आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर

IN THE INCOME TAX APPELLATE TRIBUNAL, INDORE BENCH, INDORE

BEFORE SHRI MAHAVIR PRASAD, JUDICIAL MEMBER
AND
SHRI MANISH BORAD, ACCOUNTANT MEMBER
VIRTUAL HEARING

ITA No.51& 52/Ind/2021
Assessment Year: 2010-11 and 2011-12

ACIT, Central-1,
Indore
: Appellant

V/s
M/s. Goyal Developers
Indore
PAN:AAFFG5813Q : Respondent

CO No.27 & 28/Ind/2021
(Arising out ITA No.51 & 52/Ind/2021)
Assessment Year: 2010-11 and 2011-12

M/s. Goyal Developers
Indore
PAN:AAFFG5813Q : Appellant

V/s
ACIT, Central-1,
Indore : Respondent

Appellant by	Shri P.K. Mitra, CIT-DR
Respondentby	CA, Pranay Goyal, AR
Date of Hearing	21.12.2021
Date of Pronouncement	17.01.2022

O R D E R

PER MANISH BORAD, A.M.:

The above captioned appeals filed at the instance of the Revenue and Cross Objection filed by the assessee for Assessment Year2010-11 & 2011-12 are directed against the order of Ld. Commissioner of Income Tax (Appeals) (in short 'Ld.CIT]-3 Bhopal dated 21.12.2020 which is arising out of the order u/s 143(3)of the Income Tax Act 1961(In short the 'Act') dated 09.02.2019 framed by ACIT(Central)Bilaspur.

The revenue has raised following grounds of appeal in ITANo.51/Ind/2021 for AY 2010-11

1. *On the facts and in the circumstance of the case, the Ld. CIT(A) has erred in law in deleting the addition of 17,16,77,580/- made on account of unaccounted receipts.*
2. *On the facts and in the circumstances of the case, the ld. CIT(A) has erred in law by ignoring that the assessee being land owner was to received its share of shale consideration from DDPL, the developer and having marketing rights without appreciating that the sale consideration includes on money also which is evident as per excel sheet and that DDPL has paid taxes on its share of on-money which clearly establishes acceptance of on money on sale of plots.*

The revenue has raised following grounds of appeal in ITANo.52/Ind/2021 for AY 2011-12

1. On the facts and in the circumstance of the case, the Ld. CIT(A) has erred in law in deleting the addition of Rs.18,64,46,687/- made on account of unaccounted receipts.
2. On the facts and in the circumstances of the case, the ld. CIT(A) has erred in law by ignoring that the assessee being land owner was to received its share of shale consideration from DDPL, the developer and having marketing rights without appreciating that the sale consideration includes on money also which is evident as per excel sheet and that DDPL has paid taxes on its share of on-money which clearly establishes acceptance of on money on sale of plots.

The Assessee has raised following common grounds of appeal in Cross Objection no.27& 28/Ind/2021 for AY 2010-11 and AY 2011-12

1. That Ld. CIT(A) erred not to consider the fact that the assessment order passed u/s 143(3) r.w.s. 147 of the Act Income Tax Act 1961 (the Act) is bad in law and void ab initio as the same is not in compliance with the provision of law.
2. That the CIT-A, erred to not consider the fact that the Ld. AO has erred in reopening the completed assessment u/s 147 of the Act, without considering the provision of law as well as facts and circumstances of the case.
3. That the respondent craves leave to add, amend, alter or delete the said grounds of Cross Objection.

2. We will first take up the Revenue's appeals for AY 2010-11 and AY 2010-11 and the only effective ground in both the assessment years are against the deletion of addition of Rs. 17,16,77,580/-in A.Y. 2010-11 and Rs. 18,64,46,687/- in A.Y. 2011-12 made on account of unaccounted receipts.

3. The brief facts of the case as culled out from the records are that assessee is a partnership firm engaged in real estate business as builders and developers. The assessee filed the return of income for

A.Y. 2010-11 on 02.10.2010 with returned income of Rs 6,36,88,220/- and for A.Y. 2011-12 on 16.09.2011 with returned income of Rs. 5,77,18,710/-. Returns for both the years were subject to scrutiny assessment u/s 143(3) of the Act. Order for A.Y. 2010-11 was passed on 19.03.2013, assessing total income at Rs. 6,38,34,700/- while order for A.Y. 2011-12 was passed on 07.02.2014 assessing total income at Rs. 5,80,52,380/-.

4. Subsequently search and seizure u/s.132(1) of the Income Tax Act was carried out on 21.09.2012, at the Apollo group of cases which included M/s Divya Dev Developers Private Limited ("In short DDDPL"). During the course of search, certain documents were found and seized from the business premises of M/s DDDPL located at Apollo Arcade, Palasia, Indore. These documents revealed that unaccounted cash had been received as 'on-money' on sale of plots in 'Uptown Apollo' by M/s DDDPL. During the course of search and post search enquiries, statements of the directors of M/s DDDPL were recorded and during the course of such statements and even during the continuation of search no any mention of the assessee firm to be recipient of any unaccounted income from M/s DDDPL was mentioned by M/s DDDPL or any of its directors or employees.

