

**IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH : BANGALORE**

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND SMT. BEENA PILLAI, JUDICIAL MEMBER**

ITA Nos.1375 to 1378/Bang/2016
Assessment year : 2008-09 to 2011-12

Shri B.H Basha, Prop. M/s Bahar Films, No.18, 13 th Cross, Jayamahar Extension, Bengaluru-560 046. PAN – AEBPB 0242 C	Vs.	The Dy. Commissioner of Income- tax, Central Circle-1(4), Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Shri B.S Balachandra, Advocate
Respondent by	:	Shri Roumvan Paite, CIT(DR)

Date of hearing	:	01.10.2021
Date of Pronouncement	:	28.10.2021

ORDER

Per Chandra Poojari, Accountant Member

This appeal by the assessee is directed against
different orders of the CIT(A), Bengaluru for the
assessment years 2008-09 to 2011-12.

2. There was a search under section 132 of the Income Tax Act on 30/08/2011 in the case of the assessee. Consequent to search action, notice under section 153A of the Income-tax Act was issued to the assessee and assessee filed return of income on 19/9/2011. Notice was issued on 15/03/2012 and served to the assessee on 20/03/2012. The assessee filed return of income consequent to this notices for all these assessment years on 15/05/2012. The assessment orders passed in all these assessment years vide order dated 25/3/2014. In these assessment years, in addition to the income declared by the assessee, the Assessing Officer made addition towards unexplained investment on the basis of loose sheets found during the course of search, which is as follows:-

Assessment year	Rs.
2008-09	- 25 lakhs
2009-10	- 25 lakhs
2010-11	- 3.20 crores
2011-12	- 3,28,50,000/-.

3. On appeal, CIT(A) confirmed the additions made by the AO. Against this, assessee is in appeal before us.

First we will take up common ground raised in all these appeals.

4. The first common ground in all these appeals is with regard to framing of assessment without any incriminating material and issuance of notice u/s 153A without recording satisfaction. At the time of hearing, this ground is not pressed, hence the same is dismissed.

ITA No.1375/Bang/2016 (Asst. Year 2008-09)

5. The ground in this appeal is with regard to making addition under section 69A of the Act, though there was no finding that the assessee was found to be the owner of the money, and by ignoring the case laws cited by the assessee. According to the assessee, the provisions of section 69A of the Act is not applicable but section 69 is applicable. Further, the AO not recorded any satisfaction as required under section 69A of the Act.

6. The ld.DR relied on the order of the lowest authorities and also submitted that presumption u/s 132(4A) is a rebuttable presumption, the assessee herein has been unable to rebut that presumption. Hence, no

fault with the conclusion arrived by the lower authorities.

He relied on the following judgments :-

- 1) Surendra M Khandhar Vs. ACIT reported in 224 CTR 409, by the Hon'ble Bombay High Court
- 2) ITO Vs. Legal heirs of Nazmin Jamal 33 taxmann.com 208, the Hon'ble ITAT, Mumbai
- 3) Hazari Lal Vs. CIT reported in 20 taxmann.com 714 by the Hon'ble Punjab & Harayana High Court
- 4) CIT Vs. Naresh Kumar Agarwala, reported in 198 taxman 194, the Hon'ble Delhi High Court.

7. Finally he submitted that considering the seized material there was sufficient material before AO who have made additional u/s 69/69A of the Act in these asst. years and the same to be confirmed.

8. In this case, addition made towards unexplained investment and mentioning the wrong section is not fatal, though such addition to be made under section 69 of the Act but the AO mentioned the same as section 69A of the Act. Accordingly, this ground of appeal is dismissed.

9. Next ground in this appeal is that the assessee placed reliance on the loose sheet entries found during the

course of search action. During the course of search, a folder containing loose sheets marked as A/BHB/11 was seized from the assessee's premises at No.18, 13th Cross, Jayamahal Extension, Bangalore. Page No.10 of the folder marked as A/BHB/11 contains the following information, which is as under marked as A/BHB/11:

1 S Narayan ——— 100 = 00	11 Eshwari 6/4
Dusia 23/2	Rudrappa ——— 20 = 00
2 A Ganesh ——— 65 = 00	12 KC Nagaraj 25/3 15 = 00
Mass 12/1/11	13 Anand ——— 25 = 00
3 N Kumar ——— 45 = 00	Prasanna Theatre
Badra 8/12/10	14 K Udaya Ravi Films - 25 = 00
4 Shankar Reddy ——— 95 = 00	15 Bhanu Theatre
Addhuri 10/1/11	Hassan 2/2/10 35 = 00
5 Mahadesh ——— 200 = 00	16 Basava Reddy 3/1/10 95 = 00
Chingari 1/3/11	17 Shanta Enterprises
6 Ramu ——— 55 = 00	King Ravi 4/1/10 20 = 00
Kanteerava 10/1	18 Percept Pictures 15/4/10 20 = 00
7 Ramu 14/9 ——— 20 = 00	19 Vipulsha ——— 15 = 00
Veera	20 Tulaja Bhavani
8 Prasanna 1/3/10 65 = 00	21 M N Suresh ——— 130 = 00
Doddaballapura	22. Pradeep ——— 5 = 00
9 Hargi Anaji	
Nagaraj 1/1/10 65 = 00	
10 Vijay Kumar ——— 25 = 00	
2/4	

