained continuous up to 21-11-2016 except a small break for rest on 20-11-2016 (APB 89).

This attitude of search party is against CHARTER OF RIGHTS AND DUTIES OF PERSONS SEARCHED AS REPORTED IN (1994) 208 ITR 5 (ST), which provides that the assessee has right to have facility of having meals etc at normal time. Shri Nitin Kedia was not allowed for break for dinner, sleep, breakfast, rest etc.

Shri Nitin Kedia was kept whole night in office situated at Evershine Tower Vaisali Nagar, Jaipur where there is no facility of bed in office to sleep. Therefore, Shri Nitin Kedia was kept awoken whole night. All these were noting but torture to assessee with a motive to get the desired surrender and get the signature over the statement whatever recorded by the search party.

- (b) One person cannot be at two different places at same time. As per the copy of statement provided to assessee, Shri Nitin Kedia confirmed the surrendered the income made by Shri Nirmal Kedia in statement recorded on 20-11-2016 which started at 9 AM from question no. 4 (APB page 66). In last question no. 15 Shri Nitin Kedia was asked to submit the explanation over the confession statement made by his brother Shri Nirmal Kumar Kedia. (APB page 74).

If we see the statement of Shri Nitin Kedia at Evershine Tower, (APB page 85-92) he was at Evershine Tower Vaishali Nagar, Jaipur from 5.30 PM on 19-11-2016 to 21-11-2016 (up to conclusion of statement). Then how could be his availability at Kedia House on 20-11-2016 from 9.00 AM to conclusion of statement on 20/11/2016.

Shri Nitin Kedia could not be present at two places at same time. The statement at Evershine Tower, Vaisali Nagar shows that Shri Nitin Kedia was present at Vaisali Nagar in between 5.30 PM on 19/11/2016 to 21-11-2016 (up to conclusion of statement) whereas the statement at Kedia House shows that Shri Nitin Kedia was present at Kedia House during 9.00 AM on 20/11/2016 to conclusion of statement. How it can be possible to record the statement of Shri Nitin Kedia at Kedia House on 20/11/2016.

(c) Other discrepancies in statement

Statement at Shop at Ganesh Nagar: - During the course of survey u/s 133A of the Act, statement of Shri Nitin Kedia was recorded at the premise Ganesh Nagar, 6A, Nadi Ka Phatak, Murlipura Jaipur. There are following discrepancies in the recording of statement by the survey team.

c.i) Commencement of the statement and after recording 7 questions the postponing of the statement at same time

As per the copy of the statement provided by the department, the department commenced the recording of the statement of Shri Nitin Kedia on 19/11/2016 at 2.00 PM. (APB page 75). After recording of answer to question number 1 to 7 in three pages, the statement was postponed for physical verification. The time marked for postponing the statement is 2.00 PM (APB page 77) i.e. commencement of the statement and postponing the statement at same time which shows no time consumed in question, answer and in writing of 7 question answer on paper.

c.ii) Shri Nitin Kedia could not be present at two places at same time on 19/11/2016.

After postponing the statement at 2.00 PM, the statement was resumed at 6.30PM on 19-11-2016 (APB page 77) at Shops at Ganesh Nagar. This statement was again postponed at night 11.00 PM on 19-11-2016 (APB page 78). These statements were resumed at 10.00AM Morning on 20-11-2016 (APB page 79) and concluded on 20-11-2016 after recording answer to question no. 11 to 23. As per the copy of statement given, the assessee should be at Premise situated at Ganesh Nagar from 6.30PM to 11PM on 19-11-2016 and 10 AM to conclusion of statement on

20-11-2016. Question and answer for Q.No. 18-19 was in between 6.30 PM to 11PM.

But if we see the copy of statement Shri Nitin Kedia recorded at F-110 Evershine Tower, Vaisali Nagar, Jaipur (APB 57-64), we find that here the statements were commenced at 5.30 PM on 19/11/2016, which remained continue upto 21-11-2016 except a small break for rest on 20-11-2016 (APB 61).

Therefore, Shri Nitin Kedia could not be present at two places at same time on 19/11/2016. The statement at Ganesh Nagar shows that Shri Nitin Kedia was present at Ganesh Nagar in between 6.30 PM to 11 PM on 19/11/2016 where the statement at Evershine Tower in Vaisali Nagar shows that Shri Nitin Kedia was present at Vasali Nagar office during 5.30 PM on 19/11/2016 to 21-11-2016. How it can be possible to record the statement of Shri Nitin Kedia at Ganesh Nagar in between 6.30 PM to 11.00 PM on 19/11/2016.

This shows that the statements were prewritten and the search/survey team got the signature of Shri Nitin Kedia under duress, coercion and under inhumanity.

This was the reason for not providing the copy of statements in spite of repeated request to ADIT and AO and other higher authorities.

Shri Nirmal Kumar Kedia's Statements were recorded under fear & duress and serious other discrepancies in recording of the Statement of Shri Nirmal Kumar Kedia:-

Search started on 19-11-2016 at residence situated at Kedia House near Nadi ka Phatak, Murlipura, Jaipur.

Statement of Shri Nirmal Kumar Kedia started at 9.00 AM at residence on 19-11-2016 and suspended at 10.00AM (APB page 39-40).

The department also carried out survey at office situated at Sanganer (about 30 Km from residence) on same day. Shri Nirmal Kumar Kedia was taken there by the officers of the department and his statement was started to record at 6.40 PM on 19-11-2016 at Sanganer office which continued upto 11.50PM on 19-11-2016 (APB Page 45-50). There was no break in statement for dinner and he was without dinner in night. He was sick and tired. So, a break in statement was given at 11.50 PM on 19-11-2016. In Sanganer Office there was no bed or other basic facilities. The assessee was kept awoken whole night and he was not allowed to go at home.

On 20-11-2016 at early morning his statement was resumed at 6.30 AM. The assessee was kept tired, sleepless and without food, this was nothing but torture by the survey team to get the desired surrender and sign on the prewritten statements. This was the reason of surrender of Rs. 5 crores in just in first effective question of the statement on 20/11/2016 (APB page 50) without any corroborative material or incriminating documents.

Then the assessee was taken to Kedia House. The search party started to recorded the statement of the assessee at 1.00 PM (APB page 41). Here in very first question the assessee had to confirmed the surrender of Rs. 5 Crore made at Sanganer office and has to overall surrender Rs. 20 Crore without any corroborative material or incriminating documents. The assessee made surrender under inhumanity conditions created by search/survey party. The search/survey party kept the assessee and his

brother Shri Nitin Kedia whole night without sleep and without food, and they created an atmosphere of fear and duress where the assessee was forced to make the desired surrender.

Therefore, no cognizance can be given the statements recorded during the search and survey.

Copy of statement was not given in spite of repeated requests: -

The survey/search party after recording of statement of assessee did not provide copy of statements to the assessee group. The assessee made the repeated request by following letters (copy at PB page 791-800/Vol IV in APB for AY 2015-16):-

S.No	Date of letter	Addressed to	Copy of letter given to
1	Dated 21/11/2016	ADIT-3 Jaipur	1. Principal Director of Income Tax, Investigation, Jaipur 2. Additional Director of Income Tax, Investigation, Jaipur.
2	Dated 08/03/2017	DCIT Central Circle-3, Jaipur	1. Principal Commissioner of Income Tax, Central, Jaipur 2. Principal Director of Income Tax, Investigation, Jaipur 3. Additional Director of Income Tax, Investigation, Jaipur. 4. Joint Commissioner of Income Tax, Central, Jaipur 5. Asstt. Director of Income Tax, Investigation-III, Jaipur
3	Dated 17/04/2017	DCIT Central Circle-3, Jaipur	
4	Dated 18/05/2017	DCIT Central Circle-3,	Joint Commissioner of Income Tax, Central, Jaipur.

		Jaipur	
5	Dated 08/01/2018	DCIT Central Circle-3, Jaipur	(i) The Principle Commissioner of Income Tax, Central, Jaipur (ii) Joint Commissioner of Income Tax, Central, Jaipur.

It was submitted vide letter dated 18/05/2017 and 08/01/2018 that despite to the repetitive request of the assessee to ADIT and AO, the copy of the statements recorded at the time of search and post search has not been provided to the assessee and from this it appears that the department does not want to use these statements against the assessee and want to make assessment on the basis of documents seized during the course of search.

The assessee group was under bonafide belief that since the survey/search party has not given the copy of the statements, therefore, the same would not be used against them.

This attitude of search party is against CHARTER OF RIGHTS AND DUTIES OF PERSONS SEARCHED AS REPORTED IN (1994) 208 ITR 5 (ST), which provides that the assessee has right to have a copy of any statement that is used against him by the department.

After the survey/search several requests were made to Investigation wing as well as AO to provide the copy of statements recorded by the survey/search party. After the continuous efforts of the assessee group, the copy of the statements were provided on 19.01.2018 (Friday) and thereafter on very first working day i.e. 22.01.2018 the assessee filed the affidavit (Copy at APB Page 97-107) before Id. AO to retract the statements. The relevant para of the affidavit is as under: -

(ii) *In reply to the Q. No. 4 and 5 of the statement I accepted to having been earned undisclosed income of Rs. 20 Crore from sales of*

plots/buildings by my concern naming Kedia Real Estate LLP while no such income was actually earned by me or our business concerns or my family members. The entire receipts and payments pertaining to our group are duly recorded in books of accounts/ITR of respective person. No unaccounted money was received by me or our business concerns or my family members against any transactions and likewise no unaccounted payments/investments were made. During the course of search, the search party said to me that several documents and evidences have been found from various places which prove that undisclosed payment has been received against sales. Since major sales were made through staff/sales team/business associates and during the course of search/survey we were not able to contact them therefore the correctness of documents found as a result of search/survey and its contents could not be verified, therefore under misconception/misrepresentation by search/survey party, and under fear and mental tension this wrong surrender was made.

- iii) In the reply to the Q. No. 4 of my statement it was accepted that the undisclosed income of Rs. 20 Crore was expended/invested in making payment of Rs. 5 Crore for purchases of 3 Bigha 18 Biswa land, Rs. 1.02 Caror for investment in Jewellery, part amount for purchases of some plots by way of agreements in my name and balance amount by way of advance & other heads in difference projects of LLP. Actually no such unaccounted investment/expenditure was made for any purposes by me or our business concerns or my family members. The clarification regarding admission of payment of Rs. 5 Crore has been given in forgoing para. The excess Jewellery found as a result of search pertains to our grandparents which was found in search held in the year 1996. No evidence regarding other unaccounted investment/expenses was found to the search party.*

Thereafter during the course of assessment proceedings, the Id. AO recorded the statement of assessee on 23.02.2018 wherein, the assessee explained the factual position. (APB pg 108-118).

Thus, the surrender of Rs. 20 crores made by the Assessee during the course of search was not voluntarily but the same was because of mental tension, fear and under torture and inhumanity conditions.

The Board of direct taxes issued instruction to the All Chief Commissioners of Income Tax, (Cadre Contra) & All Directors General of Income Tax Inv. vide letter F. No. 286/2/2003-IT (Inv) dated 10.03.2003 in regard of confiscatory statement in the course of search and seizer.

The Board has again issued a Circular dated 18th December, 2014 and advised the taxing authorities to avoid obtaining admission of undisclosed income under coercion/undue influence.

But in spite of clear-cut board circular the surrender of income was taken by the search/survey party without having any corroborative or incriminating material.

The Addition cannot be made merely on the basis of search statement Except to search statement which was later on retracted by assessee by filing affidavit there is nothing with the department to visualize that the assessee has undisclosed income. The AO herself has made addition for the balancing amount merely on confession statement. Further, in confession statement the person wise and year wise bifurcation was not given by the assessee. Further, the confession statement is not in relation to incriminating documents. It is well settled principal of law that no addition can be made only on the basis of survey/search statement more so when there is no supporting evidence with department to prove that the surrender made in the statement was correct. The department has no evidence/documents which prove that surrender in statement by assessee is correct, therefore the same cannot be relied upon.

Further Reliance is placed on the following decisions:-

- (i) Apex Court in the case of Pullangode Rubber Produce Co Ltd v/s State of Kerala & Another (1973) 91 ITR 18 (SC) has held that admission is an extremely important piece of evidence but it can't be said that it is conclusive. It is upon to the assessee to show that it is incorrect.
- (ii) Hon'ble Rajasthan High Court in the case of CIT v/s Ashok Kumar Soni 291 ITR 172 (Raj.) has held that admission in statement during search is not conclusive proof of fact and can always be explained.
- (iii) Hon'ble Rajasthan High Court in the case of Mantri Share Brokers PL (96 taxmann.com 279) have held as under:

Section 69B of the Income-tax Act, 1961 - Undisclosed investments (Burden of proof) - Whether where except statement of director of assessee-company offering additional income during survey in his premises, there was no other material either in form of cash, bullion, jewellery or document or in any other form to conclude that statement made was supported by some documentary evidence, said sum could not be added in hands of assessee as undisclosed investments - Held, yes [Paras 10-11] [In favour of assessee]

Para 10 & 11 of the order is as under :

10. *Before proceeding with the matter, it will not be out of place to mention that except the statement in the letter, the AO has no other material on record to assess the income of Rs. 1,82,00,000/-.*

11. *It is settled proposition of law that merely on the statement that too also was taken in view of threat given in question No.36 as narrated by Mr. Gupta and the same sought to have been relied upon, there is no other material either in the form of cash, bullion, jewellery or document in any other form which can come to the conclusion that the statement made was supported by some documentary evidence. We have gone through the record and find that the CIT (A) has rightly observed as stated hereinabove, which was confirmed by the Tribunal.*

It would not be out of place to mention that this order of Hon'ble Rajasthan High Court has been confirmed by Hon'ble Supreme Court also.

Further, Hon'ble Delhi High court in case of Harjeev Agarwal (70 Taxmann.com 95) held:

"...A plain reading of Section 132 (4) of the Act indicates that the authorized officer is empowered to examine on oath any person who is found in possession or control of any books of accounts, documents, money, bullion, jewellery or any other valuable article or thing. The explanation to Section 132 (4), which was inserted by the Direct Tax Laws (Amendment) Act, 1987 w.e.f. 1st April, 1989, further clarifies that a person may be examined not only in respect of the books of accounts or other documents found as a result of search but also in respect of all matters relevant for the purposes of any investigation connected with any proceeding under the Act. However, as stated earlier, a statement on oath can only be recorded of a person who is found in possession of books of accounts, documents, assets, etc. Plainly, the intention of the Parliament is to permit such examination only where the books of accounts, documents and assets possessed by a person are relevant for the purposes of the investigation being undertaken. Now, if the provisions of Section 132(4) of the Act are read in the context of Section 158BB (1) read with Section 158B (b) of the Act, it is at once clear that a statement recorded under Section 132(4) of the Act can be used in evidence for making a block assessment only if the said statement is made in the context of other evidence or material discovered during the search. A statement of a person, which is not relatable to any incriminating document or material found during search and seizure operation cannot, by itself, trigger a block assessment. The undisclosed income of an Assessee has to be computed on the basis of evidence and material found during search. The statement recorded under Section 132(4) of the Act may also be used for making the assessment, but only to the extent it is relatable to the incriminating evidence/material unearthed or found during search. In other words, there must be a nexus between the statement recorded and the evidence/material found during search in order to for an assessment to be based on the statement recorded...."

Though the above principle is laid down in relation to assessment of block period u/s 158 BC of the Act, the same was also applied in respect of assessment u/s 153A by Delhi High Court in case of Best Infrastructure (84 Taxmann.com 287) when it was held thus:

38. Fifthly, statements recorded under Section 132 (4) of the Act of the Act do not by themselves constitute incriminating material as has been explained by this Court in Harjeev Aggarwal (supra).

Some of the more decisions laying down ratio that mere statement is not enough to make addition are as under:

Hon'ble Madras High Court in the case of Smt. S. Jayalakshmi Ammal [2016] 74 taxmann.com 35 (Madras)

"...While advertng to the above, we are of the considered view that, for deciding any issue, against the assessee, the Authorities under the Income Tax Act, 1961 have to consider, as to whether there is any corroborative material evidence. If there is no corroborating documentary evidence, then statement recorded under Section 132(4) of the Income Tax Act, 1961, alone should not be the basis, for arriving at any adverse decision against the assessee. If the authorities under the Income Tax Act, 1961, have to be conferred with the power, to be exercised, solely on the basis of a statement, then it may lead to an arbitrary exercise of such power. An order of assessment entails civil consequences. Therefore, under judicial review, courts have to exercise due care and caution that no man is condemned, due to erroneous or arbitrary exercise of authority conferred...."

"...If the assessee makes a statement under Section 132(4) of the Act, and if there are any incriminating documents found in his possession, then the case is different. On the contra, if mere statement made under Section 132(4) of the Act, without any corroborative material, has to be given credence, than it would lead to disastrous results. Considering the nature of the order of assessment, in the instant case characterized as undisclosed and on the facts and circumstances of the case, we are of the view that mere statement without there being any corroborative evidence should not be treated as conclusive evidence against the maker of the statement..."

Naresh Kumar Agarwal [2015] 53 taxmann.com 306 (Andhra Pradesh)

"...it is admitted by the Revenue that on the dates of search, the Department was not able to find any unaccounted money, unaccounted bullion nor any other valuable articles or things, nor any unaccounted documents nor any other valuable articles or things, nor any unaccounted documents nor any such incriminating material either from the premises of the company or from the residential houses of the managing director and other directors. In such a

case, when the managing director or any other persons were found to be not in possession of any incriminating material, the question of examining them by the authorised officer during the course of search and recording any statement from them by invoking the powers under section 132(4) of the Act, does not arise. Therefore, the statement of the managing director of the assessee, recorded patently under Section 132(4) of the Act, does not have any evidentiary value. This provision embedded in sub-section (4) is obviously based on the well established rule of evidence that mere confessional statement without there being any documentary proof shall not be used in evidence against the person who made such statement..”

