

**IN THE INCOME TAX APPELLATE TRIBUNAL, JODHPUR BENCH,
JODHPUR
BEFORE SHRI SANDEEP GOSAIN, JUDICIAL MEMBER AND
SHRI VIKRAM SINGH YADAV, ACCOUNTANT MEMBER**

ITA No. 180/JODH/2016

&

ITA No. 295/Jodh/2016

(Assessment Years 2011-12 & 2012-13)

A.C.I.T., Central Circle-1, Udaipur.	Vs.	M/s Ankit Chirag Developers Pvt. Ltd., 54-55, Rajdeep, New Fatehpura, Udaipur.
		PAN No. AAGCA 9897 C

Revenue by	Smt. Sanchita Kumar, CIT-DR
Assessee by	Shri Shrawan Gupta, Adv.
Date of Hearing	11/08/2021
Date of Pronouncement	15/09/2021

ORDER

PER: SANDEEP GOSAIN, J.M.

Both these appeals have been filed by the revenue against the separate orders passed by the Id. CIT(A)-2, Udaipur dated 18/02/2016 and 05/07/2016 for the A.Y. 2011-12 and 2012-13 respectively.

2. The hearing of the appeal was concluded through video conference in view of the prevailing situation of Covid-19 Pandemic.

3. Common issues are involved in both these appeals, therefore, both are clubbed and heard together and for the sake of convenience, a common order is being passed.

4. As a lead case for the deciding the appeals, we take ITA No. 180/Jodh/2016 for the A.Y. 2011-12. From perusal of the record, we found

that in the first round of appeal, the Coordinate Bench of this Tribunal had decided the appeal vide its order dated 17/12/2018 by giving part relief to the assessee. Against the order passed by the Tribunal, the assessee filed a Misc. application No. 02/Jodh/2020 mentioning the fact that during the appellate proceedings before the Bench, the Id. AR have filed the common written submissions for assessment year 2011-12 and 2012-13 on 04.05.2017 and also filed additional written submissions dated 02.11.2017 filed on 03.11.2017. Certain specific plea and arguments related to the issue under consideration have been submitted through this additional written submission filed on 03/11/2017. However, on perusal of the order of the ITAT dated 17/12/2018, it is very clear that the additional written submission dated 02.11.2017 which was filed on 03/11/2017 have not been considered at all by the ITAT before passing the above said order dated 17/12/2018. In the written submission, the Id AR had specifically taken the plea and arguments that no evidence relating to receipt of excess sale consideration is available on record and with the arguments he had also referred various related judgments. He also mentioned that the loose papers relied upon for addition by the AO was not related to the year under consideration. In fact the loose papers were found during the course of search on 10.03.2010 and seized. The related year of search was assessment year 2010-11 and accordingly the period under consideration in this appeal was succeeding or later year and the loose papers were not at all related to the year under consideration and prayed that the mistake is

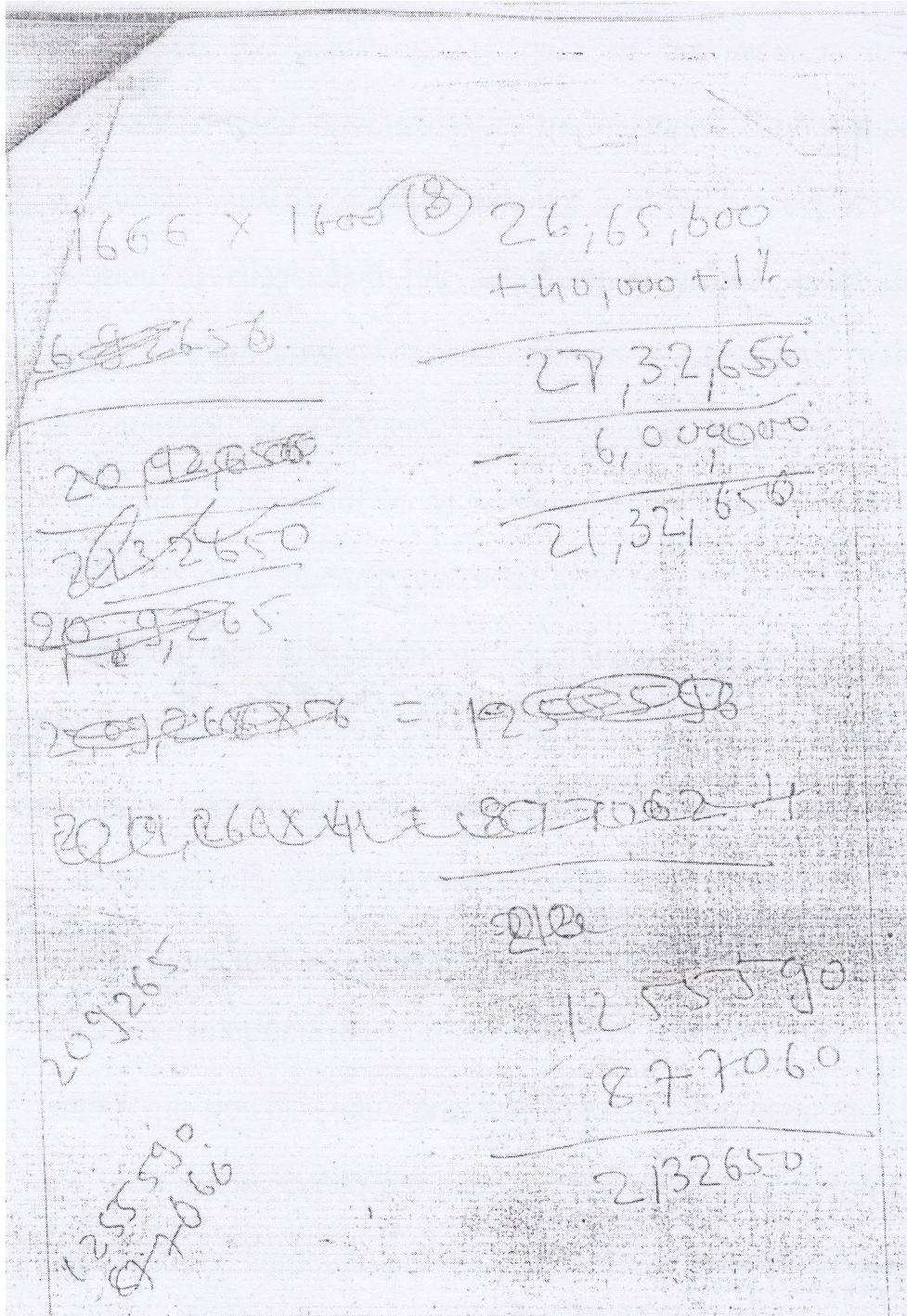
apparent from record and rectifiable as per law under section 254(2) of the Income Tax Act, 1961 (in short, the Act). On the prayer of the assessee and after perusal of the order passed by the Coordinate Bench dated 17/12/2018, the another Coordinate Bench of this Tribunal vide its order dated 04/02/2021 recalled the order dated 17/12/2018 for limited purpose.