5. Subsequently, on 28.11.2014, M/s DDDPL filed an application u/s 245C before the Income Tax Settlement Commission (in short ITSC). In the Statement of facts (in short SOF) contained in Enclosure–II of the application, the applicant M/s DDDPL admitted to have received Rs 55,50,89,760/- as "on money" in cash on sale of plots in the project 'Uptown Apollo'. In the SOF,M/s DDDPL have stated

that during the search at the residential premises of one Shri Sanjay Jain, marketing manager cum broker, an excel sheet containing total amount received on sale / booking of plots of land was seized. The total amount of "on money" received was computed on the basis of this excel sheet. Further, M/s DDDPL went on to state that 55% of the total cash received amounting to Rs 35,81,24,267/- was handed over to the assessee firm. Based on this information , on 23.03.2016 Learned Assessing officer issued notice u/s 148 of the Act to the assessee firm for the A.Y. 2010-11 followed by a notice u/s 148 on 31.03.2016 for A.Y. 2011-12. During the course of assessment proceeding the assessing officer proceeded to add the amount at Rs.17,16,77,580/- for AY 2010-11 and at Rs.18,64,46,687/- claimed by M/s DDDPL as having been paid to the assessee firm out of the alleged 'on money' received in in cash as undisclosed income. Income assessed at Rs. 23,53,65,800/-and Rs.24,41,65,400/- for A.Y. 2010-11 & A.Y. 2011-12 respectively.

6. Aggrieved assessee preferred an appeal before the Ld. CIT (A), who after considering the submission made by the assessee, deleted the addition so made holding that the addition made by the assessing officer has been made without having any cogent evidence having any nexus with the assessee firm of having received the alleged 'on money' on sale of plots.

7. Aggrieved with the above finding of Ld. CIT(A), the revenue is in appeal before this Tribunal and the assessee has also filed cross objection.

First we will take up the revenue's appeal for A.Y.2010-11 & 2011-12 challenging the finding of Ld. CIT(A) deleting the addition made by the Ld. AO alleging unaccounted receipts of 'on money' from M/s. DDDPL raising common ground no.1 & 2 for both the years.

8. Ld. CIT-DR vehemently argued that Ld. CIT(A) was not justified in deleting the addition. He submitted that the A.O. has brought out material facts to infer that the respondent firm has received unaccounted receipts from M/s DDDPL, Ld. CIT-DR strongly supported the order of the A.O. and submitted that it has been observed by the Ld. A.O. that an excel sheet located on a hard disc was seized from the office premises of M/s DDDPL at Apollo Arcade, Palasia, Indore and this excel spread sheet contains details of 118 plots sold by M/s DDDPL. Against plots number 76 onwards it is noted "registry from our part" while no marking is made against plots number 1 to 75. This according to the assessing officer is because plots 1 to 75 fell in the share of the appellant. Further in para 8(iv) of the assessment order the assessing officer has stated that in this spread sheet there is a record of amounts received in cash as well as cheque against sale of plots listed as columns A and B. The assessing officer therefore rightly inferred that 'on money' collected against plots number 1 to 75 has been handed over to the respondent firm since, as per development agreement between the two parties, the respondent firm was to receive the sale proceeds pertaining to the 75 plots falling in its share. Thus, Ld. D.R. submitted that under these facts, the A.O.

was justified in making the addition on account of unaccounted receipts in the hands of respondent.

9. Ld. Counsel for the assessee opposed the arguments so made and submitted that the Ld. A.O. failed to appreciate the facts in right perspective and stated that there was no joint development agreement in real terms but it was in the nature of sale of land, wherein the entire control of sell of plots and collection of money was with M/s DDDPL and the assessee firm has only received the agreed consideration through cheque as intimated by M/s DDDPL to the assessee time to time. It was also vehemently argued that no incriminating material has been found against the assessee and thus the addition is made in absence of single piece of evidence against the assessee, as even the impugned excel sheet relied upon by Ld. AO does not even have mention of the name of the assessee. Further, it was submitted that the addition made in the present case is solely influenced by the statement of facts filed before the Hon'ble Settlement commission by M/s DDDPL which is clearly an afterthought as during the search and post search enquires as well as during the course of statement recorded U/s 132(4) and 131(1), not even a wisper was made by directors of M/s DDDPL that any unaccounted money has been handed over to the assessee but such allegation was made at a very later stage i.e. at the time of filing application before Hon'ble Settlement commission.

10. Ld. Counsel for the assessee also submitted that the order passed by the Ld. A.O. is against the clear directions issued by the

"ITSC" while passing the order in case of M/s DDDPL as well as against the order dt. 16.12.2016 passed by Hon'ble M.P. High Court in writ petition filed by the assessee, as both the authority stated that the Ld. A.O. shall pass the order on the basis of material available on record through independent enquiry and without being getting influenced by the order passed by "ITSC". But the fact is that the order passed by the Ld. A.O. is only on the basis of claims made by M/s DDDPL relying upon the dumb document i.e. the excel sheet as no any other corroborative independent material was found against the assessee firm.