Hon'ble Gujarat High Court, vide its order dated 14.07.2016, in the case of CHETNABEN J SHAH LEGAL HEIR OF JAGDISHCHANDRA K. SHAH, in TAX APPEAL NO. 1437 of 2007, laid down the ratio that no additions can be made in the hands of the assessee merely on the basis of statements recorded, during the course of search, under section 132(4). Hon'ble High Court in the above-mentioned case relied on its earlier order in the case of Kailashben Manharlal Chokshi [2008] 174 Taxman 466 (Guj.), wherein a similar ratio was laid down. Further, in the case of Narendra Garg & Ashok Garg (AOP) [2016] 72 taxmann.com 355 (Gujarat), Hon'ble Gujarat High Court held that

“...It is required to be borne in mind that the revenue ought to have collected enough evidence during the search in support of the disclosure statement. It is a settled position of law that if an assessee, under a mistake, misconception or on not being properly instructed, is over assessed, the authorities are required to assist him and ensure that only legitimate taxes are collected. The Assessing Officer cannot proceed on presumption u/s 134(2) of the Act and there must be something more than bare suspicion to support the assessment or addition. In the present case, though the revenue's case is based on disclosure of the assessee stated to have been made during the search u/s 132(4) of the Act, there is no reference to any undisclosed cash, jewellery, bullion, valuable article or documents containing any undisclosed income having been found during the search...”

CIT v/s G.Krishnan (1994) 210 ITR 707 Mad.

Held, that additions cannot be made merely on the basis of statements.

The Jodhpur ITAT Bench in Maheshwari Industries v. Asstt. CIT [2005] 148 Taxman 74 (Jodh) (Mag.) has held that additions should be considered on merits rather than on the basis of the fact that the amount was surrendered by the assessee. It is settled legal position that unless the provision of statute warrant or there is a necessary implication on reading of section that the principles of natural justice are excluded, the provision of section should be construed in manner incorporating principles of natural justice and quasi judicial bodies should generally read in the provision relevant section a requirement of giving a reasonable opportunity of being heard before an order is made which will have adverse civil consequences for parties effected.

Rajesh Jain Vs. DCIT 100 TTJ 929 (ITAT, Delhi 'A' Bench) Search and seizure - Block assessment - Retraction of statement - Addition of Rs.25 lacs made solely on the basis of confessional statement of assessee that he earned the said amount in the last ten years was not justified - Confessional statement should be corroborated with some material to show that assessment made is just and fair.

KRISHNA TERINE (P) LTD. vs. ASSISTANT COMMISSIONER OF INCOME TAX, ITAT, AHMEDABAD 'D' BENCH 56 DTR, ITAT 395

Held that it appears that both the additions have been made by the AO because the assessee in the statement under s. 132(4) of the IT Act made surrender of the above amounts but later on did not disclose the same in the return of income filed for the block period. However, on consideration of the orders of the authorities below, we are of the view that no evidence or material is discussed to show any incriminating material recovered during the course of search to make the above additions. The Tribunal in the first round of proceedings has already directed to examine the case on the basis of material seized, material available on record and books of account. In the absence of any specific findings as per the direction of the Tribunal dt. 31st May, 2005 and as per law for the block assessment noted above, before making the addition on the above issue the AO and the learned CIT(A) should have specified as to what material was found during the course of search to make the above additions. In the absence of any proper explanation and finding in the above grounds, we set aside the orders of the authorities below and restore these two grounds of

appeal to the file of the AO with direction to re-decide both the grounds afresh on the basis of material seized, material available on record and the books of accounts as is directed by the Tribunal earlier vide order dated 31st May, 2005 and in accordance with law for the block assessment as noted above.

The law relating to retraction is well-settled by Supreme Court in Sri Krishna V. Kurukshetra University, AIR 1976 SC 376, wherein it is held that if the original statement suffers from any defects, the person is entitled to go back on the statement already made by making correct statement. The Supreme Court have laid down the ratio, after considering S. 18 of the Evidence Act, 1872 that any admission made in the ignorance of the legal rights or under duress, cannot bind the maker of the admission. This right has been tested under Income-tax Act and the same has been upheld by Punjab & Haryana High Court in Kisan Lal Shivchand Rai v. CIT, (88 ITR 293).

Hon'ble ITAT Jaipur Bench in the case of Shri Pawan Lashkary ITA No 808/JP/2011 dated 06.01.2012 has held that income cannot be assessed merely on the basis of statement. Hon'ble ITAT has observed in Para 2.37 to 2.38 as under:-

"2.37 The revenue has relied upon the statement of the assessee recorded during the course of search in which the assessee surrendered the amount on account of revaluation of land as undisclosed income. Kelkar Panel studied the problem of confessions and surrenders during its studies and deliberations in para 3.27 and the same is reproduced as under:

"A cross section of people cutting across 4trade and industry complained of a high handed behaviour of raiding parties particularly while recording a statement. It was pointed out that overenthusiastic aiding parties would often coerce a 'surrender'. As a result all follow up investigations are distracted and generally brought to a stand still. Since the surrender is not backed by adequate evidence, the tax evader invariably retracts from the statement of surrender by which time it is too late for the Department to resume investigations. Similarly, where adequate evidence is indeed found, a surrender is not necessary to establish tax evasion. Therefore, the Task Force recommends that the CBDT must issue immediate instructions to the effect that no raiding party should obtain any surrender whatsoever. Where a tax payable desires to voluntarily make a disclosure, he should be advised to make so after the search. As a result, the taxpayer will not be able to allege coercion and successfully distract investigations. All cases where surrender is obtained during the course of the

search in violation of the instructions of the CBDT, the leader of the raiding party should be subjected to 'vigilance enquiry. Further the task force also recommends that statements recorded during the search should be video recorded. This will indeed add to the confidence of the taxpayer in the impartiality of the system.'"

2.38 The Finance Minister in the budget speech for the year 2003 stated that no confession shall be obtained during search and seizure operation. The instructions were followed by CBDT by issue of a circular on the lines desired by the Finance Minister. There can be an estoppel on the issue of the facts but there cannot be estoppel on the principle of law. It is not the case of the revenue that the assessee was not disclosing the amount received as a result of retirement from the firm. The assessee obtained the legal advice and was of the opinion that such revaluation is capital receipt which is not liable to tax. Hence, we feel that income cannot be added simply on the basis of surrender. The statement recorded u/s 132(4) can be rebutted by the assessee and the case of the assessee is that the amount is not liable to tax."

The search party took the similar type surrender in the case of M/s Suresh Medical Agency ITA No 443/JP/2012 dated 21.08.2013, Shri Radhey Shyam Mittal ITA No 420/JP/2012 dated 26.08.2013, Shri Suresh Kumar Mittal ITA No 947/JP/2013 dated 24.09.2015 and Shri Madan lal Mittal ITA No 948/JP/2013 dated 24.09.2015. In these cases without having any corroborative material, the AO made the addition in these cases merely on the basis of search statement. In these cases the copy of statements were given at much later stage and the assessee retracted from the statement after receipt the copy of statement. Hon'ble ITAT has deleted the addition in all these cases. The findings of Hon'ble ITAT in the case of Shri Radhey Shyam Mittal are produced as under:-

"6. We have heard parties with reference to material on record and case laws brought to our notice. The action under section 132 was carried out at assessee's premises on 27.8.2008 and in the statement assessee made surrender of income of Rs. 30,00,000/- on account of income earned from trading of items in pharmaceutical business outside the books. The appellant, however, had been approaching the authorized officer to provide copy of statement so obtained in proceedings under section 132 of the Act. When these statements were not provided, the appellant vide letter dated 3.10.2008 addressed to the authorized officer and another letter dated 18.12.2008 addressed to the assessing authority requested to provide the copy of statement in case the same were to be used

against him. Till such time the copy of statement was not provided, assessee entertained a bonafide belief that in the absence of any documentary evidence or corroborative evidence having been found as a result of search, such statement would not be used against him. If such statements were to be used, the department was under legal obligation to have provided the copy thereof to the appellant. It is only on persistent efforts of the appellant, copies of statement were provided only on 13.3.2009. The appellant after understanding the legal implication of such statement made a valid retraction as the surrender was not supported by any corroborative evidence. The affidavit filed in this regard is laid on assessee's paper book pages 64 to 68. This affidavit has carefully been perused. After the affidavit was filed before the assessing authority, he remained silent on the face of it and carried no enquiry thereon to verify the correctness thereof. The assessee was also not cross examined on the point of retraction nor was required to produce any documentary evidence or any other evidence. Assessee was, therefore, entitled to assume that the income tax authorities were satisfied with the affidavit as sufficient on this point. The Hon'ble Allahabad High Court in the case of *Sohan Lal Gupta vs. CIT (1958) 33 ITR 786 (All.)*, as also put to the parties during the course of argument, has made elaborate discussion on the evidentiary value of the affidavit. The relevant passage from the aforesaid judgment at page 791 of the report is reproduced as under :-

"The most important points on which the Tribunal relied, is that mentioned at No. 2, viz., that, according to the Tribunal, the assessee had not satisfactorily established that the shares had to be sold as the purchaser of the Jaswant Sugar Mills was not willing to purchase that mill unless the shares in the Straw Board Mills Ltd. held by the family were also transferred to him at the same time. On this point, the only material available on the record is the affidavit which was filed by the assessee before the Income-tax Officer. The assessee in his affidavit, had definitely stated that the purchaser wanted to purchase both the going concerns, the Jaswant Sugar Mills and the Straw Board Mills Ltd., together and one of his conditions of purchase was that all the shares of Lala Jaswant Rai, his sons and other relatives had to be transferred to the purchaser. The Income-tax Appellate Tribunal rejected this affidavit of the assessee on the mere ground that there was no documentary evidence in corroboration in the form of any correspondence of otherwise on this point. Shri G.S. Pathak contended rightly before us that the Tribunal was not entitled to reject the affidavit on this point on such a ground. After the assessee had filed the affidavit, he was neither cross-examined on that point, nor was he called upon to produce any documentary evidence. Consequently, the assessee was entitled to assume that the Income-tax authorities were satisfied with the affidavit as sufficient proof on this point. If it was not to be accepted as a sufficient proof either by the Income-tax Officer or by the Appellate Assistant Commissioner of Income-tax or by the Income-tax Appellate Tribunal, the assessee should have been called upon to produce documentary evidence, or, at least he should have been cross-examined to find out how far his assertions in the affidavit were correct."(emphasis supplied)

*The reliance placed by the assessee on the judgment by Hon'ble Apex Court in the case of *Pullangode Rubber Produce Co. Ltd. (supra)* and Hon'ble Rajasthan High Court in the case of *Ashok Kumar Soni (supra)* are well placed as the assessee has successfully demonstrated that the admission made during the course of search is not correct. The ingredient for retraction of statement made during the search,*

therefore, stand duly satisfied as the assessee is found to have made retraction within a reasonable time immediately after the copies of statement were provided to him. Furthermore, there being no material or evidence on record to show that appellant has carried any business outside the books for sale and purchase of items of pharmaceutical companies that could give rise to income to the extent of Rs. 30,00,000/-, addition merely on the basis of such statement which stood validly retracted could not have been made. On similar basis and reasoning in the case of Suresh Medical Agency another assessee of the group who were also searched on the same day along with this appellant, vide our order dated 21.8.2013 in ITA No. 443/JP/2012 have found the retraction made as valid and also deleted the addition. We, therefore, find no factual or legal justification in sustenance of addition by Ld. CIT (A) in this regard. As a result, the addition sustained by Ld. CIT (A) is deleted and ground no. 1 raised in appeal is allowed."

Hon'ble ITAT Jaipur Bench in the case of Ashok Kumar Lakhyani vs DCIT ITA No 30/JP/2018 order dated 24/07/2018 held that

"We have heard the Id. A/R as well as the Id. D/R and considered the relevant material on record. The assessee is engaged in the business of trading of Fertilizers and pesticides. A survey under section 133A of the I.T. Act was carried out at the business premises of the assessee on 19th December, 2012. During the course of survey action, an agreement to sale dated 1st March, 2012 executed between Shri Harish Kumar, the son of the assessee and one Shri Daya Kishan was found from the premises of the assessee. As per the said agreement Shri Harish Kumar agreed to purchase the plot of land from Shri Daya Kishan for a consideration of Rs. 6,75,000/- and a sum of Rs. 1,00,000/- was paid as an advance on the date of agreement and balance of Rs. 5,75,000/- was to be paid by 10th May, 2012. Accordingly, the assessee who is the father of Shri Harish Kumar in his statement recorded under section 133A surrendered the undisclosed income including the income of Rs.5,75,000/- on account of investment in plot. After the survey, the assessee vide letter dated 16.01.2013 informed the AO that the agreement found during the survey was cancelled by his son though the assessee was not aware about this fact and, therefore, the surrender of Rs. 5,75,000/- on account of investment in the plot was mistakenly made during the survey. The assessee filed his return of income declaring undisclosed income of Rs. 24,50,000/- inclusive of Rs. 1,00,000/- on account of the advance given for purchase of land. The AO made an addition of Rs. 5,75,000/- which was not offered by the assessee to tax in the return of income but was surrendered during the course of survey proceedings. The assessee challenged the action of the AO before the Id. CIT (A) but could not succeed.

3. Having considered the rival submissions and the relevant material on record, we note that the assessee produced a sale deed dated 18.05.2012 whereby the owner of the land Shri Daya Kishan sold the said plot of land to third party Mrs. Nirmala Devi and, therefore, once the said plot of land was sold by the owner to third party and not to the assessee or his son, then the question of investment of Rs. 5,75,000/- which was to be paid at the time of sale deed does not arise. The

AO has made the addition only on the basis of surrender made by the assessee during the course of survey though there was an agreement found during the survey action. As per the said agreement only Rs. 1,00,000/- was found to be paid by the son of the assessee as an advance for purchase of the plot of land and, therefore, to that extent the addition can be made if assessee has not surrendered the amount. Since the assessee has already surrendered the amount of Rs. 1,00,000/-, therefore no further addition can be made on account of investment in the land when the said agreement found during the course of survey was not given effect by the parties and the plot of land was sold by the owner to some third party vide sale deed dated 18th May, 2012. Hence, when the facts were brought on record by the assessee regarding the sale of plot of land to the third party, then the statement recorded under section 133A which is contrary to the actual facts, cannot be a basis of addition. Accordingly, in the facts and circumstances of the case, the addition made by the AO is not sustainable in law and the same is deleted."

The following decisions of Hon'ble Rajasthan High Court is distinguishable on facts. Therefore the addition cannot be sustained on the basis of the following decisions:-

- a) 2018 (11) TMI 953 - Rajasthan High Court Pr. Commissioner Of Income Tax (Central), Jaipur Versus Shri Roshan Lal Sancheti, Prateek-13

In this case in the search, on the basis of seven loose papers were seized on which the assessee had written various amounts showing undisclosed investment in construction, purchase and advances the assessee agreed to surrender amount of Rs. 2,28,44,545/-. Thereafter, the statement of the assessee on these seven papers was recorded on 27.09.2012 where surrender of the aforesaid amount was made by the assessee.

But in the case of the assessee, the surrender is not relatable to any material. Further, the surrender was obtained under duress, coercion, and in the atmosphere of fear. Further, in view of several discrepancies pointed out by the assessee in recording of the statement, the recording of statement is against the principle of natural justice vitiated in law and no cognizance of these statements should be taken.

- b) 2016 (5) TMI 1304 - RAJASTHAN HIGH COURT CIT, Bikaner Versus Ravi Mathur and others

In this case the assessee agreed to surrender certain amount on the basis of incriminating documents, cash, jewellery etc., in statements recorded under Section 132(4) on 9.11.1995 and later, however, it was contended by the assessee that the statements under Section 132(4) of the Act was not correct and the amounts which were taken into lakhs are in thousands and attempted to retract from the statements made at the time of search and seizure operation.

But in the case of the assessee, the surrender is not relatable to any material. Further, the surrender was obtained under duress, coercion, and in the atmosphere of fear. Further, in view of several discrepancies pointed out by the assessee in recording of the statement, the recording of statement is against the principle of natural justice vitiated in law and no cognizance of these statements should be taken.

- c) 2019 (4) TMI 1120 - Rajasthan High Court in the case of M/S Bannalal Jat Constructions Pvt. Ltd. Versus ACIT, Central Circle-2, Ajmer

In this case a search was conducted at the business/residential premises of Shri Banna Lal Jat, the Director of appellant company - M/s. Bannalal Jat Constructions Private Limited, on 10.10.2014, in which he was also operating his proprietary concern in the name of M/s. Bannalal Jat Contractor. During the search proceedings at residential premises of Shri Bannalal Jat, a cash worth of Rs. 1,21,43,210/- was found and inventorised as per Annexure CF of Panchnama dated 11.10.2014. He, in his statement, recorded under Section 132(4) of the Income Tax Act, 1961 (for short 'the IT Act') during the course of search and even subsequent statement recorded under Section 131 of the IT Act, admitted the same as undisclosed income of the appellant-company. However, subsequently while filing the return of income for the relevant assessment year, the appellant-company did not offer the said undisclosed income to tax.

Therefore, in this case, surrender was backed by cash found during the search.

But in the case of the assessee, the surrender is not relatable to any material. Further, the surrender was obtained under duress, coercion, and in the atmosphere of fear. Further, in view of several discrepancies pointed out by the assessee in recording of the statement, the recording of statement is against the principle of natural justice vitiated in law and no cognizance of these statements should be taken.

In view of above submission this is to submit that the addition made by Id. AO is not justifiable and CIT (A) rightly deleted to such addition.

32. We have considered the rival contentions and carefully gone through the orders of the authorities below and found from the record that the addition of Rs. 5.00 crores were made on account of alleged undisclosed income alleged to be used for making undisclosed payment for purchases of agriculture land purchased from Shri Jai Singh Yadav.

