

**IN THE INCOME TAX APPELLATE TRIBUNAL
NAGPUR BENCH, NAGPUR**

**BEFORE SHRI P. K. BANSAL, VICE PRESIDENT
AND SHRI AMARJIT SINGH, JUDICIAL MEMBER**

I.T.A. Nos. 56 TO 61/Nag/2016
Assessment Years:2007-08 TO 2012-13)

ACIT CENTRAL CIR – 2(1), 3 RD FLOOR, ROOM NO. 312, AAYAKAR BHAWAN, CIVIL LINES, NAGPUR – 440 001.	Vs	MITESH GOTULALJI BHANGADIYA 20-2, HOUSE NO. 526, NEAR GATEWELL HOSPITAL, DHANTOLI, NAGPUR – 440012 PAN: AERP2503E
(Appellant)		(Respondent)

I.T.A. Nos. 261 TO 265/Nag/2016
Assessment Years:2007-08 TO 2011-12)

MITESH GOTULALJI BHANGADIYA 20-2, HOUSE NO. 526, NEAR GATEWELL HOSPITAL, DHANTOLI, NAGPUR – 440012 PAN: AERP2503E	Vs	DCIT CENTRAL CIR – 2(1), AAYAKAR BHAWAN, CIVIL LINES, NAGPUR – 440 001.
(Appellant)		(Respondent)



Revenue by	Shri A. R. Ninave
Assessee by	Shri K. P. Dewani
Date of hearing	19/06/2017
Date of pronouncement	29/06/2017

ORDER

PER P. K. BANSAL, V.P.

All these cross appeals have been filed against the order of the CIT(A) dated 30/12/2015. The assessee in all the assessment years in its appeal has taken the following common grounds of appeal:

"1. The notice issued under Section 153A of I.T. Act, 1961 is illegal, invalid and bad in law and consequent assessment framed thereupon is liable to be cancelled.

2. The Learned CIT(A) ought to have directed to accept the income as shown in return filed pursuant to notice u/s. 153A of I.T. Act 1961 and deleted the entire addition as made by the A.O. in the assessment framed.

3. The Learned CIT(A) erred in not accepting the prayer of assessee to adopt net receipt for determining the estimated income at the hands of assessee after excluding the recoveries made by the Government Departments on account of material supplied, sales tax and service tax etc.

4. The addition confirmed by learned CIT(A) by adopting 16% of receipts is unjustified, unwarranted and excessive.

5. The learned CIT(A) erred in upholding the part addition made by A.O. by adopting 16% of receipts.

6. The assessee denies liability to pay interest under section 234A, 234B and 234C of I.T. Act 1961. Without prejudice, levy of interest under section 234A, 234B and 234C of I.T. Act 1961 is unjustified, unwarranted and excessive."



2. The Revenue in its appeal for A.Y.07-08 has taken the following grounds of appeal. Similar grounds are taken in A.Y.08-09 to 12013 except change in figures:

"1. Whether on the facts and circumstances of the case and in law the Ld. CIT(A) was right in thwarting the very purpose of search and seizure provisions of the Act by ignoring seized incriminating documents and thereby directing the AO to tax the income on presumed percentage based on surmises.

2. Whether on the facts and circumstances of the case and in law the Ld. CIT(A) was right in not affording the opportunity to the AO of being heard during appellate proceedings despite AO has specifically asked of being

heard vide his letter dated 19.02.2015 and thereby passing order in undue haste ignoring provisions of the Act.

3. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was right in deleting the addition of Rs. 40,98,887/- made on account of bogus sub-contract payments?
4. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in deleting the addition of Rs. 40,98,887/- made on account of bogus sub-contract payments without appreciating the fact revealed from the seized materials and statements recorded that the sub-contractors are only name lenders and have not executed any sub-contract?
5. Whether on the facts and circumstances of the case and in law the Ld. CIT(A) was right in holding that the incriminating diaries seized from residence of the main person of the group cannot be said to be belonging to particular concern ignoring the documentary evidence and the admission of Shri Mitesh Bhangdiya himself that the entries in the diaries pertain to the details of cash flow of assessee group's business activity and the entries in the diaries were not completely recorded in the books of account.
6. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was right in deleting the addition of Rs. 94,82,027/- being unaccounted income?
7. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in deleting the addition of Rs. 94,82,027/- being unaccounted income without appreciating the evidences found and seized during the search and seizure action?
8. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in directing AO to adopt total income of the assessee at the rate of 16% gross receipt by ignoring the findings given by the AO regarding bogus sub-contractors, unaccounted income and gratification payments?



9. On the fact and circumstance of the case and in law the Ld. CIT(A) erred in accepting assessee's contention that various sub contractors used to keep deposit of money withdrawn by them from bank with the assessee group for safe custody which was recorded on the credit side of the incriminating diaries without appreciating that if the contention of the assessee is true then the credit entries shall be in the name of the sub-contractors but the fact is otherwise as only names of the banks were found written there.

10. On the fact and circumstance of the case and in law the Ld. CIT(A) erred in accepting assessee's contention that the sub contractors kept their money for safe custody with the assessee group and amounts in small quantities were later withdrawn by them for meeting the expenses at sites by ignoring the fact that none of the names of the sub contractors appeared on debit side of the incriminating diaries.

11. On the fact and circumstance of the case and in law the Ld. CIT(A) erred in not calculating exact unexplained expenditure and unaccounted investment mentioned in seized incriminating diaries as well as inflated claim of expenditure in various projects and directing the AO to assume certain percentage.

12. On the fact and circumstance of the case and in law the Ld. CIT(A) erred in holding that having been accepted receipts from the assessee for assessing the income in the hands of sub contractors the payments made by assessee group to such sub contractors cannot be treated as non genuine, ignoring the fact that sub contract payments were assessed in the hands of the assessee group as bogus sub contract payments and in the hands of the sub contractors protective assessments were made by treating the entire receipts as income as no contract was executed.

13. On the fact and circumstance of the case and in law the Ld. CIT(A) erred in observing that unaccounted payments or unallowable expenses like gratification paid to various politicians and government employers have no



corroborative evidence on record to hold that assessee has made payments of any illegal gratification. The onus is on the assessee to prove that the payments were genuine and incurred legally. As the cash payments were not recorded in the regular books of account and as the assessee failed to substantiate those payments, the CIT(A) ought to have upheld that the entire amount of Rs. 171.10 crores is unaccounted expenditure.

14. *On the fact and circumstance of the case and in law the Ld. CIT(A) erred in relying on the decision of Hon'ble ITAT in Bhangdiya group of cases as at that time the information contained in incriminating diaries was not available either to the AO or to the appellate authorities while restricting it to 12%. The CIT(A) ought not have relied on the decision of Hon'ble ITAT when seized documents prove clear concealed income and unexplained expenditure.*

15. *On the fact and circumstance of the case and in law the Ld. CIT(A) ought to have appreciated the fact that in the case of assessee's group it is not feasible to estimate the net profit at a particular ratio as out of gross receipts of 579 crores the assessee group made unaccounted payments to the tune of Rs. 171 crores and hence spent only Rs. 408 crores towards execution of contract work. Whatever profit was derived on execution of the contract work by the assessee group, to that profit unexplained / unrecorded expenses of Rs. 171 crores were required to be added to arrive at the correct taxable income of the assessee.*



16. *On the fact and circumstance of the case and in law the Ld. CIT(A) failed to appreciate that the taxable income need not be equal to the actual net profit derived by the assessee as it may include addition towards various other provisions like section 40A(3), 40(a)(ia), 68, 69, 69C etc. and in the case of the assessee group addition u/s. 69C is applicable."*

3. Ground No. 1 & 2 taken by the assessee were not pressed during the course of hearing therefore, these grounds are dismissed as not pressed.

4. Ground Nos. 3 to 5 in assessee's appeal as well as ground nos. 1, 2 & 16 in Revenue's appeals relate to the common issue regarding the deletion of addition made on account of bogus sub-contract payment, deletion of addition being unaccounted income by the CIT(A) and sustaining the addition by CIT(A) by estimating the profit by adopting 16% of the gross receipts.

5. The facts and circumstances and issue involved in all the six years of the appeal are similar and identical therefore, all these appeals are being disposed of by this consolidated order for the sake of convenience. The assessment year-wise details of date of filing of return, returned income assessed income and the section are laid down as under:



S. No	A.Y.	Date of filing of return	Returned Income (Rs.)	Assessed Income (Rs.)	Section
1	2007-08	31.01.2013	4795480	16472525	153A
2	2008-09	31.01.2013	4162970	13743360	153A
3	2009-10	31.01.2013	8805660	14465371	153A
4	2010-11	31.01.2013	113080060	262827426	153A
5	2011-12	31.01.2013	355253400	745949819	153A
6	2012-13	03.12.2013	10421350	101024303	143 (3)

6. The facts of the case, in brief, are that Search and seizure operations were conducted in the residential premises of Shri Mitesh G. Bhangdiya on 19/7/2011. Simultaneously search actions were carried out in other premises belonging to Bhangdiya Group including three

residential-cum-business premises, one office and one residential premises which are spread across Nagpur, Amravati, Chandrapur, Wardha and Bhopal. Another seven premises at Nagpur, Chandrapur and Mumbai were also covered under section 133A of the I.T. Act. During the course of search, books of accounts and large number of incriminating documents and diaries were found and seized. Thereafter notices u/s 153A of the I.T. Act dated 28/12/2012 were issued and served on assessee on 01/01/2013 requiring him to file the returns of income within 30 days from the receipt of the notice. The assessee has filed the return for each of the assessment years in response to notice u/s 153A declaring income as mentioned in the table given herein above.

6.1 The assessee i.e. Shri Mitesh Gotumal Bhangdiya is the key person of the group. His family consists of the following members:

Shri Mitesh G. Bhangdiya (MGB) + Megha (Wife of MGB)
 Kirtikumar (son) + Sonal (wife of Kirtikumar)
 Shrikant (son) + Aarti (wife of Shrikant)
 Neha – Daughter

Besides, the business is handled by Shri Kirtikumar M Bhangdiya (hereinafter referred to as KMB) and Shri Shrikant M Bhangdiya (hereinafter referred to as SMB). The other important persons in the group are: Shri Sanjaykumar Rameshchandra Heda, husband of MGB's sister, Smt. Pradnya, residing at Amravati and Smt. Manisha O. Maniyar, widowed sister of MGB who lives with the MGB family.

6.2 4.1 The business concerns of the group (including those discovered as a result of the search action) are as follows –

1. M/s M.G. Bhangdiya (AERP2503E), (Prop. MGB); converted into a company M/s M.K.S. Constro-venture Pvt. (AAHCM0383T) Ltd. from 01.04.2011.



2. M/s Mahendra Construction, Prop. Shri Sanjay Heda (MC) (AADPH7109J)
3. M/s Mahendra Construction 85 M.G. Bhangdiya (JV) (AANFM5658B)
4. M/s Kirtikumar M. Bhangdiya (Prop. KMB); converted into a company M/s M.K.S. Acme Buildcon Pvt. Ltd. (AAHCM0382K) from 01.04.2011. (AGYPB1659G)
5. M/s K.M. Bhangdiya & Mahendra Construction (JV) (AAKFK1820C)
6. M/s Shrikant M. Bhangdiya (Prop. SMB)(ATCPB1337J)
7. Mitcon Infraproject Pvt. Ltd. (MIPL) (AAGCM1868H)
8. Lokshahi Publications Pvt. Ltd. (LPPL)(AABCL6673L)
9. MITZ Infraproject Pvt. Ltd.(AAGCM3047A)
10. Sakshi Gruh Nirman Pvt. Ltd. (SGNPL)(AAOCS7974G)
11. Balaji Stone Crusher & Infraventure Pvt. Ltd.(AADCB5273C)

6.3 The group has also entered into joint ventures with various other civil contractors of the city to secure some civil contracts. A few of them are listed below:

1. M/s M.G. Bhangdiya & Hitbhav Engg (JV) (AAOFM4745L)
2. M/s M.G. Bhangdiya & S. S. Patil & Co. (JV)(ABIFS3645L)
3. M/s Darshan Construction (JV) (AAHFD0654N)
4. M/s M R Dhoble 8s K M Bhangdiya (JV)(AAPFM0622B)

6.4 The nature of the business of the group primarily is executing civil contracts. The group work mainly for Government departments like M/s Vidarbha Irrigation Development Corporation and engaged in executing various contracts pertaining to the irrigation projects in the state of Maharashtra. The evidences seized from the business and residential premises reveal that the entire business activities are managed by Shri Mitesh Bhangdiya and his sons.

6.5 During the course of search operations several incriminating documents were found and seized from the residential premises of Shri Mitesh Bhangdiya. Item no. 1 to 65 of Annexure-B seized from his



residence are the diaries containing ledgers, daily cash books and bank books maintained by the Bhangdiya group.

6.6 Survey operations u/s 133A were also conducted against the Bhangdiya Group on 17/02/2009. During the survey operations, it was noticed that the assessee group has inflated the expenses, especially sub-contract expenses, to earn unaccounted income. The assessee Group has accepted the discrepancies and disclosed additional income of Rs.11,04,48,592/- for the period from AY 2006-07 to 2009-10. Apart from the above disclosure made during survey operations, the assessee Group has also made additional disclosure of Rs 26 Crore consequent to the search operations, as discussed in the subsequent paras below.

6.7 The Assessing Officer in para-5.1 of the assessment order has highlighted the significance of diaries seized at Annexure B-1 to B-65. According to the Assessing Officer, the analysis of the entries in the diaries reveals that on receipt side various receipts including receipt from withdrawals from bank accounts of group entities and sub-contractors were recorded and on payment side entries of expenses like interest payments, repayment of loans, deposits into bank accounts, household expenses, personal expenses, payment to various persons in cash and investment in properties are found recorded. The Assessing Officer also found that some of the entries made in the seized diaries were also found reflected in the regular books account maintained by the Bhangdiya group. A statement of Shri Mitesh Bhangdiya was recorded on oath on 20/07/2011. In his sworn statement recorded during the course of search action, Shri Mitesh Bhangdiya was confronted with the entries borne out from the seized diaries marked as B-1 to B-65 and to explain the contents of these diaries. Shri Mitesh Bhangdiya in his reply to Q-30 of his statement recorded has submitted



that the entries in the diaries and the ledger pertain to the business receipts and business expenditure but at present it is very difficult to state whether the entries recorded in the seized diaries are accounted in the regular books of account and the same can be explained only after verification of entries of diaries with the regular books of account maintained by the Bhangdiya group. However, in his reply to Q-38 of his statement recorded on 20/07/2011, Shri Mitesh Bhangdiya voluntarily offered additional unaccounted income of Rs.26 crores (twenty six crores) for the block period including the current financial year over and above the regular income declared in the returns of income filed for the assessment years falling within the block period in the hands of different assesseees. During the course of assessment proceedings, Shri Mitesh Bhangdiya was summoned and his statement was again recorded on oath on 27/07/2013 by the Assessing Officer. Shri Mitesh Bhangdiya has confirmed his earlier statement made on oath on 20/07/2011 during the course of search action confirming the additional declaration of Rs.26 Crs. Shri Mitesh Bhangdiya in his statement recorded on 27/07/2013 by the Assessing Officer has clearly deposed that the seized diaries were primarily maintained by his father Shri Gotulalji Bhangdiya. The Assessing Officer has also recorded a finding that the seized diaries contain payments made in cash for probable extraneous gratification to various politicians, government officers/officials which are recorded therein. Prima-facie the Assessing Officer has neither examined such parties referred in the order nor brought any corroborative evidence on record in support of his finding that the payments made in cash are for probable extraneous gratification to various politicians and government officers/officials, despite ample time available.



6.8 The Assessing Officer had made efforts to match the entries of tax payment and receipts with the entries in the regular books of account of the Bhangdiya group. The Assessing Officer found instances where small amounts are found reflected both in the incriminating diaries and regular books of account.

6.9 The Assessing Officer noted that the assessee group has claimed huge expenses on account of sub-contract payments. During the AY 2006-07 to 2012-13 the Bhangdiya group has debited Rs.361 crores towards the sub-contract payments against the gross receipts aggregating to Rs.579 crores which constitutes 62% (not correct) of the gross receipts. On verification of bank accounts of the sub-contractors, the Assessing Officer found that payments were credited in the bank accounts of the sub-contractors through the cheques issued by the Bhangdiya group and the amounts were subsequently withdrawn in cash. The Assessing Officer has further recorded a finding that such withdrawals from the sub-contractors accounts are found credited to the daily cash balance of the seized diaries which were utilized for unaccounted payments or unaccounted investments. Shri Mitesh Bhangdiya in his statement recorded on 14/09/2011 had admitted that the entries in the seized diaries marked as Annexure B-1 to B-65 pertain to daily cash handling of the group, and has reaffirmed in his subsequent statement dated 27/07/2013 recorded by the Assessing Officer. The cash withdrawn from the bank accounts of the sub-contractors and by them and kept with the assessee for safe custody and to be issued at various sites as per the requirements on behalf of such sub-contractors. The Assessing Officer concluded that these sub-contractors are name lenders, therefore, the payments made to them is bogus expenditure. The Assessing Officer in his assessment order, though has discussed the issue of allowability or otherwise of the



expenditure made to these sub-contractors u/s 69C but no such addition / disallowance finally has been made.

6.10 The Assessing Officer in his order noted that statements of 17 sub-contractors to whom payments have been made by Bhangdiya group under the head subcontract payments were recorded during the survey proceedings in which they have confessed that they were mere name lenders. The Assessing Officer has also reproduced the statements of couple of sub-contractors in the assessment order. The Assessing Officer has referred to the statements of 11 sub-contractors agreement for subcontract and all income-tax matters of these sub-contractors were being handled by the Bhangdiya group. The Assessing Officer has also mentioned that the persons at sites were getting a small amounts ranging between Rs.15,000/- to 25,000/- at the sites as advance from the assessee group periodically in cash for making necessary expenses at sites or any other task assigned to them and the sub-contractors are also getting approximately Rs.15,000/- to 25,000/- per month. Thus, the Assessing Officer has concluded that the payments made to the sub-contractors _ are bogus which were siphoned back by the Bhangdiya group as per the seized diaries.