10. The typed copy the same is as follows:-

1.	Vijay Kumar	25	2008-09
2.	Anand Theatre	25	2009-10
3.	Aaptharakshaka	15	2010-11
4.	Bhanu Hassan	35	2010-11
5.	Prasanna Theatre	65	2010-11
6.	Anaji Nagaraj	65	2010-11
7.	Basava Reddy	95	2010-11
8.	K.C.Nagaraj-Shantha	20	2010-11
9.	M.N.Kumar --Bhadra	25	2010-11
10.	Sanju Weds Geetha	45	2011-12
11.	Kanteerva	45	2011-12
12.	Chingari	11.50	2011-12
13.	Dushta	100	2011-12
14.	Shankar Reddy - Adduri	67	2011-12
15.	A Ganesh -Mass	45	2011-12
16.	Eshwari Talkies	20	2012013

17.	Aaptharakshaka	24	2012-13
18.	Aarakshaka	15	12-13
19.	Chingari	15	12-13

11. The AO quantified the addition in the assessment 2008-09 @ Rs.25 lakhs.

12. Now the contention of the ld.AR is that the AO considered the entry in the loose sheets marked as A/BHP/11 at page No.10 as Shri Vijay Kumar - 24 lakhs- 2/4 @ Rs.25 lakhs advanced to Shri Vijay Kumar. According to ld.AR, the AO recorded his statement under section 131 of the Act on 17/8/2011 in question number 21 on this issue.

Question number 21 :

13. In this case of Shri Vijayakumar, it is seen from the seized material A/BHP/11 at page no. 10, the amounts paid are mentioned and they do not match with the figures reflected in the ledger produced by the assessee. As per the seized material, the following is paid to Shri Vijay Kumar: 2/4 25

Ans : Shri Vijay Kumar is a Telugu Distributor and he had approached for finance and I didn't finance. I have not dealt with him at all.

11.1 According to ld.AR, the amount mentioned @ Rs.25 on 2/4. There was no figure of Rs.25 lakh, for date 2nd April 2007. The ld.AO interpreted 25 as Rs.25 lakhs and 2/4 as 2/4/2007, so as to bring it to tax in the finance year 2007-08 relevant to assessment year 2008-09, which he cannot do so without any supporting material to

suggest that assessee advanced sum of rupees 25 lakhs to Shri Vijayakumar on 2/4/07. This is only on the basis of imagination and addition was made without any supporting document.

14. The ld.DR submitted that the assessee has not satisfactorily explained the reason for making entries in the loose sheet and actually it is out of the books of account. The assessee advanced money and the same was brought to tax. Further, it was submitted that the document was seized from the possession of the assessee and he did not deny the said document, hence the AO presumed that the amount shown in documents which has not reflected in the accounts made by assessee was his income by way of unexplained investment. He relied on the order of the CIT(A).

15.1 The ld.DR also relied on the following case laws:-

1. *Surendra M.Khandhar vs ACIT* reported in 224 CTR 409, by the Hon'ble Bombay High Court.
2. *ITO vs Legal heirs of Nazmin Jamal* 33 taxmann.com 208, the Hon'ble ITAT, Mum ba.
3. *Hazari Lal vs CIT* reported in 20 taxmann.com 714 by the Hon'ble Punjab & Haryana High Court
4. *CIT vs Naresh Kumar Agarwala*, reported in 198 taxman 194, the Hon'ble Delhi High Court.

15. We have heard both the parties and perused material on record. In the present case, the basis for addition is entry in the loose sheet, which shown as 25/4/2007 to Shri Vijaya Kumar on the basis of this entry in the loose sheet made addition under section 69A of the Act. To sustain the addition, there should be positive material and more than entry in the loose sheet which is missing in this case. The seized materials in the form of loose sheet marked as A/BHP/11 does not bare any signature of any person. The AO examined Shri Vijay Kumar, who was said to be taken loan from the present assessee. It is very important to examine the party and thereafter the AO has to give an opportunity of cross examination in this regard.

16. The seized material relied upon by the AO are mere loose sheet containing un-substantiated jottings having no evidentiary value unless supported by the corroborative material or documents. First of all, to come to the conclusion that these are foolproof document, the department should have in a position to have requisite material to show that the assessee has actually advanced money to Shri Vijay Kumar on a particular date. The AO mostly relying on the answer to question number 21 to

the statement recorded under section 131 of the Act on 17/8/2011. As held by the Delhi High Court in the case of PCIT Vs. Best Infrastructure India Private Limited 397 ITR 82 (Del), wherein, statement recorded under section 132(4) did not by themselves substantiate incrementing material on that basis of assumption of jurisdiction under section 153A of the Act and consequent addition made by the AO does not justify. In our opinion, the statement recorded under section 132(4) during the course of search action not only has to be confronted to the concerned parties but an opportunity to cross examine the parties has also to be given to the assessee. If it was not provided, it is sufficient to disregard such statement. In the present case, the seized material did not contain the name of the assessee or signature of any person, they are merely unsubstantiated loose sheet as held by Tribunal in the case of ACIT Vs. Layers Exports Private Limited, 53 ITR (Trib) 416 (Mum), wherein, held that addition cannot be sustained merely on the basis of rough noting made in loose sheets, unless AO brings on records some independent and corroborative material to prove irrefutably that the said noting revealed unaccounted income or unaccounted investments or unaccounted expenditure of the assessee. The very

purpose of search concluded under section 132 is to unearth the hidden income or get hold of books of account or documents which has not been or will not be otherwise produced by the assessee in regular course on issue of summons or notice. For this purpose, we place reliance on the finding of the coordinate Bench in the case of Devraj Urs Educational Trust for Backward Classes in ITA No.500 to 506/Bang/2020 dated 16/8/2021 wherein held as under-