The addition was made solely on the basis of search statement of Shri Nirmal Kedia partner of the assessee, which were retracted later-on, without having any corroborative evidence/document to prove the same to be correct.

31. By the impugned order, the Id. CIT(A) has deleted the addition after observing as under:

“8. Basic facts relating to Ground 1 is about addition of Rs.5 Crores made by the AO. During the course of search Sh. Nirmal Kedia stated u/s 132(4) that he has paid Rs.5 Crores to Shri Jal Singh Yadav for acquisition of plot. The relevant portion of statement is reproduced by the AO on page 3 of the order. While filing return u/s 153A the sum of Rs.5 crore was retracted. This retraction as reiterated in the statement recorded by the AO u/s 131 of the Act. A letter was filed by the appellant before the AO confirming his retraction. The AO was not satisfied with explanation of appellant and added a sum of Rs.5 Crores as undisclosed income.

I have perused the written submissions submitted by the Ld. A/R and the order of AO. I have also gone through various judgments cited by the Ld. A/R and those contained in the order of AO.

8.2 In the detailed submission made by the assessee it has vehemently argued that the settled position of law is that addition cannot be made simply on the basis of statement of the assessee alone. The same has to be substantiated and

corroborated either by post search enquiries or by linking with the material found in search with the statement of the assessee.

I find that AO has proceeded to make an addition merely on the basis of statement given by appellant.

- 8.3 *It is a settled law that statement alone cannot be treated as incriminating material for the purposes of making addition for assessment completed u/s 153A / 143(3). It has been held in many judgments that mere statement u/s 132(4) or u/s 131 is not sufficient to make an addition. A statement made must be relatable to incriminating material found during the course of search or the statement must be made relatable to material by subsequent inquiry/investigations. Hon'ble High Court of Rajasthan in the case of Mantri Share Brokers PL (96 taxmann.com 279) have held as under:*

Section 698 of the Income-tax Act, 1961 - Undisclosed investments (Burden of proof) Whether where except statement of director of assessee-company offering additional income during survey in his premises, there was no other material either in form of cash, bullion, jewellery or document or in any other form to conclude that statement made was supported by some documentary evidence, said sum could not be added in hands of assessee as undisclosed investments - Held, yes [Paras 10-11] [In favour of assessee]

Para 10 & 11 of the order is as under :

10. *Before proceeding with the matter, it will not be out of place to mention that except the statement in the letter, the AO has no other material on record to assess the income of Rs. 1,82,00,000/-.*
11. *It is settled proposition of law that merely on the statement that too also was taken in view of threat given in question No.36 as narrated by Mr. Gupta and the same sought to have*

been relied upon, there is no other material either in the form of cash, bullion, jewellery or document in any other form which can come to the conclusion that the statement made was supported by some documentary evidence. We have gone through the record and find that the CIT (A) has rightly observed as stated hereinabove, which was confirmed by the Tribunal.

It would not be out of place to mention that this order of Hon'ble Rajasthan High Court has been confirmed by Hon'ble Supreme Court also. Further, Hon'ble Delhi High court in case of Harjeev Agarwal (70 Taxmann.com 95) held thus:

Harjeev Agganval [2016] 70 taxmann.com 95 (Delhi)

"...A plain reading of Section 132 (4) of the Act indicates that the authorized officer is empowered to examine on oath any person who is found in possession or control of any books of accounts, documents, money, bullion, jewellery or any other valuable article or thing. The explanation to Section 132 (4), which was inserted by the Direct Tax Laws (Amendment) Act, 1987 w.e.f. 1st April, 1989, further clarifies that a person may be examined not only in respect of the books of accounts or other documents found as a result of search but also in respect of all matters relevant for the purposes of any investigation connected with any proceeding under the Act. However, as stated earlier, a statement on oath can only be recorded of a person who is found in possession of books of accounts, documents, assets, etc. Plainly, the intention of the Parliament is to permit such examination only where the books of accounts, documents and assets possessed by a person are relevant for the purposes of the investigation being undertaken. Now, if the provisions of Section 132(4) of the Act are read in the context of Section 158BB (1) read with Section 158B (b) of the Act, it is at once clear that a statement recorded under Section 132(4) of the Act can be used in evidence for making a block assessment only if the said statement is made in the context of other evidence or material discovered during the search. A statement of a person, which is not relatable to any incriminating document or material found during search and seizure operation cannot, by itself, trigger a block assessment. The undisclosed income of an Assessee has to be computed on the basis of evidence and material found during

search. The statement recorded under Section 132(4) of the Act may also be used for making the assessment, but only to the extent it is relatable to the incriminating evidence/material unearthed or found during search. In other words, there must be a nexus between the statement recorded and the evidence/material found during search in order to for an assessment to be based on the statement recorded...."

Though the above principle is laid down in relation to assessment of block period u/s 158 BC of the Act, the same was also applied in respect of assessment u/s 153A by Delhi High Court in case of Best Infrastructure (84 Taxmann.com 287) when it was held thus:

38. Fifthly, statements recorded under Section 132 (4) of the Act of the Act do not by themselves constitute incriminating material as has been explained by this Court in Harjeev Aggarwal (supra).

Some of the more decisions laying down ratio that mere statement is not enough to make addition are as under:

Smt. S.Jayalakshmi Ammal [2016] 74 taxmann.com 35 (Madras)

"...While advertng to the above, we are of the considered view that, for deciding any issue, against the assessee, the Authorities under the Income Tax Act, 1961 have to consider, as to whether there is any corroborative material evidence. If there is no corroborating documentary evidence, then statement recorded under Section 132(4) of the Income Tax Act, 1961, alone should not be the basis, for arriving at any adverse decision against the assessee. If the authorities under the Income Tax Act, 1961, have to be conferred with the power, to be exercised, solely on the basis of a statement, then it may lead to an arbitrary exercise of such power. An order of assessment entails civil consequences. Therefore, under judicial review, courts have to exercise due care and caution that no man is condemned, due to erroneous or arbitrary exercise of authority conferred...."

"...If the assessee makes a statement under Section 132(4) of the Act, and if there are any incriminating documents found in his possession, then the case is different. On the contra, if mere

statement made under Section 132(4) of the Act, without any corroborative material, has to be given credence, then it would lead to disastrous results. Considering the nature of the order of assessment, in the instant case characterized as undisclosed and on the facts and circumstances of the case, we are of the view that mere statement without there being any corroborative evidence should not be treated as conclusive evidence against the maker of the statement..."

Naresh Kumar Agarwal [2015] 53 taxmann.com 306 (Andhra Pradesh)

"...it is admitted by the Revenue that on the dates of search, the Department was not able to find any unaccounted money, unaccounted bullion nor any other valuable articles or things, nor any unaccounted documents nor any other valuable articles or things, nor any unaccounted documents nor any such incriminating material either from the premises of the company or from the residential houses of the managing director and other directors. In such a case, when the managing director or any other persons were found to be not in possession of any incriminating material, the question of examining them by the authorised officer during the course of search and recording any statement from them by invoking the powers under section 132(4) of the Act, does not arise. Therefore, the statement of the managing director of the assessee, recorded patently under Section 132(4) of the Act, does not have any evidentiary value. This provision embedded in sub-section (4) is obviously based on the well-established rule of evidence that mere confessional statement without there being any documentary proof shall not be used in evidence against the person who made such statement.."

Hon'ble Gujarat High Court, vide its order dated 14.07.2016, in the case of CHETNABEN J SHAH LEGAL HEIR OF JAGDISHCHANDRA K. SHAH, in TAX APPEAL NO. 1437 of 2007, laid down the ratio that no additions can be made in the hands of the assessee merely on the basis of statements recorded, during the course of search, under section 132(4). Hon'ble High Court in the above mentioned case relied on its earlier order in the case of Kailashben Manharlal Chokshi [2008] 174 Taxman 466 (Guj.), wherein a similar ratio was laid down. Further, in the case of Narendra Garg & Ashok Garg (AOP) [2016] 72 taxmann.com 355 (Gujarat), Hon'ble Gujarat High Court held that "...It is required to be borne in mind that the revenue ought to have collected enough evidence during the search in support of the disclosure statement. It is

a settled position of law that if an assessee, under a mistake, misconception or on not being properly instructed, is over assessed, the authorities are required to assist him and ensure that only legitimate taxes are collected. The Assessing Officer cannot proceed on presumption u/s 134(2) of the Act and there must be something more than bare suspicion to support the assessment or addition. In the present case, though the revenue's case is based on disclosure of the assessee stated to have been made during the search u/s 132(4) of the Act, there is no reference to any undisclosed cash, jewellery, bullion, valuable article or documents containing any undisclosed income having been found during the search..."

It is clear from order of AO in para 5 of the order by the AO there is no other material other than statement of appellant which forms the basis of adding a sum of Rs.5 Crores as undisclosed income. Since the addition is made merely on statement of appellant u/s 132(4) and there is not incriminating material linking it with statement, the addition of Rs.5 Crores is unsustainable. On the facts and in the circumstances of the case, the AO is directed to delete the addition of Rs.5 Crores. Appellant's Ground No. 2 is allowed."

34. We also found from the record that during the course of search, statement was recorded U/s 132(4)/131 of the Act. In the statement Shri Nirmal Kumar Kedia surrendered the income of Rs. 5.00 crore in statement recorded u/s 131 of IT Act during the course of Survey on 20-11-2016 at Sanganer Office in answer to question no 18 & 19. The assessee surrendered overall unaccounted income of Rs. 20 crore (including Rs. 5.00 cr surrendered at Sanganer Office) in his statement recorded u/s 132(4) on 20-11-2016 at 1.00 PM at Kedia House. However, no assessee wise or year wise bifurcation of undisclosed

income is given in the statement. The assessee confirmed this surrendered in his statement u/s 131 recorded at Sanganer office during the course of survey u/s 133A of the Act recorded on 20-11-2016 at 11.30 PM in answer to question no. 57 & 58.

35. Similarly, the search party recorded the statement of Shri Nitin Kedia u/s 132(4) at Kedia House on 19-11-2016 at 10 AM which was temporarily suspended at 11 AM of 19-11-2016. The statement was resumed on 20-11-2016 at 9 AM starting from question no. 4. This was again suspended for rest after recording the statement up to question no 14. The statement was again resumed and Shri Nitin Kedia in question no 15 confirmed the surrender made by Shri Nirmal Kedia. Post search statement recorded on 02.12.2016, Shri Nirmal Kedia partner of the assessee confirmed his earlier statement but here also no year wise or person wise bifurcation of undisclosed income could be given or worked out by the ADIT. Here the assessee has specifically stated that he has surrendered Rs. 20 Crore for peace and self satisfaction.

36. However, the assessee retracted the from the surrender by not disclosing the said income in his return filed on 31-10-2017. The assessee could obtain the copy of statement on 19-01-2018 (Friday). Subsequent to that the assessee and his brother Shri Nitin Kedia filed

affidavit on 22-01-2018. They said that they admitted the undisclosed income under mental tension & fear.

37. Thereafter, Statement u/s 131 by the AO subsequent to retraction affidavit filed by the assessee. Subsequent to the retraction affidavit filed by the assessee and his brother Shri Nitin Kedia the AO recorded the statement u/s 131 of the Act.

38. From the assessment order, documents submitted during the course of assessment proceedings and submission given to the AO following facts emerges: -

- i) During the course of survey/search proceedings carried out over the assessee group no documents/evidence were found to prove that the assessee group made some unaccounted payment to Shri Jai Singh Yadav for purchases of agriculture land. No such documents/evidence was also found from the possession of assessee as well as from the possession of Shri Jai Singh Yadav during the search/survey carried out over this person.
- ii) The entire additions was made solely on the basis of statement of Shri Nirmal Kumar Kedia recorded during the course of search/survey.
- iii) As soon as the copy of statements of partners of assessee Shri Nirmal Kumar Kedia and Shri Nitin Kedia recorded during the course of search/survey was provided to the assessee group they filed an affidavit before the AO for retracting the incorrect statement given in search/survey.
- iv) During the course of assessment proceedings to verify the veracity of the affidavit filed by Shri Nirmal Kumar Kedia and Shri Nitin Kedia whereby they retracted the search/survey statements; the AO recorded the statement during the course of

assessment proceedings on 23.02.2018 u/s 131 of I.Tax Act wherein Shri Nirmal Kumar Kedia denied to making any unaccounted payment to Shri Jai Singh Yadav against purchases of land. However no heed was given by AO to statements u/s 131 of I.Tax Act and sworn affidavit and the additions was made by solely relying on the statements given during the course of search/survey.

39. It is clear from the record that no corroborative or incriminating material was linked to the addition. The A.O made the addition of Rs. 5,00,00,000/- merely on the basis of statement of assessee recorded u/s 131 of the Act during the survey at Sanganer Office and was subsequently confirmed in statement u/s 132(4) at residence "Kedia House". The AO has not pointed out any material, seized document, incriminating material to support the addition.

40. From the record we also found that the department had carried out survey at 1, Gaytri Nagar-1, Main Sanganer Flyover, Tonk Road, Jaipur on 19.11.2016. During the course of survey, the survey party recorded the statement of partner of assessee u/s 131 of Income Tax Act on 19.11.2016. In answer to question No. 18 and 19 of statement the partner of assessee accepted the undisclosed payment of Rs. 5 Crore made to Shri Jainsingh Yadav for purchases of agriculture land. Regarding making the reliance by the AO on the statement of the assessee u/s 131 recorded at the time of survey u/s 133A at Sanganer Office and subsequently confirmed in statement u/s 132(4) at Kedia

House, wherein he admitted the undisclosed income of Rs. 5 crores. In this regard, we found that the partners of the assessee made repeated request to ADIT, AO and other senior authorities to provide the copy of statements. As soon as the copy of search statements was received to assessee he filed an affidavit before the AO retracting from surrender made in his statements given during search. Thereafter during the course of assessment proceedings, the AO recorded the statement of the partner of assessee u/s 131 of Income Tax Act, 1961 on 23.02.2018 wherein in reply to Q. No. 4 of the statement asked regarding to this transaction the partner of assessee replied as under: -

प्रश्न-4	जैसा कि आपने दिनांक 22.01.2018 को इस कार्यालय में दाखिल हलफनामों में बताया है कि सर्वे कार्यवाही के दौरान आपने 5 करोड़ की राशि का समर्पण सर्वे टीम के यह "कहने" पर कि श्री जय सिंह यादव के यहां से मिले दस्तावेजों में अघोषित भुगतान का पता चला है, पर किया था जबकि दिनांक 20.11.2016 को दर्ज बयानों में प्र.स. 8 और 9 के उत्तरों में आपने बताया था कि post dated cheque को आपने security के तौर पर दिया था जिसे 5 करोड़ की राशि का नकद भुगतान करने के पश्चात् वापस प्राप्त कर लिया था। इसके अतिरिक्त प्रश्न संख्या 19 के उत्तर में आपने बताया था कि 5 करोड़ की राशि के समर्पण के बारे में आपने आपके सी.ए. श्री विजय गोयल से भी मशवरा कर लिया है। अतः हलफनामों में आपके द्वारा यह कहना कि सर्वे कार्यवाही के दौरान किया गया 5 करोड़ रुपये का समर्पण बिना किसी आधार के सर्वे टीम के कहने पर किया था, गलत है। इस बारे में आपका क्या कहना है ?
उत्तर-4	Post dated cheque की बात मैंने सर्च पार्टी के कहने पर कही थी। सर्वे के दौरान सर्वे पार्टी ने ये कहा था कि जयसिंह यादव के यहां से कुछ दस्तावेज मिले हैं जो 5 करोड़ का अघोषित भुगतान दर्शा रहे हैं। मैंने इसी आधार पर यह समर्पण किया था किन्तु वास्तव में मैंने इस तरह का कोई भी भुगतान नहीं किया था इसलिए मैंने इसे आयकर की विवरणी में दिखाया भी नहीं है। मेरे CA श्री विजय गोयल ने भी इसी आधार पर सलाह दी थी कि कुछ कागज यदि जयसिंह यादव के यहां से जब्त हुए हैं तो पेनल्टी बचाने के उद्देश्य से समर्पण करना

	उचित होगा।
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41. If we see the copy of statement Shri Nitin Kedia recorded at F-110 Evershine Tower, Vaisali Nagar, Jaipur, we will find that here the statements were commenced at 5.30 PM on 19/11/2016, which continued up to 21-11-2016 except a small break for rest on 20-11-2016.

42. It is clear that Shri Nitin Kedia was not allowed for break for dinner, sleep, breakfast, rest etc. as the statement at Evershine Tower started at 5.30 PM on 19/11/2016 which remained continuous up to 21-11-2016 except a small break for rest on 20-11-2016.

43. In this regard, the Id AR placed before us CHARTER OF RIGHTS AND DUTIES OF PERSONS SEARCHED AS REPORTED IN (1994) 208 ITR 5 (ST), which provides that the assessee has right to have facility of having meals etc. at normal time. Shri Nitin Kedia was not allowed for break for dinner, sleep, breakfast, rest etc. Shri Nitin Kedia was kept whole night in office situated at Evershine Tower Vaisali Nagar, Jaipur where there is no facility of bed in office to sleep. Therefore, Shri Nitin Kedia was kept awaken whole night. All these were noting but torture to partner of assessee with a motive to get the desired surrender and get

the signature over the statement whatever recorded by the search party.

44. The Id AR has further contended that one person cannot be at two different places at same time. As per the copy of statement provided to assessee, Shri Nitin Kedia confirmed the surrendered the income made by Shri Nirmal Kedia in statement recorded on 20-11-2016 which started at 9 AM from question no. 4 (APB page 38). In last question no. 15 Shri Nitin Kedia was asked to submit the explanation over the confession statement made by his brother Shri Nirmal Kumar Kedia.