6.11 The Assessing Officer had done the scrutiny of entries made in the diaries seized at Annexure B-1 to B-65 in the assessment order. The diaries are in the form of cash books which contained cash receipts on one side and cash payments on the other side of each page. The receipt side of the seized diaries contains the amounts withdrawn from the bank accounts of the sub-contractors, the amounts withdrawn from the bank accounts of the Bhangdiya group concerns and amounts and amounts received from individuals. The narration of the entries in some cases mention name and place of the banks and at some places names of some of the sub-contractors are also found reflected. The cash receipts from

the other concerns of the Bhangdiya group are also reflected along with their bank names and such entries of cash are also found reflected on the payment side as well. The Assessing Officer observed from the seized diaries that there were cash transactions amongst the group concerns due to which some entries were found on both the sides. Thus, the Assessing Officer after considering the withdrawals from the bank accounts of the sub-contractors and the withdrawals made by Bhangdiya group concerns arrived at the financial year-wise unaccounted receipts as found credited in the seized diaries as under:

Financial Year	Amount (In Crores)
2006-07	20.07
2007-08	36.12
2008-09	19.67
2009-10	44.34
2010-11	51.32
2011-12	11.00
Total	182.52



6.12 According to the Assessing Officer, the Bhangdiya group has claimed huge expenses towards sub-contract payments and after depositing the cheques in the respective bank accounts of the sub-contractors, cash was allegedly withdrawn by the Bhangdiya group and brought into the diaries for utilizing the funds for unaccounted expenses such as gratification to politicians and government officers/officials. The Assessing Officer has further recorded a finding that the cash payments entered in the seized diaries are of various nature such as household expenditure, donation/charity, salaries to staff and domestic help, office expenditure, site expenditure, expenditure on machinery,

legal , payments to individuals, cash transfer, cash payments to group concerns and cash payments made towards purchase of agricultural lands, payments towards transportation, petrol diesel expenses etc. The Assessing Officer in order to elucidate the modus-operandi has reproduced few scanned copies of pages from seized diaries and ledger in the assessment order. The unaccounted payments, according to the Assessing Officer, given in diaries, are computed financial year-wise as under:

Financial Year	Amount (In Crores)
2006-07	7.99
2007-08	28.89
2008-09	19.71
2009-10	52.09
2010-11	50.33
2011-12	12.09
Total	171.10



6.13 The unaccounted receipts determined by the Assessing Officer financial year-wise are to the tune of Rs.182.52 crores. Therefore, the Assessing Officer has considered entire unaccounted receipts of Rs.182.52 crores for addition in the hands of various concerns of Bhangdiya group. The Assessing Officer gave a finding that efforts were made to link the cash withdrawals from the bank accounts of the subcontractors and the bank accounts of various concerns of Bhangdiya group which, according to the Assessing Officer, claimed bogus sub-

contract payments with reference to that particular sub-contractor.
The relevant finding given is as under:

"Since it was not feasible to correlate the withdrawals from all the sub-contractors of the assessee group with the respective group concerns, 21 sub-contractors bank accounts were verified. It was noticed that cash withdrawals from the bank accounts of these sub-contractors were done immediately after cheques were credited by the respective group concerns. These cash withdrawals were then entered on the receipt side with bank names in the incriminating diaries in date wise manner. In view of this, cash withdrawals from the bank accounts of the subcontractors, as entered in the diaries, are added in the hands of respective group concerns in proportion to the amounts cheques credited by the respective group concerns. Total of these verified cash withdrawals, to be added in the hands of respective group concerns, comes out to be Rs.54.40 crores."

6.14 Thus, according to the Assessing Officer, out of the total unaccounted receipts of Rs.182.50 Crs., a sum of Rs.54.40 Crs. is attributable to the amounts deposited in the bank accounts of the sub-contractors by account payee cheques by various concerns of Bhangadiya group which was subsequently withdrawn in cash, which is found reflected on receipt side of the seized diaries. This amount of Rs.54.40 Crs. has been added by the Assessing Officer in the hands of the respective group concerns of Bhangdiya group in proportion to the amount of cheques credited by the respective group concerns in the various assessment years falling in the block period. Based on such methodology, the Assessing Officer has made the addition in different assessment years falling within the block period in the case of the assessee.



6.15 As regards to the balance amount of unaccounted income of Rs.128.12 Crs. (Rs.182.52 Crs.-Rs.54.40 Crs.), the Assessing Officer in para 9.2 & 9.3 has recorded the following finding:

"With regard to the balance amount of Rs.128.12 Crores, efforts were made to correlate the cash withdrawals which were credited on the receipt side of the diaries with the bank accounts of the remaining subcontractors. It is essential to note that the assessee group is having more than 100 sub-contractors. Vide questionnaires issued, assessee group was specifically asked to produce the sub-contractors who have not appeared, along with their books of account and bank accounts for verification but, there was no cooperation from the assessee group. Further, the assessee group was asked to explain the entries in the diaries but no such explanation was offered. As the entries in the diaries were made giving narration of either name of the bank or name of the bank along with the branches and as some of the sub-contractors are having bank accounts in the same bank and branch, it was difficult to match the entries in the diaries with the particular sub-contractor from whose account cash was withdrawn brought into the diaries.

In view of the above, and in view of the assessee's non-cooperation in this matter, the only opinion left is to add the balance amount of Rs.128.12 Crore to the income of the group concerns on prorata basis i.e. in the ratio of contract receipts shown by the group concern in the respective assessment years to the total turnover of the group concerns in that year."



6.16 It is thus seen from the above finding that the Assessing Officer has made the total addition of Rs.182.52 Crs. in the hands of various concerns of Bhangdiya group in various assessment years falling within the block period on prorata basis for want of proper correlation between the amounts credited in the seized diaries and the withdrawals made from the bank account of the sub-contractors. An addition of Rs.54.40 Crs. has been made on account of entries of withdrawals from the bank account

of sub-contractors recorded in the seized diaries in proportion to the cheque payments.

6.17 As regards to the balance addition of Rs.128.12 Crs., the Assessing Officer in his finding reproduced above has stated that efforts were made to correlate the cash withdrawals credited on the receipt side of the diaries with the bank accounts of the remaining sub-contractors but the same could not be accomplished, therefore, the Assessing Officer made the addition of Rs.128.12 Crs. in the hands of various group concerns on prorata basis in proportion to the contract receipts declared by such group concerns in various years falling within the block period.

7. When the matter went before the CIT(A), the CIT(A) did not appreciate the method of making the addition by the Assessing Officer in respect of the gross receipt of Rs.182.52 crore but directed the Assessing Officer to compute the addition by estimating the profit by applying rate of 16% on the gross receipts of group concerns and allocated the income so arrived among the various assessee group concerns including the assessee. The CIT(A) while estimating the profit @16% appreciated the order of the Tribunal in the case of the assessee group in I.T.A.Nos. 268, 269 and 285/Nag/2012 in the case of the assessee dated 03/04/2013 for the assessment year 2006-07 to 2008-09 in which the Tribunal in consequence of the evidence found during the course of survey operation as well as recording the statement of various sub-contractors on which the Assessing Officer has relied while making the addition during the impugned assessment, directed the Assessing Officer to work out the income by applying net profit @12%. The CIT(A) has directed the Assessing Officer to adopt 16% of the gross receipts as the net profit for the block period of the search comprising of the assessment year 2007-08 to 1012-13 instead of 12% directed by the Tribunal keeping in view that



the assessee had made the undisclosed investment found during the course of search in the assets and jewellery to the tune of Rs.26 crores and Rs.2.37 crores. To cover up the undisclosed investment in the immovable assets amounting to Rs.26 crores and in jewellery of Rs.2.37 crore respectively, the net profit was directed to be adopted @16% of the total turnover of Rs.579 crores which comes to Rs.92.62 crores ignoring the fact that the gross receipt of the assessee group includes the sum of Rs.50,00,98,566/- in respect of the sales tax and royalty which do not constitute of any profit element but are in fact the liability to be discharged to the thirty party by observing as under:

"10.0 I have carefully considered the submissions of the AR of the appellant, the assessment order, the material on record, the remand report of the AO and the judicial decisions relied upon by the AR.

11.0 On careful examination of the material facts, the following facts have emerged from the submissions of the AR of the appellant.

11.1 The AR has contended that it was explained before the AO that the deduction like royalty, VAT, Work contract taxes, material supplied in respect to various works executed by assessee are to the tune of Rs. 51.29 crores and no income could be said to have been earned in respect to such deduction for the purpose of determining the income in the case of assessee. The gross receipts before deduction are to the tune of Rs. 579 crores and the net receipt from it, the assessee possibly could have derived income from contract business are only to the tune of Rs. 527.71 crores. The estimated income declared by assessee in the various returns filed under section 153A of I.T. Act 1961 is more than reasonable and thus there is no warrant or justification for making any addition at the hands of assessee. The action of A.O. in not considering receipts at 527.71 crores ignoring the binding decision of Apex Court in the case of Brij Bhushanlal reported at 115 ITR 524 (SC) is unjustified.



11.2 The AR has further pleaded that the assessee is engaged in the activity of execution of work for Irrigation Department of State Government of Maharashtra. The work has been allotted to the assessee group for executing the orders year after year on completion of the work allotted from time to time. There is due process of verification for execution of work before releasing of payment. In the case of assessee group execution of work and receipts for the same are not in dispute. The work having been executed which was not in dispute a reasonable rate of profit alone could be liable to be assessed at the hands of assessee. The assessment of income at more than 40% of the receipts in no manner of consideration can be considered as reasonable.

11.3 The AR has enclosed details of the business income assessed by the A.O. in terms of percentage of gross receipts shown in the returns of income by various entities of the group. The various percentages of income as computed by the AR would indicate that the income assessed by A.O. is inconceivable to have been earned on the business receipts received by assessee group. Therefore, according to the AR, the substantial addition made at the hands of the various business entities of assessee group is excessive and unreasonable.

Income from Contract Business Assessed by AO in % terms:

Particular	AY	AY	AY	AY	AY	AY	AY
	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13
M/s. M G Bhangdiya	11.79%	41.27%	35.60%	18.60%	27.46%	49.50%	
MKS Constro Venture P. Ltd.							9.34%
M/s. Mahendra Construction	10.78%	43.13%	25.44%	11.04%	21.79%	33.05%	27.73%
M/s. Mahendra Const. & M.G. Bhangdiya JV		49.53%	73.44%	17.69%	41.81%	16.03%	
M/s. K.M. Bhangdiya	11.97%	23.39%	26.76%	26.26%	15.22%	13.94%	
MKS Acme Build P Ltd							10.28%
M/s. M G Bhangdiya and Hitbhav Engg JV			66.53%	11.98%	27.83%	0.00%	
M/s. M G Bhangdiya and SS PATIL JV		54.82%	129.92%	13.18%			
M/S K M Bhangdiya JV					25.28%	39.52%	
Mitcon Infra Project P Ltd					10.07%	10.00%	10.00%
Consolidated	12.36%	47.01%	74.36%	18.52%	34.25%	49.97%	44.59%

11.4 It is seen that in the case of assessee group books of account were rejected in regular assessment framed. Prior to

action under Section 132(1) of I.T. Act 1961. The income returned by assessee is also on estimated basis being percentage of net receipt received by each of the business entities of the assessee group. The appellant during the assessment proceedings has explained before the A.O. that the verification of the seized documents with reference to books of account loses its relevance in as much as that the books of account have not been relied upon by assessee at the time of declaration of income and thus it would be only fair to determine a reasonable income on estimated basis which could be said to have been derived from the net business receipts received by various business entities of assessee group.

11.5 In the case of assessee group, the assessments under section 153A of I.T. Act 1961 have been framed for assessment years 2006-07 to assessment year 2012-13. The nature of activity being execution of government contracts was the same during all the assessment years. In assessment year 2006-07, the nature of work executed for Vidarbha Irrigation Development Corporation remains the same as in the case of assessee for subsequent assessment years. The sub contractors who have executed the works are also similar in the various assessment years. The A.O. in the case of assessee for assessment year 2006-07 has accepted the income as shown in the return under section 153A of I.T. Act 1961 at about 12% of the gross receipts. The A.O. having accepted the net profit of 12% on the receipts for assessment year 2006-07, ought not have made additions on different footings in the case of assessee group for subsequent assessment years under the similar circumstances.



11.6 The perusal of the assessment, order would make it evident that the source of income of the various business entities of the group is only in respect to execution of government contracts and it has no other major activity of business where from the income is derived or generated. The notings found in the seized documents are part of the gross receipts received from the government department. The various notings in the seized document are part of the gross receipts of contracts received by group entities is not disputed. The inference drawn by Id. A.O. is that the entries in the seized document lead to inflating the sub contract

payments which have been utilized for incurring illegal expenses. The aforesaid inference drawn by A.O. is without any finding of a fact nor, it has been corroborated with any independent evidence. In the case of assessee no corroborative evidence or material was found during the course of search or anything has been brought on record subsequently in the course of assessment proceedings to establish that the notings made in the seized document are in relation to incurring of any illegal expenses.

11.7 *The AR has contended that the notings were made in the seized document at the instance of late Shri Gotulalji Bhangdiya who has expired in the month of April, 2011. Therefore, the assessee to the best of his ability has made efforts to explain the notings. The employees of assessee in whose handwritings the notings found in the seized document have been examined by A.O. in the course of assessment proceedings. The employees while admitting that writings belonged to them have also stated that the aforesaid notings have been made at the instance of late Shri Gotulalji Bhangdiya. The aforesaid independent statement recorded by A.O. supports and substantiates the explanation submitted at the time of search and in the subsequent proceedings that the notings are in respect to movement of money.*



11.8 *The perusal of the seized document would make it evident that it cannot be identified to one individual business entity of assessee group. The transactions noted in the seized document are of mixed nature being business, personal and investment. The document being not related to any one identified entity, the notings made cannot be held as unexplained credit to be apportioned amongst the various business entities. In fact, even as per the A.O., the seized document does not belong to any one assessable individual. In the absence of seized document being identified to any one individual entity and same being not identified to any business entity, it cannot be held to be as belonging to business entity so as to make estimated addition at the hands of various business entities on proportionate basis of turnover of such group entities.*

11.9 *The A.O. in para 6 of the assessment order has observed that assessee group for A.Y. 2006-07 to 2012-13*

has debited Rs.361 crores towards sub-contract payments out of gross contract receipts from the Government aggregating to Rs.579 crores which is more than 62% of gross receipts. It is seen that subcontract payments include various other payments to associate concerns which are considered as receipts in the case of associate concerns for making assessment by the same A.O. The actual payment to outside subcontractors is Rs.263 crores only which is 45% of gross contract value. The finding of A.O. to the extent of sub-contract expenses at 62% is factually not correct.

11.10 In assessment order at para 5.1, the A.O. has discussed the significance of the diaries B-1 to B-65 and has observed as under:

"The analysis of the entries in the diaries reveal that on receipt side various receipts including receipts from withdrawals from bank accounts of group entities and sub-contractors were recorded and on payment side entries of expenses like interest payments, repayment of loans, deposits into bank accounts, house hold expenses, personal expenses, payments to various persons in cash, investment in properties etc. were recorded. For the F.Y. 2006-01 to 2008-09 and 2011-12 the cash books and the ledgers mainly contain the cash receipts and the payment entries in cash. It is interesting to observe that some of the entries in these diaries were also reflected in the regular books of accounts maintained by the assessee group."

The same para refers to the reply to question No. 30 of the deposition made by Shri Mitesh Bhangdiya on oath on 20/07/2011, wherein Shri Mitesh Bhangdiya has stated that seized documents are details of cash flow. The A.O. at page 9 in the same paragraph has observed that they contain probable extraneous gratifications. It is evident that A.O. has no evidence on record for any illegal gratification but observation is made on inferences and presumption. The observation of the AO at para 5 . 1 inf act clearly explain the nature of entries found noted in the seized document wherein the Id. AO has recorded a finding that receipts are from bank accounts of group entities and sub-contractors. On the face of such observations, the conclusion drawn by the Id. A.O.



holding that credit entries are assessable income at the hands of assessee is unjustified.

11.11 The A.O. at para 6 of assessment order has discussed the nature of sub-contracts. The A.O. has on enquires from bank accounts found that withdrawals made have been credited in daily cash balance of diaries. The A.O. on inference has observed that same are utilized for unaccounted payments. The A.O. at page 17 has observed that most of the sub-contractors are name lenders and are of meager means and some are employees. The names observed are Shri Kesharsingh Rotele and Firous Khan etc. It is seen that both individuals as observed are assessed by same A.O. The income from sub-contract work done for assessee group has been accepted in the assessment framed u/s 143(3)/153C of I.T. Act 1961 on the same date. The receipts from assessee group having been accepted for assessing income at the hands of such individuals, payments made by the assessee group cannot be doubted as non genuine at the hands of assessee. Similarly A.O. has observed names of other sub-contractors. Out of names of subcontractors observed Shri Sanjay Malani, Shri Chintaman M. Nakade, Shri Vishal Rachalwar, Shri Dwarkadas M. Bhutada, Shri Dnyaneshwar Meshram and Shri Suresh Masram have been assessed u/s 153C by the same A.O. The receipts from assessee group having been accepted for assessing the income in the hands of sub-contractors, the payments made by assessee group to such sub-contractors cannot be doubted as non-genuine in the hands of various entities of the Bhangdiya group.

11.12 The A.O. at para 7 has made analysis of diaries marked as B-1 to B-65. The A.O at para 7.1 has categorically observed that receipt side contains amount withdrawn from banks of assessee group concerns and individuals. The financial year wise receipts entered in these diaries were computed at 182.52 crores. It is peculiar to note that the Id. A.O. at one hand has observed that withdrawals from bank account of business concerns and individuals which were found credited on left side of the diaries and at the same time he has concluded the same receipts of credits as unaccounted income of the group. The AR has contended that the Id. A.O. has not doubted the deposits in the bank account of assessee. Infact, they are deposit of receipts which are



considered as income, therefore withdrawals of such amount cannot again be assessed as income.

11.13 The A.O. in the assessment order has observed that the amount withdrawn from diaries is utilized for unaccounted payments or unallowable expenses like gratification paid to various politicians and Government employees. However, the assessment order does not refer to any corroborative evidence on record to hold that assessee has made payments of any illegal gratification. In fact A.O. at page 9 has observed that payment made in cash is for probable extraneous gratification which shows that this is a probable view taken by the AO without bringing the issue to a logical conclusion. Therefore, the working made by A.O. at page 36 to 38 about analysis of payments out of seized documents are just adverse inference drawn on assumptions and is not based on any corroborative evidence on record.

11.14 The A.O. has made observation at para 7.3 as regards to the quality of work executed by the assessee group and in particular visit of A.O. to various sites where work is executed by Bhangdiya group. The AR has contended that it is just an oral information obtained behind the back of assessee which has no evidentiary value. Assessee group has executed work as per standard parameters specified in the tenders allotted to the assessee group. The State Government has due process of verification as to quality and quantity of work executed before release of payments. In the case of assessee successive works were allotted year after year which itself demonstrates the fact that the State Government had no question as to quality of work executed by assessee group.

11.15 The A.O. in para 8 has discussed as to confronting of seized documents to assessee. The replies submitted have been partly reproduced. It is seen that in the course of search, the statement of the Shri Mitesh Bhangdiya was recorded on 20/07/2011 and the assessee in answer to question No.30 has explained that seized documents are details of cash flow and same has been reproduced in assessment order on page 5. During the assessment proceedings too, the assessee has explained that the diaries are notings for movement of cash in reply to question No. 23 in the statement recorded on 27/07/2013. The assessee all along in the course of



assessment proceedings had explained that the seized documents are to be in the nature of notings for movement of fund. It was explained in the course of assessment proceedings that the sub contractors on withdrawal of money from their bank accounts used to keep in trust/safe custody the amounts which are found to be noted in the seized documents. The explanation submitted by assessee was verified by the A.O. and it was found that the withdrawals made from the bank accounts of the sub contractors is on certain occasion credited in the seized document. It was further explained that the amounts credited in the seized document being the amounts received from the sub contractors were remitted to the sites where such sub contractors were executing the work. The amount remitted was through any representative of the subcontractor or any person going to various sites which are located at remote places. The seized documents contain notings in respect to handling of cash by late Shri Gotulajee Bhangdiya who has expired in April 2011. The assessee in the course of assessment proceedings has explained as to how notings happened to be made in the seized document. In the case of assessee, the statement of assessee was recorded on the seized document and in particular questions were asked as regard to the names which had similarity with the names of some politicians. The assessee in the statement recorded on oath has clearly explained that the notings made in the seized documents had nothing to do with political leaders in as much as such political leaders have no business transaction with any of the business entities of Bhangdiya group. The assessee in his statement made in the course of assessment proceedings had deposed that the seized documents are in respect to movement of cash with regard to activity of business, personal expenses and investments made by assessee. Thus, the AR has contended that neither the Investigation Wing of the Department nor the A.O. in a span of almost more than three and half years have brought any evidence on record to show that the various notings made in the seized documents are in relation to any illegal expenses incurred by assessee group. The AR further contended that explanation submitted by assessee was substantiated by submitting independent evidence of affidavits of sub-contractors that they had collected back the amounts deposited with late Shri Gotulajee Bhangdiya. The various persons who had submitted the



affidavits have not been cross examined subsequent to affidavits submitted nor any material or evidence on record has been brought to dislodge the averment made in the affidavits. Therefore, the AR pleads that the contents of the affidavits filed by sub-contractors have gone un-rebutted and have to be taken as true and correct. In this regard the appellant has relied on the decision of **Hon'ble Apex Court** in the case of **Mehta Parekh reported at 30 ITR 181 (SC)** , wherein it has been held that:

"No further documents or vouchers in relation to those entries were called for, nor was the presence of the deponents of the three affidavits considered necessary by either party. The appellants took it that the affidavits of these parties were enough and neither the AAC, nor the ITO , who was present at the hearing of the appeal before the AAC, considered it necessary to call for them in order to cross-examine them with reference to the statements made by them in their affidavits. Under these circumstances, it was not open to the Revenue to challenge the correctness of the cash entries or the statements made by those deponents in their affidavits."