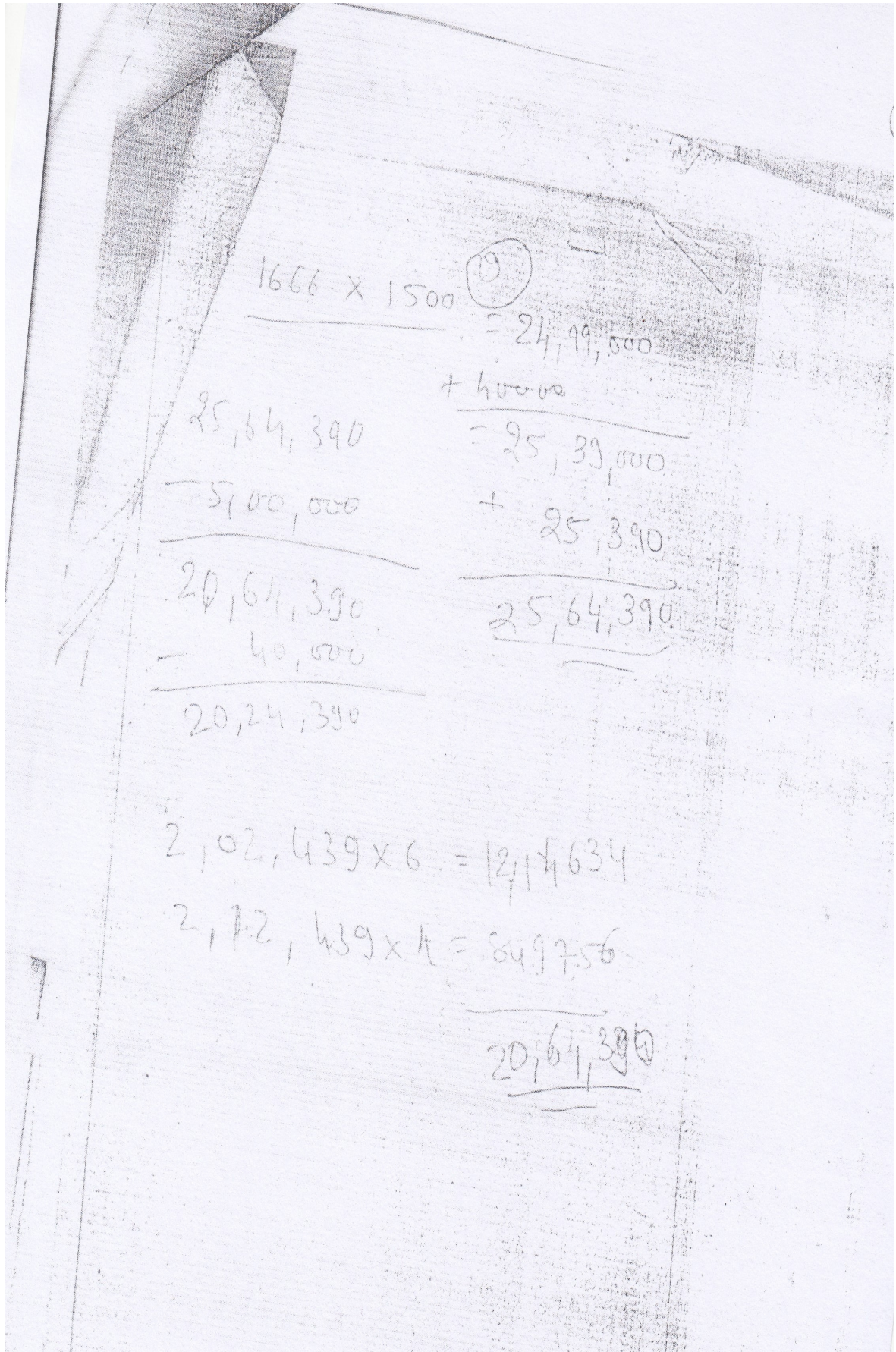
5. In this appeal, the ground No. 5 under dispute raised by the Revenue reads as under:

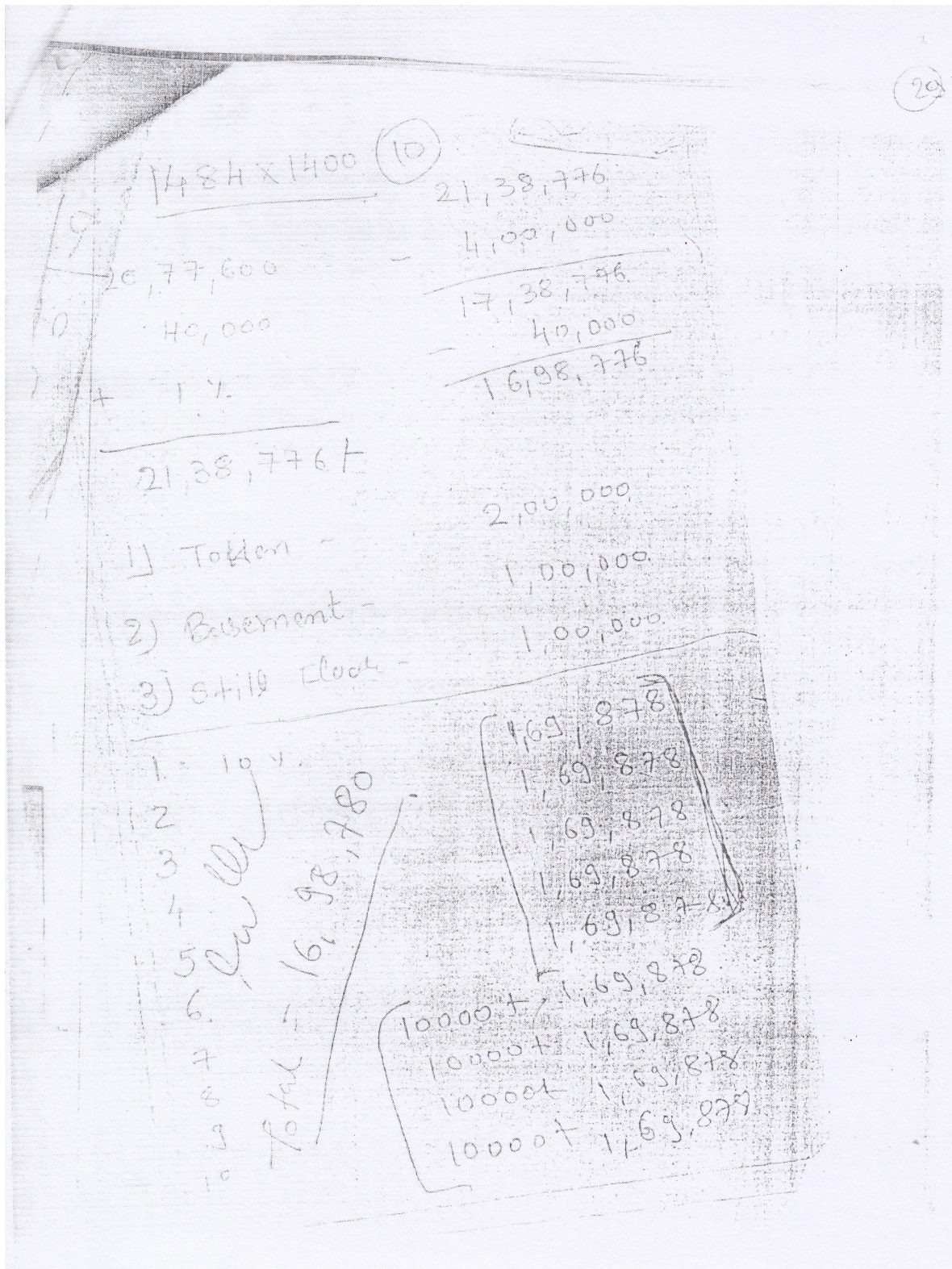
“5. Whether on the facts and circumstances of the case the CIT(A) was right in deleting the addition of Rs.36,51,800/- on account of understatement of sale consideration of three flats without appreciating the facts that the said addition was rightly made by the AO on the basis of detailed analysis of seized papers being page No. 8 to 10 of Annexure-AS, Exhibit-4 which proved that the flats have been sold to the buyers at the rates and as per plan mentioned on the aforesaid three pages but in the books sale considerations were shown less. “

6. Having considered the rival contentions and carefully perused the material placed on record. We have also gone through the orders passed by the revenue authorities. From perusal of the records as well as additional written submissions filed by the assessee, we observed that the assessee is a company engaged in the business of real estate, constructed multi storied complex and residential flats at Bhuwana near new RTO office, Udaipur. In this case a search and Seizure operation was carried out u/s 132A of the Act at the business premises of assessee company alongwith residential premises of directors and their family members on 10/03/2010. During the course of search and seizure proceedings, certain loose papers were found at the office of the assessee company which were seized as page 8 to 10 of-

Annexure AS Exhibit-4 and also placed before us vide PB 27-29. On page 8, 9 and 10 where some calculation was found. These seized pages are as under:







The Assessing Officer has discussed about these seized pages in para 8.1 to 8.7 of his assessment order and the AO has inferred the calculations on these three pages. On being confronted about these calculation, the AO has

also asked about the size of flats, selling price of the flats, booking amount and payment plan etc. to Sh. Ankit Jain who handles the sales and marketing the flats and the AO has recorded his statements u/s 131 on dt. 21.04.2010 vide page 17-18 of the assessment order. In his Statements Sh. Ankit Jain has stated as under:.

प्र.2	कृपया अमर विलास प्रोजेक्ट के बारे में विस्तार से बतायें ?
उत्तर:	अमर विलास एक आवासीय परियोजना है, जो मेसर्स अंकित चिराग डवलपर्स प्रा.लि. नामक कम्पनी के अन्तर्गत बन रही है। इसमें 96 फ्लेट्स बनाये जाने हैं। यह परियोजना भुवाणा में स्थित है।
प्र.3	इन फ्लेट्स की साईज क्या-क्या हैं?
उत्तर:	इस परियोजना में दो साईज के फ्लेट्स हैं। एक का एरिया 1001 वर्गफीट Builtup Area है तथा दूसरे का Builtup Area 1126 वर्गफीट है।
प्र.4	आपके ब्रोशर के हिसाब से फ्लेट्स की साईज 1484 व 1666 वर्गफीट है। इस विषय में आपका क्या कहना है ?
उत्तर:	ब्रोशर में जो एरिया लिखा हुआ है वह Super Builtup Area एरिया है। इसमें कोमन पोर्सन जैसे कि सीढ़ियां, कोरिडोर इत्यादि भी शामिल हैं। ग्राहकों को जो विक्रय किया जाता है वह खाली Builtup Area किया जाता है।
प्र.5	प्रति वर्गफीट जो रेंट चार्ज की जाती है वह सुपर बिल्ट-अप एरिया की ली जाती है या बिल्ट-अप एरिया की ?
उत्तर:	Builtup Area की रेंट ली जाती है।
प्र.6	सारे फ्लेट्स एक ही स्टैण्डर्ड के हैं या उनमें कोई फर्क भी है?
उत्तर:	फ्लेट्स में केवल साईज का फर्क है व जैसे कि मैं उपर बता चुका हूँ दो साईज के फ्लेट्स हैं।
प्र.7	कृपया फ्लेट्स की बुकिंग दर, विक्रय दर तथा यह राशि केश अथवा चेक द्वारा ली जाती है, उसका विवरण दें?
उत्तर:	फ्लेट्स की बुकिंग के लिए 2 लाख रुपये की राशि रखी गई थी। मगर किसी ने कम ज्यादा भी दी है। विक्रय दर का जहाँ तक प्रश्न है, छोटे फ्लेट्स Lum-Sum 12,46,000/-रुपये तथा बड़ा फ्लेट Lum-Sum 14,00,000/-रुपये में बेचा जाना है।
	बुकिंग राशि चेक व केश दोनों तरह से प्राप्त की गई है। जिनसे केश लिया है उनकी रसीद काट कर राशि बैंक में जमा करा दी गई है।
प्र.8	इस परियोजना में पार्किंग के लिए क्या खरीदारों से क्या कोई अलग से राशि ली गई है?
उत्तर:	शुरू में पार्किंग के लिए अलग से 40 - 50 हजार रुपये अलग से लेने का प्रावधान था, लेकिन बाद में सुप्रीम कोर्ट का एक डिसिजन आया था, जिसके तहत अलग से पार्किंग चार्ज लेने से मना किया गया था। इसलिए हमने किसी से पार्किंग के लिए अलग से चार्ज नहीं लिया।