11. In addition to above, the Ld. council of the assessee firm stated that M/s DDDPL in making the claim of payment of unaccounted receipts to the assessee firm has made various false claim and contradictory statements before the "ITSC" and Ld. CIT-(A) gave due consideration to the same holding in favour of the assessee firm. In support of the contentions on merits of the issue Ld. counsel for the assessee referred and relied on the following decisions;

S.No.	Name of the judgment/decisions	Page No.
1	The Principal Commissioner of Income Tax-I Vs. Shri Pukhraj Soni Income Tax Appeal No.53 of 2017 (M.P.) (HC)	**29 - 37**
2	Commissioner of Income-tax, (C) – III v. Vineeta Gupta [2014] 46 taxmann.com 439 (Delhi) (HC)	**38 – 42**
3	The Principal Commissioner Of Income Tax-4 Vs. Mukesh Keshavlal Patel, R/Tax Appeal No. 838, 840 of 2019(HC)(Gujrat)	**43 – 48**
4	The Commissioner of Income Tax 11, Mumbai Vs. Dr. Avinash C. Tiwari Income Tax Appeal No.176 OF 2014, (HC)(Bombay)	**49 - 54**
5	Commissioner Of Income tax Vs. Shri Pramod Choudhary D.B.	**55 – 65**

	Income Tax Appeal No. 77 / 2004 (HC)(Raj.)	
6	Additional Commissioner of Income-tax v. Miss Lata Mangeshkar [1974] 97 ITR 696 (BOM.)(HC)	**66 – 68**
7	Income-tax Officer v. Bharat A. Mehta (HC)(Guj.) [2015] 60 taxmann.com 31 (Gujarat)	**69 - 75**
8	Principal Commissioner of Income-tax-III, Ahmedabad v. Vivek Prahladbhai Patel [2016] 66 taxmann.com 41 (Gujarat)(HC)	**76 - 84**
9	Pradeep Amrutlal Runwal v. Tax Recovery Officer, Range-3, Pune [2014] 47 taxmann.com 293 (Pune - Trib.)	**85 - 100**
10	Abhay Kumar Bharamgouda Patil v. Assistant Commissioner Income Tax, Circle-1, Belagavi [2018] 96 taxmann.com 377 (Panaji - Trib.)	**101 – 114**
11	Commissioner of Income-tax – Central v. Sunita Dhadda [2018] 100 taxmann.com 526 (SC)	**115 – 115**
12	Eagle Seeds & Biotech Ltd v. ACIT [2006] 6 ITJ 668 (Indore)	**116 – 134**
13	Dy. CIT v. Mahendra Ambalal Patel [2010] 40 DTR 243 (Guj)	**135 – 139**
14	Shri Abhishek Dhanotia V. ITO-3(1), Indore ITA No.655/Ind/2018 (Trib – Indore)(SMC)	**140 - 169**

12. We have heard rival contentions and perused the records placed before us and carefully gone through the decision referred and relied by the Ld. counsel for the assessee. Through the captioned appeals filed by the revenue for A.Y.2010-11 & 2011-12 the revenue has challenged the deletion of addition of Rs. 17,16,77,580/- in AY 2010-11 and Rs. 18,64,46,687/- in AY 2011-12 on account of "on money" received on sale of plots. The AO during the course of re-assessment proceedings observed that various incriminating documents were found and seized during the course of search on 21.09.2012 from premises of APOLLO Group of Indore located at 205, Apollo Arcade, ½ Old Palasia, Indore. During the course of search a hard disc of a computer was found and seized which contain an excel sheet having details of 118 plots. The

AO on perusal of the said excel sheet found that the entries at Sr.No 1 to 75 pertains to appellant and entries from 76 to 118 pertains to M/s DivyaDev Developers Pvt Ltd (In short DDDPL). As per the impuged excel sheet the appellant has earned "on money" of Rs. 17,16,77,580/- in FY 2009-10 and Rs. 18,64,46,687/- in AY 2010-11, therefore, the AO required the assessee to explain the transaction and reconcile the same with books of accounts. The assessee submitted its reply on 26.12.2016 and the same is reproduced on page no 9 to 54 in the body of assessment order. The AO after considering reply of the assessee held that the assessee has received on- money on sale of plots and is clearly mentioned in the seized excel sheet.