11.16 The A.O. has observed that the various sub contractors in the case of assessee are name lenders and bogus. The A.O. has listed the names of such sub contractors at para 9.1 of the assessment order. In this regard, it is seen that the aforesaid sub contractors are also assessed by the ACIT, Central Circle-2 (1), Nagpur who is also the A.O. of assessee group. In cases of such sub-contractors notices under section 153C of I.T. Act 1961 were issued and returns were submitted by such sub contractors pursuant to receipt of notice under section 153C of I.T. Act 1961. The assessments have been framed under section 153C of I.T. Act 1961 by the same A.O. wherein the income returned in respect of business income shown arising to such sub-contractors out of receipt received from the assessee group have been accepted. Thus, the A.O. having accepted the business receipts in the hands of sub-contractors for determining the income in the cases of sub-contractors could not have concluded that the payments made by assessee group to such sub contractors are bogus.



11.17 The A.O. in the assessment order has observed that some of the sub-contractors are working as employees like drivers/supervisors of the assessee group. There is no prohibition for working as employee and also operating as sub-contractor. The AR in this regard has submitted that the assessee in order to encourage his employees has provided employees to be sub-contractor in order to make more personal gain by such employees. In view of above there is nothing which can be held adversely in respect to such observation.

11.18 As regards to the addition of Rs. 54.40 crores made by the AO on the basis of the depositions of the sub-contractors, the AR has contended that an opportunity of cross examination of such sub-contractors has not been given to the appellant which is in violation to the principles of natural justice. The AR of the appellant in this regard has placed reliance on the decision of Hon'ble Supreme Court in the case of **M/s Andaman Timber Industries vs. Commissioner of Central Excise, Kolkata** (Civil Appeal No. 4228 of 2006). The Hon'ble Apex Court in this case has held as under:

"According to us, not allowing the assessee to cross examine the witness by the Adjudicating Authority though the statements of those witness were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected.

In view of the above, we are of the opinion that if the testimony of these two witness is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witness was the only basis of issuing the Show Cause Notice.

We, thus, set aside the impugned order as passed by the Tribunal and allow this appeal"

The ratio laid down by the Hon'ble Apex Court is *mutatis mutandi* applicable to the facts and circumstances of the present case of the appellant group.



12.0 The AR of the appellant has submitted that in the assessment framed various additions made are based on the seized documents from B-1 to B-65. It is further submitted that notings on seized documents were explained by appellant by placing legal evidences on record. The AR thus contended that it is settled position of law that in the absence of corroborative evidence on record no adverse view can be taken in respect of notings found in the seized documents. According to the AR, in the case of assessee for notings made, no adverse corroborative evidence was found in the course of search action or has been brought on record by the Id. AO during the course of assessment proceedings at the time of framing of assessment. The AR therefore, pleaded that in the absence of any adverse corroborative evidence on record for notings on seized documents, addition made by AO on the basis of such notings are unjustified and unsustainable.

In support of his contention, the AR has relied on the following judicial decisions:

- 1) **(1978)115 ITR 524 (SC)**
Brij Bhushan Lal Parduman Kumar vs. CIT

In this case the Hon'ble Apex Court has held as under:



"It is true that, ordinarily, when a works contract is put through or completed by a contractor the income or profits derived by the contractor from such contract is determined on the value of the contract as a whole and cannot be determined by considering several items that go to form such value of the contract but in our view where certain stores/material is supplied at fixed rates by the Department to the contractor solely for being used or fixed or incorporated in the works undertaken on terms and conditions mentioned above, the real total value of the entire contract would be the value minus the cost of such stores/material so supplied. Therefore, since no element of profit was involved in the turnover represented by the cost of stores/material supplied by the M.E.S. to the assessee firms, the income or profits derived by the assessee firms from such contracts will have to be determined on the basis of the value of the contracts represented by the cash payments received by the assessee-

firms from the M.E.S. Department exclusive of the cost of the material/stores received for being used, fixed or incorporated in the works undertaken by them."

**2) (1973) 92 ITR 90 (Mad.)
CIT vs. K.S. Guruswami Gounder & K.S.
Krishnaraju**

The Hon'ble Madras High Court has held "if the assessee gave its tender on the definite understanding that the Department concerned is to supply the required materials for the construction of the buildings, the rates quoted by him would have been adjusted on that basis. Therefore, there is no question of the assessee purchasing the materials required for the buildings from outside and putting itself to a disadvantage. Admittedly, the materials supplied by the Departments had been used in the construction of the buildings and the assessee did not, in fact, earn any profit in relation thereto. We are not, therefore, in a position to say that the turnover represented by the cost of the material supplied, in any manner, contributed to the profit of the assessee."



**3) AIR 1998 (SC) 1406
Central Bureau of Investigation vs. V.C. Shukla &
Ors.**

39. A conspectus of the above decisions makes it evident that even correct and authentic entries in books of account cannot without independent evidence of their trustworthiness; fix a liability upon a person. Keeping in view the above principles, even if we proceed on the assumption that the entries made in MR 71/91 are correct and the entries in the other books and loose sheets (which we have already found to be not admissible in evidence under Section 34) are admissible under section 9 of the Act to support an inference about the formers' correctness still those entries would not be sufficient to charge Shri Advani and Shri Shukla with the accusations leveled against them for there is not an iota of independent evidence in support thereof. In that view of the matter we need not discuss, delve into or decide upon the contention raised by Mr. Altaf Ahmed in this regard. Suffice it

to say that the statements of the four witnesses, who have admitted receipts of the payments as shown against them in MR 71/91, can at best be proof of reliability of the entries so far they are concerned and no others. In other words, the statements of the above witnesses cannot be independent evidence under Section 34 as against the above two respondents. So far as Shri Advani is concerned Section 34 would not come in aid of the prosecution for another reason also."

4) **(1965) 57 ITR 532(SC)**
Parimiseti Seetharamamma vs. CIT

The Hon'ble Apex Court has held as under:

"By ss. 3 and 4 the Act imposes a general liability to tax upon all income. But the Act does not provide that whatever is received by a person must be regarded as income liable to tax. In all cases in which a receipt is sought to be taxed as income, the burden lies upon the Department to prove that it is within the taxing provision. Where however a receipt is of the nature of income, the burden of providing that it is not taxable because it falls within an exemption proved by the act lies upon the assessee."

5) **(2007) 294 ITR 49 (SC)**
CIT vs. P.V. Kalyanasundaram

In this case the Hon'ble Supreme Court has observed as under:

"The respondent assessee vide a registered sale deed dt. 27th Oct., 1998 purchased certain land at Brindavan Road, Fairlands, Salem for a sum of Rs.4.10 lakhs. During a search of the office and residential premises of Polimer Net Work, certain notes on loose sheets allegedly in the hands of the respondent were found and seized by the Department. In his statement recorded on 8th Dec., 1998, the assessee submitted that he could not remember as to why the notings had been made. The statement was further confirmed by another statement on 11th Dec., 1998. The Department also recorded the statement of the vendor Rajarathinam on 8th Dec., 1998 which too was confirmed on 11th Dec., 1998 in which he



admitted that he had in fact received a total consideration of Rs.34.35 lakhs and that the sum of Rs.4.10 lakhs reflected in the sale deed had been received by him by way of a demand draft and the balance in cash. Rajarathinam however retracted from his statement on 8th Jan., 1999 and filed an affidavit deposing that the sale price was Rs.4.10 lakhs only and that his statements earlier given to the authorities were incorrect. In a subsequent statement recorded on 20th Nov., 2000 Rajarathinam again reverted to his earlier portion and deposed that the sale price was Rs.34.85 lakhs.

..... The CIT accordingly deleted the addition made. An appeal was thereafter preferred by the Revenue against the order of the CIT before the Tribunal. The Tribunal in its order dt. 6th July, 2005 held that the notings on the loose pieces of paper on the basis of which the initial suspicion with regard to the undervaluation had been raised were vague and could not be relied upon as it appeared that the total area with respect to the sale deeds and that reflected in the loose sheet was discrepant."



"When the assessee did not give any explanation to the notings found and at the same time the Revenue is able to corroborate the same with the statement of the seller for the purpose of determination of actual sale value, would the lower authority be justified in interfering with the same?

.... Be that as it may, we are of the opinion that the three questions reproduced above can, in no way, be called substantial questions of law. The fact as to the actual sale price of the property, the implication of the contradictory statements made by Rajarathinam or whether reliance could be placed on the loose sheets recovered in the course of the raid are all questions of fact. We therefore find no infirmity in the order of the High Court. Accordingly, we dismiss the appeal."

6) (1999) 237 ITR 570 (SC)
CIT vs. Smt. P.K. Noorjahan

"The Tribunal however, held that even though the explanation about the nature and sources of the purchase money was not satisfactory but in the facts and circumstances of the case it

was not possible for the assessee to earn the amount invested in the properties and that by no stretch of imagination could be assessee be credited with having earned this income in the course of the assessment year or was even in a position to earn it for a decade or more. The Tribunal took the view that although the explanation of the assessee was liable to be rejected, s. 69 of the Act conferred only a discretion on the ITO to deal with the investment as income of the assessee and that it did not make it mandatory on his part to deal with the investment as income of the assessee as soon as the latter's explanation happened to be rejected.

..... This clearly indicates that the intention of Parliament in enacting s. 69 was to confer a discretion on the ITO in the matter of treating the source of investment which has not been (satisfactorily explained by the assessee as the income of the assessee and the ITO is not obliged to treat such source of investment as income in every case where the explanation offered by the assessee is found to be not satisfactory.

In the instant case, the Tribunal has held that the discretion had not been properly exercised by the ITO and the AAC in taking into account the circumstances in which the assessee was placed and the Tribunal has found that the sources of investments could not be treated as income of the assessee. The High Court has agreed with the said view of the Tribunal. We also do not find any error in the said finding recorded by the Tribunal. There is thus no merit in these appeals and the same are accordingly dismissed. No order as to costs."

7) Bombay High Court order in ITA No.1224 of 2011 in the case of M/s. Supreme Industries Ltd.

"A search action was conducted on the respondent assessee and its directors. During the course of search, the officers of the document which reads as under:

Payment mode	Cheque	65.00
	Cash	<u>33.00</u>
		98.00
Rate per sq. yard	2,019	
Per Sq. mt.	2,414	



transactions recorded in the said seized material. Considering the facts and circumstances of the case in its entirety, we are of the considered view that the addition as made by the AO. Being based on mere presumptions and assumptions and without any corroborative evidence, cannot be sustained and the said additions have rightly been deleted by the CIT (A) in all the years under consideration. The Revenue's appeals, therefore, fail."

**9) (2007) 293 ITR 43 (Del.)
 CIT vs. S.M. Aggarwal**

In this case the court has held:

"Statement made by assessee's daughter cannot be said to be relevant or admissible evidence against the assessee, since the assessee was not given any opportunity to cross examine her."

"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."



"The explanation tendered by the assessee that the account belongs to his daughter Smt. Sarla Gupta was categorically denied by her and in view of her specific denial, there is no justification to hold it otherwise."

"If the evidence collected against a person has not been confronted against him then it cannot be utilized against him. In the present case, the A.O. has taken into account the statement of Smt. Sarla Gupta and has utilized the same against the assessee but the fact remains that this statement was recorded behind the back of the assessee and no opportunity was given to him to cross-examine her."

"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 letter '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."

**10) (2008) 266 ITR 619 (Del.)
CIT vs. Girish Chaudhary**

"The company and its directors were searched on 18.01.2000 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 Hon'ble Delhi High Court following the decision of Apex Court in CBI Vs. V.C. Shukla (1998) 3SCC 410 has held "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."

**11) (2014) 39 CCH 034 (Hyd.)(Trib.)
Deputy CIT vs. K. Babu Rao**

The Hon'ble ITAT, Hyderabad Bench has held as under:

"Guess work not possible in case of search assessment framed u/s 143(3) or u/s 153A, without any proper material - AO should have basis for assuming that expenditure incurred by assessee is out of undisclosed income - Unsubstantiated loose sheets cannot be considered as conclusive evidence to make any addition towards undisclosed income -- In instant case

additions were made on basis of entries recorded in two note books seized – **Entries in note book were unsubstantiated** --On basis of same AO concluded that figures mentioned therein are to be read by adding 3 zeros and assessed undisclosed income - Other than loose paper, AO has not brought on record any corroborative material or evidence - CIT(A) rightly concluded that it cannot be acted upon and deleted addition - Impugned order upheld - Revenue's appeal dismissed."

"He observed that in the statement recorded on the date of search, assessee admitted that the seized books contain details of day to day expenditure. In the statement recorded u/s 131 on 23/7/2008, the assessee further admitted that the seized books contain receipts and payments party related to him and partly related to others and the entries were written in coded form. He also admitted that these books were written by his managers and his two wives Smt. Sridevi and Smt. Rani."

"Tax has to be collected on real income but not on hypothetical income. Unless those entries are independently corroborated with contemporaneous record, no adverse view can be taken by the Assessing Authority. No such direct independent evidences have been brought to demolish the contention of the assessee. As contended by the assessee, no assets have been unearthed during search, which is ultimate weapon of the Dept., for making such addition on the basis of some mathematical calculation."

"As stated earlier, these documents are prepared and maintained by managers, there are bound to be mistakes which cannot fasten on the assessee to pay taxes on unearned income. During search and seizure proceedings, cash Rs.4 lakhs and the two diaries were recovered but no unaccounted assets found. AO did not mention any of such unaccounted assets found during search. In this background additions based on some entries in the diaries by affixing three zeroes for all transactions is totally unjustified. There should be some reasonable matching between the income and the assets or expenditure, that nexus is clearly lacking on the facts as brought on record."



"In the present case, the seized material (two note books) marked as KBR/A/02 and KBR/A/04 wherein certain entries are found recording various transactions pertaining to the assessee. These entries in the note book are unsubstantiated and on that basis the AO reached to the conclusion that the figures mentioned therein are to be read by adding 3 zeros and thereby he came to conclude that there is undisclosed income in these 6 assessment years. In our opinion, the document recovered during the course of search was a dumb document and led nowhere. The CIT(A) rightly came to the conclusion that it cannot be acted upon and deleted the addition."

"Other than the loose paper, the AO has not brought on record any corroborative material or evidence to show that the inference made by him is correct. The CIT(A) after taking the totality of the circumstances into consideration came to the conclusion that the addition made by the AO is not justified and the argument put forth by the assessee is supported by documentary evidence. This was not a case where relevant evidence had been ignored by the CIT(A) and their relevant evidence has been taken into consideration. The only test that was required to be applied was whether on the facts found and the state of evidence on record, the conclusion arrived at by the CIT(A) was one which could be arrived by a reasonable person properly informed in law. Applying this test, it could not be said that the decision recorded by the CIT(A) one which could not have been arrived at by a reasonable person properly informed in law considering the state of evidence on record. Hence, in our considered opinion, the CIT(A) has reached a correct conclusion in deleting the addition made by the AO on the basis of loose sheets."



**12) (2005) 92 TTJ (Ctk) 464
Addl. CIT vs. Prasant Ahluwalia**

The Hon'ble ITAT Cuttack Bench has held :

"The AO stated that these notings were in the handwriting of the assessee and therefore, he has to explain why the total of which comes to Rs. 7,55,000, were added in the income of the

assessee. It was submitted by the assessee during the course of search itself that this is estimation of expenditure to be incurred for forthcoming period."

"No corroborative material has been brought on record by the AO for rejecting the assessee's contention that jotting on the piece of paper was an estimate and not actually expended. As per our considered view, additions based on chit papers and presumption of AO could not be sustained in the absence of any corroborative material or evidence brought on record, supporting it."

"As no corroborative material has been brought on record by the Department to reject the assessee's contention, we do not find any reason on interfere in the order of the CIT(A) for deleting the impugned addition".

**13) (2007) 106 TTJ (Ranchi) 422
ACIT vs. Ashok Kumar Vig**

Held:

"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.

..... 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 ofs. 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. - Rama Traders vs. ITO (1988) 32 TTJ (Pat) (TM) 483 : (1988) 25 ITD 599 (Pat)(TM) and Kollipara Subba Rao vs. ITO (1990) 32 ITD 668 (Hyd.) distinguished."

14) (2004) 91 TTJ (Del.) 938 N.K. Malhan vs. Deputy CIT

Held:

"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.

..... Heavy onus lay upon the Revenue to prove that the document gives rise to undisclosed investment by the assessee".

"As regards interest, from mere jottings or calculations it cannot be said that there was any liability incurred by the assessee as he is also not found to have paid the amount from his resources nor utilized the amount for his individual benefits. The Revenue did not examine these parties though the complete identity and particulars thereof were available before them Proof of payment has also not been found. In case the calculations were made for interest, they were merely the cost estimates but cannot be said as a payment in reality or a liability incurred by the assessee. In any event the burden was on the Revenue to show that the documents represented undisclosed income of the assessee. Without bringing any corroboratory evidence by the Revenue, this burden cannot be held to have been discharged. Under such



peculiar circumstances and the facts as emerging from record, the entries of Rs.1,65,000 could not have been treated as undisclosed income of the assessee for the block period. The addition so made is, therefore, directed to be deleted".

"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".

15. (2004) 89 TTJ (Cal.) 917JCIT vs. West Bengal Trading Agency

Held:

"No positive material, direct or circumstantial, to establish that amount was received by assessee - Addition made on the basis of suspicion was rightly deleted by CIT(A)".

"It was necessary for the AO to gather material either direct or circumstantial to establish that the intention expressed in the diary by K was actually implemented and that the assessee had received the money from K. The very receipt of money from K is doubtful and, therefore, the tax liability cannot be fastened on the assessee merely on the basis of suspicion. The CIT(A) was justified in deleting the addition".

16) (2008) 10 DTR (Del.) (Trib.) 507 Sonal Constructions vs. Deputy CIT

Held:

"Presumption under s. 132(4) cannot be used in the assessment proceedings to make an assessment of income.



One fails to understand as to why the AO did not think fit to examine V in the course of assessment proceedings. So also, non-examination of S by the AO in the course of assessment proceedings was fatal to the case of the Revenue. The seized documents were alone not sufficient to draw any definite conclusion regarding the existence of undisclosed income.

.....