“The contention of the Id. DR is that the department relied upon the statement of assessee’s own employee, who need not cross-examine its own employee and there is no mistake in not providing opportunity of cross-examination to the assessee. However, we are not in agreement with the contention of the Id. DR. The right to cross-examine is not dependent upon the assessee’s relationship with the witnesses. The right to cross-examine depends upon the fact that statement of the party is used against the assessee. Therefore the mere fact that the statement sought to be relied upon by the AO is that of the employee would not disentitle the assessee to cross-examine. Therefore, the ratio relied upon by the assessee squarely applies and it is the prerogative of assessee whether it wants to cross-examine or not. It was held in the case of Smt. Madhu Gupta v. DCIT 2006 (2) TMI 496 - ITAT MUMBAI / [2006] 8 SOT 691 (MUM.) that even if the assessee was provided a copy of the statement recorded by the revenue on the spur of the moment, that should not be treated as an effective opportunity given to the assessee. In that case the Tribunal relied upon the judgment of the Hon’ble Allahabad High Court in the case of Gargi Din Jwala Prasad v. CIT [1974] 96 ITR 97 (All) wherein it was held that permission to cross-examine witness given, but names of the witnesses and substance of the statement made by them not given is not a proper opportunity and on that ground assessment was vitiated by the principles of natural justice as permission to cross-examine all

the witnesses are illusory. Further in the present case, these seized material A/DUU/1 to 4 though did not contain the name of assessee or signature of any person, they are merely unsubstantiated loose sheets. As held by the Tribunal in the case of ACIT v. Layers Exports P. Ltd [2017] 53 ITR (Trib) 416 (Mumbai), addition cannot be sustained merely on the basis of rough noting made on few loose sheets, unless AO brings on record some independent and corroborative material to prove irrefutably that the said noting revealed unaccounted income or unaccounted investment or unaccounted expenditure of the assessee. The very purpose of search concluded u/s. 132 is to unearth hidden income or property or get hold of books of account or documents which has not been or will not be otherwise produced by the assessee in regular course on issue of summons or notice. In the assessee's case, as stated above, the purported search action did not lead to discovery of any unaccounted money, bullion, jewellery or other valuable article or thing. Further, no books of account revealing any undisclosed transactions of the assessee were found during the course of search. The entire assessment order revolves around scribbling in loose sheets of papers seized from premises of another person in course of search action on such other person. It is a fact that the said rough loose sheets of papers scribbled by some anonymous person and seized in course of search of another person cannot be termed as 'documents' having any evidentiary value within the meaning of section 132 or section 132A of the Act. Thus, the entire assessment u/s 153A of the Act in case of the assessee rests on shaky and incorrect foundation and thus deserves to be quashed.

17. The Tribunal in the case of Sri Y. Siddaiah Naidu, Tirupathi vs. Asst. Commissioner Of Income-Tax 2015 (2) TMI 403 - ITAT HYDERABAD held that it is very much clear that from such notings, it cannot be deduced whether they are receipt or payments nor it can be concluded whether they are in relation to any particular

transaction as no names have been mentioned. In these circumstances, no addition can be made on the basis of such document.

19. In CIT v. M/S Khosla Ice & General Mills 2013 (1) TMI 451 - Punjab & Haryana High Court, the Hon'ble Court held that assessee rightly contended that the impugned document was a non-speaking document inasmuch as it does not contain any intelligible narration in support of the inference drawn by the Assessing Officer that it reflected sales carried out by the assessee outside the regular books of account. When a dumb document, is to be made the basis to fasten tax liability on the assessee, the burden is on the Revenue to establish with corroborative evidence that the nature of entries contained therein reflect income and also that such income was in the control of the assessee. Thus, Revenue has to establish, with necessary corroborative evidence, that various entries contained in the seized document reflect sales of rice and broken rice effected by the assessee. Considering the entirety of circumstances, in the absence of any material to support the nature and ownership of the entries found in the seized document, no addition is permissible in the hands of the assessee as

undisclosed income by merely arithmetically totalling various figures jotted down on such document.

19. The Bangalore Tribunal in the case of Kirloskar Investments & Finance Ltd. v. Assistant Commissioner of Income-tax [1998] 67 ITD 504 (Bang.) held that the provision of the copy of the statement or letters is not sufficient opportunity. Oral evidence of persons concerned with the transaction are important piece of evidence and before it could replace the written evidence, the party against whom such oral evidence is being used must be allowed the opportunity of examining the person because, both the types of evidences need to weighed properly before rejecting one for the other.

21. The Hon'ble Supreme Court in Common Cause (A Registered Society) v. UOI [2017] 394 ITR 220 (SC) observed with regard to evidentiary value 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. It is apparent from the aforesaid discussion that loose sheets of papers are wholly irrelevant as evidence being not admissible under Section 34 of Evidence Act so as to constitute evidence with respect to the transactions mentioned therein being of no evidentiary value. The entire prosecution based upon such entries which led to the investigation was quashed by the Court. There has to be some relevant and admissible evidence and some cogent reason, which is prima facie reliable and that too, supported by some other circumstances pointing out that the particular third person against whom the allegations have been levelled was in fact involved in the matter or he has done some act during that period, which may have co-relations with the random entries. In case we do not insist for all these, the process of law can be abused

against all and sundry very easily to achieve ulterior goals and then no democracy can survive in case investigations are lightly set in motion against important constitutional functionaries on the basis of fictitious entries, in absence of cogent and admissible material on record, lest liberty of an individual be compromised unnecessarily.