Despite by referring the relevant portion of statement of Shri Ankit Jain recorded as above during the post search proceedings to the effect that the price of each flat is Rs. 26,65,600/-. Then, he has estimated the total sale consideration of three flats sold during the year under consideration at Rs. 79,96,800/- at the rate of Rs. 26,65,600/- per flat as against Rs.14,00,000/-, 15,45,000/- and 14,00,000/- respectively shown by the assessee totalling to Rs. 43,45,000/- and accordingly he concluded that there was under statement of sales to the extent of Rs. 36,51,800/- (79,96,800/- less 43,45,000/-) in the year under consideration. Thus, the AO has made addition of Rs. 36,51,800/- as understatement of sales.

7. In first appeal, before the Id. CIT(A) the assessee has filed the detailed WS and legal position and stated before him that the AO has made the addition of Rs. 36,51,800/- just on the basis of assumption and presumption without bringing on record any positive, corroborative evidence related to or in support of his imagination, assumptions and presumptions in support of his arbitrary calculations as well as in support of his inferences regarding noting on page 8 to 10 of Annexure AS- Exhibit -4 as well as his holding of actual income derived by the assessee Company. The AO further erred at law in misinterpreting the explanations furnished by the assessee at the time of statement recorded during the search and seizure proceedings and thereby erred in resorting to arbitrary calculation and accordingly arriving at wrong conclusions. The AO erred in making additions without

appreciating the correct facts, just on the basis of arbitrary assumptions and presumption applied on noting on page 8 to 10 of annexure AS, Exhibit - 4 which was in fact rough noting and projected estimates only. The noting on the papers does not represent about the actual nature or actual execution any business transactions by the assessee Company. In fact there was no such transaction actually executed by the Company. That the subjected loose papers are undated, unsigned, not reflecting the nature of transactions, there are so many cuts on written figures which clearly speaks about and implied that the noting are of rough nature and hence the same are estimates or projected figures and hence noting on such papers cannot be relied upon for making addition in the declared income. The loose papers and the noting are technically, legally and factually a rough, deaf and dump paper/noting which cannot be made base for determination of income if any derived by the assessee.

7.1 The Id AR also submitted that the AO has made the additions on wrong footings, ignoring the records, statement of the relevant persons in this respect and hence the addition is arbitrary in nature without confronting with the assessee which is against the principle of natural justice and such additions cannot be sustained in the eye of law. That the addition so made is arbitrary, without proper base for the same, misinterpretation of loose paper, imaginary inferences on assumptions and presumptions only ignoring the material and explanations available on record, which is against the

principle of natural justice. The AO not appreciated the true and correct facts explained in this respect at the time of recording of statement during the course of search proceedings but AO misinterpreted the explanations of the Marketing Manager Shri Ankit Jain in this respect and hence arrived at wrong conclusion. During the course of search and post search proceedings the statement of Marketing Manager Shri Ankit Jain was recorded on 21/10/2010 under section 131 and the Ld. AO has also referred such statement at page 28 and 29 of his order in para 8.6. In this statement at question No.3 information and explanations related to size of flats have been asked for against which Shri Ankit Jain has clearly explained and stated that the size of flats are 1001 sqft.(built up area) and 1126 sqft. (built up area) only. Similarly the Ld. Officer has asked clarification about the size of flats mentioned in the broacher i.e. 1666 and 1484 sqft. In response thereto he has clearly explained that this was nothing but super built up area of both type of flats constructed by the Company. Further, against specific question regarding charging of rates by the assessee Company from the customer in question No.5 he has clearly stated the facts that the rates per sqft are charged on built up area only. There were documents related to sale agreement of flats executed prior to the date of search and available with the assessee which were also seized by the search party, E.g. Sale agreement dated 22/01/2010, 9/02/2010 and 16/01/2010, between the company and Shri Mahesh Chandra Swarnkar, Shri Pawan Dagalia and Shri Virndra Singh Chajjad respectively which are duly signed and notarized. In

all the above agreements the built area as well as total sale consideration has been mentioned clearly. There is no question of estimating the same without bringing on records any material contrary to the same. No material found during the course of search from which it can be inferred that there was excess amount received or receivable by the company over and above the amount mentioned in such agreements. The actual amount received are appearing in the registered sale. The statements recorded under section 131 are to be accepted as truthful until the same is rebutted by way of evidence brought on records. In the present case the statement of Shri Ankit Jain has to be accepted as a truthful version in absence of any counter evidence. He also submitted that noting on the paper was not in the hand writing of any of the Director or Office bearers. There were no transactions of such nature actually executed by the Company. It clearly reflects the rough nature on the face of loose paper which did not contains the name, nature, date of transactions etc and also contains cuts on the rough noting itself. The only inference which can be drawn after appreciating the noting on such paper that it is rough noting and no assumptions/presumption can be made inference can be drawn for earning of income by the Company. The addition on the basis of such a rough, deaf and dump loose paper such loose sheet of papers could not be construed as books of accounts for the purpose of making addition. No such transaction of either receipt or payment was ever made by the assessee company. As the noting are not

made by the assessee and no transaction ever executed from the persons mentioned therein.