The corroboration could have come in the form of examination of V and S: The purchasers of the property from the assessee could have been examined to find out if they had paid consideration over and above what has been recorded by the assessee in its books of account. The additions made cannot be sustained in law. - Shivani Properties (P) Ltd. vs. Dy. CIT (ITA Nos. 1957/Del/1999 and 4100/Del/2001, dt. 29th Dec., 2006) relied on;"

"It is observed that the writing made in the loose papers were treated by the A.O. as the actual investment made by the assessee and the actual receipts of the sale of properties. We find that the said documents Annex. A1 pp. 2 and 29 are loose papers and not any books of account. Further, in the said document date-wise break-up of the alleged payments made or the alleged sales proceeds received are not recorded. From the said documents it cannot be said that the figures stated there in were the actual investment made by the assessee and actual sale proceeds received by the assessee. No corroborative evidence of the writing found to be made in the loose papers were found during the course of search. It is no doubt true that the seized document on which the impugned addition was made by the AO namely Annex. A1 pp. 21 and 29 did give out certain figures regarding the four projects that the assessee had undertaken in the course of his business".

"The question that would fall for consideration is as to whether this correlation alone was sufficient to make the impugned addition. In this connection, we have to first notice that the document in question was seized from the residential premises of one of the partners of the assessee firm. At the time of search the statement of the partner was recorded. He disowned any knowledge about the seized documents".
The Hon'ble Supreme Court in a recent decision in the case of P.R. Metrani vs. CIT (2006) 206 CTR (SC) 290 : (2006) 287



ITR 209 (SC) has laid down that presumption under s. 132(4) cannot be used in the assessment proceedings to make an assessment of income".

"We are of the view that the seized document A1 pp. 21 and 29 were alone not sufficient to draw any definite conclusion regarding the existence of undisclosed income. It was therefore not possible to draw any inference on the basis of this document without proper corroboration. As already stated the corroboration could have come in the form of examination of Mr. V.K. Narang and Mr. S.S. Sodhi. The property could have been got valued by the DVO to find out the real investment in this property. The purchasers of the property from the assessee could have been examined to find out if they had paid consideration over and above what has been recorded by the assessee in its books of account."

"It is also pertinent to note that there was no attempt made by the AO even to make any enquiry with the concerned flat purchasers from whom the on-money was alleged to be received by the assessee on the basis of the contents of the relevant seized documents. The allegation of the AO about the receipt of on-money from the flat purchasers thus was based on mere surmises and conjectures and in the absence of any evidence to corroborate the same, the addition made by him presuming the receipt of on-money, in our opinion, was not justified. In that view of the mater, we set aside the impugned order of the learned CIT(A) confirming the said addition and direct the AO to delete the same."



**17) (1997) 59 TTJ (Mumbai) 574
ACIT vs. Shailesh S. Shah**

Held:

"As a result of search at assessee's premises on 26th August, 1987 certain loose papers were found and seized and one of those loose papers which has been marked as page No. 44 which has been responsible for creating the controversy under appeal before us has the following details: (Details are as per the Entries repeated on page No. 3 & 4 of the order.)"

*"We are of the opinion that the AO has not invoked any of the deeming provisions of ss. 69 to 69D and, therefore, it is clear that these figures have been considered as assessee's income under the substantive provision of the IT Act. Under the substantive provision of IT Act, it is now settled law that every receipt is not necessarily or cannot necessarily be income in the hands of the recipient and, therefore, the question whether any particular receipt is income or not depends on the nature of the receipt and true scope as well as the fact of the relevant taxing provisions
settled proposition, it follows that Revenue can tax only those receipts, which, first have been proved to be income in the hands of the recipients and secondly, the same have to be proved as non-exempt from tax. We are, therefore, of the opinion that it is Revenue's onus, before assessing any receipt as taxable income; to proved that the receipt in the hands of the recipient is income and this can be proved or established only on the basis of some material or evidence. This view finds support from the decision of the Hon'ble Allahabad High Court in the case of Lachand Gopaldas vs. CIT."*

"In view of the above discussions, facts and circumstances of the case as well as the settled principles of law, we are of the opinion that the conclusion arrived at by the AO was based purely on suspicions and the CIT(A) was justified in deleting the additions having been made only on suspicions. The order of the CIT(A) is upheld and the revenue's appeal is dismissed. As regards to Departmental Representative plea relating to consideration of assessee's explanation by the CIT(A) submitted before him, without giving opportunity to AO, we have found that the CIT(A) has not based his decision on that explanation, rather had accepted the assessee's plea made before the AO to the effect that the figures on loose paper No.44 were rough working of the firm. This plea is, therefore, rejected. "



**18) (2008) 5 DTR (Jab) (Trib) 202
ACIT vs. Satyapal Wassan**

The Hon'ble Tribunal has held as under:

"Our view in this regard is supported by the decision of Hon'ble Supreme Court in Govind Saran Ganga Saran vs. CST

(1985) 155 ITR 144 (SC) wherein it was held that for the purpose of charging to tax, there should be four components to be satisfied. For the sake of convenience, we refer to the relevant headnotes form that decision:"

"The component which enter into the concept of a tax are well known. The first is the character of the imposition known by its nature which prescribes the taxable event attracting the levy, the second is a clear indication of the person on whom the levy is imposed and who is obliged to pay the tax, the third is the rate at which the tax is imposed and the fourth is the measure or value on which the rate will be applied for computing the tax liability. If those components are not clearly and definitely ascertainable, it is difficult to say that the levy exists in point of law. Any uncertainty or vagueness in the legislation scheme defining any of those components of the levy will be fatal to its validity."

The first component shows that it is necessary to find out the nature of transaction which is the source of generating income. It has to be clearly spelt out as to whether a particular transaction is of income yielding nature as per IT law.

Merely because a document is recovered from the body of a person, does not automatically lead to the inference that it belonged to him. It is only for certain purposes that presumption under s. 132(4A) has been enacted and not for all purposes including the assessment. Further, this presumption is not conclusive. It is rebuttable.



"What amount of evidence one requires to rebut the evidence depends upon facts of each case. There is no rigid rule in this behalf. Sometimes, mere statement of the assessee may be enough. Hon'ble Rajasthan High Court in Addl. CIT vs. Thahrayamal Balchand 1977 CTR (Raj.) 219 : (1980) 124 ITR 111 (Raj.) observed "a mere statement of the assessee may be enough in some cases. It does not raise a question of law."

"The document and/or follow up investigation must establish the period of transaction before charge of income tax could be levied during the current assessment year".

"The A.O. has failed to properly decode the figures mentioned in the document as to whether they are in thousands or in ten thousands or in lakhs and what is the unit of these transactions. The document does not tell anything about this. It could have been done only by way of investigation. It has not been done. Therefore, one cannot infer merely from the face of the document as to what is the total of those transactions and whether they are in rupees or in kilograms or something else. In the absence of such proper decoding and clarification of number/quantity involved, no charge of income tax can be levied".

"The above discussion also leads us to infer that a charge on the basis of document can be levied only when the document is a speaking one.

"The speaking from the document should be loud, clear and unambiguous in respect of all the four components as described above. If it is not so, then document is only a dumb document. No charge can be levied on the basis of dumb document".

"It was held in Neena Syal's case (supra) that where a document found during the course of search is open to more than one possibility of interpretation and does not prove conclusively that any premium was given by the assessee or received by the seller then no addition could be made in respect of premium paid on purchase of plot. From this decision, it is clear that the document must unmistakably reflect the transaction without having any second interpretation".

"The crux of these decisions is that a document found during the course of 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 various components as mentioned in s. 4 of the IT Act must be filled up by the AO through investigations and correlations with other material found either during the course of the search or on investigation. As a result, we hold that document No.7 is a non-speaking document".



13.0 On perusal of the assessment orders of various entities of Bhangdiya group, it is seen that the net profit adopted by the learned AO is quite at variance in each of the group entities, besides being abnormally high. The following chart depicts the net profit adopted by the AO in various group concerns for the purpose of taxable profits:

Income from Contract Business Assessed By AO in %

Particular	AY	AY	AY	AY	AY	AY	AY
	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13
M/s. M G Bhangdiya	11.79%	41.27%	35.60%	18.60%	27.46%	49.50%	
MKS Constro Venture P. Ltd.							9.34%
M/s. Mahendra Construction	10.78%	43.13%	25.44%	11.04%	21.79%	33.05%	27.73%
M/s. Mahendra Const. & M.G. Bhangdiya JV		49.53%	73.44%	17.69%	41.81%	16.03%	
M/s. K.M. Bhangdiya	11.97%	23.39%	26.76%	26.26%	15.22%	13.94%	
MKS Acme Build P Ltd							10.28%
M/s. M G Bhangdiya and Hitbhav Engg JV			66.53%	11.98%	27.83%	0.00%	
M/s. M G Bhangdiya and SS PATIL JV		54.82%	129.92%	13.18%			
M/S K M Bhangdiya JV					25.28%	39.52%	
Mitcon Infra Project P Ltd					10.07%	10.00%	10.00%
Consolidated for All Entities	12.36%	47.01%	74.36%	18.52%	34.25%	49.97%	44.59%

14.0 It is quite manifest from the above that the income assessed by the Id. AO for the purpose of taxation in respect of various group concerns, engaged in the same business as contractors, is quite at variance. The income assessed by AO as percentage receipts for various years varies from 9.34% to 129.92%.

15.0 In view of the huge variance in the income assessed as percentage to receipts by the AO and various infirmities pointed out by the AR of the appellant in the order of the AO as discussed in the foregoing para No. 11 of this order, the AR has vehemently objected to the income assessed by the AO in the hands of various entities of the group, including the present appellant. The AR thus has contended that income assessed by the AO in the assessment order is merely an estimation which is quite at the higher side looking to the facts and circumstances of the case. The AR of the appellant in this regard has also relied on the decision of the Hon'ble ITAT, Nagpur Bench, Nagpur in the case of the appellant and various group entities in ITA No. 268,



269 & 285/Nag/2012 dated 03.04.2013. The AR of the appellant in this regard, has submitted that a survey action was conducted on 17.02.2009 in the Bhangdiya group of cases, wherein the similar situation as payments to sub-contractors was disputed and doubted by the AO. The survey action comprises AY 2006-07 to AY 2008-09 which are also forming part of the block periods for the search action conducted on the assessee group on 19.07.2011. The AR has pleaded that the Hon'ble ITAT after having considered the similar activity of business and deficiencies in sub-contract payments found during the survey action conducted on 17.02.2009 has decided the appeals for AY 2006-07 to 2008-09. The Hon'ble ITAT, Nagpur Bench, Nagpur after considering the impounded material has directed the AO to adopt the net profit @ 12% as against net profit adopted by AO @ 14%. Therefore, the AR of the appellant vehemently contended that the nature of defects found in the course of search action are similar to that of the evidences impounded in the course of survey action, therefore, the net profit in any case should not exceed @ 12% as adjudicated by the Hon'ble jurisdictional ITAT, Nagpur Bench, Nagpur in the various group cases of assessee for AY 2006-07 to AY 2009-10.

16.0 On perusal of assessment order, remand report and evidence on record, it is seen that the entire addition made in the assessment framed is based on the seized documents inventorized as B-1 to 65, The A.O. has analyzed the said documents and has found that the various amounts shown a receipt in the said documents are withdrawals from bank accounts of assessee as well as from the bank accounts of sub contractors. It is for this reason the conclusion has been drawn by A.O. that payments made to sub contractors are bogus. The A.O. had examined 21 sub contractors as is evident from the assessment order and had identified a sum of Rs. 54.40 crores till date of assessment to be credit entries in the seized document having nexus with withdrawals from the bank accounts of sub contractors. In the assessment order A.O. has computed total addition to be made at Rs.182.52 crores being credits in the seized documents. The sum of Rs. 54.40 crores was added at the hands of respective assesses in the group on the basis of credits appearing in the bank accounts of sub contractors. A sum of Rs. 128.12 crores was assessed at the hands of various business entities of the



group in ratio of business receipt. The methodology adopted by A.O. while distributing the addition on estimate basis itself indicates that the books of account have not been accepted and have been rejected while determining the assessable income at the hands of assessee. In the case of assessee in regular assessment proceedings books of account were rejected and income was estimated as net profit percentage of business receipt at the hands of various business entities of assessee group. In the course of remand proceedings, the A.O. had made further exercise to identify the credit entries in the diary having nexus with withdrawals from the bank accounts of sub contractors. The A.O. in the remand report has made general observation that the credit entries in the seized document are withdrawals from the accounts of sub contractors. However in remand report no specific amount/name of sub contractor has been identified by him as to credit of whom it was in the seized document. The exercise in the remand proceedings was only to demonstrate that the credit entries in the seized document are in relation to amounts withdrawn from the bank accounts of sub contractors. It is seen that the work executed by assessee group is mainly in relation to work of various government organizations. The State Government has due process of verification as regards to quality and quantity of work executed before release of payment. In the case of assessee the work is allotted by Government year after year. This itself is demonstrative for the fact that the State Government has no question as to quality and quantity of work executed by assessee. The execution of work is not disputed by A.O. In the case of assessee work executed is undisputedly through sub contractors. In view of payments made by assessee to sub contractors cannot be outrightly rejected as is being attempted by the Id. A.O.



16.1 On perusal of various observations made in the assessment order as regard to seized documents inventorized as B-1 to B-65, it is evident that the aforesaid documents do not pertain to any one of the business entities of assessee group. The aforesaid seized document had been maintained by late Shri Gotulalji Bhangdiya on memorandum basis for making the notings in respect to handling of cash relating to activities of business. The receipt side of assessee's diary has been concluded by A.O. to be out of withdrawals from the

bank account of assessee group as well as from the bank accounts of sub contractors. In the assessment order as well as in the remand report submitted by A.O. there is no allegation that the receipt side of the diary contains any receipt over and above in respect to activities of business declared by assessee in the return of income. In other words, the credits appearing are in respect to activity of execution of the various works for Irrigation Department and other government agencies.

16.2 In the case of assessee much prior to the date of search an action 133A of I.T. Act 1961 has taken place on 17/2/2009. In the case of assessee payments made to various sub contractors was a matter of dispute by the A.O. pursuant to survey proceedings. A.O. had alleged in the course of survey proceedings that the expenditure claimed on account of payment to sub contractor is bogus/inflated. The regular assessments have been framed in the case of assessee for the assessment years 2006-07 to 2008-09 wherein in the payments made to sub contractor have not been accepted and net profit rate was applied in regular assessment framed. In fact assessments framed subsequent to survey proceedings for assessment years 2006-07 to 2008-09 have again been framed as re-assessments for above stated assessment years in terms of provisions of section 153A of I.T. Act 1961.

16.3 The seized document is not pertaining to any single entity and it is record maintained in respect to movement of money by late Shri Gotulalji Bhangdiya in the form of cash flow. The aforesaid submission of assessee has also been affirmed by two employees in whose handwritings the seized documents are found to be written.

16.4 The analysis of income assessed by the AO in percentage terms in the various years falling in the block period as under:

Income from Contract Business Assessed By AO in %

Particular	AY 2006-07	AY 2007- 08	AY 2008-09	AY 2009- 10	AY 2010- 11	AY 2011- 12	AY 2012-13
M/s. M G Bhangdiya	11.79%	41.27%	35.60%	18.60%	27.46%	49.50%	
MKS Constro Venture P. Ltd.							9.34%
M/s. Mahendra Construction	10.78%	43.13%	25.44%	11.04%	21.79%	33.05%	27.73%



M/s. Mahendra Const. & M.G. Bhangdiya JV		49.53%	73.44%	17.69%	41.81%	16.03%	
M/s. K.M. Bhangdiya	11.97%	23.39%	26.76%	26.26%	15.22%	13.94%	
MKS Acme Build P Ltd							10.28%
M/s. M G Bhangdiya and Hitbhav Engg JV			66.53%	11.98%	27.83%	0.00%	
M/s. M G Bhangdiya and SS PATIL JV		54.82%	129.92%	13.18%			
M/S K M Bhangdiya JV					25.28%	39.52%	
Mitcon Infra Project P Ltd					10.07%	10.00%	10.00%
Consolidated	12.36%	47.01%	74.36%	18.52%	34.25%	49.97%	44.59%

The income assessed in various years by the Id. AO varies from 9.34% to 129.92% and brings in absurdity in income determined with reference to business receipts for various years under consideration. The above analysis also fully justifies, the determination of income should be at net profit rate of receipts at the hands of appellant group.

16.5 *The perusal of the assessment order would make it evident that the source of income of the various business entities of the various group is only in respect to execution of government contracts and it has no other major activity of business where from the income is derived or generated. The notings found in the seized documents are part of the gross receipt received from the government department. The various notings in the seized document are part of the gross receipt of contract received by group entities is not disputed. The inference drawn by A.O. is that the entries in the seized document are by inflating the sub contract payments which have been utilized for incurring illegal expenses. In the case of assessee no corroborative evidence or material was found during the course of search or anything has been brought on record subsequently in the course of assessment proceedings to establish that the notings made in the seized document are in relation to incurring of any illegal expenses. Thus, the AR has pleaded that the explanation submitted by assessee as regard to movement of money noted by late Shri Gotulajee Bhangdiya is plausible and reasonable explanation which has been disbelieved/discarded for no valid justification. I find substantial force in the submission of appellant.*

16.6 *The perusal of the seized document would make it evident that it cannot be identified to one individual business entity of assessee group. The transactions noted in the seized document are of mixed nature being business, personal and investment. The document being not related to*



any one identified entity, the notings made cannot be held as unexplained credit to be apportioned amongst the various business entities. In fact, even as per the A.O. the seized document does not belong to any one assessable individual. In the absence of seized document being identified to any one individual entity and same being not identified to any business entity, it cannot be held to be as belonging to business entity so as to make estimated addition at the hands of various business entities in proportion to the turnover.

16.7 The A.O. at para 6 of the assessment order has observed that the assessee group for AY 2006-07 to 2012-13 has debited Rs.361 crores towards sub-contract payment out of gross contract receipts from the Government totaling to Rs.579 crores which is more than 62% of gross receipts. It is seen that sub-contract payments include various payments to associate concerns which are considered as receipts in the case of associate concerns for making assessment by same A.O. The actual payment to outside sub-contractors is Rs.263 crores only which is 45% of gross contract value. The finding of A.O. to the extent of sub-contract expenses at 62% is factually not correct.

16.8 In assessment order at para 5.1, the A.O. has discussed the significance of the diaries B1 to B65 and has observed as under:

"The analysis of the entries in the diaries reveal that on receipt side various receipts including receipts from withdrawals from bank accounts of group entities and subcontractors were recorded and on payment side entries of expenses like interest payments, repayment of loans, deposits into bank accounts, house hold expenses, personal expenses, payments to various persons in cash, investment in properties etc, were recorded. For the F. Y. 2006-07 to 2008-09 and 2011-12 the cash books and the ledgers mainly contain the cash receipts and the payment entries in cash. It is interesting to observe that some of the entries in these diaries were also reflected in the regular books of accounts maintained by the assessee group. "



In the same para in answer to question No. 30 from the statement of Shri Mitesh Bhangadiya recorded on oath on 20/07/2011 it is evident that it is stated that seized documents are details of cash flow. The A.O. at page 9 in the same paragraph has observed that they contain probable extraneous gratifications. It is evident that A.O. has no evidence on record for any illegal gratification but observation is made on inferences and presumption. The observation at para 5.1 infact clearly explain the nature of entries found noted in the seized document to be in the nature of cash flow. The A.O. has also recorded that receipts are from bank accounts of group entities and subcontractors. On the face of such observation conclusion of A.O. holding that credit entries are assessable income at the hands of assessee as unexplained credits is unjustified.