45. Our attention was also invited to the fact that if we see the statement of Shri Nitin Kedia at Evershine Tower, he was at Evershine Tower Vaishali Nagar, Jaipur from 5.30 PM on 19-11-2016 to 21-11-2016 (up to conclusion of statement). Then how could be his availability at Kedia House on 20-11-2016 from 9.00 AM to conclusion of statement on 20/11/2016. Similarly, Shri Nitin Kedia could not be present at two places at same time. The statement at Evershine Tower, Vaisali Nagar shows that Shri Nitin Kedia was present at Vaisali Nagar in between 5.30 PM on 19/11/2016 to 21-11-2016 (upto conclusion of statement) whereas the statement at Kedia House shows that Shri Nitin Kedia was

present at Kedia House during 9.00 AM on 20/11/2016 to conclusion of statement. How it can be possible to record the statement of Shri Nitin Kedia at Kedia House on 20/11/2016.

46. The Id AR has also pointed out the other discrepancies in the statement. He has invited our attention to the statement recorded at shop at Ganesh Nagar, during the course of survey u/s 133A of the Act, statement of Shri Nitin Kedia was recorded at the premise Ganesh Nagar, 6A, Nadi Ka Phatak, Murlipura Jaipur. There are following discrepancies in the recording of statement by the survey team.

- c.i) Commencement of the statement and after recording 7 questions the postponing of the statement at same time

As per the copy of the statement provided by the department, the department commenced the recording of the statement of Shri Nitin Kedia on 19/11/2016 at 2.00 PM. (APB page 47-49). After recording of answer to question number 1 to 7 in three pages, the statement were postponed for physical verification. The time marked for postponing the statement is 2.00 PM (APB page 49) i.e. commencement of the statement and postponing the statement at same time which shows no time consumed in question, answer and in writing of 7 question answer on paper.

- c.ii) Shri Nitin Kedia could not be present at two places at same time also on 19/11/2016.

After postponing the statement at 2.00 PM, the statement were resumed at 6.30PM on 19-11-2016 (APB page 49) at shop at Ganesh Nagar. This statement was again

postponed at night 11.00 PM on 19-11-2016 (APB page 50). These statements were resumed at 10.00AM Morning on 20-11-2016 (APB page 51) and concluded on 20-11-2016 after recording answer to question no. 11 to 23. As per the copy of statement given, the assessee should be at Premise situated at Ganesh Nagar from 6.30PM to 11PM on 19-11-2016 and 10 AM to conclusion of statement on 20-11-2016. Question and answer for Q.No. 18-19 was in between 6.30 PM to 11PM.

But if we see the copy of statement Shri Nitin Kedia recorded at F-110 Evershine Tower, Vaisali Nagar, Jaipur (APB page 57-64), we find that here the statements were commenced at 5.30 PM on 19/11/2016, which remained continue up to 21-11-2016 except a small break for rest on 20-11-2016 (APB 61).

Therefore, Shri Nitin Kedia could not be present at two places at same time on 19/11/2016. The statement at Ganesh Nagar shows that Shri Nitin Kedia was present at Ganesh Nagar in between 6.30 PM to 11 PM on 19/11/2016 where the statement at Evershine Tower in Vaisali Nagar shows that Shri Nitin Kedia was present at Vasali Nagar office during 5.30 PM on 19/11/2016 to 21-11-2016. How it can be possible to record the statement of Shri Nitin Kedia at Ganesh Nagar in between 6.30 PM to 11.00 PM on 19/11/2016.

This shows that the statements were prewritten and the search/survey team got the signature of Shri Nitin Kedia under duress, coercion and under inhumanity.

This was the reason for not providing the copy of statements in spite of repeated request to ADIT and AO and other higher authorities.

47. Our attention was also invited to the statement of Shri Nirmal Kumar Kedia started at 9.00 AM at residence on 19-11-2016 and

suspended at 10.00 AM. The department also carried out survey at office situated at Sanganer (about 30 Km from residence) on same day. Shri Nirmal Kumar Kedia was taken there by the officers of the department and his statement was started to record at 6.40 PM on 19-11-2016 at Sanganer office which continued up to 11.50PM on 19-11-2016. There was no break in statement for dinner and he was without dinner in night. He was sick and tired. So, a break in statement was given at 11.50 PM on 19-11-2016. In Sanganer Office there was no bed or other basic facilities. The assessee was kept awaken whole night and he was not allowed to go at home. On 20-11-2016 at early morning his statement was resumed at 6.30 AM. The assessee was kept tired, sleepless and without food, this was nothing but torture by the survey team to get the desired surrender and sign on the prewritten statements. This was the reason of surrender of Rs. 5 crores in just in first effective question of the statement on 20/11/2016 without any corroborative material or incriminating documents. Then the assessee was taken to Kedia House. The search party started to recorded the statement of the assessee at 1.00 PM. Here in very first question the assessee had to confirmed the surrender of Rs. 5 Crore made at Sanganer office and has to overall surrender Rs. 20 Crore without any corroborative material or incriminating documents. The assessee made

surrender under inhumanity conditions created by search/ survey party. The search/survey party kept the assessee and his brother Shri Nitin Kedia whole night without sleep and without meal, and they created an atmosphere of fear where the assessee made the surrender.

48. From the record we also found that the survey/search party after recording of statement of assessee did not provide copy of statements to the assessee group. The assessee made the repeated request by following letters (copy at APB page 240-249/Vol II) :-

S.No	Date of letter	Addressed to	Copy of letter given to
1	Dated 21/11/2016	ADIT-3 Jaipur	1. Principal Director of Income Tax, Investigation, Jaipur 2. Additional Director of Income Tax, Investigation, Jaipur.
2	Dated 08/03/2017	DCIT Central Circle-3, Jaipur	1. Principal Commissioner of Income Tax, Central, Jaipur 2. Principal Director of Income Tax, Investigation, Jaipur 3. Additional Director of Income Tax, Investigation, Jaipur. 4. Joint Commissioner of Income Tax, Central, Jaipur 5. Asstt. Director of Income Tax, Investigation-III, Jaipur
3	Dated 17/04/2017	DCIT Central Circle-3, Jaipur	
4	Dated 18/05/2017	DCIT Central Circle-3, Jaipur	Joint Commissioner of Income Tax, Central, Jaipur.
5	Dated 08/01/2018	DCIT Central Circle-3, Jaipur	(i) The Principle Commissioner of Income Tax, Central, Jaipur (ii) Joint Commissioner of Income Tax, Central, Jaipur.

It was submitted vide letter dated 18/05/2017 and 08/01/2018 that “despite to the repetitive request of the assessee to ADIT and AO, the copy of the statements recorded at the time of search and post search has not been provided to the assessee and from this it appears that the department does not want to use these statements against the assessee and want to make assessment on the basis of documents seized during the course of search.”

The assessee group was under bonafide belief that since the survey/search party has not given the copy of the statements, therefore, the same would not be used against them.

49. However, as per the charter of rights and duties of persons searched as reported in (1994) 208 ITR 5 (ST), we found that the assessee has all the rights to have a copy of any statement that is used against him by the department. In the instant case, after the survey/search several requests were made to Investigation wing as well as AO to provide the copy of statements recorded by the survey/search party. After the continuous efforts of the assessee group, the copy of the statements were provided on 19.01.2018 (Friday) and thereafter on very first working day i.e. 22.01.2018 the Shri Nirmal Kumar Kedia Partner of assessee filed the affidavit (Copy at APB Page 81-86) before

the AO to retract the statements. The relevant para of the affidavit is as

under: -

“a) Regarding my statements recorded on 19.11.2016 and 20.11.2016 at my residence at Kedia House, Benar Road, Ganesh Nagar, Near Nadi Ka Phatak, Jhotwara, Jaipur

i) *In reply of the Q. No. 4 of the statement, I confirmed to my reply given in respect to Q. No. 18 and 19 of my statement recorded at our Sanganer Office wherein I accepted that the undisclosed payment of Rs. 5 Crore was made to Shri Jaisingh Yadav for purchases of agriculture land. Actually no such undisclosed payment was made by me or our business concerns or my family members and whatever payment was made against purchases of land from this person is duly recorded in regular books of accounts. During the course of survey it was said to me by the survey party that some documents has been found from the possession of Shri Jaisingh Yadav which proves that the undisclosed payment of Rs. 5 Crore has been made against land purchase from this person, therefore under this misrepresentation of fact by survey party and under fear and mental tension, I admitted the undisclosed payment of Rs. 5 Crore to Shri Jaisingh Yadav for purchases of agriculture land. Actually no undisclosed payment was made to Jaisingh Yadav against purchase of land from him and as a result of search /survey no evidence in this regard was found to the search party/survey party.*

b) Regarding my statements recorded on 19.11.2016 and 20.11.2016 at our office at 1, Gayatri Nagar-Ist, Sanganer Flyover, Tonk Road, Jaipur

i) *In reply of the Q. No. 18 and 19 of my statement recorded I accepted the undisclosed payment of Rs. 5 Crore made to Shri Jainsingh Yadav for purchases of agriculture land. Actually, no such undisclosed payment was made by me or our business concerns or my family members and whatever payment was made against purchases of land from this person is duly recorded in regular books of accounts. During the course of survey, it was said to me by survey party that some documents has been found from the possession of Shri Jaisingh Yadav which proves that the undisclosed payment of Rs. 5 Crore has been made against land purchase from this person, therefore under*

this misrepresentation of fact by survey party I admitted the undisclosed payment of Rs. 5 Crore. Actually, no undisclosed payment was made to Jaisingh Yadav against land purchases from him and as a result of search/ survey no evidence in this regard was found to the search party/survey party."

Thereafter during the course of assessment proceedings, the AO recorded the statement of the partner of assessee u/s 131 of the Act on 23.02.2018 wherein in reply to Q. No. 4 of the statement asked regarding to this transaction the partner of assessee replied as (APB page 98) under: -

प्रश्न-4	जैसा कि आपने दिनांक 22.01.2018 को इस कार्यालय में दाखिल हलफनामों में बताया है कि सर्वे कार्यवाही के दौरान आपने 5 करोड़ की राशि का समर्पण सर्वे टीम के यह "कहने" पर कि श्री जय सिंह यादव के यहां से मिले दस्तावेजों में अघोषित भुगतान का पता चला है, पर किया था जबकि दिनांक 20.11.2016 को दर्ज बयानों में प्र.स. 8 और 9 के उत्तरों में आपने बताया था कि post dated cheque को आपने security के तौर पर दिया था जिसे 5 करोड़ की राशि का नकद भुगतान करने के पश्चात् वापस प्राप्त कर लिया था। इसके अतिरिक्त प्रश्न संख्या 19 के उत्तर में आपने बताया था कि 5 करोड़ की राशि के समर्पण के बारे में आपने आपके सी.ए. श्री विजय गोयल से भी मशवरा कर लिया है। अतः हलफनामों में आपके द्वारा यह कहना कि सर्वे कार्यवाही के दौरान किया गया 5 करोड़ रुपये का समर्पण बिना किसी आधार के सर्वे टीम के कहने पर किया था, गलत है। इस बारे में आपका क्या कहना है ?
उत्तर-4	Post dated cheque की बात मैंने सर्वे पार्टी के कहने पर कही थी। सर्वे के दौरान सर्वे पार्टी ने ये कहा था कि जयसिंह यादव के यहां से कुछ दस्तावेज मिले हैं जो 5 करोड़ का अघोषित भुगतान दर्शा रहे हैं। मैंने इसी आधार पर यह समर्पण किया था किन्तु वास्तव में मैंने इस तरह का कोई भी भुगतान नहीं किया था इसलिए मैंने इसे आयकर की विवरणी में दिखाया भी नहीं है। मेरे CA श्री विजय गोयल ने भी इसी आधार पर सलाह दी थी कि कुछ कागज यदि जयसिंह यादव के यहां से जब्त हुए हैं तो पेनल्टी बचाने के उद्देश्य से समर्पण करना उचित होगा।

50. It is clear from the record that the partner of assessee retracted from the statement on this issue as soon as the copy of statements were provided, therefore the retracted statement does not have any legal value in absence of any corroborative material. The income tax department carried out search/survey and seizure operations over the assessee group and during the course of search/survey no evidence/documents was found to the department which shows that the assessee made this much undisclosed payment Except to statement of partner of assessee which was given for the reasons mentioned hereinabove and retracted subsequently there is no evidence with the department to prove that the assessee made this much undisclosed payment. The department also carried out search on seller of land Shri Jai Singh Yadav and no evidence was also found during the search over Shri Jai Singh Yadav regarding undisclosed payment of Rs.5,00,00,000/-.

51. From the record, we also found that the admission of undisclosed payment against the purchase of the land is not supported even by the market rate of land in the area. Further it is relevant to mention here that the land so purchased from Jai Singh Yadav is situated in Village Badaram, Patwar Halka Sirsi, Teh. Jaipur. The land is 400 mts. inside from road and about 2 Km far from Jaipur Express highway flyover on Kalwar Road. The total area of land so purchased is 3 Bigha and 18

Biswa. The total cost of the land as per books of accounts is Rs. 3,31,85,000/- and if the alleged undisclosed payment of Rs. 5 Crore is added in this amount, the cost of the land becomes Rs. 8,31,85,000/- i.e. 2.13 crore per bigha which is impossible in this area. The comparison of market rate in the main highway i.e. main Jaipur Express High Way, Ajmer Road, Tonk Road, Sikar Road, Agra Road is as under: -

Location	Market Rate per Bigha	Basis of the rate
Main Jaipur Express Highway	38,05,587	Circle Rate
Main Ajmer Road National High way	67,50,000	Circle Rate
Main Tonk Road National High way	63,00,000	Circle Rate
Main Sikar Road National High way	52,83,360	Circle Rate
Main Agra Road National High way	67,24,569	Circle Rate
Main Kalwar Road	81,40,500	Circle Rate

The above chart shows that on main national Highway nearby to Jaipur the land of Agricultural land is much below to the so-called rate arrived after adding the alleged undisclosed payment to the cost of the land disclosed in the books of account of the assessee. Therefore, nobody could have purchased the agricultural land situated at 400 mts. inside from road and about 2 Km far from Jaipur Express highway flyover on Kalwar Road.

52. It was also argued by the Id AR that if the alleged undisclosed payment is taken into consideration, there is no viability of sales. The total area of land so purchased is 3 Bigha and 18 Biswa. The total cost

of the land as per books of accounts is Rs. 3,31,85,000/- and if the alleged undisclosed payment of Rs. 5 Crores is added in this amount, the cost of the land becomes Rs. 8,31,85,000/-. The JDA has approved the colony made over this land; namely Ganesham Vihar. 18 Vishwa land went in sector road. The JDA approved saleable plot area over this land 4894.72 sq yard. Thus, the cost of the land under the plot comes to Rs. 16,995/- ($8,31,85,000/4894.72$). Apart from this an amount of Rs. 1700/- per sq. yards will be incurred on conversion/development of the plot meaning which the cost of plot in the hands of the assessee comes Rs. 18,695/- ($16995+1700$). The selling rate of the plots in the scheme of the assessee is Rs. 12000/- to Rs. 13000 per sq. yards only. These data shows that the if the cost is derived by adding the alleged unaccounted payment made for purchases of land the same is much more to sale rate. In view of the above, it was argued that no would like to purchase the agricultural land which if developed into a colony, would give the sale of the plots at much lesser value than the gross.

53. In support of the contention that no addition can be made merely on the basis of statement, reliance was placed on the decision of Hon'ble Supreme Court in the case of Pullangode Rubber Produce Co Ltd v/s State of Kerala & Another (1973) 91 ITR 18 (SC) has held that admission is an extremely important piece of evidence but it can't be

said that it is conclusive. It is upon to the assessee to show that it is incorrect. Hon'ble Rajasthan High Court in the case of CIT v/s Ashok Kumar Soni 291 ITR 172 (Raj.) has held that admission in statement during search is not conclusive proof of fact and can always be explained. Hon'ble Rajasthan High Court in the case of Mantri Share Brokers PL (96 taxmann.com 279) have held as under:

Section 69B of the Income-tax Act, 1961 - Undisclosed investments (Burden of proof) - Whether where except statement of director of assessee-company offering additional income during survey in his premises, there was no other material either in form of cash, bullion, jewellery or document or in any other form to conclude that statement made was supported by some documentary evidence, said sum could not be added in hands of assessee as undisclosed investments - Held, yes [Paras 10-11] [In favour of assessee]

Para 10 & 11 of the order is as under :

10. Before proceeding with the matter, it will not be out of place to mention that except the statement in the letter, the AO has no other material on record to assess the income of Rs. 1,82,00,000/-.

11. It is settled proposition of law that merely on the statement that too also was taken in view of threat given in question No.36 as narrated by Mr. Gupta and the same sought to have been relied upon, there is no other material either in the form of cash, bullion, jewellery or document in any other form which can come to the conclusion that the statement made was supported by some documentary evidence. We have gone through the record and find that the CIT (A) has rightly observed as stated hereinabove, which was confirmed by the Tribunal.

It would not be out of place to mention that this order of Hon'ble Rajasthan High Court has been confirmed by Hon'ble Supreme Court also.

Further, Hon'ble Delhi High court in case of Harjeev Agarwal (70 Taxmann.com 95) held:

“...A plain reading of Section 132 (4) of the Act indicates that the authorized officer is empowered to examine on oath any person who is found in possession or control of any books of accounts, documents, money, bullion, jewellery or any other valuable article or thing. The explanation to Section 132 (4), which was inserted by the Direct Tax Laws (Amendment) Act, 1987 w.e.f. 1st April, 1989, further clarifies that a person may be examined not only in respect of the books of accounts or other documents found as a result of search but also in respect of all matters relevant for the purposes of any investigation connected with any proceeding under the Act. However, as stated earlier, a statement on oath can only be recorded of a person who is found in possession of books of accounts, documents, assets, etc. Plainly, the intention of the Parliament is to permit such examination only where the books of accounts, documents and assets possessed by a person are relevant for the purposes of the investigation being undertaken. Now, if the provisions of Section 132(4) of the Act are read in the context of Section 158BB (1) read with Section 158B (b) of the Act, it is at once clear that a statement recorded under Section 132(4) of the Act can be used in evidence for making a block assessment only if the said statement is made in the context of other evidence or material discovered during the search. A statement of a person, which is not relatable to any incriminating document or material found during search and seizure operation cannot, by itself, trigger a block assessment. The undisclosed income of an Assessee has to be computed on the basis of evidence and material found during search. The statement recorded under Section 132(4) of the Act may also be used for making the assessment, but only to the extent it is relatable to the incriminating evidence/material unearthed or found during search. In other words, there must be a nexus between the statement recorded and the evidence/material found during search in order to for an assessment to be based on the statement recorded....”