13. We notice that Ld. CIT(A) after considering the submissions of the assessee that the alleged excel sheet found in the premises of third party was merely a dumb document, assessee's name was not appearing in this sheet, nothing adverse was stated by the searched person before the search team and the case of the assessee was scrutinized and additions are made only on the basis of the statements of facts filed by the searched person i.e. M/s DDDPL stating that 55% of the 'on money' received from sale of units at units located in the project up down Apollo were on behalf of the assessee, concluded that Ld. AO erred in making the addition observing as follows:

> *"4.2.* ***Ground No. 3 & 4 for AY 2010-11 & 2011-12:-*** *Through these grounds of appeal the appellant has challenged addition of Rs. 17,16,77,580/- in AY 2010-11 and Rs. 18,64,46,687/- in AY 2011-12 on account of on money received on sale of plots. The AO during the course of*

re-assessment proceedings observed that various incriminating documents were found and seized during the course of search on 21.09.2012 from premises of APOLLO Group of Indore located at 205, Apollo Arcade, ½ Old Palasia, Indore. During the course of search a hard disc of a computer was found and seized which contain an excel sheet having details of 118 plots. The AO on perusal of the said excel sheet found that the entries at Sr.No 1 to 75 pertains to appellant and entries from 76 to 118 pertains to M/s DivyaDev Developers Pvt Ltd (In short DDDPL). As per the impuged excel sheet the appellant has earned on money of Rs. 17,16,77,580/- in FY 2009-10 and Rs. 18,64,46,687/- in AY 2010-11, therefore, the AO required the assessee to explain the transaction and reconcile the same with books of accounts. The assessee submitted its reply on 26.12.2016 and the same is reproduced on page no 9 to 54 in the body of assessment order. The AO after considering reply of the assessee held that the assessee has received on- money on sale of plots and is clearly mentioned in the seized excel sheet.

4.2.1 I have considered facts of the case, plea raised by the appellant and findings of the AO. Briefly, the facts of the case are that the appellant owned land admeasuring 27.136 acres located in village Nipania Indore. The appellant firm had entered into an understanding with M/s DDDPL for sale of entire land. In pursuance of the same, a sale deed was executed on 31.03.2008 for 5.540 acres and was registered in favour of M/S DDDPL Subsequently a second sale deed was executed and registered in respect of 2.386 acres of land on 5.04.2008 in favour of M/S DDDPL. However, for the remaining portion of land admeasuring 19.21 acres M/s DDDPL paid an advance amount of Rs 6.86 crores between 20.07.2007 and 07.7 2008 against sale consideration of Rs 14.75 crores. The transaction for 19.21 acres was to be concluded within a year of the first payment ie by 20.07.2008. However, due to shortage of funds, the buyer M/s DDDPL was unable to raise the required funds to conclude the deal and it was decided that the a development agreement shall be executed between the appellant and the buyer, and further the advance of Rs 6.86 crores received against the earlier proposed sale of land shall be hence forth treated as security deposit against the development agreement. In pursuance of this decision, a development agreement/Joint Venture agreement was executed between appellant and M/s DDDPL on 04.04.2009. The appellant has filed copy of development agreement which is placed on record. On perusal of the impunged development agreement it is seen that a colony in the name and style of 'Uptown Apollo' will be developed by Ms DDDPL. This colony was to be developed on 20.02 acres which included the balance 19.21 acres owned by the appellant and 0.81 acres owned by M/s DDDPL. The development work was to be carried out by M/s DDDPL at their own cost and in lieu of the same, they were to receive 45% of the developed plots. The total number of plots to be developed were 142 measuring 5,66,720sq fi. subsequently, it was decided that 14 plots measuring 57425 sqft spread over 2 acres

shall be retained by the appellant, and towards development charges of the same, a sum of Rs 85.75 lacs shall be paid to M/S DDDPL. As per the terms of the development agreement, the developer i.e. M/s DDDPL not only had to develop the plots, but was totally in charge of sales, including finding customers, negotiating sale price, collecting the sales consideration, and making payment to the appellant out of such sales consideration received. Also, the developer will be responsible for taking all necessary permissions from government authorities, however, the same will be signed by appellant. The appellant before me as well as before AO has claimed that the share in amount of the appellant was remitted by M/s DDDPL from time to time along with account statements. The total amount received by the appellant, was Rs 14.23 crores, and the balance amount of security money was refunded to M/s DDDPL by 23.07.2011.

42.2 Subsequently, a search and seizure operation u/s 132 of the Act was carried out on 21.09.2012 in the case of Apollo Group of Indore which includes Ms DDDPL. During the course of search at business premises of M/s DDDPL located at Apollo Arcade, Palasia, Indore a hard disk was found and seized which contain an excel sheet having details of sale of plots in Uptown Apollo by M/s DDDPL. The impunged excel sheet contain details of plot sold with details of sale consideration and on-money received on sale of plots. Statements of directors of M/s DDDPL were also recorded on oath and it was never accepted that any on-money was received on sale of plots. However. On 28.11.2014, M/s DDDPL filed an application with Hon'ble ITSC u/s 245C of the Act and has voluntarily accepted on money received in cash amounting to Rs. 55,50,89,760/- and out of entire on- money sum of Rs. 35,81,24,267/- was given to appellant being 55% of shar holder of the project. Further, Pr.CIT(Central), Bhopal in report submitted in Rule 9 has clearly mentioned that no confirmation or affidavit has been filed by appellant substantiating the receipt of unaccounted money on sale of plots. However, Hon'ble ITSC has accepted claim of M/s DDDPL and income was assessed with 45% share of M/s DDDPL. Hon 'ble ITSC has also mentioned in its order that for balance unaccounted on-money proceedings u/s 148 has been initiated on appellant. The appellant aggrieved with the notice issued by the AO ws148 and order of the ITS filed a petition before Hon ble MP High Court. Hon'ble Court after considering entire facts of the case has held that the AO is fully justified in issuing notice u/s 148 of the Act, however, the court has directed AO to pass an order on merits without being influenced by the order passed by the Settlement Commission and without being influenced by the order passed by this court by taking into account the material available on record.