16.9 The A.O. at para 6 of assessment order has discussed the nature of sub-contracts. The A.O. has on enquires from bank account found that withdrawals made has been credited in daily cash balance of diaries. The A.O. on inference has observed that same are utilized for unaccounted payments. The A.O. at page 17 has observed that most of the sub-contractors are name lenders and are of meager names and some are employees. The names observed are Shri Kesharsingh Rotele and Firus Khan etc. It is seen that both individuals as observed are assessed by same A.O. The income from sub-contract work done for assessee has been accepted in the assessment framed u/s 143(3)/153C of I.T. Act 1961 on the same date. The receipts from assessee having been accepted for assessing income at the hands of such individuals, payment made by assessee cannot be doubted as non genuine at the hands of assessee. Similarly A.O. has observed names of other subcontractors. Out of names of sub-contractors observed Shri Sanjay Malani, Shri Chintaman M. Nakade, Shri Vishal Rachalwar, Shri Dwarkadas M. Bhutada, Shri Dnyaneshwar Meshram and Shri Suresh Masram have been assessed u/s 153C by the same A.O. The receipts from assessee having been accepted for assessing income at the hands of sub-contractors, payment made by assessee cannot be doubted as non-genuine at the hands of assessee.



16.10 The A.O. at para 7 has made analysis of diaries marked on B1 to B65. A.O. at para 7.1 it is categorically observed that receipt side contains amount withdrawn from banks of assessee group concerns and individuals. The financial year wise receipts entered in these diaries were computed at 182.52 crores. It is strange that A.O. at one hand observed that withdrawals from bank account of business concern and individuals is credited on left side of the diaries and at the same time he concluded the same as unaccounted income. The A.O. has not doubted the deposit in the bank account of assessee. In fact they are deposit of receipt which are considered as income withdrawals of such amount cannot again be assessed as income. This clearly shows incorrect and unjustified approach for determining the income.

16.11 The A.O. has observed in various part of assessment order that amount withdrawn from diaries is utilized for unaccounted payment or unallowable expenses like gratification paid to various politicians and Government employees. The assessment record does not show any corroborative evidence on record to hold that assessee has made payment of any illegal gratification. In fact A.O. at page 9 has observed that payment made in cash is for probable extraneous gratification which supports the submission made that assessee has not paid any illegal gratification. The conclusion of A.O. is on assumptions and presumptions which are unjustified. The A.O. although has computed payments out of seized documents out has not brought on record any corroborative evidence to support his inference/ conclusion drawn.

16.12 The working made by A.O. at page 36 to 38 about analysis of payment out of seized documents are just adverse inference drawn on assumptions and is not based on any corroborative evidence on record.

16.13 The A.O. at para 8 has observed as to confronting of seized documents to assessee. The replies submitted have been partly reproduced. It is seen that in the course of search the statement of the assessee was recorded on 20/07/2011 and assessee has explained in answer to question No.30 that seized documents are details of cash flow and same has been reproduced in assessment order on page 5. During the



assessment proceedings too, the assessee has explained that the diaries are notings for movement of cash in reply to question No. 23 in the statement recorded on 27/07/2013. The assessee all along in the course of assessment proceedings had explained that the seized documents are to be in the nature of notings for movement of fund. It was explained in the course of assessment proceedings that the sub contractors on withdrawal of money from their bank accounts used to keep in trust/safe custody the amounts which are found to be noted in the seized documents. The explanation submitted by assessee was verified by the A.O. and it was found that the withdrawals made from the bank accounts of the sub contractors is on certain occasion credited in the seized document. It was further explained that the amounts credited in the seized document being the amounts received from the sub contractors were remitted to the sites where such sub contractors work executing the work. The amount remitted was through any representative of the sub-contractor or any person going to various sites which are located at remote places. The seized document contains notings in respect to handling of cash by late Shri Gotulalji Bhangdiya who has expired in April 2011. The assessee in the course of assessment proceedings has explained to best of his ability as to how notings happened to be made in the seized document. The statement as made at the time of search continued to be the same in the course of assessment proceedings that the seized documents are in respect to movement of cash with regard to activity of business, personal expenses and investments made by assessee. The Investigation Wing of the Department nor the A.O. in span of almost more than three and half years have not brought any evidence on record to show that the various notings made in the seized documents are in relation to any illegal expenses incurred by assessee. The explanation submitted by assessee was substantiated by submitting independent evidence of affidavits of sub-contractors that they had collected back the amounts deposited with late Shri Gotulaljee Bhangdiya. The various persons who had submitted the affidavits have not been cross examined subsequent to affidavits submitted and nor any material or evidence on record has been brought to dislodge the averment made in the affidavits. The contents of the affidavits have gone unrebutted and have to be taken as true and correct. The



aforesaid proposition is in line with the law laid down by Hon'ble Apex Court in the case of Mehta Parekh reported at 30 ITR 181 (SC) wherein it has been held that:

"No further documents or vouchers in relation to those entries were called for, nor was the presence of the deponents of the three affidavits considered necessary by either party. The appellants took it that the affidavits of these parties were enough and neither the AAC, nor the ITO, who was present at the hearing of the appeal before the AAC, considered it necessary to call for them in order to cross-examine them with reference to the statements made by them in their affidavits. Under these circumstances, it was not open to the Revenue to challenge the correctness of the cash entries or the statements made by those deponents in their affidavits."

16.14 The A.O. has observed that the various sub contractors in the case of assessee are bogus. The A.O. has listed the names of such sub contractors at para 9.1 of the assessment order. It is observed that the aforesaid sub contractors are also assessed by the ACIT, Central Circle-2 (1), Nagpur who is also the A.O. of assessee group. In cases of such sub contractors notices under section 153C of I.T. Act 1961 were issued and returns were submitted by such sub-contractors pursuant to receipt of notice under section 153C of I.T. Act 1961. The assessments have been framed under section 153C of I.T. Act 1961 by the same A.O. wherein income returned in respect to business income shown arising to such sub contractors out of receipt received from the assessee have been accepted. The A.O. having accepted the business receipt at the hands of sub contractors for determining the income in the cases of sub contractors could not have concluded that the payments made by assessee to such sub contractors are bogus.

Considering the entire evidence on record and fact that in the case of assessee books of account have not been accepted in the past assessment years, I am of the considered opinion that assessee's income in the case of assessee needs to be estimated on the basis of business receipts and that would be most appropriate and reasonable manner for



determination of income at the hands of assessee group. The addition made by A.O. by referring to seized diaries is unjustified and unsustainable for various reasons observed hereinabove. The income of assessee need to be determined at estimated percentage of business receipt at the hands of respective assessee's of group.

17.0 It is settled proposition of law that the income sought to be taxed should be in the nature of real income of assessee. The aforesaid proposition is in line with the decision of Hon'ble Apex Court in the case of Sanjeev Woolen Mills vs. CIT reported at 279 ITR 434. In the case of assessee the A.O. has made addition during the block period to the tune of Rs.182.52 crores. The addition made is over and above income offered by assessee in the return as additional income of Rs.26 crores offered during the course of search and Rs. 11 crores offered during the course of survey proceedings for the years falling in the block period. In the course of search assessee is not found to have possessed any such huge undisclosed assets so as to justify assessment of such huge income at the hands of assessee. The addition made by A.O. of such huge income cannot be held to be justified on principle of real income as settled by Hon'ble Apex Court. The addition made by A.O. thus is clearly excessive and unreasonable.

18.0 It is seen that in assessment framed in the case of M/s. Admane Construction Co. for assessment year 2005-06, A.O. had made additions in respect to bogus labour payments, bogus sundry creditors and other disallowances. In the appeal filed by such assessee before CIT (Appeals) it was held that the income needs to be determined at the estimated percentage of business receipt towards civil construction and accordingly it was directed to assess net profit at 8% of the contract receipt. The department challenged the matter before the Hon'ble ITAT seeking to sustain specific additions on account of bogus labour payments and bogus trade creditors, The appeal filed by the revenue was dismissed by Hon'ble ITAT in ITA No. 93/Nag/2012 vide order dated 01/05/2013. The appeal filed by the revenue against the order of ITAT has also been dismissed by the Hon'ble Bombay High Court, Nagpur Bench in ITA No. 134 of 2013 vide judgment dated 09/12/2015. The ratio laid down in



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the aforesaid case fully supports the submission of the assessee that in the case of assessee determination of income on estimated basis is most reasonable and rational manner for determining the tax liability at the hands of assessee.

19.0 In the case of Shri Mitesh Bhangdiya and Group, an action under section 133A of I.T. Act 1961 was also taken by the Department on 17.02.2009 prior to the date of search. In the course of survey under section 133A of I.T. Act, 1961, the statements of various sub-contractors were recorded and the verification of the records maintained by assessee group was undertaken by the A.O. having jurisdiction. In the course of survey action in pursuance to discussion with the A.O. and after considering the fact that no complete record was available with assessee as well as with the subcontractors executing the work, it was agreed to offer additional income at Rs. 11 crores amongst the various business entities the Bhangdiya group for the assessment years 2006-07 to 2009-10. The aforesaid assessment years covered by survey action are also forming the part of the block period which is assessed in terms of provisions of section 153A of I.T. Act, 1961. In the case of the assessee group, prior to the date of search, regular assessments were completed up to assessment year 2008-09. In the regular assessments framed, the AO after considering the additional income offered at the time of survey proceedings and the facts and circumstances on record including that payments made to sub-contractors and various defects/mistakes as found during the course of survey, had estimated the net profit at 14% of the net receipts computed at the time of assessment proceedings. The aforesaid estimated addition made at the hands of assessee were subject matter of challenge before CIT(Appels), Nagpur. During the period while appellate proceedings were pending, action under section 132(1) of I.T. Act, 1961 had taken place at the business premises of assessee group on 19.07.2011. The CIT(Appels) after noticing the fact as regard to action under section 132(1) of I.T. Act, 1961 at the premises of assessee and considering the additional disclosure made by assessee group in the course of search proceedings, had dismissed the appeal filed by assessee vide order dated 05.03.2012.



20.0 The order passed in the case of assessee in appellate proceedings was challenged before Hon'ble ITAT, Nagpur Bench, Nagpur. The Hon'ble ITAT, after considering the entire material facts and evidence on record, concluded that assessee group to be assessed at 12% of the receipts and thereby granted part relief in the cases of various assesses of Bhangdiya group.

21.0 It is thus seen that prior to proceedings having been initiated under section 132(1) of I.T. Act 1961, an action under section 133A of I.T. Act 1961 had taken place at the business premises of assessee on 17.02.2009. Pursuance to action under section 133A of I.T. Act 1961, a lump-sum amount was offered for taxation in respect to various assessment years which are also forming part of block period for the search. In the case of assessee books of account were not accepted and were rejected in assessment framed under section 143(3) of I.T. Act 1961. It is a fact on record that books of account had not been accepted for the purpose of framing assessment at the hands of assessee. In view of the above verification of entries with reference to regular books of account loses relevance and has no bearing for determining assessable income in the hands of assessee.

22.0 In view of the above facts and circumstances and keeping in view of various infirmities and various judicial decisions as discussed in foregoing paras of this order and to meet ends of justice, to my considered opinion, it would be fair and reasonable to adopt the net profit @ 16% on the gross receipts of Rs.579 Crs.; being the turnover of the various group concerns for the block period from AY 2007-08 to AY 2012-13 in the respective years of the block and bring the same to the taxation on the guidelines determined by the Hon. ITAT, Nagpur Bench, Nagpur in ITA No.268, 269 & 285/Nag/2012 vide order dtd.07.03.2013 on the similar activities of business as well as deficiencies found in the case of the appellant during the course of survey action conducted at the premises of the appellant group on 17.02.2009. The relevant facts as emanated from para-4 of the order of the Hon'ble ITAT in the case of the appellant are as under:

"4. Brief facts of the case are that a survey u/s. 133A of the Income Tax Act, 1961 was carried out in the business



premises of the assessee and his associates on 17.02.2009. During the course of survey operations it was found that most of the bills, vouchers and other evidence in support of the entries in the books of account like labour charges, material purchases, 'machine hire charges, site expenses, sub contract expenses, oil and lubricants, repairs and maintenance etc. pertaining to this A.Y. were not available. Statement of Sri Mithesh Bhangadiya was recorded under Section 133A and u/s. 131 of the Act on behalf of the assessee. In the statement dt.24.02.2009 and 13.03.2009, in response to various questions relating to the genuineness of the payments to third party sub contractors and in respect to other deficiencies, the assessee admitted additional income in group cases of Rs. 11 crore and proportionately were allocated between all the assessment years relating to these four assessee. For the year under consideration i.e. for assessment year 2006-07 in case of Sri Mithesh Bhangadiya, the additional income was offered at Rs.23,97,361/- besides the income shown originally at Rs.23,63,910/-. Due tax was paid before the issuance of notice under Section 148 as admitted by the AO in para 2 of his order. The important contents of submission recorded on 24-02-2009 and 13-3-2009 of Sri Mithesh Bhangadiya are incorporated in the order of the AO. In query of question No. 11, it was answered that during the course of survey, it was noticed that there are certain discrepancies and omissions and to cover up all such discrepancies we have made out mind to offer additional income over and above the regular income. We are under the process to determine such additional income to avoid litigation and, to buy peace of mind. Thereafter in response to question Nos. 18 & 19 of the statement recorded on 13-3-2009, it was answered that the sub contractors were awarded the sub contract work by our firms as per contract notes and the nature of sub contractors has been that labour charges and machine hire charges. The sub contractors by and large illiterate and therefore, their books of accounts found to be incomplete, without maintenance of any bills and vouchers. The expenses incurred by our firm has been on the basis of the so called vouchers raised by them and therefore, there appears the discrepancies in the expenses claimed. It was further stated that the assessee has admitted in his previous statement recorded during the course of survey that there are certain discrepancies and anomalies in the sub contract expenses in their books of accounts, non availability



of bills and vouchers for the past three assessment years. Accordingly, it was submitted that there were certain discrepancies and anomalies in the sub contract accounts, in books of accounts for assessment years 2006-07 to 2009-10. The assessee declared the additional income of Rs. 11 crore in their firm and the five sister concerns in the assessment year 2006-07 to 2009-10. The working of the additional income of Rs. 11 crores will be done accordingly and the same will be shown. These part of the statements have been incorporated in the order of the AO as state above. Thereafter the AO started scrutiny of the case. The AO noted that the assessee has shown various expenses under the head labour & wages, machine hire charges, site expenses and sub contract expenses etc. on very higher side, which are not supported by valid vouchers. Neither any further evidence was filed. It was also observed by the AO that since there are various deficiencies in accounts of sub contracts and the assessee has offered a sum of Rs. 23,97,361/- on account of discrepancies in respect to sub contract, therefore, he proceeded to make further addition on account of various deficiencies i.e. in absence of bills and vouchers, excess claim towards machinery hire charges, verification of applicability of provision of Section 194C and denial of alleged sub contractors regarding the sub contract given by the assessee. All these discrepancies are noted by the AO in his order. Thereafter in para 7, the AO has observed that after having rejected the books of account of the assessee under Section 145(3) of the Act, the profit of the assessee has to be estimated reasonably. The AO also observed that the assessee has declared net profit ratio of 6% and 7% of the total turnover in assessment years 2006-07 & 2007-08. After offering additional income of Rs.23,97,360/- for assessment year 2006-07, the results in revised net profit comes to 12.87% of the contract receipts. However, this net profit was found by the AO on lower side. The AO noted that in one of the group case namely, M/s. Mahendra Construction & M.G. Bhangadia (JV) , who had declared additional income of Rs. 1,57,47,760/- in the Assessment Year 2007-08, which gives a net profit ratio of 13.84% of the net contract receipts. In view of these facts the AO adopted 14% net profit. Thereafter the AO completed the assessment and made addition of Rs. 30,12,722/- against additional income shown by the



assessee at Rs. 23,97,360/-, which resulted further addition of Rs.6,15,362/-."

23.0 On the above material facts, the matter was carried over to CIT (A), Nagpur who has confirmed the net profit adopted @ 14% by the AO on the gross receipts emanated from the records. On subsequent appeal the Hon'ble ITAT, Nagpur Bench, Nagpur after considering the above material facts, has directed the AO to adopt the net profit @ 12% of the gross receipts. The relevant finding of the Hon'ble ITAT, Nagpur Bench, Nagpur in the case of the Bhangdiya group on the identical material evidences impounded during the survey action is reproduced below for better appreciation of facts:

"7. After considering the submission and perusing the material on record, we find that the assessee deserves to succeed in his appeal in part. We noted for the year under consideration i.e. for assessment year 2006-07, the assessee's NP rate comes to 12.87%, for assessment year 2007-08, the assessee's NP rate comes to 10.53%, respectively. We also noted that if the NP rate of all the concerns are taken into consideration, then it is seen that all the assesses have shown government receipt at Rs.258,55,37,850/- and income on these contracts have been shown by these assessee at Rs.6,49,57,111/- which gives a NP rate of 6.38%. The assessee has offered additional income declared during the survey at Rs. 11, 03,85,877/-, which gives a NP rate of 4.27% and the total NP rate in all these concerns comes to 10.65%. Of course, the additional income of Rs. 11 crore or odd was segregated proportionately on the basis of contract receipts in the hands of each concern. In case of M/s Mahendra Construction & M.G. Bhangadia (JV), the NP rate comes to 13.84% i.e. for assessment year 2007-08 and this rate has been adopted by the AO and has applied the NP rate of 14% in all the years in case of all these assesses on whom a survey was conducted. In view, this approach of the AO was not correct approach. In case of M.G. Bhangadiya, the NP rate of three years come to 9.87%, whereas in case of other assesses i.e. Sanjay Heda, M/s Mahendra Construction & M.G. Bhangadiya (JV), the NP rate comes to 9.50% and in case of M/s Mahendra Construction & M.G. Bhangadiya (JV), the average NP rate of three years comes to 11.28% and in case



of M/s Kirtikumar Bhangadiya, the NP rate comes to 8.72% and in case of M.G. Bhangadiya and M/s Mahendra Construction & M.G. Bhangadiya (JV), the NP rate comes to 6.12%. In case of M.G. Bhangadiya and S.S. Patil & M.G. Bhangadiya, the NP of three years comes to 11.55%. As stated above, the average NP rate of all the assesses for all the three years comes to 10.65%. Therefore, in our view, a rational approach should have been adopted by the AO or by the learned CIT (A). For one case i.e. M/s Mahendra Construction & M.G. Bhangadia (JV), the NP rate was 13.84% and if this rate is applied in all other cases, which in our view, is not justified. However, there is also no dispute that there were so many discrepancies in maintaining vouchers, bills, sub contracts accounts and other heads, which were not verifiable, therefore, the assessee and his group came forward to offer an additional income of Rs. 11 crore and the same has also offered and due tax has been paid. Since as stated above, there are certain discrepancies, we are of the view, that if NP rate of 12% is adopted instead of 14%, that will meet the end of justice. We made it clear that where NP rate shown by the assessee in any year is more than 12% then the more NP rate shown by the assessee has to be taken as assessee has declared himself and in other years where NP rate shown by the assessee is lower than 12%, then 12% NP rate has to be taken. The AO will recomputed the income accordingly. For the sake of clarification, in case of assessee for assessment year 2006-07, the NP rate comes to 12.87% after showing the additional income, therefore, the income shown by the assessee has to be accepted. However, for assessment years 2007-08 & 2008-09, the NP rate shown by the assessee after additional income comes to 10.69% and 10.53%. The AO will adopt the rate of 12% and will compute the income accordingly. "



24.0 On careful examination of records, it is found that the evidences surfaced from the material found and seized in the course of search & seizure action conducted at the premises of the appellant are identical and similar in nature. The Hon'ble ITAT, Nagpur Bench, Nagpur has delivered its judgement directing the AO to adopt 12% of the gross receipts as net profit and bring the same to tax. It is also vital to mention that the block period for search comprises of 07 assessment years i.e. AY 2006-07 to 2012-13. The survey

period comprises of assessment years i.e. AY 2006-07 to 2009-10 in which the Hon'ble ITAT has delivered its judgment. Thus, the AY 2006-07 to 2009-10 in the case of the appellant group are overlapping in respect of survey and search proceedings, where the facts and activities are similar in nature.