22. The Delhi Tribunal in *Vijay Kumar Aggarwal v. ACIT* 2017 (5) TMI 1354 held that it is clear that the presumption of facts u/s 292C of the Act is not a mandatory or compulsory presumption but a discretionary presumption. Since, the word used in the said Section is “may be” and not “shall”. Secondly, such a presumption is rebuttable presumption and not a conclusive presumption because it is a presumption of fact not a presumption of law. In the present case, the assessee from the very beginning stated that the documents found during the course of search did not belong to him. Therefore, the addition made by the AO is only on the basis of surmises and conjecture without bringing any cogent material on record to substantiate that the assessee was engaged in the business of gold and jewellery and the AO had not brought any material on

record to substantiate that the denial of the assessee was false.

23. The Hon'ble Supreme Court in *Andaman Timber Industries v. Commissioner of Central Excise*, 281 CTR 241 (SC) held as follows:-

“Not allowing the assessee to cross-examine the witness by the Adjudicating Authority though the statements of those witnesses 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. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating

Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. (para 6)

Appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price-list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price-list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. (para 7)

If the testimony of these two witnesses 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 witnesses was the only basis of issuing the Show-Cause Notice. (para 8)”

24. The Delhi Tribunal in the case of Veena Gupta v. ACIT in ITA No.5662/Del/2018 dated 27.11.2018 relying on the above judgment of Hon’ble Supreme Court in the case of Andaman Timber Industries (supra) quashed the assessment order on the reason of not providing cross-examination of witnesses whose statements were recorded.

25. The Hon’ble Supreme Court in the case of Mehta Parikh & Co. v. CIT, 30 ITR 181 held as under:-

“In the instant case a mere calculation of the nature indulged in by the ITO or the AAC was not enough, without any further scrutiny, to dislodge the position taken up by the assessee, supported as it was, by the entries in the cash book and the affidavits put in by the assessee before the AAC.

The Tribunal also fell into the same error. It could not negative the possibility of the assessee being in possession of a substantial number of these high denomination currency notes. It, however, considered that it was impossible for the assessee to have had 61 such notes in the cash balance in their hands on 12-1-1946, and then it applied a rule of the thumb treating 31 out of such 61 notes as within the bounds of possibility, excluding 30 such notes as not covered by the explanation of the assessee. This was pure surmise and had no basis in the evidence, which was on the record of the proceedings.

Facts proved or admitted may provide to support further conclusions to be deduced from them, which conclusions may themselves be conclusions of fact and such inferences from facts proved or admitted could be matters of law. The court would be entitled to intervene if it appears that the fact finding authority has acted without any evidence or upon a view of the facts, which could not reasonably be entertained or the facts found are such that no person acting judicially and properly instructed as to the relevant law would have come to the determination in question.

The High Court treated this finding of the Tribunal as a mere finding of fact and recognised this position in effect but went wrong in applying the true principles of interference with such findings of fact to the present case. Really speaking the Tribunal had not indicated upon what material it held that Rs. 30,000 should be treated as secret profit or profits from undisclosed sources and the order passed by it was bad. The assessee had furnished a reasonable explanation for the possession of the high denomination notes of the face value of Rs. 61,000 and there was no justification for having accepted it in part and discarded it in relation to a sum of Rs. 30,000.

The High Court ought to have held that there were no materials to justify the assessment of Rs. 30,000 from out of the sum of Rs. 61,000, for income-tax and excess profits tax and business profits tax purposes, representing the value of the high denomination notes which were encashed.”

26. Further the Hon’ble Supreme Court in the case of CIT v. Odeon Builders (P.) Ltd., 418 ITR 315 (SC) head-note is as follows:-

“Section 37(1) of the Income-tax Act, 1961 - Business expenditure - Allowability of (Bogus purchase) - Certain portion of purchases made by assessee was disallowed - Commissioner (Appeals) found that entire disallowance was based on third party information gathered by Investigation Wing of Department, which had not been independently subjected to further verification by Assessing Officer and he had not provided copy of such statements to appellant, thus, denying opportunity of cross examination to appellant, who on other hand, had prima facie discharged initial burden of substantiating purchases through various documentation including purchase bills, transportation bills, confirmed copy of accounts and fact of payment through cheques, VAT Registration of sellers and their Income-tax Return - He held that purchases made by appellant was acceptable and disallowance was to be deleted - Tribunal dismissed revenue's appeal - High Court affirmed judgments of Commissioner (Appeals) and Tribunal being concurrent factual findings - Whether no substantial question of law arose from impugned order of Tribunal - Held, yes [Para 4] [In favour of assessee]”

27. The Hon’ble High Court of Karnataka in Kothari Metals v. ITO, 377 ITR 581 (Karn) held as under:-

“Held, allowing the appeal, that the non-furnishing the reasons for re-opening an already concluded assessment goes to the very root of the matter. Since such reasons had not been furnished to the appellant, even though a request

for them had been made, proceedings for the re-assessment could not have been taken further on this ground alone.

Besides this, the statement of some other person which was recorded was the basis of reassessment and the assessee was asked to explain it but the statement was itself not furnished to the assessee. As such, besides non-furnishing of the reasons for re-opening there was also a gross violation of the principles of natural justice. The reassessment was not valid."

28. The Hon'ble Calcutta High Court in the case of CIT v. Eastern Commercial Enterprises, 210 ITR 103 (Cal) held as follows:-

"8. We have considered the contesting contentions of the parties. It is true that Shri Sukla has proved to be a shifty person as a witness. At the earlier stages, he claimed all his sales to be genuine but before the Assessing Officer in the case of the assessee, he disowned the sales specifically made to the assessee. This statement can at the worst show that Shri Sukla is not a trustworthy witness and little value can be attached to what he stated either in his affidavits or in his examination by the Assessing Officer. His conduct neutralises his value as a witness. A man indulging in double-speaking cannot be said by any means a truthful man at any stage and no court can decide on which occasion he was truthful. If Shri Sukla is neutralised as a witness what remains is the accounts, vouchers, challans, bank accounts, etc. But, we would observe here that which way lies the truth in Shri Sukla's depositions, could have been revealed only if he was subjected to a cross-examination by the assessee. As a matter of fact, the right to cross-examine a witness adverse to the assessee is an indispensable right and the opportunity of such cross-examination is one of the cornerstones of natural justice. Here Shri Sukla is the witness of the Department. Therefore, the Department cannot cut short the process of taking oral evidence by merely having the examination-in-chief. It is the necessary requirement of the

process of taking evidence that the examination-in-chief is followed by cross-examination and re-examination, if necessary.