4.2.3 The AO after considering entirety of the facts placed complete reliance on impunged excel sheet and made additions to the income of the appellant. I have also given my thoughtful consideration to the facts and

findings of the AO inter alia material brought on record. At the outset there is no denying of the fact that no incriminating material was found and seized from premises of the appellant or M/s DDDPL during the course of search having details of on-money received by appellant or handed over by M/s DDDPL. The Ld AR has vehemently challenged the arbitrary approach of the AO mainly on two major Counts:

(a) The AO erred in making additions merely on the basis of claim made by M/s DDDPL before Settlement Commission;

(b)The AO erred in making additions on suspicion, surmise and conjecture basis and without having any incriminating material on record;

(a) ***The AO erred in making additions merely on the basis of claim made by M/s DDDPL before Settlement Commission: -***

The appellant before me has taken a plea that during the course of search,carried out on 21.09.2012 at business premises of M/s DDDPL, no reference to any payment in cash towards on-money from sale of plots was made neither by M/s DDDPL nor by the search party and, therefore, no Post search enquiries were made in the case of appellant. however, at the later stage, M/s DDDPL filed an application ws 245C of the Act before Hon'ble ITSC admitting undisclosed/unaccounted on money of Rs. 55,50,89,760/- received in cash on sale of plots. The total amount of on-money was calculated on the basis of impunged excel sheet. Further, it was claimed by M/s DDDPL that out of total on-money received 55% was handed over to appellant being his share of 75 plots which amounts to Rs. 35,81,24,267/-. However, no other details such as date of exchange of cash, acknowledgement of handing over of cash, details of cash received from purchaser of the plots etc are on record. Further, The Pr.CIT (Central), Bhopal in report submitted before ITSC under Rule 9 has stated that no affidavit has been filed by appellant substantiating receipt of unaccounted money which clearly proves that the LdPr.CIT (Central), Bhopal was of view that there is no evidence on record which could prove that unaccounted money has exchanged hands. Furthermore, one ShriManojGarg, Director of M/s DDDPL on 6.04.2016 has filed an affidavit before, Hon'ble ITSC stating that the company i.e M/s DDDPL handed over cash to M/s Goyal Developers i.e the appellant. However, on the said affidavit the details such as name of the person who handed over the cash, name of the person who received it and the dates on which such cash was allegedly given are not mentioned. Most importantly, the appellant has filed details of directors of M/s DDDPL as per ROC record. ShriManojGarg became a director in M/s DDDPL on 31.5.2012 and therefore, he was not at all authorized to file any affidavit on behalf of M/s DDDPL.

*As a matter of facts, not a single iota of evidence is on record suggesting receipt of on-money by appellant either directly from buyer or from Ms DDDPL. However, the AO on other hand has treated the declaration made by M/S DDDPL before ITSC as gospel truth and made additions in the hands of appellant. It is also utmost important to mention here that Hon'ble MP High Court in the case of appellant has directed AO to complete re- assessment proceedings on merits of case and without getting influenced by the order of Settlement Commission or by the order of the Court. Admittedly, the modus operandi being followed by the appellant during entire project was that the Ms DDDPL was solely responsible for development, marketing, negotiation with customers, problem solving of customers, collection of entire sale consideration etc and the appellant was only responsible for registration of sale deed as per convenience of customers. The appellant would receive its share of sale consideration at the time of registration of sale deed. However, it has been alleged by the AO that appellant has also receive his share in on-money at the time of registration of sale deed. Hon'ble MP High Court in the case of appellant has directed the AO to complete re-assessment proceedings on the basis of merits of the case and not by getting influenced by findings of Settlement Commission or by the findings of the court. However, the AO has treated the impugned excel sheet as gospel truth and made addition to the income of the appellant, without there being not a single piece of evidence suggesting that any on-money has exchanged hands. Also, the AO except placing complete reliance on the impugned excel sheet has noting on record suggesting on-money received by appellant against sale of plots in individual capacity or through M/s DDDPL. It is settled legal position that onus of proof is on the person who makes any allegation and not on the person who has to defend. As per legal maxim "**affairmanti non negantiincumbit probation**" means burden of proof lies upon him who affirms and not upon him who denies. Similarly as per doctrine of common law "incumbit probation qui digit non qui negat" i.e. burden lies upon one who alleges and not upon one who deny the existence of the fact. Neither*
the AO nor M/s DDDPL. has discharged initial onus of proof of receipt of unaccounted on-money by appellant. Here, it is for the A0 to make independent enquiry and to unearth the true facts, which is completely missing in the instant case. Hence, it can be said that the AO has made entire addition on the basis of declaration made by M/s DDDPL before Settlement Commission without making any ground enquiry genuineness of the allegation made by M/s DDDPL on appellant.