25.0 The Id. AO in para-6.4 of his order has recorded a finding that statements of 17 sub-contractors to whom payments have been made by Bhangdiya group under the head sub-contract payments were recorded during the survey proceedings as well in which they have confessed that they were mere name lenders. At page 2 & 3 of the assessment order for A.Y. 2007-08, dated 31/12/2009 question and answer of Shri Mitesh Bhangdiya from the statement recorded on 13/03/2009 during the survey proceedings are reproduced. Perusal of question answer reproduced in the said assessment order indicates that during survey proceedings, it was found that sub-contractors were non-existent and some have denied of carrying out the full quantum of works. The sub-contractors had not kept proper record. A finding to that affect that three of the sub-contractors have denied of carrying out the contract works is also found noted at para no. 7.1 of the said order. Thus the finding of the Id. AO that the issue of payments to sub-contractors and the genuineness of such sub-contractors in question was similar to that in the survey proceedings conducted on 17/02/2009. Therefore, the facts and the circumstances and the nature of evidences found and seized during the course of search action and the survey action prior to search action in the case of the appellant are similar. Therefore, the ratio of the decision of the Hon. ITAT Nagpur Bench, Nagpur in the case of the appellant for survey appeals for AY 2006-07 to 2009-10 is mutatis-mutandi applicable to the present appeals more particularly; when four assessment years i.e. AY 2006-07 to 2009-10 pertaining to survey period are also forming the part of the block period for the search action. The AO in para-6.5 has mentioned that in the absence of some of the sub-contractors, the statement of their father was recorded and based on such statements has concluded that some of the sub-contractors were found to be employed with the Bhangdiya group as drivers etc. In this regard, it is vital to mention that the statement of father of the sub-contractor is not of any consequence so far



as the transactions have been performed by the sub-contractors. Therefore, such statements are inadmissible under the law. It is also vital to mention that the Id. AO in the case of the appellant for AY 2006-07 has accepted the income declared by the appellant u/s 153A @ 12% of gross receipts under similar circumstances. Thus the Id. AO having admitted the income declared by the appellant @ 12% in AY 2006-07, is not justified in making huge additions in subsequent assessment years.

25.1 Since, the facts and circumstances in the years under appeal are similar to that of the facts and circumstances brought out by Hon'ble ITAT in its order as reproduced above for AY 2006-07 to 2008-09 wherein the Hon. ITAT, Nagpur Bench, Nagpur has dealt with similar activities and situations as found during the course of survey action covered by these years. The only material difference however is that in the years under appeal, the search action has also resulted into detection of unaccounted assets to the tune of Rs. 26 Crs . and unaccounted jewellery of Rs. 2.37 Crs . which had not been disclosed by the appellant group in their respective returns filed nor the sources for acquisition of such assets could be explained satisfactorily. Therefore, to cover up the investment in undisclosed assets and jewellery, the net profit is directed to be adopted at the enhanced rate of 16% of gross receipts of Rs . 579 Crs . as against 12% determined by the Hon. ITAT because the issue of undisclosed investment in assets and jewellery was not there before the Hon. Tribunal in the appeals against the orders passed pursuant to the survey proceedings. But in the present appeals, the issues relating to undisclosed investment in assets and jewellery are also involved, therefore, to cover up the undisclosed investment in such assets and jewellery to the tune of Rs.26 Crs. and Rs. 2.37 Crs., the net profit is directed to be adopted at enhanced rate of 16% of gross receipts of Rs. 579 Crs. of the group. Accordingly, in the case of the appellant the total income is determined @ 16% of the gross receipts in each year.

25.2 Therefore, respectfully following the decision of Hon. ITAT, Nagpur Bench, Nagpur, to my considered opinion, in the facts and circumstances of the case, it would be fair and reasonable to meet the ends of justice to estimate the net profit on the total turnover of Rs. 579 Crs. on the guidelines



set in by Hon. ITAT in the case of the appellant on the similar set of facts. The facts and circumstances and the material evidences found and seized in the course of search action are similar to that of the evidences detected in the course of survey action as is evident from the finding of the Hon. ITAT in its order in the case of the appellant as reproduced above except that in the course of search action assets worth Rs.26 Crs. and jewellery worth Rs.2.37 Crs. were found as undisclosed assets. Therefore, to cover up the undisclosed investment in the immovable assets of Rs. 26 Crs. and in jewellery of Rs. 2.37 Crs. the net profit is directed to be adopted @ 16% of total turnover of Rs. 579 Crs. which comes to Rs. 92.64 Crs. which in my considered opinion is the reasonable income which could be determined from the activities of business of the assessee group for the block period.

25.3 In the case of assessee group work received from Government is executed by assessee itself or through any of the sister concern. In the case of assessee group subsequent to 133A proceedings on 17/2/2009 assessment were framed by estimating net profit on receipts for Asstt. Year 2006-07 to 2008-09. The assessment proceedings initiated for Asstt. Year 2009-10 pursuance to survey stood abated in view of action u/s 132(1) of I.T. Act 1961 in term of provision of sec. 153A (2) of I.T. Act 1961. In the regular assessment proceedings for Asstt. Year 2006-07 to 2008-09 net income was estimated on the receipts of assessee excluding the receipts for contract given to sister concern and offered as receipts at the hands of such sister concern. Similarly for estimating net profit at the hands of sister concern sum total of receipts from Government and from other sister concern were clubbed to determine receipts on which net profit was estimated. The above methodology for determining receipts for determining income was accepted by assessee as well A.O. in Asstt. Year 2006-07 to 2008-09 and such assessments have achieved finality in appellate proceedings. I, therefore direct that receipts for estimating income be taken at the hands of various business entities as per methodology adopted by A.O. for Asstt. Year 2006-07 to 2008-09 in regular assessment framed subsequent to 133A proceeding on 17/2/2009 and net profit at 16% be applied on such receipts of Rs. 579 crores for all the years falling within the block period.



26.0 The search & seizure action resulted into detection of undisclosed assets worth Rs.26 Crs., which, according to the AO, were neither disclosed in the returns filed nor the sources for acquisition of the same could be explained satisfactorily. Therefore, the Id. AO has treated the same as undisclosed assets, however, allowed the telescopic benefit of undisclosed assets against the undisclosed income determined. The appellant has not filed any additional evidence to explain the undisclosed assets, hence the same remains unexplained. However, since, the income directed to be determined @ 16% of gross receipts at Rs. 92.64 Crs. Covers up the undisclosed assets, therefore, the issue is not required to be revisited again.

27.0 During the course of search action, the gold jewellery studded with precious stones found from the residential premises at Dhantoli, Nagpur was valued at Rs. 2,63,00,660/- by the Government approved valuer. However, the jewellery declared by various family members of the group in their respective balance sheet as on 31.03.2011 was only to the tune of Rs . 25,38,737/-Shri Mitesh Bhangdiya in his statement recorded u/s 132(4) on 20.07.2011 has admitted that the balance jewellery of Rs. 2,37,61,923/- has not been accounted for in the regular books of account. Therefore, the excess jewellery found of Rs. 2,37,61,923/-, according to the AO, represents the unaccounted investment in the jewellery in the hands of the Bhangdiya group. However, since the unexplained investment in jewellery is covered by the undisclosed income assessed in the hands of the Bhangdiya group, therefore, this issue also does not required to be revisited during the appellate proceedings as the Id. AO has also allowed the telescopic benefit of the same against the undisclosed income determined.



25. Coming to the evidentiary value of the impounded loose sheet mentioned elsewhere, the Hon'ble Supreme Court in the case of Common Cause (A Registered Society) and Others vs. Union of India and Others in Writ Petition Civil Appeal No. 505 of 2015 has observed as under:-

16. With respect to the kind of materials which have been placed on record, this Court in V.C. Shukla's case

(supra) has dealt with the matter though at the stage of discharge when investigation had been completed but same is relevant for the purpose of decision of this case also. This Court has considered the entries in Jain Hawala diaries, note books and file containing loose sheets of papers not in the form of "Books of Accounts" and has held that such entries in loose papers / sheets are irrelevant and not admissible under Section 34 of the Evidence Act, and that only where the entries are in the books of accounts regularly kept, depending on the nature of occupation, that those are admissible.

17. It has further been laid down in *V.C. Shukla (Supra)* as to the value of entries in the books of account, that such statement shall not alone be sufficient evidence to charge any person with liability, even if they are relevant and admissible, and that they are only corroborative evidence. It has been held even then independent evidence is necessary as to trustworthiness of those entries which is a requirement to fasten the liability.

26. The Hon'ble Supreme Court further observed:-



17. From a plain reading of the Section it is manifest that to make an entry relevant thereunder it must be shown that it has been made in a book, that book is a book of account and that book of account has been regularly kept in the course of business. From the above Section it is also manifest that even if the above requirements are fulfilled and the entry becomes admissible as / relevant evidence, still, the statement made therein shall not alone be sufficient evidence to charge any person with liability. It is thus seen that while the first part of the section speaks of the relevancy of the entry as evidence, the second part speaks, in a negative way, of its evidentiary value for charging a person with a liability. It will, therefore, be necessary for us to first ascertain whether the entries in the documents, with which we are concerned, fulfil the requirements of the above section so as to be admissible in evidence and if this question is answered in the affirmative then only its probative value need be assessed.

27. With respect to evidentiary value of regular account book, the Hon'ble Supreme Court in the case of V.C. Shukla 1998 (3) SCC 410 has laid down:-

"37. In Beni v. Bisan Dayal it was observed that entries in books of account are not by themselves sufficient to charge any person with liability, the reason being that a man cannot be allowed to make evidence for himself by what he chooses to write in his own books behind the back of the parties. There must be independent evidence of the transaction to which the entries relate and in absence of such evidence no relief can be given to the party who relies upon such entries to support his claim against another. In Hira Lal v. Ram Rakha the High Court, while negating a contention that it having been proved that the books of account were regularly kept in the ordinary course of business and that, therefore, all entries therein should be considered to be relevant and to have been proved, said, that the rule as laid down in Section 34 of the Act that entries in the books of account regularly kept in the course of business are relevant whenever they refer to a matter in which the Court has to enquire was subject to the salient proviso that such entries shall not alone be sufficient evidence to charge any person with liability. It is not, therefore, enough merely to prove that the books have been regularly kept in the course of business and the entries therein are **correct**. It is further incumbent upon the person relying upon those entries to prove that they were in accordance with facts."



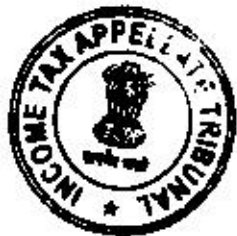
28. It is apparent from the aforesaid discussion that the loose sheet of papers are wholly irrelevant as evidence being not admissible u/s. 34 so as to constitute evidence with respect to the transactions mentioned therein being of no evidentiary value.

8. The Revenue as well as assessee being aggrieved has come in appeal before us.

9. Learned D.R., before us, vehemently relied on the order of the Assessing Officer. By referring to the assessment order, it was pointed out that the Assessing Officer has made the addition on account of the disallowance of bogus contract payment in the case of the assessee for block years from assessment year 2007-08 to 2012-13 by following a procedure for addition on proportionate basis. During the course of search & seizure operation, diaries in Annexure B-1 to B-65 were found. From these diaries, it was noticed that the Bhangdiya Group had inflated the expenditure by making the cheque payment and subsequently withdrawing the cash from the bank account of the sub-contractor who were merely name lenders. The Assessing Officer noted the total amount received by the Bhangdiya Group noted on the receipt side was to the extent of Rs.182.52 crores within the block period. The Assessing Officer, out of the said sum of Rs.54.40 crores found were the entries of withdrawal from the bank account of sub-contractor recorded in the seized diaries in proportion to the cheque payments. The various concerns of the assessee group had made the payment by account payee cheque to the sub-contractor. The said sum belongs only to 21 sub-contractors out of the total more than 100 sub-contractors. The assessee has contended that cash withdrawn from the account of the sub-contractors, which is found reflected in the diaries, were kept with Late Gotulaji Bhangdiya, father of Mitesh Bhangdiya by such sub-contractors, which was being sent to various sites for the use of the sub-contractors as per the requirement at the site. The Assessing Officer however, discarded the explanation filed by the assessee and took the view that all the 21 sub-contractors, which were duly examined by him, are merely name lender and amount paid to them under the head sub-contracts are bogus payment and correspondingly the receipt by way of withdrawal from the bank account of sub-contractor is liable to be added as unaccounted



income in the hands of the various group concerns in various assessment years of the block period in proportion to such payment. There are more than 100 sub-contractors. The Assessing Officer examined only 21 sub-contractors to which a sum of Rs.54.40 crores were correlated out of the sum of Rs.182.52 crores found on the receipt side of the diary. The Assessing Officer added the said sum of Rs.54.40 crores in the hands of the respective group concern of Bhangdiya Group in proportion to the amount of cheque credited by the respective group concern in the various assessment year falling in the block period. For the balance sum of Rs.128.12 crores, the Assessing Officer made his effort but cash withdrawal credited on the receipt side of the diaries could not be correlated with the bank accounts of the remaining sub-contractors. Therefore, the Assessing Officer added a sum of Rs.128.12 crores in the hands of the various group concern on pro-rata basis in proportion to the contract receipt declared by such group concern in various years falling within the block period. It was pointed out that the said diaries, which accounted for cash received during the block period to the extent of Rs.182.52 crores from assessee's group concern as well as sub-contractors through withdrawal from their respective bank account, also contains the details of the expenditure. The Assessing Officer noted that the assessee has made unaccounted payment to the extent of Rs.171.10 crore during the block period i.e. the assessment year 2007-08, 2008-09, 2009-10, 2010-11, 2011-12 and 2012-13 to the extent of Rs.7.99 crores, Rs.28.89 crores, Rs.19.17 crores, Rs.52.09 crores, Rs.50.33 crores and Rs.12.09 crores. These payments consist of the payment made towards gratification etc. by mentioning 'sir/saheb', payment towards Hawala to Mumbai and other destination, payment towards immovable properties transactions, payment towards house hold expenditure and other personal expenses, payment towards the donation. Some of the payments made



were recorded in the books of account so far it relates to the expenses but part of the payments were not recorded in the books of account for which our attention was drawn towards the assessment order especially para 5.1 in which the Assessing Officer made the analysis of entries in the diary. It was pointed out that on the payment side, entries of the expenses like interest payment, repayment of loan, deposit into bank account, house hold expenditure, personal expenses, payment to various persons in cash and investment in properties are found recorded. It is apparent from the diaries that the assessee's group made the payment to the sub-contractor during the aforesaid period to the extent of Rs.363 crores out of the receipt of Rs.579 crores. The part payment so made as payment to the assessee group itself proves that the payments to the sub-contractors were not genuine and therefore, the Assessing Officer was correct in law in making the addition to the extent of Rs.182.52 crore in the hands of the assessee and assessee's group concerns. The CIT(A) was not correct in deleting the addition and directing the Assessing Officer to make the addition by estimating the income by applying a net profit rate of 16%.



10. Learned A.R., on the other hand, before us, vehemently contended that the assessee and assessee's group concerns are executing the work of Irrigation Department and derives business receipts from State Government. The regular assessment for years falling within the block period from assessment year 2006-07 to 2008-09 have been completed by the Assessing Officer rejecting the book result by estimating the income. The returns for the block period in respect to notices issued u/s 153A have also been submitted declaring income on estimated basis considering the income disclosed u/s 132(4) of Income Tax Act 1961. The Assessee has declared in the return filed in response to the notice issued

u/s 153A of I.T. Act net profit @12% of receipts from Government Department. Gross receipts as shown by assessee for declaring income have been accepted and not disputed. In the assessment framed, estimated additions considering the seized documents are computed and assessed in terms of contract receipts declared in return. The CIT(A), after detailed discussion in his appellate order and submissions of assessee, has concluded that assessee is liable to be assessed at net profit of 16% of receipts resulting into upholding addition to the extent of 4% of receipts. The assessee is seeking relief in respect of the addition sustained by CIT(A) at 4% of the receipts from the Government. The only dispute on the basis of the seized documents is the claim of expenditure by the assessee on account of sub-contract expenses. The Revenue has alleged that the claim made by assessee in respect to sub-contract expenses is bogus/inflated. It was submitted that all the sub-contractors are assessed to Income Tax and are submitting return of income declaring income derived from the contract receipt received from the assessee. In course of regular assessment proceedings, assessments were framed in respect to certain sub-contractors wherein income was estimated in assessment years 2007-08 @10% of contract receipts and in assessment year 2008-09 @8% of contract receipts. The CIT(A) in first appeal of sub-contractors had held in assessment year 2007-08 net income @8%. The I.T.A.T. in the case of sub-contractor Manish Tumpalliwar in I.T.A. No.333/Nag/2012 vide order dated 05/02/2016 concluded that sub-contractor is liable to be assessed @5% of the receipts. Similarly in respect of all the sub-contractors, income is assessed from the payments received from assessee group. The income having been assessed on receipts being payment made by assessee group as sub-contract charges by ITAT, Nagpur Bench, Nagpur, there is no case for holding that sub-contract expenses claimed by assessee are bogus. Not



even this, the Assessing Officer in response to the assessment made u/s 153C for the sub-contractor has determined income accepting the receipts shown by them being payment made by assessee group to such sub-contractor. Once the Assessing Officer has accepted the receipts in the hands of sub-contractors and having determined income in the hands of sub-contractors ought not to have concluded that the payment made by assessee in respect to sub-contract is bogus. In this regard our attention was drawn towards the assessment order framed u/s 153C read with section 143(3) in the case of sub-contractor. It was further submitted that the Assessing Officer has given a categorical finding that the sum of Rs.182.52 crores found noted in the diaries on the receipt side is the amount which represents the withdrawals made by the assessee group from their bank as well as by the sub-contractor from their bank. The sub-contractors have categorically stated in their affidavit during the assessment proceedings that they used to keep the money with assessee's father for safe custody and for expenses to be incurred. Once the amount as shown receipt in the diary has come out of the contract receipt as well as sub-contract receipt on which the tax has already been paid, these receipts cannot be regarded to be unaccounted and no addition thereon can be made. In response to the notice issued u/s 153A, the assessee has made the additional disclosure to the extent of Rs.26 crores. Not only this, there has been survey operation u/s 133A conducted against the assessee group on 17/02/2009 i.e. during the block period. In the survey operation also there was allegation that the assessee has inflated the expenses especially contract expenses to earn unaccounted income. The statement of sub-contractors were recorded during the course of the survey. The assessee group has disclosed additional income due to certain discrepancies at Rs.11,04,48,592/- for



the assessment year 2006-07 to 2009-10. The group-wise additional income disclosed by the assessee were as under:

Sr No	Assessee Concern	Disclosure during Survey(in crores)
1	Mitesh Gotulalji Bhangdiya	0.66
2	Sanjay Rameshchandra Heda/ Mahendra Construction	1.08
3	M/s Mahendra Construction &M/s MG Bhangdiya JV	8.4
4	Kirti Kumar Bhangdiya	0.66
5	M/s M G Bhangdiya & Hitbhav Engineers JV	0.06
6	M/s S S Patil &Co and M/s M G Bhangdiya	0.14
	TOTAL	11.00