7.2 He also submitted that as regards provision of section 292C of the Act, he has to submit that "section 292C is a presumptive provision where certain facts are to be presumed by the operation of law. However it is a settled law that such presumptions are rebuttable presumptions and the documents and papers has to be considered considering the totality of the facts of the case. The deeming provisions cannot be applied mechanically ignoring the true and real facts of the case, the material evidences available on records and the surrounding circumstances and the statements recorded by the department during the course of search and post search proceedings. The AO appears to be confused about the position of super built up area and built up area the terms used in this line of business. Actually as per law actual built up area can be sold to the buyer but in order to charge regular maintenance expenses the common areas is being included proportionately and informed/advertise to the buyer in order to avoid confusion in future regarding maintenance charges. Similar is the position of confusion about charging of parking space to the AO. He has estimated on assumptions and presumptions the sale consideration on the basis of projected amount in rough noting on the subjected loose papers. That on such loose papers it is very clearly reflected that the rate of 1400 per sq ft to 1600 sq ft has been applied on projected calculations. Further there may be calculations for

furnished flats and for non-furnished flats also. In this respect of the specific mention by the Ld. AO about the cost of construction at Rs.1400/- per sq ft at para 8.3 of the order. If consider the same then the overall profit per sq ft appears to be 100 per sq ft only if sale consideration is of 1500/-sq ft as appearing on page number 9. This amount of profit already declared by the assessee company. It appears that there is no logic in the arbitration calculation made by the Ld. AO without confronting the issue with the assessee company at the time of assessment proceeding.

7.3 He further submitted that in fact, the noting were rough estimates related to sale price which could have been achieved if the flats would have been sold after furnishing the same i.e. instead of selling the flats in the present situation if the same would be sold after furnishing (providing modular kitchen, drawing/bed room furniture, AC, Geysers, complete furnishing etc.). Accordingly the Finance and Marketing Manager Shri Ankit has explained the correct inferences appearing from such noting on the subjected loose papers as per his knowledge at the time of recording of statement during the course search even though the paper was not related to any of the transactions actually executed by them. It appears on proper appreciation of paper that the noting contains estimated rate of Rs.1600/- at page 8, 1500/- at page 9 and 1400/- page 10 and that too be applied against the flats proposed to be built up and sold. There is no material evidence on record from which it can be inferred or proved that such

amount has been actually received at all. The AO has not brought any evidence with regards to and in support of his presumptions and has not proved whether such transactions were ever executed by the Company. Accordingly under no circumstances any addition can be made on this account in the year under consideration. The presumption made by the AO appears to be without any proper base or evidence just on assumptions and presumptions hence not correct. The additions made on such wrong presumptions cannot be sustained in the eye of law. Further after bringing on record the explanations in this regard. The AO had not made any independent enquiry in this respect before making any addition on this account. He has neither brought on record nor proved with the help of any evidence on record that the assessee has actually received such amount nor given the reasoning how the assessee has derived income from such noting. No addition can be made only on the basis of assumptions, presumptions or guess work ignoring the record and assessment order it is very clear that the Id. AO has proceeded only on suspicion. It is settled principle of law that an allegation remains a mere allegation unless proved. Suspicion cannot take the place of reality. In this respect he relied on the following judicial pronouncements:

- (1) Dhakeshwari Cotton Mills 26 ITR 775 (SC)
- (2) R.B.N.J. Naidu v/s CIT 29 ITR 194 (Nag),
- (3) Kanpur Steel Co. Ltd. v/s CIT 32 ITR 56 (All).
- (4) CIT v/s Kulwant Rai 291 ITR 36(Del).
- (5) CIT v/s Shalimar Buildwell Pvt Ltd 86 CCH 250(All).

That it is an admitted fact in this case as is appearing on proper appreciation of the paper that the loose paper does not reflect the date of transaction, nature of transaction, the person in whose writing it was noted, position whether transaction executed or not, whether executed by the assessee or not and whether the assessee has derived any income from such transaction. In support of all the above arguments assessee also relied on ratio of the following decided cases.

1. Ashwni Kumar v/s ITO (1991) 39 ITD 286 (Delhi).
 2. D.N.Kamani (HUF) v/s CIT (1999) 70 ITD 77, 113 (TM)
 3. S.P.Goel V/s DCIT (2002) 82 ITD 85 Mumbai
 4. CIT v/s Rajpalsingh Ramavat (2007) 288 ITR 498 (Allab)
 5. Ram Traders v/s First Income Tax Officer, 25 ITD 599(TM) (Pat)
 6. CIT v/s Dharampal Premchand Limited (2007) 295 ITR 105(Delhi)
 7. CIT V/s Khazan Singh and borther (2008) 304 ITR 234(P&H)
 8. CIT V/s R.K.Venketchanalam (2008) 301 ITR 236(Mad)
 9. CIT V/s Maulik Kumar K shah (2008) 307 ITR 137 (Guj)
 10. Prakash Chandra Nahata V/s CIT (2008) 301 ITR 134 (MP)
 11. CIT v/s D.K.Gupta (2009) 308 ITR 320 Delhi
 12. DCIT v/s Redha Developers India Ltd. (2010) 329 ITR 1 (Guj)
 13. Nirmal Fashions (P) Ltd. V.s DCIT (2009)123 TTJ (Kol) 180.
8. The Id. CIT(A) after considering the above plea and submissions has deleted the additions by observing as under.