9. *It is not just a question of form or a question of giving an adverse party its privilege but a necessity of the process of testing the truth of oral evidence of a witness. Without the truth being tested no oral evidence can be admissible evidence and could not form the basis of any inference against the adverse parties. We have also examined the records and we find that this Shri Sukla was examined by a number of officers. The Assistant Director of Investigation examined him on August 4, 1987, and in reply to question No. 2 in that deposition he confirmed that he was a dealer in lubricating oil since 1977. In reply to question No. 3, he confirmed having been assessed to income-tax. Again, in reply to question No. 4, he explained that he used to purchase lubricating oil from different garages as well as through various brokers. Such lubricating oil was processed by him in his factory for sale. All payments were received by him through account payee cheques. In reply to question No. 5, he stated that he had seven full-time employees whose names are mentioned by him. He also claimed to have maintained books of account like sales books, purchase books, cash books and sale bills. In reply to question No. 18, he, on his own, stated that his big customers were the Reliance Oil Mills and Eastern Commercial Enterprises, the assessee, in the present reference. As for his cash withdrawals, he explained that his business required ready cash for purchase of raw materials which explained his large drawings of cash from the bank. Learned counsel then cited a host of decisions to bring home the point that no evidence or document can be relied upon unless it is shown to the assessee. Kishanchand Chellaram v. CIT. Similarly, the requirement of cross-examination as the requirement of the rules of natural justice has been underlined by the Bombay High Court in VasANJI Ghela and Co. v. CST [1977] 40 STC 544. It is trite law that cross-examination is the sine qua non of due process of taking evidence and no adverse inference can be drawn against a party unless the party is put on notice of the case made out against him. He must be*

supplied the contents of all such evidence, both oral and documentary, so that he can prepare to meet the case against him. This necessarily also postulates that he should cross-examine the witness hostile to him.

10. In any case, we have nothing to rely upon to come to a decision this way or the other. The first thing is that which of the statements of Shri Sukla is correct, is anybody's guess. Therefore, it is necessary to delve out the truth from him and for that matter a cross-examination is necessary. Secondly, if the statement of Shri Sukla as a witness against the adverse party, the assessee, is relied upon as truthful, still remains the question of estimation of the profit. The assessee no doubt has given a comparative instance of gross profit rate but it is also necessary for the Department to come to a finding as to the norm of the gross profit on the basis of comparative cases. Therefore, it is the duty of the Assessing Officer to counter the comparative statement cited by the assessee before he can have the option to estimate the gross profit. Again, it is the comparative instance that alone can be the foundation of such estimate in case the accounts are really found to be unreliable and requiring to be rejected. Therefore, in the interest of justice for both the parties, the assessee and the Revenue, it is necessary for us to direct the Tribunal to remand the case to the Assessing Officer for reconsidering the whole matter in the light of the observations made by us in the foregoing and redo the assessment accordingly. All opportunities should be given to the assessee in order to lead any evidence that the assessee may feel necessary to rebut the case against him. As a result we decline to answer the question.

29. In the present case, as stated above, the purported search action did not lead to discovery of any unaccounted money, bullion, jewellery or other valuable article or thing. Further, no books of accounts or any undisclosed transaction of the assessee were found during the course

of search. The entire assessment order revolve around scribbling in loose sheet of paper received from assessee in course of such action. It is the fact that the said rough loose sheet on paper scribbled by some anonymous person seized in the course of search cannot be termed as 'document' having any evidentiary value within the meaning of sec. 132 or sec.132(A) of the Act. Thus, entire addition made at Rs.25 lakhs in the case of assessee in these assessment years is incorrect and thus to be deleted.

30. In our opinion, the loose sheet found during the course of search are undated and did not bare the signature of the assessee or any other person. Hence, they are not in the nature of self speaking documents having no evidentiary value and cannot be taken as sole basis of determination of undisclosed income of the assessee. When document like loose sheets of paper are recovered and the revenue wants to make use of it, the onus is on the revenue to collect cogent evidence to corroborate the noting. The revenue has failed to corroborate the noting by bringing some cogent material on record to prove conclusively that the noting in the seized paper reveled the unaccounted income of the

assessee. Further, no circumstantial evidence in the form of any unaccounted cash, jewelry or investment outside the books of account was found in the course of search action in the case of assessee. Thus, the impugned addition was made by the AO on gross relief in advocate material or rather no sufficient material at all and as such neither to be deleted. We are of the view that an assessment carried out in pursuance of such action, no addition can be made on the basis of un-corroborative noting and scribbling on loose paper made by unidentified person having no evidentiary value, is unsubstantiated and is bad in law.

31. Thus, we are agreeing with the contention of Id. AR that placing reliance on the seized material is not proper and all the additions on the basis of the above are deleted on the following reasons :-

- 1) no opportunity to cross-examine the persons whose statements have been relied upon is afforded;
- 2) some of the statements have been recorded under section 131 by the Revenue which cannot be relied upon without confronting to the same to the concerned parties subsequent to completion of search;

3) the seized material are in the form of various loose sheets, scribbling and jottings having no signature or authorization from the assessee's side. These are unsubstantiated documents and there is nothing to suggest any undisclosed assets of assessee found during the course of search. More so, search action not resulted in recovery of any undisclosed assets in the form of landed property, building, investments, money, bullion, jewellery or any kind of movable or immovable assets.