Thus, it was contended that the assessee has surrendered, during the block period, a total sum of Rs.37 crores (11 crores+26 crores), which the assessee has not set off against any expenditure. It was submitted that in the case of the assessee for the assessment year 2006-07 to 2008-09, ITAT, Nagpur Bench in I.T.A.No.268, 269 and 285/Nag/2012 vide order dated 03/04/2013 has held that net income @12% would be reasonable income in respect of the Government receipt in the hands of the assessee. In this regard our attention was drawn towards the order of the Tribunal filed before us. The Tribunal in the said decision has considered the order of the CIT(A) which in turn at page No.10 of the appellate order has noticed the action undertaken at the premises of the assessee u/s 132 of the Act on 19/07/2011. Thus, it was contended that the order passed by the Tribunal holding net profit @12% has been accepted by the Revenue

and has achieved finality. In view of this, CIT(A) was not correct in law in directing the Assessing Officer to estimate the income by applying a net profit rate @16%. The assessment for the assessment year 2006-07 has been framed subsequent to the search. The Assessing Officer has accepted the income as shown so also the receipt from the Government Department. The Assessing Officer accepted the income @12% of the receipt and such assessment has achieved finality. The Assessing Officer ought to have concluded that net profit should be determined @12% of the receipt for subsequent year. In the assessment order of some of group concerns, net profit has been accepted by the Assessing Officer @10% and 12% in assessment framed u/s 153A of the Act. The CIT(A) estimated the net profit @16% thereby upholding addition to the extent of 4% of the receipts. Learned A.R. also placed reliance on provisions of section 44AD of Income Tax Act which provides rate of net profit at 8% to be applied in respect to civil construction. The statutory rate of presumptive income is in respect of small contractors of turnover between Rs.40 lacs to 60 lacs in the impugned assessment year. The turnover of assessee being larger, the net profit could be assessed at lower than the presumptive rate. Reliance was placed by the Learned counsel for the assessee towards the decision ITAT, Indore Bench in the case of M/s. S.K. Jain in I.T.A.No.21/Ind/2013 order dated 17/04/2013. It was submitted that the said case was of Irrigation Contractor for Madhya Pradesh Government and there had also been search. In that case during the assessment year 2008-09, the books were rejected. Labour expenses were held to be bogus and vouchers being in the nature of Kachcha voucher were also rejected. Turnover of business was Rs.162.68 crores. The net profit was estimated @8%. The Tribunal finally held that net profit @6.25% was reasonable. The facts and circumstances of that case were also similar to the case of the assessee therefore, the net profit



shown by the assessee @12% was fair and reasonable. Reliance was also placed in the case of M/s. Chirag Infraprojects Pvt. Ltd. in which vide order dated 20/12/2013, the net profit rate of 9% has been held to be reasonable by the Settlement Commission in respect to Govt. receipts from State Government. In the case of assessee, the entire receipts from the State Government contract have been taken at Rs.579 crores therefore, the case of the assessee is comparable to this case. The net profit receipt shown by the assessee @12% ought to have been accepted. It was further submitted that in the case of the assessee group, the contract has been taken at Rs.579 crores by applying net profit @16% by the CIT(A). Out of the said contract receipt, certain deductions have been made towards royalty, VAT and insurance premium, which according to Learned counsel for the assessee should not form part of the gross receipt. Reliance was placed in this regard on the decision of Hon'ble Supreme Court in the case of Brij Bhushanlal Parduman Kumar 115 ITR 524 (SC). Attention was invited to the assessment order for the assessment year 2008-09 wherein the net profit was assessed after deducting the deduction on account of sales tax. Similarly, in the case of Shri Sanjay Heda, one of the group concern, in assessment year 2007-08 estimated the income on the net receipt after deducting the sales tax and royalty. Such method of determining the receipt on which net profit rate has been applied is also followed in assessment years 2006-07 and 2007-08. Reliance was also placed in this regard on the decision of Hon'ble Delhi High Court in the case of Piyarelal Harsingh vs. CIT 252 ITR 739 (Del). If the VAT, royalty and insurance premium are ^{ex}cluded, the net receipt of the group for the block period would be Rs.529.15 crores. Learned counsel for the assessee even contended that the assessee should be allowed the statutory allowance of the depreciation out of the profit estimated and confirmed by CIT(A). Statutory allowance has to be



allowed in view of the provisions of section 32 of the Act. It was further submitted that in order to honour the declaration made u/s 132(4), the entire group of assessee has surrendered Rs.26 crore and offered additional income in the return over and above 12% net profit income from business receipts. Thus, it was contended that income offered by the assessee being fair and reasonable, should be directed to be accepted.

11. We have heard the rival submissions, carefully considered the same along with the orders of the tax authorities below. We noted that the facts and the issue involved in all the years under appeal in the case of the assessee are similar and identical. The CIT(A) has passed a consolidated order. The undisputed facts in the case of the assessee and the group concern are that a search and seizure action u/s 132 of the Act was carried out in the Bhangdiya Group of cases on 19/07/2011. Simultaneously, the business and residential premises of the assessee were also searched. During the course of search conducted, incriminating papers and documents were found and seized. Shri Mitesh Gotumal Bhangdiya is the key person of the group. Shri Mitesh Bhangdiya has two sons namely Shri Kirtikumar M. Bhangdiya and Shri Srikant M. Bhangdiya and one daughter Neha. The business of the Bhangdiya group is being looked after by Shri Mitesh Bhangdiya and his two sons. The other key persons associated with the group are Shri Sanjay Rameshchandra Heda, husband of Mitesh Bhangdiya's sister, Smt. Pradnya, resident of Amravati and Smt. Manisha O. Maniyar, widowed sister of Shri Mitesh Bhangdiya who lives with Bhangdiya family.



11.1 The main business concerns of the group (including those discovered as a result of the search action) are as follows –

1. M/s M.G. Bhangdiya (AERP2503E), (Prop. MGB); converted into a company M/s M.K.S. Constro-venture Pvt. (AAHCM0383T) Ltd. from 01.04.2011.
2. M/s Mahendra Construction, Prop. Shri Sanjay Heda (MC) (AADPH7109J)
3. M/s Mahendra Construction 85 M.G. Bhangdiya (JV) (AANFM5658B)
4. M/s Kirtikumar M. Bhangdiya (Prop. KMB); converted into a company M/s M.K.S. Acme Buildcon Pvt. Ltd. (AAHCM0382K) from 01.04.2011. (AGYPB1659G)
5. M/s K.M. Bhangdiya & Mahendra Construction (JV) (AAKFK1820C)
6. M/s Shrikant M. Bhangdiya (Prop. SMB)(ATCPB1337J)
7. Mitcon Infraproject Pvt. Ltd. (MIPL) (AAGCM1868H)
8. Lokshahi Publications Pvt. Ltd. (LPPL)(AABCL6673L)
9. MITZ Infraproject Pvt. Ltd.(AAGCM3047A)
10. Sakshi Gruh Nirman Pvt. Ltd. (SGNPL)(AAOCS7974G)
11. Balaji Stone Crusher & Infraventure Pvt. Ltd.(AADCB5273C)

11.2 The group has also entered into joint ventures with various other civil contractors of the city to secure some civil contracts. A few of them are listed below:

1. M/s M.G. Bhangdiya & Hitbhav Engg (JV) (AAOFM4745L)
2. M/s M.G. Bhangdiya & S. S. Patil & Co. (JV)(ABIFS3645L)
3. M/s Darshan Construction (JV) (AAHFD0654N)
4. M/s M R Dhobie 8s K M Bhangdiya (JV)(AAPFM0622B)

11.3 The nature of the business of the Bhangdiya group primarily is executing civil contracts. The group works mainly for Government departments like M/s Vidarbha Irrigation Development Corporation and has been engaged in executing various contracts pertaining to the irrigation projects in the state of Maharashtra. During the course of search operations incriminating documents were found and seized from the residential premises of Shri Mitesh Bhangdiya. Item no. 1 to 65 of Annexure-B seized from his residence are the diaries containing ledgers, daily cash books and bank books maintained by the Bhangdiya group. 36



Cash books contained entries for the period from 26/07/2006 to 18/07/2011 and 27 diaries relate to the financial year 2006-07 to 2010-11 whereas the remaining two diaries were maintained for house hold and miscellaneous expenses. A statement of Shri Mitesh Bhangdiya was recorded on oath on 20.07.2011. In his sworn statement recorded during the course of search action, Shri Mitesh Bhangdiya was confronted with the entries borne out from the seized diaries marked as B-1 to B-65 and to explain the contents of these diaries, Shri Mitesh Bhangdiya in his statement recorded has submitted that the entries in the diaries and the ledger pertain to the business receipts and business expenditure. The Assessing Officer in the assessment order has recorded a finding that as per the item no. 1 to 65 of annexure-B, it is apparent that the amounts withdrawn from the bank accounts of the subcontractors were credited to the daily cash balance of Bhangdiya group which was confirmed by Shri Mitesh G. Bhangdiya in his statement dated 14/09/2011. The Assessing Officer has reproduced the statement of Shri Mitesh Bhangdiya recorded on 14/09/2011 in para 6 of the assessment order. The Assessing Officer in the assessment order has also recorded a finding that the seized documents being B-1 to B-65 contain entries of all expenses incurred by the Bhangdiya group in cash from F.Y. 2006-07 onwards and expenses incurred through the bank accounts from F.Y. 2009-10 onwards. Thus, the Assessing Officer found that the actual expenses incurred do not match with those shown to have been incurred in the books. The Assessing Officer thus concluded that the books of account of Shri M.G. Bhangdiya maintained for income-tax purpose do not reflect the true business affairs and are not at all reliable. The Assessing Officer analyzed the entries in the diaries and took the view that on receipt side various receipts including the withdrawal from the bank of the assessee group concerns were recorded and on payment side entries of expenses like interest



payment, repayment of loan, deposit into bank account, household expenses, personal expenses, payment to various persons in cash and investment in properties are found recorded. It was also noted by the Assessing Officer that some of the entries made in the seized diaries were found reflected in the books of account maintained by the Bhangdiya Group. Statement of Mitesh Bhangdiya was recorded on 20/07/2011. During the course of search, Mitesh Bhangdiya was confronted with the entries borne out from the seized diaries marked B-1 to B-65. In reply to question No. 30 of his statement, Mitesh Bhangdiya submitted that the entries in the diaries and ledgers pertain to the business receipts and business expenditure but at present it is very difficult for him to state whether the entries recorded in the seized diaries and accounted in the regular books of account and same can be explained only after verification of the entries of the diaries with the regular books of account maintained by the Bhangdiya Group. Shri Mitesh Bhangdiya, reply to question No. 38, we noted voluntarily offered additional unaccounted income of Rs.26 crores for the block period including the current financial year over and above the regular income declared in the return filed for the assessment year falling within the block period. The income so declared are summarized as under:



BHANGDIYA GROUP

Particular	AY 06-07	AY 2007-08	AY 2008-09	AY 2009-10	AY 2010-11	AY 2011-12	AY 2012-13	Grand Total (Rs.)
M/s M.G. Bhangdiya								
Contract Income as per original return	22,00,540	28,96,131	18,61,863	56,30,712	543,18,322	714,82,707		1383,90,275
Additional Income declared during Survey	23,97,361	13,94,009	27,04,312	1,50,336	-	-		66,46,018
Additional Income Offered During Search	-	5,09,860	-	27,18,952	576,81,678	255,17,293	-	864,27,783
Contract Income Declared	45,97,901	48,00,000	45,66,175	85,00,000	1120,00,000	970,00,000	-	2314,64,076

M/S. Constro Venture P Ltd								
Contract Income as per original return							182,75,373	182,75,373
Additional Income declared during Survey								
Additional Income Offered During Search							164,74,627	164,74,627
Contract Income Declared							347,50,000	347,50,000
M/s. Mahendra Construction								
Contract Income as per original return	36,77,656	125,10,051	26,48,924	20,60,666	73,38,074	76,26,315	7,58,488	366,20,174
Additional Income declared during Survey	40,41,896	49,17,076	7,14,112	11,13,224				107,86,308
Additional Income Offered During Search	26,80,448	37,72,873	18,36,964	8,26,110	128,61,926	101,73,685	26,41,512	347,93,518
Contract Income Declared	104,00,000	212,00,000	52,00,000	40,00,000	202,00,000	178,00,000	34,00,000	822,00,000

M/s. Mahendra Const. & M. G. Bhangdiya JV								
Contract Income as per original return		157,47,756	310,92,743	715,14,147	358,75,320	74,77,336		1617,07,302
Additional Income declared during Survey		157,19,964	193,98,115	492,69,033				843,87,112
Additional Income Offered During Search				257,16,820	190,24,680	172,22,664		619,64,164
Contract Income Declared		314,67,720	504,90,858	1465,00,000	549,00,000	247,00,000		3080,58,578

M/s. K. M. Bhangdiya								
Contract Income as per original return	10,18,705	32,86,795	27,20,401	21,08,306	61,66,670	32,99,234		186,00,111
Additional Income declared during Survey	14,12,344	25,22,355	19,09,360	7,50,653				65,94,712
Additional Income Offered During Search		8,90,850	10,70,239	28,41,041	58,33,330	33,00,766		139,36,226
Contract Income Declared	24,31,049	67,00,000	57,00,000	57,00,000	120,00,000	66,00,000		391,31,049



<u>MKS Acme Build P Ltd</u>								
Contract Income as per original return								34,70,653
Additional Income declared during Survey								34,70,653
Additional Income Offered During Search								-
Contract Income Declared								16,29,347
								51,00,000
								51,00,000
<u>M/S.M.G.Bhangdiya and Hiltbhav Enag JV</u>								
Contract Income as per original return			26,84,727	2,20,187	4,63,997	4,68,994		38,37,905
Additional Income declared during Survey			5,63,583	30,344	-	-		5,93,927
Additional Income Offered During Search			-	2,49,469	-	1,31,006		3,80,475
Contract Income Declared			32,48,310	5,00,000	4,63,997	6,00,000		48,12,307

<u>M/s M.G Bhangdiya and SS PATIL JV</u>								
Contract Income as per original return		4,65,923	4,77,544					9,43,467
Additional Income declared during Survey		6,01,929	8,38,586					14,40,515
Additional Income Offered During Search				40,000				40,000
Contract Income Declared		10,67,852	13,16,130	40,000				24,23,982
<u>M/S K.M.Bhangdiya JV</u>								
Contract Income as per original return					5,14,551	9,32,461		14,47,012
Additional Income declared during Survey								-
Additional Income Offered During Search					5,85,449	11,67,539		17,52,988
Contract Income Declared					11,00,000	21,00,000		32,00,000



Mitscon Infra Project P Ltd								
Contract Income as per original return					60,39,000	43,98,429	53,20,051	157,57,480
Additional Income declared during Survey					-	-	-	-
Additional Income Offered During Search					62,61,000	111,01,571	9,19,949	182,82,520
Contract Income Declared					123,00,000	155,00,000	62,40,000	340,40,000

Additional Income offered in cases of Individual								
Mitesh Bhangdiya							74,79,442	74,79,442
Kirtikumar Bhangdiya							30,00,000	30,00,000
Shrikant Bhangdiya							35,00,000	35,00,000
Keshar Singh Rotele			10,42,553	12,03,097	80,93,260		-	103,38,910
Consolidated For All titles								
Contract Income as per original return	68,96,901	349,06,656	414,86,202	815,34,018	1107,15,934	956,85,476	278,24,565	3990,49,752
Additional Income declared during Survey	79,51,601	251,55,333	261,28,068	513,13,590	-	-	-	1104,48,592
Additional Income Offered During Search	26,80,448	51,73,583	29,07,203	323,92,392	1022,48,063	686,14,524	216,65,435	2356,81,648
Contract Income Declared	174,28,950	652,35,572	705,21,473	1652,40,000	2129,63,997	1643,00,000	494,90,000	7451,79,992
Additional Income in cases of Individual	-	-	10,42,553	12,03,097	80,93,260	-	139,79,442	243,18,352



11.4 From the statement of Shri Mitesh Bhangdiya, it is apparent that the diary found and seized belongs to the assessee group and the assessee group did not disown these diaries even though in the subsequent statement recorded on 27/07/2013 Shri Mitesh Bhangdiya stated that these diaries were primarily maintained by his father Gotumal Bhangdiya. The Assessing Officer, we noted, has also observed that these seized

diaries also contain the payment made in cash for probable extraneous gratification to various persons including politicians, government officers/officials which are recorded along with their names, dates of payment and amount paid. We noted that the Assessing Officer has not examined these persons for bringing the corroborative evidence on record in support of his finding that the cash has been paid by the assessee group for probable extraneous gratification. We noted that the Assessing Officer made an exercise to match the entries of the tax payment and receipt with the entries in the regular books of account of Bhangdiya Group. The Assessing Officer came to the conclusion that the receipts are predominantly withdrawals from the bank account by way of creating bogus sub-contract expenditure. The Assessing Officer found that the assessee group has deducted a sum of Rs.361 crores towards the sub-contract payment against the gross receipts aggregating to Rs.579 crores. It was found by him after verifying from 21 contractors that a sum of Rs.54.40 crore is attributable to the amount deposited in the bank account of the sub-contractor by account payee cheques by various concerns of Bhangdiya Group, which was subsequently withdrawn in cash and is reflected on the receipt side of the seized diaries. The total amount so reflected in the diaries on the receipt side was computed at Rs.182.52 crore. The Assessing Officer added the said unaccounted amount of Rs.182.50 crore in the income of the assessee group concern. A sum of Rs.54.40 crore was added in proportion to the amount of cheque credited by respective group concern in the hands of the respective group concerns. For the balance amount of Rs.128.12 crore, the Assessing Officer added the same in proportion to the contract receipt shown by the group concern in the respective assessment years to the total turnover of the group concern in that year. Now the question before us arises whether the said sum of Rs.182.52 crores, found recorded in the diaries



found during the course of search as receipt being withdrawal from the bank account of the group concern as well as from the bank account of the sub-contractor can be regarded to be the unaccounted income of the assessee. At the micro level, if we look into the nature of the receipt, it is not denied by the Revenue that the receipt has come from the bank account of the assessee group concern and part of the receipt and has come out of the cash withdrawn by the sub-contractor to whom the assessee group concern had made the payment. The assessment has been made by the Assessing Officer u/s 153A in the case of the assessee as well as assessee's group concern. Proceedings have also been initiated by the Assessing Officer in the case of the sub-contractor u/s 153C of the Act. The sub-contractor has submitted the return in response to the notice u/s 153C. The sub-contractor has shown the income from the contract receipt being amount paid to them by assessee group. The said income has duly been accepted by the Assessing Officer on substantive basis in the hands of the sub-contractor. The Assessing Officer thus has duly accepted while framing the assessment of the sub-contractor that the payment received by the sub-contractor from the assessee as well as the assessee group concern were not bogus but were the payment received by performing the obligation for a consideration entrusted on them under the sub-contract. This denotes that the relationship of the assessee as well as assessee group concern with the sub-contractor, as genuine, has duly been accepted by the Assessing Officer. Once the sub-contractor has been assessed and their income has duly been accepted by the Revenue, in our view, the Revenue, on the basis of the same facts in the case of the assessee, cannot take the view that the payment made to the sub-contractor were bogus. Further it is not the case of the Revenue that the Revenue has disallowed the payment made to the sub-contractor. It is a case where the Revenue has added the impugned receipt from the sub-



contractor entered into the diaries found and seized during the course of the search. From the analysis of these diaries, the Assessing Officer has categorically given the finding that the diaries consist of the receipt being the withdrawal made by the sub-contractor as well as the withdrawal made by the assessee from the bank account of the group. The diary also consists of the payment, some of which relate to the site expenses, expenses recorded in the books of account, investment in the immovable property, personal expenses, expenses for the jewellery as well as money transferred and the amount paid to various persons. It is not the case of the Revenue that the assessee has debited the amount paid to various persons into his regular books of account and claimed the deduction so that these expenses can be disallowed by applying the explanation to section 37 of the Act. In fact the assessee has not claimed deduction of these expenses. The Assessing Officer added the receipt being amount withdrawn by the contractor as income of the assessee. The receipt in fact is coming out of the sub contract receipt of the sub-contractor as well as assessee and group concerns, which has already been assessed to income tax by the Assessing Officer. The source of the receipt therefore, is apparent. Where the nature and source of the receipt stands explained, it cannot be added to the income of the assessee. On this basis itself, in our view, no addition in view of the cash withdrawn from the bank account of the group concern and the sub-contractor which are duly disclosed to the department, can be added in the income of the assessee.