- “7.3 *I have considered the facts of the case, submission of the appellant, finding of the AO and have also appraised ratio of the various case laws referred in relation to the issue under consideration.*
- 7.3.1 *I have found that in the subjected loose papers. Considering the line of appellant's business, one tends to infer 1666X1600 on page 8, 1666X1500 on page 9 and 1484X1400 on page 10 as areas of flat for first figure and rate of per sq.ft. for the second figure in all three pairs of figures on above seized papers. However, seeing paper as unsigned & contained no meaningful information such as no number of flat, no name of buyer, no date of transaction or nature of transactions it cannot be conclusively be inferred that it conveys the sale considerations charged by the appellant. Furthermore, on page No.8 various cuttings are appears and page 9 & 10 some further figures are seen as jotted down which indicates the paper are some rough estimates or projected calculations. The loose papers are not speaking documents and did not contain any narration or description about different figures noted thereon. None of the noting on these paper any way suggests whether they meant for sale price and whether the such sale consideration were at all charged / received by the appellant or paid by somebody. Even the name of assessee or any other person is not appearing anywhere on such loose papers.*
- 7.3.2 *I have found that the noting on alleged loose paper is open to more than one interpretations and did not prove conclusively that any transaction was actually executed or not by the appellant. Considering these specific facts of this case it is very clear that the Id. AO has proceeded only on suspicion.*
- 7.3.3 *I have found that during the course of search and post search proceedings as well as later on the assessee has denied that they have not executed any transactions of such nature and noting on such loose papers which is not in the hand writing of any of the office bearer.*
- 7.3.4 *I have noticed that the AO confused about the terms super built up area and built up area used at different places. In the local laws applicable for registration of immovable property the built up area is being considered in the documents of registration as has been appearing in the sale agreements placed on records. The super built up area is published to include the common area of complex on proportionate basis normally for charging maintenance from different flat owners. The AO seems to have based his inference for sale considerations charged by the appellant on super built up area ignoring notarized sale agreement which were seized and available in his records.*
- 7.3.5 *I have also found that the statements of Shri Ankit Jain and the explanations by him with regards to sale price have not been properly appreciated by AO. In the statement recorded immediately after the date of search i.e. 21/10/2010 specific questions have been raised which*

were answered and explained by Shri Ankit Jain which also clarifies the confusion regarding built up and super built area as well as the position of sale consideration of flats actually received by the Company.

- 7.3.6 *It is observed that the AO had not made any independent verification / enquiry from the date of statement 21/10/2010 to the date of assessment of the year under consideration i.e. 11/03/2014 with regards to and in support of the inference drawn by him regarding understatement or difference in sale price on the basis of which the additions have been made by the AO. In the present case neither the assessee has admitted suppression/under-statement of sales at any point of time nor any of buyers have confirmed for paying any extra consideration/on money for buying flats from the appellant. In absence of such specific and speaking material also there is no scope for such estimations made by the AO.*
- 7.3.7 *In tile case of L.K.Advani Vs CBI their Lordship have held that " Based upon the incriminating material found at the premises of a third party but no belonging or signed by the appellant the presumption provided under section 132(4A) will not be applicable until and unless corroborated by other evidence. " Similarly, in the case of Rama Traders Vs First ITO (1998) 25 ITO 599 (Pat)(TM) it is held that no addition could be made on the basis of presumption raised by section132(4A) in the hands of the assessee here in the books of another firm. The ratio of these judgment have been applied in so many cases where in it is held that no addition can be made on the basis of documents found from third parties in the absence of corroborative evidence. In the case under consideration no corroborative evidence brought on records by the AO.*
- 7.3.8 *From the various judgments relied upon by the appellant and on the facts of the case, I have to observe that no addition can be made only on the basis of assumptions, presumptions or guess work based upon rough, unsigned, projected noting on loose papers ignoring the material evidences seized and statement available on record. In impugned assessment order it is very clear that the AO has proceeded only on on assumptions. It is settled principal of law that an allegation remains a mere allegation unless proved. Presumptions and assumptions cannot take the place or reality.*
- 7.3.9 *Considering the specific facts and ratio of various judgments discussed herein above I am in the considered view that such loose papers is technically, legally and factually can only be termed as rough, deaf and dumb papers and under no circumstances it can be utilized as evidence heating the same as a legal document. Further the loose papers are undated, unsigned and does not reflect the exact nature or actual execution of transactions by the company. No adverse inference can be drawn on the basis of such paper on suspicion as the noting on such paper is open to more' than one possible of interpretations in absence of cogent and speaking adverse material by inquiry/verification for such*

estimation. Hence, the addition made by the AO in this case of Rs. 36,51,800/- in the year under consideration is not justified. Accordingly, the addition of Rs. 36,51,800/- is deleted. This ground of appeal is allowed.

9. Against the said order for deletion of the addition, the Revenue was in appeal before us on the ground mentioned above.

10. The Id. CIT-DR has vehemently supported the order of the A.O.

11. On the contrary, the Id AR appearing on behalf of the assessee has relied on the order of the Id. CIT(A) and also relied on the additional written submissions and the contents of the same are reproduced below:

“3. For understatement of sales No evidence of receiving Excess sale consideration: Further the Id. AO has not brought on record that the assessee has received more consideration than to actual sale consideration mentioned in sale deed except loose rough papers, which have no value unless there is no direct nexus . On this preposition kindly refer following decision.

3.1 In the case of Inder lok Hotels (P) Ltd v/s ITO 122 TTJ 145(Mum). Here also the position is very same because here assessee purchases a land and after conversion and developing in to plotting the same have been sold after making some profit. The lower authority nowhere alleged that the assets were sold in loss and he neither made any inquiry nor brought any evidence on record that the land sold on higher price than shown in sale deed. If he was having any doubt about the sale price of lands he could have made independent inquiry. The assessee has discharged onus lie upon him by producing the copies of sale deed. Now the onus was lies upon the revenue to disprove the same.