Though the above principle is laid down in relation to assessment of block period u/s 158 BC of the Act, the same was also applied in respect of assessment u/s 153A by Delhi High Court in case of Best Infrastructure (84 Taxmann.com 287) when it was held thus:

38. Fifthly, statements recorded under Section 132 (4) of the Act of the Act do not by themselves constitute incriminating material as has been explained by this Court in Harjeev Aggarwal (supra).

Some of the more decisions laying down ratio that mere statement is not enough to make addition are as under:

Hon'ble Madras High Court in the case of Smt. S. Jayalakshmi Ammal
[2016] 74 taxmann.com 35 (Madras)

"...While adverting to the above, we are of the considered view that, for deciding any issue, against the assessee, the Authorities under the Income Tax Act, 1961 have to consider, as to whether there is any corroborative material evidence. If there is no corroborating documentary evidence, then statement recorded under Section 132(4) of the Income Tax Act, 1961, alone should not be the basis, for arriving at any adverse decision against the assessee. If the authorities under the Income Tax Act, 1961, have to be conferred with the power, to be exercised, solely on the basis of a statement, then it may lead to an arbitrary exercise of such power. An order of assessment entails civil consequences. Therefore, under judicial review, courts have to exercise due care and caution that no man is condemned, due to erroneous or arbitrary exercise of authority conferred...."

"...If the assessee makes a statement under Section 132(4) of the Act, and if there are any incriminating documents found in his possession, then the case is different. On the contra, if mere statement made under Section 132(4) of the Act, without any corroborative material, has to be given credence, than it would lead to disastrous results. Considering the nature of the order of assessment, in the instant case characterized as undisclosed and on the facts and circumstances of the case, we are of the view that mere statement without there being any corroborative evidence should not be treated as conclusive evidence against the maker of the statement..."

Naresh Kumar Agarwal [2015] 53 taxmann.com 306 (Andhra Pradesh)

"...it is admitted by the Revenue that on the dates of search, the Department was not able to find any unaccounted money, unaccounted bullion nor any other valuable articles or things, nor any unaccounted documents nor any other valuable articles or things, nor any unaccounted documents nor any such incriminating material either from the premises of the company or from the residential houses of the managing director and other directors. In such a case, when the managing director or any other persons were found to be not in possession of any incriminating material, the question of examining them by the authorised officer during the course of search and recording any statement from them by invoking the powers under section 132(4) of the Act, does not arise. Therefore, the statement of the managing director of the assessee, recorded patently under Section 132(4) of the Act, does not have any evidentiary value.

This provision embedded in sub-section (4) is obviously based on the well established rule of evidence that mere confessional statement without there being any documentary proof shall not be used in evidence against the person who made such statement..”

Hon’ble Gujarat High Court, vide its order dated 14.07.2016, in the case of CHETNABEN J SHAH LEGAL HEIR OF JAGDISHCHANDRA K. SHAH, in TAX APPEAL NO. 1437 of 2007, laid down the ratio that no additions can be made in the hands of the assessee merely on the basis of statements recorded, during the course of search, under section 132(4). Hon’ble High Court in the above-mentioned case relied on its earlier order in the case of Kailashben Manharlal Chokshi [2008] 174 Taxman 466 (Guj.), wherein a similar ratio was laid down. Further, in the case of Narendra Garg & Ashok Garg (AOP) [2016] 72 taxmann.com 355 (Gujarat), Hon’ble Gujarat High Court held that

“...It is required to be borne in mind that the revenue ought to have collected enough evidence during the search in support of the disclosure statement. It is a settled position of law that if an assessee, under a mistake, misconception or on not being properly instructed, is over assessed, the authorities are required to assist him and ensure that only legitimate taxes are collected. The Assessing Officer cannot proceed on presumption u/s 134(2) of the Act and there must be something more than bare suspicion to support the assessment or addition. In the present case, though the revenue's case is based on disclosure of the assessee stated to have been made during the search u/s 132(4) of the Act, there is no reference to any undisclosed cash, jewellery, bullion, valuable article or documents containing any undisclosed income having been found during the search...”

CIT v/s G.Krishnan (1994) 210 ITR 707 Mad.

Held, that additions cannot be made merely on the basis of statements.

The Jodhpur ITAT Bench in Maheshwari Industries v. Asstt. CIT [2005] 148 Taxman 74 (Jodh) (Mag.) has held that additions should be considered on merits rather than on the basis of the fact that the amount was surrendered by the assessee. It is settled legal position that unless the provision of statute warrant or there is a necessary implication on reading of section that the principles of natural justice are excluded, the provision of section should be construed in manner incorporating principles of natural justice and quasi judicial bodies should generally read in the provision relevant section a requirement of giving a reasonable opportunity of being heard before an order is made which will have adverse civil consequences for parties effected.

Rajesh Jain Vs. DCIT 100 TTJ 929 (ITAT, Delhi 'A' Bench) Search and seizure - Block assessment - Retraction of statement - Addition of Rs.25 lacs made solely on the basis of confessional statement of assessee that he earned the said amount in the last ten years was not justified - Confessional statement should be corroborated with some material to show that assessment made is just and fair.

KRISHNA TERINE (P) LTD. vs. ASSISTANT COMMISSIONER OF INCOME TAX, ITAT, AHMEDABAD 'D' BENCH 56 DTR, ITAT 395

Held that it appears that both the additions have been made by the AO because the assessee in the statement under s. 132(4) of the IT Act made surrender of the above amounts but later on did not disclose the same in the return of income filed for the block period. However, on consideration of the orders of the authorities below, we are of the view that no evidence or material is discussed to show any incriminating material recovered during the course of search to make the above additions. The Tribunal in the first round of proceedings has already directed to examine the case on the basis of material seized, material available on record and books of account. In the absence of any specific findings as per the direction of the Tribunal dt. 31st May, 2005 and as per law for the block assessment noted above, before making the addition on the above issue the AO and the learned CIT(A) should have specified as to what material was found during the course of search to make the above additions. In the absence of any proper explanation and finding in the above grounds, we set aside the orders of the authorities below and restore these two grounds of appeal to the file of the AO with direction to re-decide both the grounds afresh on the basis of material seized, material available on record and the books of accounts as is directed by the Tribunal earlier vide order dt. 31st May, 2005 and in accordance with law for the block assessment as noted above.

The law relating to retraction is well-settled by Supreme Court in *Sri Krishna V. Kurukshetra University*, AIR 1976 SC 376, wherein it is held that if the original statement suffers from any defects, the person is entitled to go back on the statement already made by making correct statement. The Supreme Court have laid down the ratio, after considering S. 18 of the Evidence Act, 1872 that any admission made in the ignorance of the legal rights or under duress, cannot bind the maker of the admission. This right has been tested under Income-tax Act and the same has been upheld by Punjab & Haryana High Court in *Kisan Lal Shivchand Rai v. CIT*, (88 ITR 293).

Hon'ble ITAT Jaipur Bench in the case of Shri Pawan Lashkary ITA No 808/JP/2011 dated 06.01.2012 has held that income cannot be assessed merely on the basis of statement. Hon'ble ITAT has observed in Para 2.37 to 2.38 as under:-

"2.37 The revenue has relied upon the statement of the assessee recorded during the course of search in which the assessee surrendered the amount on account of revaluation of land as undisclosed income. Kelkar Panel studied the problem of confessions and surrenders during its studies and deliberations in para 3.27 and the same is reproduced as under:

"A cross section of people cutting across 4trade and industry complained of a high handed behaviour of raiding parties particularly while recording a statement. It was pointed out that overenthusiastic aiding parties would often coerce a 'surrender'. As a result, all follow up investigations are distracted and generally brought to a stand still. Since the surrender is not backed by adequate evidence, the tax evader invariably retracts from the statement of surrender by which time it is too late for the Department to resume investigations. Similarly, where adequate evidence is indeed found, a surrender is not necessary to establish tax evasion. Therefore, the Task Force recommends that the CBDT must issue immediate instructions to the effect that no raiding party should obtain any surrender whatsoever. Where a tax payable desires to voluntarily make a disclosure, he should be advised to make so after the search. As a result, the taxpayer will not be able to allege coercion and successfully distract investigations. All cases where surrender is obtained during the course of the search in violation of the instructions of the CBDT, the leader of the raiding party should be subjected to 'vigilance enquiry. Further the task force also recommends

that statements recorded during the search should be video recorded. This will indeed add to the confidence of the taxpayer in the impartiality of the system.’’

2.38 The Finance Minister in the budget speech for the year 2003 stated that no confession shall be obtained during search and seizure operation. The instructions were followed by CBDT by issue of a circular on the lines desired by the Finance Minister. There can be an estoppel on the issue of the facts but there cannot be estoppel on the principle of law. It is not the case of the revenue that the assessee was not disclosing the amount received as a result of retirement from the firm. The assessee obtained the legal advice and was of the opinion that such revaluation is capital receipt which is not liable to tax. Hence, we feel that income cannot be added simply on the basis of surrender. The statement recorded u/s 132(4) can be rebutted by the assessee and the case of the assessee is that the amount is not liable to tax.’’

The search party took the similar type surrender in the case of M/s Suresh Medical Agency ITA No 443/JP/2012 dated 21.08.2013, Shri Radhey Shyam Mittal ITA No 420/JP/2012 dated 26.08.2013, Shri Suresh Kumar Mittal ITA No 947/JP/2013 dated 24.09.2015 and Shri Madan lal Mittal ITA No 948/JP/2013 dated 24.09.2015. In these cases without having any corroborative material, the AO made the addition in these cases merely on the basis of search statement. In these cases the copy of statements were given at much later stage and the assessee retracted from the statement after receipt the copy of statement. Hon'ble ITAT has deleted the addition in all these cases. The findings of Hon'ble ITAT in the case of Shri Radhey Shyam Mittal are produced as under:-

"6. We have heard parties with reference to material on record and case laws brought to our notice. The action under section 132 was carried out at assessee's

premises on 27.8.2008 and in the statement assessee made surrender of income of Rs. 30,00,000/- on account of income earned from trading of items in pharmaceutical business outside the books. The appellant, however, had been approaching the authorized officer to provide copy of statement so obtained in proceedings under section 132 of the Act. When these statements were not provided, the appellant vide letter dated 3.10.2008 addressed to the authorized officer and another letter dated 18.12.2008 addressed to the assessing authority requested to provide the copy of statement in case the same were to be used against him. Till such time the copy of statement was not provided, assessee entertained a bonafide belief that in the absence of any documentary evidence or corroborative evidence having been found as a result of search, such statement would not be used against him. If such statements were to be used, the department was under legal obligation to have provided the copy thereof to the appellant. It is only on persistent efforts of the appellant, copies of statement were provided only on 13.3.2009. The appellant after understanding the legal implication of such statement made a valid retraction as the surrender was not supported by any corroborative evidence. The affidavit filed in this regard is laid on assessee's paper book pages 64 to 68. This affidavit has carefully been perused. After the affidavit was filed before the assessing authority, he remained silent on the face of it and carried no enquiry thereon to verify the correctness thereof. The assessee was also not cross examined on the point of retraction nor was required to produce any documentary evidence or any other evidence. Assessee was, therefore, entitled to assume that the income tax authorities were satisfied with the affidavit as sufficient on this point. The Hon'ble Allahabad High Court in the case of Sohan Lal Gupta vs. CIT (1958) 33 ITR 786 (All.), as also put to the parties during the course of argument, has made elaborate discussion on the evidentiary value of the affidavit. The relevant passage from the aforesaid judgment at page 791 of the report is reproduced as under :-

“ The most important points on which the Tribunal relied, is that mentioned at No. 2, viz., that, according to the Tribunal, the assessee had not satisfactorily

established that the shares had to be sold as the purchaser of the Jaswant Sugar Mills was not willing to purchase that mill unless the shares in the Straw Board Mills Ltd. held by the family were also transferred to him at the same time. On this point, the only material available on the record is the affidavit which was filed by the assessee before the Income-tax Officer. The assessee in his affidavit, had definitely stated that the purchaser wanted to purchase both the going concerns, the Jaswant Sugar Mills and the Straw Board Mills Ltd., together and one of his conditions of purchase was that all the shares of Lala Jaswant Rai, his sons and other relatives had to be transferred to the purchaser. The Income-tax Appellate Tribunal rejected this affidavit of the assessee on the mere ground that there was no documentary evidence in corroboration in the form of any correspondence of otherwise on this point. Shri G.S. Pathak contended rightly before us that the Tribunal was not entitled to reject the affidavit on this point on such a ground. After the assessee had filed the affidavit, he was neither cross-examined on that point, nor was he called upon to produce any documentary evidence. Consequently, the assessee was entitled to assume that the Income-tax authorities were satisfied with the affidavit as sufficient proof on this point. If it was not to be accepted as a sufficient proof either by the Income-tax Officer or by the Appellate Assistant Commissioner of Income-tax or by the Income-tax Appellate Tribunal, the assessee should have been called upon to produce documentary evidence, or, at least he should have been cross-examined to find out how far his assertions in the affidavit were correct.”(emphasis supplied)

The reliance placed by the assessee on the judgment by Hon'ble Apex Court in the case of Pullangode Rubber Produce Co. Ltd. (supra) and Hon'ble Rajasthan High Court in the case of Ashok Kumar Soni (supra) are well placed as the assessee has successfully demonstrated that the admission made during the course of search is not correct. The ingredient for retraction of statement made during the search, therefore, stand duly satisfied as the assessee is found to have made retraction within a reasonable time immediately after the copies of statement were provided to him. Furthermore, there being no material or evidence on record to

show that appellant has carried any business outside the books for sale and purchase of items of pharmaceutical companies that could give rise to income to the extent of Rs. 30,00,000/-, addition merely on the basis of such statement which stood validly retracted could not have been made. On similar basis and reasoning in the case of Suresh Medical Agency another assessee of the group who were also searched on the same day along with this appellant, vide our order dated 21.8.2013 in ITA No. 443/JP/2012 have found the retraction made as valid and also deleted the addition. We, therefore, find no factual or legal justification in sustenance of addition by Ld. CIT (A) in this regard. As a result, the addition sustained by Ld. CIT (A) is deleted and ground no. 1 raised in appeal is allowed."

Hon'ble ITAT Jaipur Bench in the case of Ashok Kumar Lakhyani vs DCIT
ITA No 30/JP/2018 order dated 24/07/2018 held that

"We have heard the ld. A/R as well as the ld. D/R and considered the relevant material on record. The assessee is engaged in the business of trading of Fertilizers and pesticides. A survey under section 133A of the I.T. Act was carried out at the business premises of the assessee on 19th December, 2012. During the course of survey action, an agreement to sale dated 1st March, 2012 executed between Shri Harish Kumar, the son of the assessee and one Shri Daya Kishan was found from the premises of the assessee. As per the said agreement Shri Harish Kumar agreed to purchase the plot of land from Shri Daya Kishan for a consideration of Rs. 6,75,000/- and a sum of Rs. 1,00,000/- was paid as an advance on the date of agreement and balance of Rs. 5,75,000/- was to be paid by 10th May, 2012. Accordingly, the assessee who is the father of Shri Harish Kumar in his statement recorded under section 133A surrendered the undisclosed income including the income of Rs.5,75,000/- on account of investment in plot. After the survey, the assessee vide letter dated 16.01.2013 informed the AO that the agreement found during the survey was cancelled by his son though the assessee was not aware about this fact and, therefore, the surrender of Rs. 5,75,000/- on account of investment in the plot was mistakenly made during the

survey. The assessee filed his return of income declaring undisclosed income of Rs. 24,50,000/- inclusive of Rs. 1,00,000/- on account of the advance given for purchase of land. The AO made an addition of Rs. 5,75,000/- which was not offered by the assessee to tax in the return of income but was surrendered during the course of survey proceedings. The assessee challenged the action of the AO before the Id. CIT (A) but could not succeed.

3. Having considered the rival submissions and the relevant material on record, we note that the assessee produced a sale deed dated 18.05.2012 whereby the owner of the land Shri Daya Kishan sold the said plot of land to third party Mrs. Nirmala Devi and, therefore, once the said plot of land was sold by the owner to third party and not to the assessee or his son, then the question of investment of Rs. 5,75,000/- which was to be paid at the time of sale deed does not arise. The AO has made the addition only on the basis of surrender made by the assessee during the course of survey though there was an agreement found during the survey action. As per the said agreement only Rs. 1,00,000/- was found to be paid by the son of the assessee as an advance for purchase of the plot of land and, therefore, to that extent the addition can be made if assessee has not surrendered the amount. Since the assessee has already surrendered the amount of Rs. 1,00,000/-, therefore no further addition can be made on account of investment in the land when the said agreement found during the course of survey was not given effect by the parties and the plot of land was sold by the owner to some third party vide sale deed dated 18th May, 2012. Hence, when the facts were brought on record by the assessee regarding the sale of plot of land to the third party, then the statement recorded under section 133A which is contrary to the actual facts, cannot be a basis of addition. Accordingly, in the facts and circumstances of the case, the addition made by the AO is not sustainable in law and the same is deleted.”