It is utmost important to mention here that M/s DDDPL while selling a plot would furnish copies of statement of accounts reflecting only payment received through cheque and the amount mentioned on

registered sale deeds which has also been filed by the appellant before me. On perusal of the documents submitted by the appellant there is no mention of any cash component received as on money. Thus, the appellant was only provided with the amount as mentioned in sale deeds and it is the M/s DDDPL who has to explain when and how the unaccounted on-money was given to appellant. Not even a single receipt duly acknowledged by appellant has been brought on record. It is not the case where few hundreds or thousands were taken and handed over to appellant it is the case for allegation of crores of rupees, no prudent business man would hand over such huge amount without keeping any acknowledgement or receipt. Hence, it can be safely concluded that the story created by M/s DDDPL is self serving and clearly an after though because, if the same was genuine and a true story the same would have been narrated to the search party or before investigation wing, however, the same was taken well after that before Settlement Commission.

Nevertheless, there is a serious flaw in the findings of the AO, the AO has not been able to bring on record any evidence in support of his imagination. Neither the appellant nor any of the purchaser has ever admitted that any such alleged on-money was paid to M/s DDDPL which was to be handed over to appellant or directly to appellant. Thus, in absence on any direct of circumstantial evidence against the appellant, the addition are devoid of any merit and are directed to be deleted.

(b) ***The AO erred in making additions on suspicion, surmise and conjecture basis and without having any incriminating material on record :-***

The AO has grossly erred in making addition simply on the basis of guess work, assumption and presumption. It is well settled that no addition can be made as a leap in the dark. The AO is not entitled to make a guess without evidence. The assessment of any particular year cannot be based on mere suspicion or bare guess, but on a legitimate material from which a reasonable inference of any unexplained expenditure can be made. Hon'ble Supreme Court in the case of ***Dhakeshwari Cotton Mills Ltd. v/s CIT (1954) 26 ITR 775 (SC)*** *has held that although strict rules of Evidence Act do not apply to income tax proceedings, still assessment cannot be made on the basis of imagination and guess work. It has been held in the case of* ***UmacharanSaha& Bros co. v/s CIT 37 ITR 21 (SC)*** *that suspicion, however strong cannot take place of evidence. Similar views have been expressed by Apex court in the case of* ***DhirajLalGirdharilal v/s CIT (1954) 26 ITR 736 (SC).*** *The AO has placed reliance on excel sheet in which even name of the appellant is missing, there is no mention of any on-money received by appellant, date of receipt of on-*

money by appellant is missing, mode of on-money either cash/kind is missing etc. Mere making any declaration by M/s DDDPL is of no proof, the AO or M/S DDDPL should have submitted evidences in support of their allegations.
Admittedly, the A neither during re-assessment proceedings or during appellate proceedings has brought on record any such evidence. Thus, it can be safely concluded that the additions has been made under guess work, presumption and laced with figment of imagination.

4.2.4 Nevertheless, M/s DDDPL before Hon'ble ITSC has admitted that following unaccounted income were earned on sale of plots and amounts mentioned against name of appellant were handed over to appellant being its share in accounted income.

F.Yr	*Total unaccounted cash receipts*	*Share of M/s Goyal Developers*	*Share of M/s DDDPL*
2009-10	*17,16,77,580*	*17,16,77,580*	*NIL*
2010-11	*22,78,32,433*	*18,64,46,687*	*4,13,85,746*
2011-12	*14,82,51,947*	*NIL*	*14,82,51,947*
2012-13	*NIL*	*NIL*	*NIL*
2013-14	*73,27,800*	*NIL*	*73,27,800*
Total	*55,50,89,760*	*35,81,24,267*	*19,69,65,493*

M/S DDDPL has claimed net profit of 25% on such unaccounted receipts of Rs 19,69,05,493/- and the balance amount has been spent on development and other expenses in cash. The amount claimed by them as spent works out to Rs 14,77,24,119/-. The JV was signed between appellant and M/s DDDPL on 04.04.2009 and the project was complete on 14.05.2020. Now, the only moot question arising out at this moment is that if the entire on-money was handed over to appellant, then how the development works were carried out by M/s DDDPL, which have been claimed to have been done from accounted as well as unaccounted money amounting to Rs. 14,77,24,119/-. It is a matter of common sense that all the expenses in any project are met when it is in development phase and not when the project is completed. Thus, the statement of M/s DDDPL is clearly contradictory, and suffers from grave infirmity. The AO has also ignored this important fact completely.
4.2.5 In view of the above discussion and judiciously following the decision of Hon'ble MP High Court in the case of appellant, wherein Hon"ble court has directed AO to adjudicate the case of appellant on merits and without getting influenced by order of Settlement Commission, I do not find any merit in the addition made by the AO which has been made without having any cogent evidence having any nexus with the appellant being recipient of alleged on-money on sale of plots, no addition can be made in the hands of appellant. Thus,

addition made by the AO amounting to ***Rs. 17,16,77,580/- in AY 2010-11 and Rs. 18,64,46,687/- in AY 2011-12*** *are* ***Deleted****. Therefore, appeal on these grounds is* ***Allowed****."*