3.2 In case of CIT v/s Supriya Enterprises 232 ITR 887(Ker). It has been held that the registered documents reflect the price of the land is a piece of evidence which cannot be discarded. The ordinary rule is that apparent state of affairs is real unless contrary is proved and the burden of proving the contrary lies on the person who assessed/alleged it Kindly refer ***Daulat Ram Rawat Mull 87 ITR 349 (SC). ACIT v/s Excellent Land Developers (P) Ltd. 1 ITR (Trib.) 563***

3.3 In CIT V/S Chandni Bhuchar 34 DTR 137(P&H)-It has been held that valuation done by the any State Agency for The purpose of the stamp duty would not ipso fact substitute the actual sale consideration as being passed on the seller by the purchaser in the absence of any admissible evidence value taken by the stamp duty authority could not be taken as actual sale consideration and value shown in the sale deed had to be accepted. Also refer ***CIT v/s Smt. Raj Kumari Vimla Devi***

(2005) 279 ITR 360(All). CIT v/s Shweta Buchar 192 Taxman 67(P&H) Also refer Hussain Ali Bohara in ITA No. 564 & 578/JDH/2011

3.4. *In this connection we also relying on the decision of Honble Rajasthan High Court in CIT v/s K.K. Enterprises 178 Taxman 187(Raj.)/13 DTR 289 wherein it has been held that “ AO determined the sale price of the plots by adopting the rate of Rs. 40 per sq.ft. on the basis of rate taken by sub registrar and made addition to assessee’s income not justified. Apparently, there was no reliable material on record before the assessing authority to assume sale of plots at Rs. 40 per sq. ft.. In the absence of any evidence on record, it cannot be presumed hat land has been sold by the assessee at a higher price than the consideration shown in the registered sale deeds- Rates of property fixed by the Stamp valuation Authority for registration purpose cannot be applied to arrive at the price for which the property might have been sold”.*

Recently followed by the Honble Bench in the case of Manoj Dubey in ITA No. 294/JP/2016 dt. 09.06.2017.

3.5 In CIT v/s Dolphin Builders (P) Ltd 90 DTR 75(MP)-Understatement of sale consideration of flates- When there was no evidence that the excess amount, if any was collected by G- Builders or even if it was collected then it was passed on the assessee. No addition could be made in the hands of the assessee.

4. Loose papers not for the year under consideration.: *It is very important to note that the search was carried o 10.03.2010 i.e for F.Y. 2009-10 and admittedly the documents were seized on 10.03.2010 it means before it. It means the seized loose papers were earlier to that date and the addition has been made in later A.Y.s. Hence how a past seized documents can be used for future or later years i.e for A.Y. 2011-12 & 2012-13, without any evidence. Hence also the addition liable to be deleted. Further in the statements dt. 21.042010 also the Ankit Jain has clarified the things and clearly stated the sale price of flats which clearly tally with the sale agreements which has also found we are enclosing herewith copy of sale agreements. On Sec. 292C we rely upon the decision of **379 ITR 160(Bom.).***

5. *Considering the overall facts and circumstances of the case and the position of law the addition made in the years under considerations have rightly been deleted by the Id. CIT(A). Hence we request your honor to please upheld the order of Id. CIT(A) in the interest of equity and justice and dismissed the appeal of the Revenue and oblige.”*

12. We have heard the Id. Counsels of both the parties and have perused the material placed on record. We have also deliberated upon the decisions cited in the orders passed by the authorities below as well as cited before us and we have also gone through the orders passed by the revenue authorities. From perusal of the record, we observed that in this case, a

search and seizer operation were carried out on 10.03.2010 relevant to A.Y. 2010-11 wherein the certain loose papers were found and seized as page 8 to 10 of- Annexure AS Exhibit-4 (as supra). On perusal of these loose papers, it is clear that these were rough noting, projected estimates only and there were also cuttings, no date, nature, flat No. does not represent about the actual nature or actual execution of any business transactions by the assessee Company. The AO made addition only by making the arbitrary calculation on the basis of above loose papers without bringing any positive, corroborative evidence on records in support he has proceeded on his own imagination, assumptions, presumptions or guess work. Further when the Assessing officer himself recorded the statements of Marketing manager Sh. Ankit Jain who was handling the sales was recorded on 21/10/2010 U/s 131 wherein he has clearly explained and stated about the size of flats are 1001 sq ft.(built up area) and 1126 sq ft. (built up area) only. He also explained about the size of flats mentioned in the broacher i.e. 1666 and 1484 sq ft. that this was nothing but super built up area of both type of flats constructed by the Company. Regarding charging of rates by the assessee Company from the customer in question No.5 he has clearly stated the facts that the rates per sq ft are charged on built up area only. We have also gone through the documents related to sale agreement of flats executed prior to the date of search and available with the assessee which were also seized by the search party, E.g. Sale agreement dated 22/01/2010, 9/02/2010 and 16/1/2010, between the company and Shri Mahesh Chandra

Swarnkar, Shri Pawan Dagalia and Shri Virndra Singh Chajjad respectively which are duly signed and notarized. In all the above agreements the built area as well as total sale consideration has been mentioned clearly. When all these explanation, documents were before the AO, he must bring on record any contrary evidence, he must have made the inquiry from the purchasers when the data or details of the purchasers were before him, before making the addition on account of understatement of sales. The Assessing Officer has not brought on record any contrary evidence except these loose papers. The Notarized sales agreements cannot be discarded in front of loose rough estimated papers without bringing any contrary evidences to rebut the same. On this preposition, we draw strength from the decision of the Hon'ble MP High court in the case of **CIT v/s Dolphin Builders (P) Ltd 356 ITR 420 wherein it was held that** *"Department had not examined any purchaser or flat owner to verify correctness of noting that some higher amount was paid by said purchaser to "B" Builders or fact that actual price was much higher to price which was recorded in account books. The Tribunal had also found that if any amount was collected in excess to the agreed price then "B" could have been liable for that and not the assessee. Aforesaid reasoning of the Tribunal was reasonable. Though there might be some doubt about the price of the flats but until and unless it could have been proved by some evidence, aforesaid doubt could not take place of proof. Until and unless such noting was corroborated by some material evidence, the AO erred in making addition in the income.*

13. Further if in the beginning, any customer or buyer has come to look or for purchase of any flats and the marketing persons tell some calculation of flats area, size, or estimation of rate on the rough papers. As in the case of flat sale/purchase or real estate business, there are so many criteria or angles to convince the customers and after bargaining amount is being reduced on the basis of payment, construction, finishing etc. Thus it means not that the rough noting or estimation is the final. Further we agree with the plea of the assessee and admitted facts that the loose papers pertain or found in the A.Y. 2010-11 as the search was carried on 10.03.2010 i.e for F.Y. 2009-10 where these documents were seized thus the seized loose papers were earlier to the date of search and prior to the A.Y. 2011-12 and 2012-13. Thus no addition can be made in later A.Y.s. 2011-12 and 2012-13 on projection basis and a past seized documents can be used for future or later years i.e for A.Y. 2011-12 & 2012-13, until and unless the Assessing officer was not having any concrete evidence, which were absent in the present case.