11.5 This is not the case of Revenue that these cash withdrawals are from the bank account which have not been disclosed to the Revenue or in which the assessee has deposited the cash outside the books of account. So for the source of the receipt is concerned, it is not denied that the business of the assessee is executing the Government contract

and all the receipts in the bank account of the assessee is generated only through the contract receipt from the contract taken from the State Government. No cogent material or evidence was brought to our knowledge which may prove that the State Government has made the payment to the assessee outside the books of account. On this basis itself, we confirm the order of CIT(A) that the addition cannot be sustained on the basis of cash receipt found recorded out of the cash withdrawal by the assessee or the contractor from their bank account. We also noted that the Assessing Officer has not only analyzed the receipt side of the diaries but has also analyzed the payment side of the diaries and found from the payment side that a sum of Rs.24.05 crore has been invested in the immovable property outside the books of account and similarly, a sum of Rs.8.47 crore has been utilized as expenses outside the books of account. As regards to observation of outgoings observed by the Assessing Officer in respect of seized document, it is noted that the Assessing Officer has mainly drawn adverse inference without there being any material evidence on record for such conclusion. Even before us, no corroborative evidence were referred to and brought on record. Thus, the outgoing/investment to the extent of Rs.32.52 crore can be regarded to have been incurred by the assessee outside the books of account but the same are spent out of money withdrawn from bank, the source thereof cannot be regarded to be unexplained. We noted that in this case the assessee as well as assessee group concern, during the course of search, surrendered a sum of Rs.26 crore and accordingly, filed the return in response to the notice u/s 153A. At the most the Assessing Officer could have made the addition in respect of the unaccounted investment provided they are not covered by the amount surrendered by the assessee during the block period. In fact, in our view, the source of the said expenditure shown in the diary is also coming out of the cash



withdrawal from the banks of the group concern as well as of sub-contractor which has already been disclosed to the Revenue and the receipt thereof has already been assessed to income tax.

11.6 We noted that the business income assessed by the Assessing Officer in percentage of the gross receipt in the hands of the various group concern varies from 9.34% to 129.92% as is apparent from the following chart:

Particular	AY 2006-07	AY 2007-08	AY 2008-09	AY 2009-10	AY 2010-11	AY 2011-12	AY 2012-13
M/s M.G. Bhangdiya	11.79%	41.27%	35.60%	18.60%	27.46%	49.50%	
MKS Constro Venture P Ltd							9.34%
M/s. Mahendra Construction	10.78%	43.13%	25.44%	11.04%	21.79%	33.05%	27.73%
M/s. Mahendra Const. & M. G. Bhangdiya JV		49.53%	73.44%	17.69%	41.81%	16.03%	
M/ s . K . M . Bhangdiya	11.97%	23.39%	26.76%	26.26%	15.22%	13.94%	
MKS Acme Build P Ltd							10.28%
M/S.M G Bhangdiya and Hitbhav Engg JV			66.53%	11.98%	27.83%	0.00%	
M/s M G Bhangdiya and SS PATIL JV		54.82%	129.92%	13.18%			
M/S K M Bhangdiya JV					25.28%	39.52%	
Mitcon Infra Project P Ltd					10.07%	10.00%	10.00%
Consolidated	12.36%	47.01%	74.36%	18.52%	34.25%	49.97%	44.59%



In the case of the assessee group the assessment u/s 153A have been framed for assessment year 2006-07 to assessment year 2011-12 while assessment for the assessment year 2012-13 u/s 143(3) of the Act. The nature of the activity being execution of government contract was the same during all the assessment years. In assessment year 2006-07, the

nature of the work executed for Vidarbha Irrigation Development Corporation remains the same as in the case of the assessee for subsequent assessment years. The sub-contractors, who have executed the work, are also similar in various assessment years. The Assessing Officer, we noted, in the case of the assessee group for the assessment year 2006-07, has accepted the income as shown by the assessee group in the return about 12% of the gross receipts. The Assessing Officer, as is apparent from the aforesaid chart, has assessed the income on different footing in the subsequent assessment years under the similar circumstances. There had been search in the case of the assessee. The nature of the business of the assessee remains the same. No other business activity or the business were found from where the income is derived or generated. In various noting in the seized documents i.e. diaries are part of the gross receipt of the contract receipt of the group entity, is not disputed. The Assessing Officer, while making the addition, observed that the amount withdrawn from the diary is utilized for unaccounted payments which are not allowable like gratification paid to politician and Government officials. However, the Assessing Officer does not refer to any corroborative evidence on record to hold that the assessee has made payment as illegal gratification. He has taken a view by observing that payment made in cash is probable extraneous gratification. During the course of search, statement of Shri Mitesh Bhangdiya was recorded on 20/07/2011 and he in answer to question No. 30 explained that the seized documents are details of cash flow. During the assessment proceedings Shri Mitesh Bhangdiya has explained that the diaries are noting for the movement of the cash in reply to question No. 23, in the statement recorded on 27/07/2013. It was also explained by him in the course of the assessment proceedings that the sub-contractors on the withdrawal of the money gave to his father for safe custody, the



amount which are found to be noted in the seized documents. In the statement recorded, the assessee has clearly explained that the notings made in the seized documents has nothing to do with the political leaders as much as political leaders have no business transactions with Bhangdiya group. Even we noted that the Assessing Officer has not brought out on record any specific evidence to show that payment is made to any politician or the Government officer/official to whom the gratification payment have been given by the assessee group. We noted that the Assessing Officer out of the sum of Rs.182.52 crores, added Rs.54.40 crores on the basis of deposition of the sub-contractor for which when the assessee has asked for the cross examination, the cross examination was not allowed to the assessee, which is contrary to the principles of natural justice. Hon'ble Supreme Court in the case of Andman Timber Industries vs. Commissioner of Central Excise, Kolkata (Civil Appeal No. 4228 of 2006), under the similar circumstances, when the adjudicating authority did not allow the cross examination of the witnesses, held as under:



"According to us, not allowing the assessee to cross examine the witness by the Adjudicating Authority though the statements of those witness were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected.

In view of the above, we are of the opinion that if the testimony of these two witness is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witness was the only basis of issuing the Show Cause Notice.

We, thus, set aside the impugned order as passed by the Tribunal and allow this appeal"

Following the said decision of Hon'ble Supreme Court, the statement of the sub-contractor, in our view, cannot be relied on. Even otherwise also,

we noted that no corroborative evidence being brought on record to prove that the receipts, which has been added by the Assessing Officer in the income of the assessee is the undisclosed income of the assessee. In fact the receipts for which the addition has been made by the Assessing Officer represents the part of the gross receipts of the assessee and assessee group concern and the sub-contractor, which has duly been taxed to income tax. As pointed by us earlier, due to this addition, there has been huge variance in the income assessed as percentage with the receipts by the Assessing Officer. The CIT(A) therefore, was correct in rejecting the basis of making the addition by the Assessing Officer. In the facts of the present case, it is seen that regular assessment came to be made as net profit percentage of receipts and which were also upheld in appellate proceedings and have achieved finality. The returns u/s 153A have also been filed as percentage of receipts in this group entities. It will only appropriate to determine the income as percentage of receipts as the same are available on record which are accepted by the assessee and the Revenue authorities without dispute.



11.7 We may mention that in the case of the assessee group, survey action was conducted on 17/02/2009 wherein under the similar situation, the payment to sub-contractor was disputed and doubted by the Assessing Officer. The survey action relates to the assessment year 2006-07 to 2008-09, which are part of the block period for the search action conducted on 19/07/2011. The Assessing Officer while making the assessment applied a net profit @14% but when the matter reached to the Tribunal, the Tribunal Nagpur Bench in I.T.A.Nos. 268, 269 and 285/Nag/2012 vide order dated 03/04/2013, after considering the impounded material, directed the Assessing Officer to adopt the net profit @12% as against the net profit adopted by the Assessing Officer @14%.

There are also the similar type of defects found as have been found in the course of search. We noted the CIT(A) has in the impugned assessment years made in consequence of search, directed the Assessing Officer to estimate the profit @16% and not @12%. Even though the CIT(A) was fully aware of that during the assessment year 2006-07 to 2009-10, the assessee group has surrendered additional income at Rs.11 crore and the Tribunal has directed the Assessing Officer to estimate the net profit @12%. The Tribunal in that order under para 4 observed as under:

"4. Brief facts of the case are that a survey u/s. 133A of the Income Tax Act, 1961 was carried out in the business premises of the assessee and his associates on 17.02.2009. During the course of survey operations it was found that most of the bills, vouchers and other evidence in support of the entries in the books of account like labour charges, material purchases, 'machine hire charges, site expenses, sub contract expenses, oil and lubricants, repairs and maintenance etc. pertaining to this A.Y. were not available. Statement of Sri Mithesh Bhangadiya was recorded under Section 133A and u/s. 131 of the Act on behalf of the assessee. In the statement dt.24.02.2009 and 13.03.2009, in response to various questions relating to the genuineness of the payments to third party sub contractors and in respect to other deficiencies, the assessee admitted additional income in group cases of Rs. 11 crore and proportionately were allocated between all the assessment years relating to these four assessee. For the year under consideration i.e. for assessment year 2006-07 in case of Sri Mithesh Bhangadiya, the additional income was offered at Rs.23,97,361/- besides the income shown originally at Rs.23,63,910/-. Due tax was paid before the issuance of notice under Section 148 as admitted by the AO in para 2 of his order. The important contents of submission recorded on 24-02-2009 and 13-3-2009 of Sri Mithesh Bhangadiya are incorporated in the order of the AO. In query of question No. 11, it was answered that during the course of survey, it was noticed that there are certain discrepancies and omissions and to cover up all such discrepancies we have made out mind to offer additional income over and above the regular income. We are under the process to determine such additional income



to avoid litigation and, to buy peace of mind. Thereafter in response to question Nos. 18 & 19 of the statement recorded on 13-3-2009, it was answered that the sub contractors were awarded the sub contract work by our firms as per contract notes and the nature of sub contractors has been that labour charges and machine hire charges. The sub contractors by and large illiterate and therefore, their books of accounts found to be incomplete, without maintenance of any bills and vouchers. The expenses incurred by our firm has been on the basis of the so called vouchers raised by them and therefore, there appears the discrepancies in the expenses claimed. It was further stated that the assessee has admitted in his previous statement recorded during the course of survey that there are certain discrepancies and anomalies in the sub contract expenses in their books of accounts, non availability of bills and vouchers for the past three assessment years. Accordingly, it was submitted that there were certain discrepancies and anomalies in the sub contract accounts, in books of accounts for assessment years 2006-07 to 2009-10. The assessee declared the additional income of Rs. 11 crore in their firm and the five sister concerns in the assessment year 2006-07 to 2009-10. The working of the additional income of Rs. 11 crores will be done accordingly and the same will be shown. These part of the statements have been incorporated in the order of the AO as state above. Thereafter the AO started scrutiny of the case. The AO noted that the assessee has shown various expenses under the head labour & wages, machine hire charges, site expenses and sub contract expenses etc. on very higher side, which are not supported by valid vouchers. Neither any further evidence was filed. It was also observed by the AO that since there are various deficiencies in accounts of sub contracts and the assessee has offered a sum of Rs. 23,97,361/- on account of discrepancies in respect to sub contract, therefore, he proceeded to make further addition on account of various deficiencies i.e. in absence of bills and vouchers, excess claim towards machinery hire charges, verification of applicability of provision of Section 194C and denial of alleged sub contractors regarding the sub contract given by the assessee. All these discrepancies are noted by the AO in his order. Thereafter in para 7, the AO has observed that after having rejected the books of account of the assessee under Section 145(3) of the Act, the profit of the assessee has to be



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estimated reasonably. The AO also observed that the assessee has declared net profit ratio of 6% and 7% of the total turnover in assessment years 2006-07 & 2007-08. After offering additional income of Rs.23,97,360/- for assessment year 2006-07, the results in revised net profit comes to 12.87% of the contract receipts. However, this net profit was found by the AO on lower side. The AO noted that in one of the group case namely, M/s. Mahendra Construction & M.G. Bhangadia (JV) , who had declared additional income of Rs. 1,57,47,760/- in the Assessment Year 2007-08, which gives a net profit ratio of 13.84% of the net contract receipts. In view of these facts the AO adopted 14% net profit. Thereafter the AO completed the assessment and made addition of Rs. 30,12,722/- against additional income shown by the assessee at Rs. 23,97,360/-, which resulted further addition of Rs.6,15,362/-."

and ultimately under para 7 as reproduced hereunder, estimated net profit @12%:

"7. After considering the submission and perusing the material on record, we find that the assessee deserves to succeed in his appeal in part. We noted for the year under consideration i.e. for assessment year 2006-07, the assessee's NP rate comes to 12.87%, for assessment year 2007-08, the assessee's NP rate comes to 10.53%, respectively. We also noted that if the NP rate of all the concerns are taken into consideration, then it is seen that all the assesses have shown government receipt at Rs.258,55,37,850/- and income on these contracts have been shown by these assessee at Rs.6,49,57,111/- which gives a NP rate of 6.38%. The assessee has offered additional income declared during the survey at Rs. 11,03,85,877/-, which gives a NP rate of 4.27% and the total NP rate in all these concerns comes to 10.65%. Of course, the additional income of Rs. 11 crore or odd was segregated proportionately on the basis of contract receipts in the hands of each concern. In case of M/s Mahendra Construction & M.G. Bhangadia (JV) , the NP rate comes to 13.84% i.e. for assessment year 2007-08 and this rate has been adopted by the AO and has applied the NP rate of 14% in all the years in case of all these assesses on whom a survey was conducted. In view, this approach of the AO was not correct approach. In case of M.G. Bhangadiya, the NP rate of



three years come to 9.87% , whereas in case of other assesses i.e. Sanjay Heda, M/s Mahendra Construction & M.G. Bhangadiya (JV) , the NP rate comes to 9.50% and in case of M/s Mahendra Construction & M.G. Bhangadiya (JV) , the average NP rate of three years comes to 11.28% and in case of M/s KirtikumarBhangadiya, the NP rate comes to 8.72% and in case of M.G. Bhangadiya and M/s Mahendra Construction & M.G. Bhangadiya (JV) , the NP rate comes to 6.12%. In case of M.G. Bhangadiya and S.S. Patil & M.G. Bhangadiya, the NP of three years comes to 11.55%. As stated above, the average NP rate of all the assesses for all the three years comes to 10.65%. Therefore, in our view, a rational approach should have been adopted by the AO or by the learned CIT (A). For one case i.e. M/s Mahendra Construction & M.G. Bhangadia (JV), the NP rate was 13.84% and if this rate is applied in all other cases, which in our view, is not justified. However, there is also no dispute that there were so many discrepancies in maintaining vouchers, bills, sub contracts accounts and other heads, which were not verifiable, therefore, the assessee and his group came forward to offer an additional income of Rs. 11 crore and the same has also offered and due tax has been paid. Since as stated above, there are certain discrepancies, we are of the view, that if NP rate of 12% is adopted instead of 14%, that will meet the end of justice. We made it clear that where NP rate shown by the assessee in any year is more than 12% then the more NP rate shown by the assessee has to be taken as assessee has declared himself and in other years where NP rate shown by the assessee is lower than 12%, then 12% NP rate has to be taken. The AO will recomputed the income accordingly. For the sake of clarification, in case of assessee for assessment year 2006-07, the NP rate comes to 12.87% after showing the additional income, therefore, the income shown by the assessee has to be accepted. However, for assessment years 2007-08 & 2008-09, the NP rate shown by the assessee after additional income comes to 10.69% and 10.53%. The AO will adopt the rate of 12% and will compute the income accordingly. "



11.8 We noted that the CIT(A) even though followed the order of the Tribunal in the case of the assessee for the assessment year 2006-07 to 2009-10 but directed the Assessing Officer to estimate the net profit

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during the block period @16% and for that he has given the reasons that there is material difference in the years under appeal i.e. search action has also resulted into detection of the unaccounted assets to the tune of Rs.26 crores and unaccounted jewellery of Rs.2.37 crores which has not been disclosed by the assessee group in their respective returns filed nor the source of such acquisition of such assets could be explained satisfactorily. We do not agree with such finding of CIT(A) as we noted that during the block period, the assessee has surrendered Rs.11 crore during the course of survey for the assessment year 2006-07 to 2008-09 and further during search a sum of Rs.26 crore was surrendered. Thus, a sum of Rs.37 crore was available with the assessee which assessee could have utilized for investment in the assets as well as for the purchase of jewellery. The unaccounted assets as well as unaccounted jewellery is only Rs.28.37 crore, which is much less and is duly covered by the disclosure of Rs.37 crore during the block period made by the assessee, Rs.11 crore during the survey and Rs.26 crore during the block period. Even otherwise also, the Assessing Officer, we noted, has gathered the information of unaccounted assets and unaccounted jewellery out of the documents found during the course of search which shows the utilization of the amount which the assessee has received by way of withdrawal from the bank account of the group concern as well as from the bank account of the sub-contractor which cannot be regarded to be undisclosed. We, therefore, do not agree with the reasoning of the CIT(A) in adopting the net profit @16% of the gross receipts. In our opinion, no addition on account of unaccounted assets to the extent of Rs.26 crores and unaccounted jewellery of Rs.2.37 crores could be made. We, therefore, after considering the facts of the case, past history, relevant case laws and nature of the activities carried on by the assessee, are of the view that the estimation of the income by the CIT(A) is at a



higher side and is not justified. Therefore, we set aside the order of CIT(A) to the extent of directing the Assessing Officer to estimate the net profit @16% of the gross receipts and direct the Assessing Officer to estimate the net profit on the gross receipt @12% as has been estimated and returned by the assessee group in their respective returns filed in response to the notice issued u/s 153A and u/s 139 of the Income Tax Act.

12. In the result, the appeals of the Revenue are dismissed whereas the appeals of the assessee are partly allowed.

(Order pronounced in the open court on 29/06/2017)




Sd/.
(AMARJIT SINGH)
Judicial Member

Sd/.
(P. K. BANSAL)
Vice President

Dated:29/06/2017
*Singh

Copy of the order forwarded to :

1. The Appellant
2. The Respondent
3. Concerned CIT
4. The CIT(A)
5. D.R.,
6. *And file*


Asstt. Registrar
सहायक पंजीकार
Assistant Registrar
आयकर विभाग, न्यायालय,
Income Tax Department, Tribunal
नागपुर न्यायालय / Nagpur Bench