32. Accordingly, the addition made by the AO u/s 69A of the Act is deleted.

ITA No.1376/Bang/2016 (asst. year 2009-10)

33. In this asst. year, the addition is made @ Rs.25 lakhs on the basis of loose sheet u/s 69A of the Act wherein, the entry as follows in seized material A/BHB/11 25

Anand 25 in the seized material A/BHB/11

34. The ld.AR submitted that as per the loose sheet A/BHP/11, item 13 shows Anand Prasanna Theater and

also date is not recorded in the loose sheet but AO takes date of Shri KC Nagarj as 25/3. According to the Id.AR, these additions of Rs. 25 lakhs was unexplained investment as per AO to one Anand Theater, Bangalore is wrong addition since A/BHB/11, there is no such name called Anand Theater, Bangalore. According to assessee only sum of Rs.13,407/- was paid on 6/2/2009 as per the ledger extract. This also confirmed by the assessee in his reply to notice u/s 142(1) dated 24/1/2014 and figure mentioned in seized material marked A/BHB/11 at page 10 only indicate amount due to him from one Shri S.D Anand of Prasanna Theatre, which is reflected in the statement and books of account, therefore, addition cannot be made on the basis of seized document. It was submitted that this was stated by the assessee as a reply to notice issued under section 142(1) of the Act dated 24/01/2014. According to the assessee, the addition is made only on the presumption basis and it cannot be allowed to do so.

35. The Id.DR relied on the order of the CIT(A).

36. We have heard both parties and perused the material on record and as discussed in earlier paras in

ITA No.1375/Bang/2016 with regard to deletion of addition in assessment year 2008-09, this addition is also deleted on similar line.

ITA No.1377/Bang/2016 (Assessment year 2010-11)

37. Here, the Assessee challenges the following addition of Rs.3.2 crores and an addition towards expenditure of Rs.24,10,000/-. The Ld.AR submitted as follows:

Aptha Rakshaka : 15 Lakhs

38. The AO considered this entry @ Rs.25 lakhs on the basis of loose sheet A/BHP/11 at page 10. He submitted that there was no such entry in the loose sheet with regard to Aptha Rakshaka. The seized document marked as A3/BE/01 is a letter from Uday Ravi Films acknowledging Rs.25 lakhs from Bahara Uday Ravi films, which is a proprietary concern of Basha. The Id.AO relied on the loose sheet A/BHB/11 paged No.10 where the above entry is not finding the place at all. He drew our attention to page nos. 33, 34 of paper book, wherein on 13/4/2011, Uday Ravi film's proprietor wrote a letter that he acknowledges that he has received Rs.25 lakhs

and balance amount of Rs.25 lakhs he has to pay on commencement of shooting. On the day of production No.2, there is a reference of Rs.50,00,000/-. Even as per statement recorded by the DGIT, Investigation, there is no mention of amount of Rs.15 lakhs.

39. Hence, the addition made by AO of Rs.15 lakhs is purely based on the assumption that amount of Rs.10 lakhs was recorded in the books of account of the assessee and assumed that the balance has been paid by cash, which is also not stated by Shri Krishna Kumar. According to the AR there was no mention of date as such attributing this amount to the assessment year under consideration is not proper. Further, he submitted that as per typed statement in Sl.No.3, the AO considered Aptha Rakshaka @ Rs.15 lakhs relating to the assessment year 2010-11 and Sl.No 17 Aptha Rakshaka (24) totaling Rs.39, when both are added. But the loose sheet mentions only Rs.25 lakhs and Shri Krishna Kumar also mentioned as Rs.25 lakhs paid to Basha vide letter dated 13/04/2011. But the AO added Rs.15 lakhs only on assumption of assessee has received by cash. Hence, this addition to be deleted.

Bhadra : 25 lakhs

40. The Id.AR submitted that there has no mention of this amount in the loose sheet. The AO observed that the assessee has given 45 lakhs to Shri N Kumar, the producer of the movie. In the ledger account filed during the course of search, it was observed that an amount of Rs.20 lakhs was shown. Thus, there was a difference of Rs.25 lakhs with the AO without proof, he assumed that it was the payment by cash. Further, the date mentioned in the assessment order was as 08/2/2010 instead of 08/12/2010 (as per loose sheet vide item no.3 - N Kumar 45=00). The AO wrongly assumed the date as 08/12/2010 and made addition for the above assessment year under consideration. The same may be deleted.

Bhanu Hassan : Rs.25 lakhs

41. In the loose sheet, the date mentioned was 02/02/2010 but there was no statement recorded from Bhanu Hassan under section 131 of the Act and also no letter was issued from Bhanu Hassan to substantiate that the assessee is either given Rs.35 or taken Rs.35 lakhs. The AO cannot tax this amount as unexplained income without having any proof of cash transaction, hence addition of Rs.30 lacks cannot be sustained.

Basava Reddy : Rs.95

42. As per the loose sheet, it was mentioned Rs.95 on 02/01/2010. In item No.5 of loose sheet A/BHB/11 in page No.15 and document appended to the asst. order shows only 58.5. However, AO's contention that assessee is giving self contradictory statement is wrong when AO made addition of Rs.95 lakhs based on assumption without appreciating that assessee from the beginning has stated that only Rs.34.73 lakhs has been advanced vide para 2 and 3 of the asst. order. Hence, the addition is to be deleted.