14. Further we would also like to say that there was no inquiry or evidence on record that whether any excess or own money has been received by the assessee from the purchasers over and above the amount mentioned in such agreements. The actual amounts received are appearing in the registered sale. In this regard we draw strength from the decision of the Hon'ble Jurisdictional Rajasthan High Court in the case **CIT v/s K.K.**

Enterprises 178 Taxman 187(Raj.)/13 DTR 289 wherein it has been held that "*AO determined the sale price of the plots by adopting the rate of Rs. 40 per sq.ft. on the basis of rate taken by sub registrar and made addition to assessee's income not justified. Apparently, there was no reliable material on record before the assessing authority to assume sale of plots at Rs. 40 per sq. ft.. In the absence of any evidence on record, it cannot be presumed hat land has been sold by the assessee at a higher price than the consideration shown in the registered sale deeds- Rates of property fixed by the Stamp valuation Authority for registration purpose cannot be applied to arrive at the price for which the property might have been sold*". Again the Honble Jurisdictional Rajasthan High Court in the case of **CIT vs. Khandelwal Shringi & Co.: (2017) 398 ITR 0420 (Raj)** it has been held that *Income from undisclosed sources—Unexplained investments—Purchase of agricultural land—Deletion of addition—Tribunal deleted addition made by AO on account of unexplained investment in purchase of agricultural land on basis of sale agreement and other documents found and impounded during course of survey u/s 133 in which sale consideration was specified amount—Held, while computing undisclosed income, rates of property fixed by Stamp Valuation Authority for purposes of registration of sale deeds, could not be taken to be price for which property was purchased—In absence of evidence on record, higher price for sale of land could not be presumed from consideration shown in registered sale deeds and rates of property fixed by Stamp Valuation Authority for registration*

purposes could not be taken to be price for which property might had been sold—There was no justification for AO to estimate selling price of land at Rs. 40 per sq.ft. instead of Rs. 20 per sq.ft. and for CIT(A) to presume selling price at 22 per sq.ft—Tribunal committed no error in allowing appeal of assessee—Revenue's appeal dismissed.

We also draw strength from the decision of the Honble Supreme Court in the case of **CIT vs. Shivakami co. (P) Ltd. 159 ITR 0071(SC)** wherein it was held that *Capital gains—Applicability of first proviso to s. 12B of 1922 Act—Proviso to s. 12B not attracted unless there is evidence that more consideration than what was stated in the document of transfer was received—Onus in this regard is on Revenue—Emphasis in those provisions is on consideration declared or disclosed by the assessee as distinguished from the consideration actually received by the assessee—Capital gains is intended to tax the gains of the assessee and not what the assessee might have gained—Shares sold by the assessee to related parties at lower value allegedly for safeguarding the shares from being taken over by Government in settlement of tax dues—No evidence that consideration actually received was more than what was disclosed or declared by the assessee—There was thus no understatement of full value of consideration—No capital gains under the first proviso to s. 12B was, therefore, leviable.*

In the case of **CIT v/s Shalimar Buildwell Pvt Ltd 86 CCH 250(All)** it has been held that *no additions can be made on own guess work,*

assumption, presumption and suspicion. An allegation remains a mere allegation unless proved. Suspicion may be strong however cannot take the place of reality, are the settled principles. In the present case looking to the above facts and circumstances it is clear that he made the addition own guess work, assumption, presumption and suspicion by using rough estimated cutting noting which were prior to the A.Y.'s under consideration which was not desirable in the eye of law. Hence also no were liable to be made. The Id. CIT-DR has not brought on record any new facts or circumstances to controvert the findings so recorded by the Id. CIT(A) qua this issue, therefore, considering the totality of facts and circumstances of the case and in view of the above findings of the Id. CIT(A) and judgments relied upon by the parties, we do not see any reason to interfere to deviate from the findings so recorded by the Id. CIT(A) qua this issue, accordingly, we uphold the same.

15. In the result, this appeal of the revenue stands dismissed.

16. Now we take ITA No. 295/JODH/2016 for the A.Y. 2012-13. In this appeal, the ground under dispute is ground No. 2 of the appeal and the same is reproduced below.

“2. *Whether on the facts and circumstances of the case the CIT(A) was right in deleting the addition of Rs.4,19,86,000/- on account of understatement of sale consideration of three flats without appreciating the facts that the said addition was rightly made by the AO on the basis of detailed analysis of seized papers being page No. 8 to 10 of Annexure-AS, Exhibit-4 which proved that the flats have been sold to the buyers at the rates and as per plan*

mentioned on the aforesaid three pages but in the books sale considerations were shown less."

17. We have noticed that in this appeal i.e. ITA No. 295/Jodh/2016 for the A.Y. 2012-13, the grounds of appeal, facts and circumstances of the case as well as submissions of both the parties are exactly same and identical as in ITA No. 180/Jodh/2016 A.Y. 2011-12. Hence the finding given in ITA No. 180/Jodh/2016 shall apply mutatis mutandis in this year also.

18. In the result, both these appeals of the Revenue are dismissed.

Order pronounced in the open court on 15th September, 2021.

Sd/-

(VIKRAM SINGH YADAV)
ACCOUNTANT MEMBER

Sd/-

(SANDEEP GOSAIN)
JUDICIAL MEMBER

Jodhpur

Dated 15/09/2021

*Ranjan

Copy to:

1. The Appellant
2. The Respondent
3. The CIT
4. The CIT (A)
5. The DR
6. Guard File

Assistant Registrar
Jodhpur Bench