The following decisions of Hon'ble Rajasthan High Court is distinguishable on facts. Therefore the addition cannot be sustained on the basis of the following decisions:-

- a) 2018 (11) TMI 953 - Rajasthan High Court Pr. Commissioner Of Income Tax (Central) , Jaipur Versus Shri Roshan Lal Sancheti, Prateek-13

In this case in the search, on the basis of seven loose papers were seized on which the assessee had written various amounts showing undisclosed investment in construction, purchase and advances the assessee agreed to surrender amount of Rs. 2,28,44,545/-. Thereafter, the statement of the assessee on these seven papers was recorded on 27.09.2012 where surrender of the aforesaid amount was made by the assessee.

But in the case of the assessee, the surrender is not relatable to any material. In the case of assessee no any agreement, receipt, material was found to corroborate the surrender made in survey. Neither such material was found from the possession of assessee group nor from the possession of Shri Jai Singh Yadav group where the search was taken place on the same day.

Further, the surrender was obtained under duress, coercion, and in the atmosphere of fear. Further, in view of several discrepancies pointed out by the assessee in recording of the statement, the recording of statement is against the principle of natural justice vitiated in law and no cognizance of these statements should be taken.

- b) 2016 (5) TMI 1304 - RAJASTHAN HIGH COURT CIT, Bikaner Versus Ravi Mathur and others

In this case the assessee agreed to surrender certain amount on the basis of incriminating documents, cash, jewellery etc., in statements recorded under Section 132(4) on 9.11.1995 and later, however, it was contended by the assessee that the statements under Section 132(4) of the Act was not correct and the amounts which were taken into lakhs are in thousands and attempted to retract from the statements made at the time of search and seizure operation.

But in the case of the assessee, the surrender is not relatable to any material. In the case of assessee no any agreement, receipt, material was found to corroborate the surrender made in survey. Neither such material was found from the possession of assessee group nor from the possession of Shri Jai Singh Yadav group where the search was taken place on the same day.

Further, the surrender was obtained under duress, coercion, and in the atmosphere of fear. Further, in view of several discrepancies pointed out by the assessee in recording of the statement, the recording of statement is against the principle of natural justice vitiated in law and no cognizance of these statements should be taken.

- c) *2019 (4) TMI 1120 - Rajasthan High Court in the case of M/S Bannalal Jat Constructions Pvt. Ltd. Versus ACIT, Central Circle-2, Ajmer*

In this case a search was conducted at the business/residential premises of Shri Banna Lal Jat, the Director of appellant company - M/s. Bannalal Jat Constructions Private Limited, on 10.10.2014, in which he was also operating his proprietary concern in the name of M/s. Bannalal Jat Contractor. During the search proceedings at residential premises of Shri Bannalal Jat, a cash worth of Rs.1,21,43,210/- was found and inventorised as per Annexure CF of Panchnama dated 11.10.2014. He, in his statement, recorded under Section 132(4) of the Income Tax Act, 1961 (for short 'the IT Act') during the course of search and even subsequent statement recorded under Section 131 of the IT Act, admitted the same as undisclosed income of the appellant-company. However, subsequently while filing the return of income for the relevant assessment year, the appellant-company did not offer the said undisclosed income to tax.

Therefore, in this case, surrender was backed by cash found during the search.

But in the case of the assessee, the surrender is not relatable to any material. In the case of assessee no any agreement, receipt, material was found to corroborate the surrender made in survey. Neither such material was found from the possession of assessee group nor from the

possession of Shri Jai Singh Yadav group where the search was taken place on the same day. Further, the surrender was obtained under duress, coercion, and in the atmosphere of fear. Further, in view of several discrepancies pointed out by the assessee in recording of the statement, the recording of statement is against the principle of natural justice vitiated in law and no cognizance of these statements should be taken.

54. Furthermore, the detailed finding recorded by the Id. CIT(A) in this regard, has not been controverted by the Id. DR by bringing any positive material on record. Considering the judicial pronouncements relied on by the Id CIT(A) vis a vis quoted by the Id AR and Id DR during the course of hearing before us in the context of factual matrix of the case, we do not find any reason to interfere in the finding so recorded by the Id CIT(A) resulting into deletion of addition of Rs. 5.00 crores. Hence, this ground of the revenue's appeal is dismissed.

55. An addition of Rs. 71,42,880/- was made by the A.O. on account of alleged unaccounted business income, by the impugned order, the Id. CIT(A) has deleted the addition of Rs. 71,42,880/-. From the record, we found that during the course of survey at 1, Gayrti Nagar, Main Tonk Road, Sanganer Flyover, Jaipur, documents as per page 18 & 19 of

Exhibit 9 of Annexure "A" (copy at PB pg 68-69) was found and impounded. The finding of the AO is at page 10 of the assessment order wherein she held that *"The reply of the assessee has been considered but not found acceptable as the names and the amounts involved are categorically recorded in the said documents. Thus, the documents cannot be called deaf and dumb. Further, on top of both the pages **"Today's collection"** is clearly written. This clearly shows that the amounts written on these papers were actually collected by the assessee group. Further, Shri Nirmal Kumar Kedia has himself stated in his statement that this amount represents daily collection made by the sales team against sale of plots. However, the assessee has failed to prove that this amount Rs. 103.52 Lakh is reflected in the books of accounts of the assessee concern. Since, the assessee has not been able to corroborate these collections from the books of accounts, the same are prima facie undisclosed and liable to be added to the total income of the assessee"* The AO made the addition of Rs. 1,03,52,000/-. The assessee challenged the action of AO before Id CIT(A) regarding addition of Rs. 1,03,52,000/- against alleged unaccounted sales. The Id CIT(A) confirmed the addition of Rs. 32,09,120/- by applying the GP rate of 31% of total amount of Rs. 1,03,52,000/- noted on Page No. 18 & 19 of AS-9 by holding that the same as undisclosed business transaction of

the assessee. Thus, the Id CIT(A) confirmed the addition of Rs. 32,09,120/- and deleted the addition of Rs. 71,42,880/-.

56. Against the above order of the Id. CIT(A), both the assessee and the revenue are in appeals before us. We found that the Id. CIT(A) has deleted the addition of Rs. 1,03,52,000/- but upheld addition by estimating G.P. @ 31%. The precise observation of the Id. CIT(A) at para 22.4 to 22.5 are as under:

“22.4 However wrt Ground No. 4 which relates to addition of Rs. 1,03,52,000/- as unexplained income being the on money received by the appellant, I am not in agreement with the contention of Ld. A/R that it is a dumb document for the g reasons (a) That this documents was found from the premises of appellant where in a word ‘total collection’ is written in the top. (b) That the appellant in the statement recorded u/s 131 of the Act on 23.2.2018 has confirmed that details on this pages is prepared by sales team and who has collected what amount is mentioned on these papers. Entire answer of Nirmal kedia, in Hindi, is scanned below:

प्रश्न-14	<p>सर्च कार्यवाही के दौरान 1, गायत्री नगर, मैन टॉक रोड, सांगानेर फ्लाईओवर, जयपुर से ज़ब्त दस्तावेज “Back side of Page No. 18 & 19” जिन पर “Today’s Collections” एवं व्यक्तियों के नाम व राशि लिखे हुए हैं। ये दस्तावेज आपके अवलोकनार्थ प्रस्तुत हैं। Page No. 18 पर कुल 10 नाम लिखे हैं जिनके आगे अंकित राशि का योग 50.05 लाख रुपये हैं एवं Page No. 19 पर कुल 9 नाम लिखे हैं जिनके आगे अंकित राशि का योग 53.47 लाख रुपये हैं। इन पर कुल 103.52 लाख रुपये “Today’s Collection” हैं।</p> <p>प्रथम दृष्टया राशि 103.52 लाख रुपये मै० केडिया रियल इस्टेट LLP का unaccounted नगद संग्रहण हैं। कृपया बतायें क्या यह राशि आपकी Books में दर्ज है। यदि नहीं तो कृपया यह बतायें कि क्यों नहीं यह राशि आपकी/मै० केडिया रियल इस्टेट LLP की आय में जोड़ दिया जाये ?</p>
उत्तर-14	<p>इन पृष्ठों पर बनाई गई Details हमारी Sales team द्वारा तैयार की गई है। जिसमें यह विवरण बनाया गया है कि किस Staff द्वारा कितनी राशि का collection किया गया है। संपूर्ण विगत इस पेपर पर उपलब्ध नहीं हैं। जो भी राशि हमारी Sales team/staff द्वारा प्लॉट Sale के बदले में collect करके हमारे को भिजवाई जाती थी उसका इन्द्राज हमारी नियमित लेखा पुस्तकों में किया गया है।</p>

It is clear from the answer above that sum mentioned on these 2 pages is cash collection by sales team. Thus, noting on these 2 pages coupled with statement of Sh. Nirmal Kedia does NOT make it a dumb document. Hence AO is right in treating this as cash collection which is not reflected in the books of accounts. However, AO action in treating entire on money as taxable is not correct as it is only the embedded gross profit which can be taxed. The contention and reliance of the Ld. A/R on judgment including those of Hon'ble ITAT Jaipur is tenable argument.

22.5 *Consequently the GP Rate is to be applied on such cash receipts which are of the nature of on money. The appellant has declared about 30.6% GP rate, thus a GP rate of about 31% is applied on Rs. 1,03,52,000/-. Thus an addition of Rs. 32,09,120/- is confirmed. Balance of Rs. 71,42,880/- is deleted. Appellant's ground is partly allowed".*

57. The Id. AR has invited our attention to the impounded pages Nos. 18-19 of AS-9 and argued that from examination of this document we find that no conclusion can be drawn from this paper and no evidently verification can be done from the books of accounts. From examination of this paper your honour's will find that on this paper: -

- a) No name of the assessee of assessee group is mentioned, therefore it is not subject to verification that from whom its pertaining.
- b) No date has been mentioned on this paper so to examine that from which date it pertain.
- c) No mode of receipt of payment is mentioned i.e. received through cash or cheque.

Therefore, in absence of above essential detail no conclusion can be drawn from this paper and till that this paper is a deaf & dump paper and no addition can be made on the basis of this paper. The AO as well as CIT (A) presumed that the noting made on these papers are in relation to unaccounted receipts of the assessee as the assessee failed to corroborate these payments from books of accounts. However in absence of any date or details regarding collection made i.e. how much the receipt was through cheque, how much the same was through cash, how much the same pertain to which person of assessee group and how much the same received from which party the receipts noted on this paper cannot be correlated with the entries in books of accounts of assessee group. Further the AO as well as CIT (A) presumed that the entire receipts on these papers are unaccounted receipt. This presumption is completely perverse. In this paper there is no reference of cash receipt or unaccounted receipts. The sales team of the assessee is having entire responsibility of making the collection of entire sales proceeds of sales made by entire assessee group. The collection can be through cheque as well as cash. Therefore, whatever collection made by the sales team of the assessee group on the date when this noting was made would be part of the figure of collection scabbled by the sales team on this paper. Therefore, there is no reason to presume that

collection noted by the sales team on this paper will only be part of unaccounted receipt only. It is further admitted fact that this noting would be made by the sales team to report the collection made by them on a particular date to the management, therefore the entire collection made by them either through cheque or cash would be mentioned by them on this paper and there is no reason to presume the same is only for unaccounted receipts. The Id. CIT (A) for treating the noting of the seized documents as unaccounted receipt referred the statement of Shri Nirmal Kumar Kedia recorded on 23.02.2018 and held that it is clear from the answer that sum mentioned on these pages is cash collection by sales team and thus noting on these 2 pages coupled with statement of Shri Nirmal Kumar Kedia does not make it a dumb document. In this regard we will like to draw your kind attention towards the statements of Shri Nirmal Kumar Kedia dated 23.02.2018 wherein in reply to answer of Q. No. 14 (Copy at PB Page 97-98) and on perusal of answer to this question it reveals that there is no admission that the amount mentioned in these documents are cash collection and the same is unaccounted collection. Rather in the statement it is categorically submitted that the entire detail is not noted on these papers and whatever amount remitted by the sales team collected by them against the sale of plot is duly entered in the regular books of accounts.

Therefore, there is nothing positive in the statement of Shri Nirmal Kumar Kedia on the basis of which the CIT (A) is drawing the negative interference and holding that the noting on these documents is not dumb. The AO made the addition on the basis of deaf & dump papers and the same was also partly confirmed by CIT (A) without proving the same to be real. From examination of the assessment order, as well as seized document and finding of CIT(A) we find that the entire additions were made on the basis of presumptions, assumption, without having any material or irrelevant material. The submission and documents submitted by the assessee completed ignored and rejected without any cogent reason. The assessing officer merely disbelieved the explanation/statements given by the assessee and has converted good proof into no proof. Hon'ble Justice Hidayatullah of the Supreme Court in the case of Sreelekha Banerjee Vs CIT [1963] 49 ITR 112 (SC); 120 observed that the Income Tax Department cannot by merely rejecting unreasonably a good explanation, convert good "proof into no proof". Hon'ble Supreme Court in the case of Uma Charan Shaw & Bros Co Vs CIT 37 ITR 271 has held that the surmises and conjectures, and the conclusion is the result of suspicion which cannot take the place of proof. Hon'ble Punjab & Haryana High Court in the case of CIT Vs Anupam Kapoor (2008) 299 ITR 179 (P & H) also held that suspicion,

howsoever strong cannot take the place of legal proof. If the department considers it as income of the assessee, it is burden on the department to prove the figures appearing on the paper found in the search represents undisclosed income of the assessee. This burden is not discharged and therefore, on the basis of this paper no addition can be made.

58. The Id AR has further argued that page No 18 & 19 of Exhibit 9 of Annexure A are not speaking documents. The documents are bereft of necessary details about the year of transaction, ownership, nature of transaction, narration etc. to infer that transaction on these documents are those which have escaped income. Reliance is placed on the following decisions:-

i) Commissioner of Income Tax Vs. S.M. Aggarwal High Court of Delhi (2007) 293 ITR 43 (Del)

In this case the department seized documents "Annexure A-28 p. 15, - gives the details of certain handwritten monetary transactions which shows that the assessee had given a loan of Rs. 22.5 lacs on interest and earned interest income of Rs. 3.55 lacs on it. The Tribunal hold this document as dumb document.

The relevant findings of the Tribunal as mentioned in the above order is as under:-

"We have ourselves examined the contents of the document and are unable to draw any clear and positive conclusion on the basis of figures noted on it. The letters 'H.S.', 'T.2' and 'D-Shop' cannot be explained and no material has been collected to explain the same. Likewise, the figures too are totally unexplained and on the basis of notings and jottings, it cannot be said that these are the transactions carried out by the assessee for advancing money or for taking money. Thus, in our opinion, this is a dumb document."

Hon'ble High Court confirmed the findings of the Tribunal and relevant findings was as under:-

"12. It is well settled that the only person competent to give evidence on the truthfulness of the contents of the document is the writer thereof. So, unless and until the contents of the document are proved against a person, the possession of the document or handwriting of that person, on such document by itself cannot prove the contents of the document. These are the findings of fact recorded by both the authorities i.e. CIT(A) and the Tribunal."

"15. Similarly, in the present case, as already held above, the documents recovered during the course of search from the assessee are dumb documents and there are concurrent findings of CIT(A) and the Tribunal to this effect. Since the conclusions are essentially factual, no substantial question of law arises for consideration".

**ii) Commissioner Of Income Tax Vs. Girish Chaudhary
High Court Of Delhi
(2008) 296 ITR 619 (Del)**

Premises of M/s I.G. Builders & Promoters (P) Ltd. in which the assessee is a Director and of the assessee were searched on 18th Jan., 2000 and a document marked as Annex. A-37 was found and seized. The said document contained the following entries :

Annexure A-37 (Page 13)

"Cash RB— 31.50

Ch. 9.50

41.00

16.50

57.50

31.50

16.50

48.00"

The Tribunal hold this document as dumb document. The relevant findings of the Tribunal as mentioned in the above order is as under:-

"In the present case, the Revenue has used its longest arm of search available to the Revenue to unearth unaccounted money or evidence thereof. Having taken above step and as per law, it has to be proved strictly that undisclosed income assessed in the hands of the assessee is undisclosed income beyond a reasonable doubt. As noted earlier in the first page, total of all the five figures is 57.50 but addition of Rs. 48 lakhs was made and not of Rs. 57.50 lakhs. Why figures mentioned at second place after some gap was not taken into consideration. How 48

have been made as Rs. 48 lakhs and that too undisclosed income of the assessee is absolutely not clear from the assessment order. It was stated that Rs. 9.50 lakhs is recorded to be received through Cheque and therefore above amount was not added. It is correct that before 9.50 the word, "Ch" is written but there was nothing on record to show this amount was any way different from other figures/amounts. No attempt whatsoever was made to link any of the entry in the seized book with any transaction carried by the assessee in his capacity as Director or by his wife or M/s I.G. Builders and Promoters Ltd. to show the amount in figure as assessable undisclosed income. No proper use of seized material was made to establish that entries in the seized document relates to undisclosed income of Rs. 48 lakhs. Seized document has rightly been held to be a dump-document. It was for the Revenue to put life into it by collecting other relevant and connected material. This has not been done to establish the case as per requirement of the statute."

Hon'ble High Court confirmed the findings of the Tribunal and relevant findings was as under:-

"13. Similarly, the document Annex. A-37 recovered during the course of search in the present case is a dumb document and lead us nowhere. Thus, the Tribunal rightly deleted the addition of Rs. 48 lakhs made by the AO on account of undisclosed income on the basis of seized material."

**iii) JAYANTI LAL PATEL vs. ASSISTANT COMMISSIONER OF INCOME TAX & ORS.
HIGH COURT OF RAJASTHAN : JAIPUR BENCH
(1998) 233 ITR 588 (Raj)**

During search at the residence of Dr. Tomar, the Department official found a slip containing some figures. This piece of paper claimed to have been recovered at the time of search contains figures under two columns. In one column, the total of these figures comes to Rs. 17,25,000 from 31st May, 1989, to 8th Dec., 1989, and in the other column, the total of these figures comes to Rs. 22,12,500. An addition of Rs. 22,12,500 on the basis of figures on a small piece of paper in respect of purchase of Plot No. B-4, Govind Marg, Jaipur was made by the AO. This plot B-4, Govind Marg, Jaipur, has been purchased jointly by Dr. Tomar, Dr. Mrs. Tomar and B.S. Tomar, HUF.