14. On perusal of the finding of Ld. CIT(A) and also considering arguments made by both sides, we observe that for making the addition Ld. AO made reference solely of an excel sheet located on the hard disk seized from the office of M/s DDDPL during the course of search at their premises and according to the Ld. AO this excel sheet contains the details of 118 plots sold by M/s DDDPL and plots 1 to 75 fell in the share of appellant as against the plot number 76 onwards it is noted "registry from our part" while no marking made against plot 1 to 75. The Ld. AO further stated in the assessment order in para 8(iv) that in such spread sheet there is a record of amounts received in cash as well as cheque against the sale of plots listed as columns A and B. The Ld. A.O. then proceeded to suggest that money collected against ploy no. 1 to 75 has been handed over to the assessee, since as per development agreement, the assessee was to receive the sale proceeds pertaining to the 75 plots falling in its share. Seized excel sheet in the sole basis of making such a huge addition on the assessee, however the same is speculative, fanciful and high on imagination and lack in substance more particularly because the assessing officer omitted to mention that the said excel sheet nowhere mentions that any part of cash reflected therein has been given to the assessee nor the fact that name of the assessee is not mentioned anywhere on such spread sheet. That, in fact not only this spread sheet but, no other seized documents have even an iota of evidence regarding transfer

of cash from M/s DDDPL or any person acting on their behalf, to the appellant. Copy of such spread sheet is placed on paper book dt. 09.12.2021, page no. 239.The fact that no transfer of cash from M/s DDDPL to the assessee was detected, is supported by the fact that at no stage during the search and seizure action, did Mr. Nirmal Agrawal director of M/s DDDPL or any other director of company suggested that the assessee has received or handed over with any cash on sale of plots.

15. We notice that the statements recorded u/s 132(4) as well as 131(1) are silent on the subject, even when specifically confronted with evidence regarding cash receipts from the project 'Uptown Apollo'. In fact, during the course of statement recorded u/s 132(4) on 21.09.12, Nirmal Agarwal while admitting undisclosed income of Rs 50 crores, stated that keeping all seized documents in view, including the excel spread sheet pertaining to 'Uptown Apollo', he is offering this income in the hands of the companies belonging to his group as well as individuals. At no stage did he refer to the assessee, and has offered the cash received, as income of his family and business concerns. Statement of Mr. Nirmal Agrawal post search taken u/s 132(4) on 16.11.2012 is placed on page no. 321 to 336 of paper book dt. 09.12.2021.

16. Further we notice that M/s DDDPL has also, in their application u/s 245C, made no reference to any evidence suggesting handing over of cash to the appellant. Apart from bald statements regarding the appellant being given their share of cash,

no direct evidence has been furnished. That, on perusal of the development agreement placed on page no. 240-251 of the paper book dt. 09.12.2021 clearly suggest that the developer M/s DDDPL was solely responsible for development of the project from the initial stage of municipal permissions to development of the site, and finally sale of plots and collection of sale proceeds. In fact, the developer was also responsible for post development maintenance of the colony. The assessee being the landowner was responsible only to affix his signatures to applications for various permissions and later to ensure conveyance of title through registration of sale deeds. Assessee was neither aware of, nor in touch with any of the buyers. The appellant was not party to any transaction between the developer and the plot buyers, which were outside the regular books of accounts. The claim of the assessing officer that, the appellant was involved in the project at all stages and that, it should have been aware of the actual sale price, and that since it was getting the plots registered, it must have been aware of the cash collected, fails the test of logic. The assessee being the landowner, was responsible for getting the sale deeds registered with the sub registrar of properties.

17. Perusal of statements of account duly signed and furnished by the developer(DDDPL) from time to time, placed at page no. 252 to 259 of the paper book dt. 09.12.2021 shows that only the amounts mentioned on the registered sale deeds were intimated to the appellant which confirm the appellant's contention that it was unaware of cash being collected on sale of plots, and such cash or

part thereof was nether intimated to him nor given to him. These statements are conclusive proof that the averments made by M/s DDDPL before the Hon' ITSC are incorrect. Ld. AO erred in relying on the same. The appellant firm is able to show that they were informed only about the amount mentioned in the registered sale deed, and paid only that sum, the developer M/s DDDPL is unable to lead any evidence to prove that any cash was paid to the appellant over and above the stated consideration. Further, not one piece of document has come to notice or has been submitted by the developer in support of his contention either during post search enquiries or during the proceedings before the ITSC to prove that assessee has accepted share of "on money" from it.