Anaji Nagaraj: Rs.65 lakhs

43. As per entry No.9, in the seized material it was mentioned as Nagaraj 1/1/10 65=00, the AO treated this as Rs.65 lakhs advanced on 01/01/2010 and made addition on this count. According to the ld.AR, there was no supporting material to hold that this is an amount of Rs.65 lakhs advanced on 01/01/2010, hence, addition to be deleted.

Prasanna Thatere : Rs.65 Lakhs

44. As per loose sheet in item No.8 shows that Prasanna Doddaballapura on 01/03/2010 - 65=00. The AO presumed that assessee advanced Rs.65 lakhs to Prasanna Theater, Bangalore. The assessee submitted that the amount of Rs.11.05 lakhs was due on account of exhibiting certain films from Prasanna Talkies at Bangalore and figure mentioned in the seized material indicate that the amount proposed to be given for taking rights of Telugu picture for Doddabalapur. Since the transaction did not materialize, no payment has to be made by the assessee. There is no evidence to suggest that the assessee has advanced money to the person, hence, the same is to be deleted.

Shanta Enterprises- Rs.25 Lakhs

45. As per loose the amount mentioned by AO is item No.17-20 dated 04/01/2020. The AO has not produced any proof of the assessee having received the amount and also AO not sought any explanation from the assessee. The AO has made the addition on surmise and assumption. The argument of the AR that there is no foolproof evidence in this regard. Hence, the addition to be deleted.

46. We have heard both the parties and perused the materials on record. As discussed in earlier assessment year 2008-09 in ITA No.1375/Bang/016, the addition is deleted on similar line.

47. Now coming to the unexplained expenditure of Rs.24.10 lakhs, the AO made addition on the basis of loose sheet marked as page-5 of seized material A/BE/6 shows as follows:-

2.2.10.	5,00,000/-	Cash	(6)	(4)
6.2.10.	4,50,000/-	Cash		
	80,000/-	Direct Payment as Advance for Rent House.		
	55,000/-	Direct Payment for Advt. Boarding.		
12.2.10.	1,00,000/-	Adv. for Car Booking.		
12.2.10.	2,00,000/-	Cash.		
	1,50,000/-	Direct Payment to Mr. Chandraj.		
13.2.10.	3,00,000/-	Cash.		
15.2.10.	3,00,000/-	Cash.		
18.2.10.	27,50,000/-	Cash.		
	<u>24,10,000/-</u>	TOTAL		
	(-) 15,000/-	Am't Excess Accounted for Advt. Boarding.		
	<u>23,95,000/-</u>	TOTAL		

FRE

48. According to AO, there was unexplained expenditure of Rs.24.10 lakhs and same was brought to tax.

49. As discussed earlier, the addition is based on unsubstantiated loose sheets and on that basis addition cannot be made. Accordingly, the addition is deleted.

Additional ground : ITA No.1377/Band/16

“The appellant having admitted u/s132(4) a sum of Rs.3.03 crore as his income and the same having been accepted and assessed as income from other sources by the AO, the AO ought to have given the benefit of telescoping of alleged cash payments against this admitted income, in the interest of justice.”

50. This additional ground is infructuous in view of our finding in the main grounds in this appeal. Hence, this additional ground is dismissed.

ITA No.1372/Bang/2016 (Asst. Year 2011-12)

51. In this asst. year, the AO made addition of Rs.328.50 lakhs as unexplained investment and also not given deduction towards voluntary disclosure of income

by the assessee himself . Regarding the addition, the AR Submitted as follows:-

Kanteerava : 45 Lacks

52 As per item Nos.6 & 7 in the loose sheet, it was mentioned as Ramu Kanteerava 55.00 and Ramu Veera 20.00 and date mentioned was 20/01 and 14/09. There was no mention of full date. As per the statement recorded from Ramu it was stated that he has received Rs.105 lakhs from the assessee but not from Kanteerava. Rs.20 lakhs by cash was received on 20/12/2010 and Rs.85 lakhs was received by cheque on various dates and the total was Rs.105 lakhs advanced by the assessee to Kanteerava. The AO computed as Rs.130 lakhs since 85 lakhs was mentioned in the books of account. He considered an amount of Rs.45 lakhs as unexplained advance given by the assessee which is to be deleted.

Dushta : 1 Crore

53. As per the loose sheet in item No.1, S.Narayan Dushta 22/02 - 100=00 was mentioned. The AO considered it an amount of Rs.100 lakhs advance for the asst. year 2011-12 and made addition. There was a letter dated 24/02/2011, wherein S.Narayan has written letter

to Secretary, Karnataka Film Chambers and Commerce that negative rights holder of the picture Dushta has been given to Bahar films as distributor but in this letter, there is no mention of money transaction and also S.Narayan given a sworn statement recorded u/s 131 of the Income-tax Act on 19/08/2011 and answered the question no 8 to 13 and he has nowhere stated that he has received Rs.1 crore from the assessee. But he has stated that he has received from Uday Rs.65 lakhs for collections received for Veera Parampare and Rs.15 lakhs from K.Manju. He has also answered to question No.13 that he has not taken any finance from Basha or anyone else. Hence, AR prayed that no addition to be sustained on this count.