Held that no addition on account of entries on a piece of paper which is claimed to have been found at the time of search, can be made, treating the figures as investment for purchase of plot No. B-4, Govind Marg, Jaipur in the hands of Dr. Tomar, Dr. Mrs. Tomar and B.S. Tomar HUF.

iv) MAHAAN FOODS LTD. vs. DEPUTY COMMISSIONER OF INCOME TAX ITAT, DELHI 'C' BENCH (2010) 123 ITD 590

Held that although the contents of the relevant seized documents show that the amounts mentioned therein relate to some expenditure, in the absence of any other evidence found during the course of search or brought on record by the AO to show that the said expenditure was actually incurred by the assessee, the same cannot be added to the undisclosed income of the assessee by invoking the provisions of s. 69C—Assessee explained that the said entries represented estimates made by its employees in respect of proposed expenditure—There is no evidence on record to rebut/controvert the said explanation- Additions not sustainable

v) ASSISTANT COMMISSIONER OF INCOME TAX vs. SATYAPAL WASSAN ITAT, JABALPUR BENCH (2008) 5 DTR (Jab)(Trib) 202

Held that the document was a dumb document containing no signature, no date, no unit like rupee, ton, kilogram, centimeter etc., full names of the parties were also not given, not showing whether it was position of assets or liabilities, receipts or payments, sale or purchase or advances made or loans received—AO did not carry out any enquiry whatsoever to find out the nature and period of transactions—The assessee had explained by way of affidavit that the document belonged to his brother 'D'—There was also an affidavit filed by widow of 'D' according to which the document belonged to her husband—Even if the affidavits are ignored as fresh evidence wrongly admitted by CIT(A), what is left behind is the dumb document bereft of any details without there being any enquiry by the AO to correlate the same with other documents seized, regular books of accounts, records kept by outside agencies or statements of concerned parties—The four essential components of s. 4, viz., the taxable event, the person chargeable, the assessment year in which charge is leviable and the total income are absent in the case.

vi) RAKESH GOYAL vs. ASSISTANT COMMISSIONER OF INCOME TAX, ITAT, DELHI 'B' BENCH (2004) 87 TTJ (Del) 151

The findings of Hon'ble Tribunal was as under:-

“20.1 After perusing the findings of the CIT(A) and the submissions of both the parties, we do not find any infirmity in these findings. Firstly the finding of the CIT(A) has not been controverted by the learned Departmental Representative by filing any positive evidence. The copies of the pages found from the possession of the assessee are placed in the paper book and after going through these papers, we find that these are simply deaf and dumb documents and they cannot be considered for making any addition. This is a

settled principle of law that any document or entry recorded in those documents should be corroborated with a positive evidence. Here in the present case nothing has been corroborated or proved that assessee was dealing in money lending business.”

**vii) N.K. MALHAN vs. DEPUTY COMMISSIONER OF INCOME TAX*
(2004) 91 TTJ (Del) 938**

The findings of Hon’ble Tribunal was as under:-

We have perused the aforesaid explanation and the seized document placed at assessee’s paper book-I pp. 48 and 50. The document does not state of any date or the year against the entries written therein. It does not show whether the assessee has made or received any payment. It also cannot be deciphered from the said documents that the entries therein pertain to the block period. The AO also did not bring on record any material to show that any investment has been made by the assessee in any chit fund company or otherwise. The document found and seized might raise strong suspicion, but it could not be held as a conclusive evidence without bringing some corroborative material on record. The document contained only the rough calculations and was silent about any investment. On the basis of such a dumb document, it cannot be said that there were investments made in fact by the assessee. Heavy onus lay upon the Revenue to prove that the document gives rise to undisclosed investment by the assessee. This onus has not been discharged. Accordingly no addition of undisclosed income could be made on the basis of such a document. Such a view has also been entertained by the Hon’ble Allahabad High Court in CIT vs. Dayachand Jain Vaidya (1975) 98 ITR 280 (All). The addition so made, therefore, is directed to be deleted.

**viii) JAGDAMBA RICE MILLS vs. ASSISTANT COMMISSIONER OF INCOME TAX
ITAT, CHANDIGARH BENCH (2000) 67 TTJ (CHD) 838**

Held that document seized during search not being clear as to whether items were payments or receipts or some other calculations, no addition could be made on the basis of such a dumb documents.

**ix) ASHWANI KUMAR vs. INCOME TAX OFFICER * ITAT, DELHI 'D' BENCH (1992)
42 TTJ (DEL) 644**

Held that :-

In order to attract the presumption under s. 132(4A), the first requirement is that the document should be found in possession or control of the assessee. In this case the Revenue has been saying that the document was found inside the shop of the assessee. However, there is nothing in the orders of the authorities below to show that the slip was in possession and control of the assessee. Everything physically present inside the shop of a person may not be in that person's control and possession. For proving possession it is necessary to show that the person concerned had the intentio possessendi. In this case

nothing of that sort is pointed out by the authorities below. Then, for presuming that the contents of the books of account or document are true, the document must be speaking one. In this case the slip said to have been recovered by the Revenue, does not contain any narration in respect of the various figures noted therein. The slip does not indicate whether the figures referred to quantities of money or to quantities of goods and whether one side, and if so, which side represents receipts which side represented outgoing. Thus, is, thus, a dumb document and as the orders of the authorities below would show they have merely added the total of the right side of the slip without supplying the figures any language to indicate their meanings. In the case of such a dumb document, the provisions of s. 132(4A) do not permit anyone to presume that the total of the figures of right side of the slip represents the assessee's income. The presumption at the most is attracted to the figures and a further presumption that they represent the income of the assessee is not permissible under s. 132(4A). When a dumb document, like the present slip, is recovered and the Revenue wants to make use of it, it is the duty of the Revenue to collect necessary evidence which may provide an acceptable narration to the various entries. The evidence collected should be such that any reasonable man would accept the hypothesis advanced by the Revenue that the figures written on the right side of the slip represent incomes earned by the assessee. It was conceded that no such evidence has been brought on record. Further, the Revenue has given no adjustment to the entries on the left side of the slip. Therefore, the slip in question did not indicate that the figures represents receipt of income to that extent by the assessee and it was not permissible to the Revenue without procuring any evidence to support such a hypothesis that the entries record the income of the assessee and to presume such assumed narration of the entries to be true. Therefore, the additions cannot be sustained and they are hereby deleted.

x) ASSISTANT COMMISSIONER OF INCOME TAX vs. ASHOK KUMAR VIG ITAT, RANCHI CIRCUIT BENCH (2007) 106 TTJ (Ranchi) 422

Held :

The AO has made the additions of Rs. 67,01,380 and Rs. 77,02,747 for the asst. yr. 2001-02 and 2002-03 on the basis of a diary marked 'PKC-60', seized from the office of the assessee in the premises of MDSS, a propriety concern of the assessee's sister-in-law. The assessee has explained to AO that the diary belonged to his employee, who was working in the office located in the said service station and the record of transactions in the said diary was in the nature of worksheets only where the transactions were completed and subsequently were taken to the books of account. The AO has also confirmed that cheques were received and were found recorded in the books of account of the assessee or that of sister-concern, as was the case. In PKC-60, where these transactions have appeared there is no indication that this account

relates to the assessee or to the sister-concern. The employee was recording transactions relating to both of them. For the financial year 2000-01, there are four parties, against which name, rate, amount, payment received and balance are duly recorded. And for the subsequent year, apart from these four, one KSI appeared. On perusal of these transactions one has to agree with the Authorised Representative that these were working sheets maintained by the employee and those transactions maturing, have been duly recorded in the books of account. The CIT(A) has taken a clear-cut view that the AO did not verify these so-called balances with the parties whose names were found mentioned. Therefore, he deleted the additions. Further the transactions appeared in the diary marked 'PKC-60' do not reveal that they are party wise account as there is no mention of any bill having been raised against the said transactions. The amounts mentioned therein appeared to be a consolidated figure but date on which these amounts are shown as outstanding is not mentioned. In both the years there are only one instance of payment received appears but the date and mode of receipt are not mentioned. The AO has also noted that cheques received as per this diary are duly recorded in the books of account. These accounts cannot be treated as reliable and properly maintained for another reason also. The next year's accounts give no indication regarding movement of amount. The parties show drastic reduction in the balances but how the payments were accounted for is not forthcoming from these entries. The Authorised Representative has invited attention to the fact that the AO did make enquiry, which the assessee has not disputed. However, the AO has not brought on record the result of such an enquiry. The only plausible conclusion, under these circumstances, would be that the findings of such an exercise was favourable to the assessee. Coming to the applicability of provisions of s. 132(4A), the assessee has explained the circumstances under which his employee maintained these documents in the premises of MDSS. Thus, the ownership is not disputed. However, there is no presumption about the earning of income. The assessment is made under Chapter XIV-B. The AO cannot make addition on the basis of incomplete entries. The onus rests on the Revenue to establish that the assessee was in receipt of money then the onus would automatically be shifted to the assessee to prove that the money has been disclosed in the account or the same is not liable to tax. In the present case in hand, the AO has not been able to demonstrate with adequate evidence that the assessee received the amounts in two years as alleged. These entries as recorded in 'PKC-60' do not clearly reveal that the assessee has earned income. The assessment of undisclosed income is under Chapter XIV-B and there is no scope of assumption or presumption while making assessment under this chapter. They are dumb documents on which reliance cannot be placed, unless they are corroborated with other evidences. There is no infirmity in the order of CIT(A) in deleting the additions

- xi) CHANDER MOHAN MEHTA vs. ASSISTANT COMMISSIONER OF INCOME TAX (INVESTIGATION) ITAT, PUNE BENCH (1999) 65 TTJ (Pune) 327 : 71 ITD 245**
Loose paper indicating money-lending activities showing the amount borrowed and amount lent—These loose papers do not indicate the name of assessee—Therefore, the loose papers by themselves lead to no conclusion and have no evidentiary value—However, it has evidentiary value because of statement of assessee under s. 131 admitting money-lending activities and explaining the various amount noted in coded figures—This statement has to be considered and accepted as a whole if the AO wants to use it in evidence—Assessee has produced confirmations from all creditors—No material brought on record to prove that these confirmations were false— Same cannot be rejected—If the statement of the assessee is to be rejected in toto no addition can be made since in that case those papers would be dumb papers—If the statement is accepted in toto, then the borrowings mentioned in the papers have to be accepted as genuine—In either case no addition can be made.
- xii) M.M. FINANCIERS (P) LTD. vs. DEPUTY COMMISSIONER OF INCOME TAX ITAT, CHENNAI 'B' BENCH (2007) 107 TTJ (Chennai) 200**
Held that no addition could be made in the hands of assessee on the basis of the dumb loose slips seized from his residence, in the absence of any corroborative material to show payment of any undisclosed consideration by the assessee towards purchase of land.
- xiii) Hissaria Bros Vs ACIT (ITA No. 179/JDPR/1998) 22 Taxworld 684 ITAT Jaipur**
It was held that addition cannot be made on the basis of vague figures found noted on seized loose paper without proving that the alleged amount are receipts and income of the assessee.
- xiv) ITO Vs Mannalal Jhalani (ITA No. 250 TO 260/JP/1998) 22 Taxworld 551 ITAT Jaipur.** It was held that addition cannot be made simply recovery of some papers found and seized during the course of search without making necessary verification and examination.
- xv) Ashwani Kumar Bhardwaj Vs DCIT 21 Taxworld 358 ITAT Jaipur.** It was held in para 29.6 that no addition can be made on the basis of deaf and dumb documents.
- xvi) Mohd. Illias Choudhary Vs DCIT 25 Tax World 394 ITAT Jaipur.** It was held that the addition cannot be justifiably be made as undisclosed income on the basis of certain entries found recorded on a seized paper without making any inquiry and investigation and without examining the assessee.
- xvii) Moonga Metals Pvt. Ltd., Vs. ACIT (All.) 67 TTJ 247**
Burden is on the revenue to establish that figures appearing on loose papers found represent undisclosed investment of the Assessee.

Reliance is placed on following decisions:-

a) Gulam Farooq Ansari vs ACIT ITA No 776/JP/2015 order

In this case, a dairy was seized showing unaccounted receipts. The Id AO determined the entire receipts recorded in dairy as undisclosed income of the assessee. Ld Id CIT(A) estimated the profit on receipts by applying Np rate of 23.32% of the receipts. Hon'ble ITAT following the decision of coordinating bench in the case of DCIT Vs Pahar Ganj Grih Nirman Sahkari Samiti Ltd & Othrs – IT(SS)A nos. 100,129,130 & 133/JP/2003 estimated profit on receipts @8% of the unaccounted receipts.

b) Deputy Commissioner Of Income-Tax. Versus Pahar Ganj Grih Nirman Sahkari Samiti Limited And Others. 005 (10) TMI 237 - ITAT JAIPUR
Other Citation: TTJ 099, 549, order Dated.- October 21, 2005

FACTS:-

On 16th Feb., 2000, a survey was conducted at the business premises of the assessee under s. 133A, but the same was converted into **search** after examining the materials found during the survey. So the survey was merged into **search** operation. Shri Iqbal Ali Khan is the secretary and Shri Bhanwari Lal Vijay is working as president of the said society. There were two more persons, namely, Shri Hemchand Joshi and Shri Kamlesh Sharma who are the employees. They made the statement to the **search** party. In their statements they stated that the sale price of the plots were shown in the books of account at 1/3rd of the actual sale proceeds and remaining 2/3rd were not accounted for. But, later on these statements were rebutted by them on 25th Feb., 2002. On the basis of the statement and seized material, the AO opined that assessee was engaged in purchasing of agricultural land, developing the same and selling them to different persons under the garb of society. The profit was earned by these two persons, namely, Shri Iqbal Ali Khan, secretary and Shri Bhanwari Lal Vijay, president, hereinafter known as Shri Khan and Shri Vijay. In the absence of proper books of account, the AO estimated the concealed income @ 10% of gross receipts and made the addition of Rs. 72,07,770/- . Hon'ble ITAT sustained the addition of Rs. 60.00 lakhs as against Rs. 72,07,770/- which gives estimation of profit @ 8.32%. The findings of Hon'ble ITAT was as under:-

25. In the light of above discussion and by considering the totality of facts and circumstances of the **case**, we are of the view that had there not been any **search/survey**, these illegal transactions might have not seen the light of the day. In the absence of books of account, the AO applied s. 145 and estimated the net profit rate at 10 per cent. We uphold the application of s. 145 for the reasons mentioned in the AO's order. However, the addition is looking on higher side due to the peculiar facts and circumstances of the **case**. Therefore, we modify both the orders of lower authorities and restricted the addition by keeping in mind the doctrine of equity, justice and good conscious to Rs. 60 lakhs (sixty lakhs) only. Thus, the assessee will get ad hoc relief of Rs. 12,07,770 (twelve lakhs seven thousand seven hundred seventy) from the order of AO. Thus, ground Nos. 1 and 2 are partly allowed in favour of the Department."

- c) Further, Hon'ble Gujarat High Court in the case of **CIT vs. President Industries, (2002) 258 ITR 654 (Guj.)**, held that the entire sales could not be added as income of the assessee but addition could be made only to the extent of estimated profits embedded in sales. Hon'ble ITAT Ahmedabad Bench in the case of **M/s Rameshwar Textile Mills Ltd vs JCIT, Range 4, Surat has 2015 (1) TMI 508** has taken similar view and followed the above decision of Hon'ble Gujarat High Court.

In view of above submission it was argued that addition made by the AO and partly confirmed by CIT (A) on the basis of this paper is only presumption and assumption and the same actually does not reflect any unaccounted income, therefore no addition can be made on the basis of this paper and the addition made by the AO and partly confirmed by CIT (A) may kindly be deleted.

59. We have considered the rival contentions and carefully gone through the orders of the authorities below and found from the record

that even though the Id. CIT(A) has deleted the addition after recording the detailed finding which has not been controverted by bringing any positive material on record. However, the Id. CIT(A) has upheld the addition by estimating G.P. rate @ 30.6% on the alleged transaction. The Id CIT(A) estimated the profit @31% on this amount which is at very higher side. No any comparable case was given to support 31%. The weighted NP rate declared by the assessee during the last two years as under:-

Asstt Year	Turnover	NP
2017-18	240142167	15509747
2016-17	7885664	-2055154
Total	248027831	13454593
Weighted Rate		5.42%

In view of the above and considering the totality of facts and circumstances of the case, we modify the order of the Id. CIT(A) and direct for applying profit rate of 6% in place of profit estimated by the Id. CIT(A) at 31%. We direct accordingly.

60. Under Ground No 3, 4, 5, 6 and 7 the department has challenged the deletion of the following additions by Id CIT(A) by holding that these documents are dumb documents

Ground No	Seized Material	APB Page No	Addition deleted by	Discussion of page of AO order
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			CIT(A)	
G-3	Exh-A-5/ page 1	Page 67	2,81,506	Pg 7 & 8 (Para 6.3)
G-4	AS-1/ P 26	70	6,99,000	Pg 11 (Para 8.3)
G-5	AS-6 / P 28, 29 AS-8 / P 7	71, 72 & 73	8,03,001	Pg 12 & 13 (Para 9.3)
G-6	Exh 1/ 10-12	74,75 & 76	42,07,083	Pg 14 (Para 10.3)
G-7	Exh -10 Ann-A/p 54 to 56	77 to 80	33,14,580	Pg 16 (Para 11.3)

61. While deleting the addition, the precise finding given by the Id CIT(A) was as under:

“22. Ground No. 3 to 8 is adjudicated together for the sake of convenience as they are based on seized material found from the different premises of the appellant. For the sake of convenience ground wise seized material, addition made by the AO and where is filed in the APB is tabulated below:

Ground No.	Seized material	Where in APB	Addition made
G3	Exh-9/ page 18, 19	Page 67	Rs. 2,81,506/-
G4	Exh-9/ page 18, 19	9/Pg 18 & 19	Rs. 1,03,52,000/-
G5	AS-1/ P 26	70	Rs. 6.99 lakhs
G6	AS-6/ P 28, 29	71 & 72	Rs. 803001
G7	Exh 1/ 10-12	74,75 & 76	Rs. 4207083
G8	Ann-10/ p 54 to 55	20,21, 22	Rs. 3314580

22.2 I have perused the written submissions submitted by the Ld. A/R and the order of AO. I have also gone through various judgments cited by the Ld. A/R and those contained in the order of AO. I have also carefully perused the copies of seized material filed by the Ld. A/R in the APB, pages of which are mentioned above. For the grounds above the Ld. A/R has taken a pleas that stated seized documents are dumb document and cannot be relied. Alternately it submitted that if an adverse is taken then

it should be the GP which should be applied to on money transaction and / or benefit of telescoping be given to appellant appropriately.

Before a view is taken on the document is dumb or not. It is important to understand what constitute a dumb document.

The taxability of transaction from the document found and seized during the course of search is dealt in detail in ACIT Vs. Satyapal Wassan 295 ITR (AT) 352 the Hon'ble ITAT Jabalpur has discussed as under:

12. Let us now examine how all these transactions are necessary for the purposes of levying tax on the basis of a seized document.

13. Section 4 relates to charge of Income-tax. It reads as under:

Section 4(1) Where any Central Act enacts that income-tax shall be charged for any assessment year at any rate or rates, income-tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions (including provisions for the levy of additional income-tax) of, this Act in respect of the total income of the previous year of every person:

Provided that where by virtue of any provision of this act income-tax is to be charged in respect of the income of a period other than the previous year, income-tax shall be charged accordingly.

(2) In respect of income chargeable under Sub-section (1), income-tax shall be deducted at the source or paid in advance, where it is so deductible or payable under any provision of this Act From a reading of above section, we find following components which enter into the concept of taxation. The first is the taxable event which attracts the levy, the second is the person on whom the levy is imposed and who is obliged to pay the tax. The third is the assessment year in which charge of income-tax is levied. The fourth is the total income of the previous year and the fifth is the rate or rates at which tax is to be imposed. The rates are prescribed in the annual Finance Act. Therefore, this component has no value in determining total income on the basis of seized document. Our view in this regard is supported by the decision of Hon'ble Supreme Court in Govind Saran

Ganga Saran v. CST wherein it was held that for the purpose of charging to tax, there should be four components to be satisfied.

The Hon'ble ITAT Jabalpur has gone to the extent of explain what constitute a dumb document. In the word of Hon'ble ITAT Jaipur same is as under:

“A charge can be levied on the basis of document only when the document is a speaking one. The document should speak either out of itself or in the company of other material found on investigation and/or in the search. The document should be clear and unambiguous in respect of all the four components of the charge of tax. If it is not so, the document is only a dumb document. No charge can be levied on the basis of a dumb document.

A document found during the course of a search must be a speaking one and without any second interpretation, must reflect all the details about the transaction of the assessee in the relevant assessment year. Any gap in the various components for the charge of tax must be filled up by the Assessing Officer through investigations and correlations with other material found either during the course of search or on investigations.

The document was bereft of necessary details about the year of transaction, ownership, nature of transaction, necessary code for deciphering the figures. The Assessing Officer presumed that the transaction belonged to the financial year. 1988-89 relevant to the assessment year 1989-90, that the figures mentioned in the document were advances made by the assessee, that the transactions belonged to the assessee, and that the transactions were in a code of lakhs and that the unit was the rupee. The Assessing Officer did not carry out any enquiry either during the course of search or during the course of assessment proceedings to find out the nature of transactions and the period in which those transactions were carried out; he had simply presumed that the figures were advances without there being any material on record to support such presumption. The Assessing Officer had drawn inferences, made presumptions, relied on surmises and thus made unsustainable additions.”

22.3 Applying the basic principal as laid down by the Hon'ble tribunal I am of the view no adverse inference can be drawn for the documents listed for Ground No. 3, 5, 6, 7 & 8. Bare perusal of copy of document indicated that these are dumb document as no name, dates or narration written which could makes us infer that transaction on these documents are those which have escaped assessments. Accordingly Ground No. 3, 5, 6, & 7 are allowed. Consequently the AO is directed to delete the addition of Rs. 2,81,506/-, Rs. 6,99,000/-, Rs. 8,03,001/-, Rs. 42,07,083/- & Rs. 33,14,580/-."

62. We have considered the rival contentions and carefully gone through the orders of the authorities below. From the record we found that the documents so relied by the A.O. as stated above are not speaking documents as the name of the assessee group or its schemes is not mentioned on this paper.

The noting made on the impounded page made by some broker of the assessee group because in scribbling of plot No. S-39 the "brokerage" is also written and if the noting on this paper would be pertaining to transaction relating to the assessee than there is no chance of receiving any amount against brokerage from the party. This proves that this paper pertaining someone else who were acting as an agent in these transactions and the cash payment was received by him at his own which was not received/receivable to the assessee group.

However, if the same is presumed to be belonging to the scheme of the assessee naming "Kediaz Kingdome" than whatever payment received/receivable to the assessee group against sales of plot No. mentioned in this paper is duly recorded in books of accounts of the assessee.

Along with written submission dated 09.02.2018 the assessee submitted the affidavit of Shri Mukesh Meena, buyer of plot No. S-39, wherein he confirmed the payments made to assessee against purchases of this plot and the same is similar to receipts recorded in books of accounts. In case of any doubt the AO could made the direct verification from this party but the same has not been made.

63. The Id. CIT(A) has analysed each and every document and came to the conclusion that these documents are dump documents as name/date or narration return which could lead to an inference that the transaction on these documents are those which have been escaped assessment. Thereafter by following the judicial pronouncements, the Id. CIT(A) has deleted the addition. The detailed findings so recorded by the Id. CIT(A) has not been controverted by the Id DR by bringing any positive material on record. Therefore, we do not find any reason to

interfere in the order of the Id. CIT(A) in deleting the impugned additions.

64. With regard to addition on the basis of AS-1 amounting to Rs. 6,99,000/-, we found from the examination of the document that no name of any person is mentioned over this paper. From this paper it cannot be drawn any conclusion that this paper pertaining to the assessee. No any plot No. or name of the scheme has been written over this paper by which it can be conclude that these papers pertaining to business transaction of the assessee group. No date has been mentioned on this paper. There is no reference in this paper that whether the same regarding the "revenue" of "expenses". There is no reference of "Cash" on this paper as alleged by the AO in the assessment order, therefore from the examination of this paper it cannot be presumed that this paper is containing the unaccounted transactions.

65. It is clear that the basis details which are required for verification of transactions is not available on this paper, therefore the same is not subject to verification from regular books of accounts and in absence of that the same can only be treated rough noting, deaf & dump paper. Had this paper would be having any relation with the real business

transaction of the assessee group than there should have been some noting/hints regarding such business transaction but the same is missing in the seized document, therefore the noting on this paper is nothing but only rough noting from which no conclusion can be drawn and no addition can be made.

66. With regard to addition of Rs. 8,03,001/- in respect of AS-6, on examination of documents, we observe that no name of any person is mentioned over this paper. From this paper it cannot be drawn any conclusion that this paper pertaining to the assessee or regarding to sales made by the assessee. No any plot No. or name of the scheme has been written over this paper by which it can be conclude that these papers pertaining to business transaction of the assessee group. No date has been mentioned on this paper.

67. In this regard, it is relevant to observe that during the course of day to day workings, several clients and prospective buyers visit the office of the assessee group and the discussion is held by them with the sale team of the assessee group regarding purchases of plots. During such discussion rough notings were made by the sales team. Had this paper would be having any relation with the actual business transaction of the assessee group than there should have been some

noting/narration such as plot No., name of buyer, date etc. but the same is missing in the seized document, therefore the noting on this paper is nothing but only rough noting from which no conclusion can be drawn and no addition can be made. It is further relevant to mentioned here that if these transactions will be actually materialized than the amount of cheque noted on these papers should be noted in the books of accounts of the assessee which is also not there which shows that the transaction noted on these transactions were not actually materialized. Further the name of the assessee or name of its scheme is not mentioned over this paper than how the same can be treated as belonging to the assessee only.

68. With regard to addition of Rs. 42,07,083/-, as per Ext.-1, we found that during the course of assessment proceedings the assessee gave the following reply to the AO in this regard: -

“The page No. 10-12 found vide exhibit No. 1 was found & seized from the residence of Shri Mohit Vijayvergiya. This papers does not belong to the assessee group and seems to be rough working or noting made by Shri Mohit Vijayvergiya.”

On examination of this document, we observe that the documents were found and seized from the residence of accountant of assessee group Shri Mohit Vijayvergiya. No name of any person is mentioned over this paper. From this paper it cannot be drawn any conclusion that this

paper pertaining to the assessee or regarding to sales made by the assessee or assessee group. No name of any buyer or name of the scheme has been written over this paper by which it can be conclude that this papers pertaining to business transaction of the assessee group. No date has been mentioned on this paper.

69. We further observe that the assessee has only one scheme "Kedia Kingdome" wherein size of plot no 40 is 164.21 sq mt as against 196.94 mentioned in the seized paper. Similarly, size of plot no 127 is 115.52 sq mt as against 169.62 mentioned in the seized paper. Similarly, size of plot no 122 is 135.35 sq mt as against 100 mentioned in the seized paper. Most interestingly, plot no 123 mentioned in the seized paper does not exist in the scheme of the assessee. The detail as per books of account of the assessee in respect of sales of plots No. noted on the paper seized from the residence of Shri Mohit Vijayvergiya is as under: -

Plot No. and size as per books of account of assessee/Map approved by JDA	Name of Scheme	Name of Buyer	Sales amount	Mode of payment received
40 (164.21 sq. mts)	Kediaz Kingdome	Anjana Sharma	6,88,550	Cheque
127 (115.52 sq. mts)	Kediaz Kingdome	Sagar Mal	5,25,000	Cheque
122 (135.35 sq. mts)	Kediaz Kingdome	Munni lal Gupta	5,15,000	Cheque
123	Kediaz Kingdome	Plot No. does not exists in the scheme		

The ledger a/c of above parties in books of accounts of assessee is at PB page 213 to 215. The cheque payment noted in the seized paper has no nexus with the cheque amount recorded by assessee in its books of account. Further the area of the plots written in the seized documents is also different from actual area of the plot. The plot no. 123 is not existing on the scheme of the assessee. These all facts shows that the noting made on this paper is not in relation of plots sold by the assessee .Further during the course of assessment proceedings the assessee submitted the affidavit of buyers of plot No. 40 and 122 wherein they confirmed the payments made to assessee against purchases of these plots and the same is similar to receipts records in books of accounts of assessee. Further the assessee was not having any plot No. 123 in its scheme "Kediaz Kingdome" which is evident from the map of the scheme at PB Page 216. Thus, when the assessee was not having any plot bearing No. 123 in its scheme than how such plot can be sold by it. All these facts show that the noting made on the paper found & seized from the residence of Shri Mohit Vijayvergiya does not pertain to the assessee and the same are only rough noting. Since this paper was found from the residence of Shri Mohit Vijayvergiya and not relevant to the business transactions of the assessee group, therefore no addition on the basis of these papers can be made in the hands of the assessee

group. It is admitted position of law that no addition can be made in the hands of the assessee on the basis of documents found from the possession of some other one without proving the relation of such paper and transaction recorded therein with the assessee which has not been done in the instant case. No any narration has been made to visualize that the notings made on this paper pertaining to business transactions of the assessee and that any consideration against the same was received to the assessee.

70. It was also argued by the Id AR that the presumption u/s 132(4A)(ii) is only against Shri Mohit Vijayvergiya and the said presumption cannot be drawn against the assessee. Reliance is placed on following decisions:-

- i) **CIT v. K.K. Abdul Kareem [1996] 88 Taxman 323 (Kerala).**
Presumption u/s 132 (4A) can arise only if it is established that the paper was in the control on or in the possession of the assessee
- ii) **Chandalal Kalyanmal Vs ACIT 21 Taxworld 125** ITAT Jaipur Bench in ITA No. 385/JP/ 1992 order dated 3/2/1998. Held that on the basis of paper recovered from brother of partner, addition in the hands of firm cannot be made.
- iii) **Mahendra Kumar Agarwal Vs ACIT 21 Taxworld 445** ITAT Jaipur Bench has held that on the basis of paper recovered from father of the assessee, addition in the hands of the assessee cannot be made.
- iv) **CIT vs SMS Investment Corporation Private Limited 207 ITR 364 Hon'ble Rajasthan High Court has held that** if any document is found in the course of a search, then by legal fiction, a

presumption has to be drawn that such document belongs to the person from whose possession or control it was found and the contents of such documents are true.

- v) **Shardha Construction Vs ACIT 76 ITD 85 ITAT Pune bench**
has held that no addition can be made in the hands of assessee firm for the papers found at the residence of partner.

- vi) **Jayantilal Patel Vs. ACIT and others/ Dr Balbir Singh Vs ACIT & others (Rajasthan High Court) 233 ITR 588. / 244 ITR 500 (Departmental appeal in DB)/**
Hon'ble Rajasthan High Court observed that addition on the basis of noting on a piece of paper cannot be sustained when it is not in assessee's own hand-writing.

71. As per the Id AR this seized paper shows cheque amount Rs. 21,95,068/- & Rs. 61560/- which has no nexus with the books of account/bank statement of the assessee. Had these transactions pertain to the assessee than the amount of cheque noted on these papers would have been found recorded in the books of account or bank statement of the assessee. Factually, the amount noted against cheque amount is neither reflected in books of account of the assessee or bank statement this clearly establish beyond doubt that the alleged sales were not affected by the assessee.

72. Our attention was also invited to the affidavits of various buyers of the plots filed, some of them examined by the AO. As per the Id AR during the course of assessment proceedings the assessee submitted the affidavits of several buyers who purchased the plots in the scheme of assessee group and out of that the AO examined to some of the plots

holders by issuing the summons to them (copy of statements at PB pg 250-257/Vol-II). The AO did not issue any summon to this party, therefore the sworn affidavit submitted by this party confirming the amount paid to the assessee group for purchases of plot should be accepted as admissible evidence. The AO has not rebutted the contents of the affidavits. The contents of affidavits, which are not vague should be accepted correct. Reliance is placed on the following decisions:-

- (i) Mehta Parikh & Co v CIT [1958] 30 ITR 181 (SC)
- (ii) Dilip Kumar Rao Vs CIT (1974) 94 ITR 1 (Bom);
- (iii) Malwa Knitting Works Vs CIT (1977) 107 ITR 379, 381
MP

73. With regard to addition of Rs. 33,14,580/- as per Ext.-10 Annexure-A, we observe that the assessee gave the following explanation to AO: -

“This is rough estimates made regarding Sanganer office renovation expenses. Actually no renovation work was carried out in the office. Further the paper pertaining to the period prior to incorporation of assessee firm.”

From the examination of the document we found that the scribbling on the paper are in relation to some renovation work which was to be carried out but the same was actually not carried out by the assessee group. The assessee group was planning to carry out some renovation work, therefore the staff of the assessee group send the tentative

estimation for such renovation work. It is relevant to mention here at the noting is made on dairy pages dated 20-05-2014 (PB 77) 21-05-2014, (PB 78) 22-05-2014, (PB 79) and 23-05-2014 (PB 80). At the top of dairy dated 21/05/2014 (PB pg 78) "Sardarji" mentioned and at the top of dairy dated 23/05/2014 "Sohan" is mentioned. There is several repetitions of entries like AC, CCTV, Fan, AC platform, Map, etc., this shows that the quotation was obtained from some "Sardarji" and "Sohan". There is noting on the record that the renovation work was actually carried out by the assessee group. No such "AC", "Sofa" and "wooden flooring" as mentioned in the paper were found installed in the premises of the assessee group. Had this work would be actually carried out then some bills/vouchers in support of that will also found which proves that this work was actually did not carried out. In view of above submission this is to submit that no addition can be made on the basis of these paper and the addition made by AO is wrong and the CIT (A) rightly deleted the addition.

74. In view of the above facts and circumstances, we do not find any infirmity in the order of the Id. CIT(A) in deleting the impugned additions.

75. In assessee's appeal, the assessee is aggrieved by the action of the Id. CIT(A) for estimating G.P. at 31% with respect to transaction of sale of Rs. 1,03,52,000/- as noted on Page No. 18 & 19 of AS-9 seized from 1, Gayatri Nagar, Main Tonk Road, Sanganer Flyover, Jaipur by holding that the same as undisclosed business transaction of the assessee.

76. In this regard, we observe that we had already discussed the issue at para 52 to 57 hereinabove. Following the same reasoning, we direct the A.O. to apply profit rate of 6.5% on the alleged transaction.

77. In the result, appeals of the revenue are dismissed whereas appeals of the assessee are allowed in part.

Order pronounced in the open court on 03rd June, 2019.

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

Sd/-
(रमेश सी शर्मा)
(RAMESH C SHARMA)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 03rd June, 2019

*Ranjan

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

1. अपीलार्थी / The Appellant- (i) Shri Nitin Kedia, Jaipur.
(ii) Kedia Real Estate LLP, Jaipur.
2. प्रत्यर्थी / The Respondent- The DCIT/ACIT, Central Circle-3, Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त(अपील) / The CIT(A)

5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर/DR, ITAT, Jaipur
6. गार्ड फाईल/ Guard File (ITA No. ITA Nos. 128 & 127/JP/2019 & 285 & 288/JP/2019)

आदेशानुसार/ By order,

सहायक पंजीकार/Asst. Registrar