Adduri - Rs.67 lakhs

54. As per loose sheet in entry No.4, Shankar Reddy Adduri – 10/1/1/ = 95.00. On the basis of this entry, the AO made addition of Rs.60 lakhs. The AO also placed reliance on unsigned letter from KS Shankar to Bahara films seeking financial assistance of Rs.25 lakhs of Kannada picture Adduri, which is made at page No.23. As per the ledger extract furnished by the assessee, the AO stated that the assessee has made the payment of

Rs.28 lakhs only by cheque and the assessee also mentioned in the ledger extract that he has advanced only Rs.3.50 crores to the producer of Adduri, a sum much more than the amount mentioned in the seized document. As mentioned in assessment order page No.27, the AO linked the letter of CMR Production, wherein they have directed to pay 30 Lakhs directly to the assessee vide letter dated 22/03/2011. The AO overlooking the ledger extracts and without having any proof of cash transaction between Shankar Reddy and the assessee, made addition of Rs.16 lakhs and same has to be deleted.

Mass : Rs.45 lakhs

55. As per item No.2 A.Ganesh Mass - 12/01/2011 – 65=00 as mentioned in the seized material. Vide letter dated 11/01/2011 written by A.Ganesh to the secretary, KFCC that Bahar films has been given negative right holder of Kannada film Mass. But nowhere there is mention of cash transaction in the letter but only the letter given by A.Ganesh to Mahesh Kothari to pay Rs.23 lakhs to the assessee. The AO wrongly presumed that balance Rs.45 lakhs has been paid by cash to A.Ganesh without having any proof for cash transaction. There was no confirmation to sworn statement recorded in the case

of A.Ganesh that assessee has given Rs.45 lakhs to A.Ganesh. Hence, addition to be deleted.

Sanju Weds Geetha Rs.45 lakhs :

56. The AO in para-2 of the assessment order at page 35 recorded that payment of Rs.120 lakhs are made through cheque of IDBI Bank (Bank of Maharashtra). During the course of search, in the statement recorded on oath, the assessee himself admitted that he has paid rupees 45 lakhs and this has been confirmed by the recipient Nagashekar, Director of the movie in the statement recorded on oath. The AO wrongly presumed that the assessee in statement of oath has admitted that he has paid in cash, but nowhere assessee admitted that he was paid by cash, but mostly by bearer cheque as accounted by assessee in his books of account. Mr.Nagashekar also not confirmed and admitted that he has taken by cash from the assessee. The AO made addition only on assumption and addition to be deleted.

Chingari: Rs.26.5 lakhs

57. As per loose sheet item No.5 Mahadesh - 200.00 dt.15/03/2011. At page no.36 of the assessment order assessee's question no. 3 and answer given by Mahadesh

is that *“I have taken total of Rs.75 lakhs from Basha out of which Rs.65 lakhs have been paid by him through cheque and Rs.15 lakhs by cash.”*

58. Mahadesh also submitted that Rs.15 lakhs by cash is taken after April 2011 on various occasions and cheque payment received Rs.50 lakhs in March & Rs.10 lakhs in April 2011, hence addition of Rs.26.5 lakhs to be deleted.

59. We heard both the parties and perused the material on record. As discussed in ITA No.1375/Bang/2016, we delete these additions on similar lines.

60. The assessee raised the following additional grounds in the asst. year 2011-12.

“The appellant having admitted u/s132(4) a sum of Rs.3.03 crore as his income and the same having been accepted and assessed as income from other sources by the AO, the AO ought to have given the benefit of telescoping of alleged cash payments against this admitted income, in the interest of justice.”

61. The assessee filed petition for admission of additional ground stating that it does not involve any

investigation on the facts otherwise than found on the records of the department and is a pure question of law and goes into the very root of the matter. Hence, it is prayed that additional ground may be admitted for advancement of substantial case of justice having regarded to the ratio laid down in National Thermal Power Co. Ltd., Vs. CIT (1998) 229 ITR 383 (SC) and Gundathur Thimmappa and Sons Vs. CIT, Mysore (1968) 70 ITR 70 (Kar).

62. We have heard both the parties on admission of above additional grounds. In our opinion, these are legal issues and it does not require any investigation of facts which are already on record. Accordingly by placing reliance on the judgment of Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd., cited Supra, we admit the additional ground for adjudication.

63. Now coming to the issue relating to not giving the telescopic benefits of Rs.3.03 crores the AO given only Rs.1.33 crores.

64. In the present case, we have deleted the various additions in all these assessment years, which are based

on the seized material marked as A/BHB/11 and not supported by any material evidence. Being so, the amount voluntarily offered by the assessee in his return of income at Rs.3,03,05,017/- is to be taxed and as such there is no question of giving any telescopic benefit and the AO not at all required to deduct Rs.1.35 crores from the computation of income in assessment year 2011-12. He has to go by return filed by the assessee on 26/11/2011 in acknowledgment No.292359831260911 for the asst. year 2011-12 while passing the giving effect order to our findings in this order. This ground of appeal is dismissed accordingly.

65. In the result, all the appeals filed by the assessee are partly allowed

Order pronounced in the open court on 28th Oct, 2021.

Sd/-

(BEENA PILLAI)
Judicial Member

Sd/-

(CHANDRA POOJARI)
Accountant Member

Bangalore,
Dated, 28th Oct, 2021

/ vms /

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore.

1. Date of Dictation
.....
2. Date on which the typed draft is placed
before the dictating Member
3. Date on which the approved draft comes to Sr.P.S
.....
4. Date on which the fair order is placed
before the dictating Member
5. Date on which the fair order comes back to the Sr.
P.S.
6. Date of uploading the order on
website.....
7. If not uploaded, furnish the reason for doing so
.....
8. Date on which the file goes to the Bench Clerk
.....
9. Date on which order goes for Xerox &
endorsement.....
10. Date on which the file goes to the Head Clerk
.....
11. The date on which the file goes to the Assistant
Registrar for signature on the order
.....
12. The date on which the file goes to dispatch section
for dispatch of the Tribunal Order
.....
13. Date of Despatch of Order.
.....