18. We notice that the order passed by Ld. AO is influenced by the statements made by M/s DDDPL before Hon'ble settlement commission as there is lack of enquiry on the part of department in the present case. Search was conducted on 21.9.2012 at premises of the Apollo group including M/s DDDPL, despite all the evidence coming to light, there was no reference to any payment in cash to the assessee. Further, no consequential action was initiated in the case of the assessee. In fact, no post search enquiries, were directed towards the assessee. Assessment's u/s 143(3) were completed for both the assessment years i.e 2010-11 and 2011-12, in March 2013, and Feb 2014, well after search proceedings and post search enquiries were over. At no stage was any reference made to the evidence seized from M/s DDDPL. Later when M/s DDDPL moved the settlement commission u/s 245C, in November

2014, the Rule 9 report submitted by the Pr CIT Central Bhopal, the assesse has challenged the averments made by M/s DDDPL. Certain extract reproduced in the order u/s 245D(4) passed by the ITSC reads as follows:-

> *"the applicant M/s DDDPL has not filed any confirmation or affidavit from M/s Goyal Developers substantiating the receipt of the unaccounted money by them".*
>
> *The Pr CIT was of the view that the "amounts in cash had been collected by M/s DDDPL, and it has the primary onus of proving its payment to M/s Goyal Developers, which it has not fulfilled".*

19. We notice that the change in view happened as late as in March 2016, after proceedings u/s 245D(4) had commenced, and perhaps the assessing officer seem to have been influenced by these proceedings. Thus, the action of the assessing officer in making additions in case of the assessee is solely on the basis of bald statements of M/s DDDPL which clearly appears to be after thought and is based on the view of the ITSC despite the fact that ITSC has given direction to carry on an independent enquiry. The allegation of handing over of any on money to the assessee by M/s DDDPL seems to be baseless in light of the fact that the assessee and M/s DDDPL had prior agreement for outright purchase of land, which was later converted to JV agreement.

20. As has been discussed above that the initial agreement between the two parties was for outright purchase of the entire parcel of land. For sake of brevity the facts as mentioned earlier are not being repeated. The above contention is corroborated from the fact that the advance of Rs 6.86 crores was received between

20.07.2007 and 07.07.2008, while the JV agreement was executed as late as April 2009. Further, in the audited balance sheet of the appellant for 31.3.2008, the amount received has been shown as advance against sale of land. In fact the balance sheet was submitted to the assessing officer during the course of assessment for A.Yr 2008-09. Secondly, the advance received, was adjusted against the amounts received from sale of plots. Finally, it is also a fact that 7.926 acres out of the total parcel of 27 acres had been sold by the appellant to M/s DDDPL by April 2008.

21. We notice that, the above fact is also substantiated through an affidavit duly submitted before the Ld. AO during the course of assessment proceedings of one of the witnesses to the executed development agreement i.e. Shri Manish Kajanchi who has stated that the original deal of appellant with M/s DDDPL is that of sale of land and due to inability of M/s DDDPL to pay the remaining amount as mentioned above under the deal, an arrangement of JV at the request of M/s DDDPL was made (Copy of such affidavit is at page no. 263 to 265 of the paper book dt. 09.12.2021).

22. We also find force in the contentions of the Ld. counsel for the assessee that M/s DDDPL has made contradictory averments and false statements before the 'ITSC', which has acted on the basis of the same, and hence, the assessing officer should not have, relied on such claims contained in the SOF to form a belief regarding receipt of cash by the appellant. It has been stated that the initial amount of collections was given to the appellant. According to the

developer, i.e M/s DDDPL, the payment of cash to the appellant was as per the schedule reproduced below.

F.Yr	*Total unaccounted cash receipts*	*Share of M/s Goyal Developers*	*Share of M/s DDDPL*
2009-10	*17,16,77,580*	*17,16,77,580*	*NIL*
2010-11	*22,78,32,433*	*18,64,46,687*	*4,13,85,746*
2011-12	*14,82,51,947*	*NIL*	*14,82,51,947*
2012-13	*NIL*	*NIL*	*NIL*
2013-14	*73,27,800*	*NIL*	*73,27,800*
Total	*55,50,89,760*	*35,81,24,267*	*19,69,65,493*

23. On the other hand, M/s DDDPL have stated that they have earned net profit of 25% on such unaccounted receipts of Rs 19,69,65,493/-, and the balance amount has been spent on development and other expenses in cash. The amount claimed to be spent on works by DDDPL comes to Rs 14,77,24,119/-. However, the completion certificate of the project 'Uptown Apollo' shows date of completion as 14.5.2010. By that time the developer had received cash amounting to Rs 17,16,77,580/- only, which he claims to have paid to the appellant. He then possibly could not have spent Rs 14,77,24,119/- in cash on development and other expenses, which he has claimed before the ITSC. Thus, the statement of M/s DDDPL is clearly contradictory, and suffers from grave infirmity. The ITSC has overlooked this contradiction, which goes to the root of the issue. It clearly shows that the cash was not being passed on to the appellant.

24. We further find that In the Rule 9 report the Pr CIT had asked for an affidavit from the landowner i.e the present assessee, regarding receipt of cash, before the claim of M/s DDDPL can be

considered. ITSC instead chose to seek and obtain an affidavit from one of the directors of M/s DDDPL. The affidavit was filed by one Shri Manoj Garg, on 6.04.2016 stating that the company i.e M/s DDDPL handed over cash to M/s Goyal Developers i.e the appellant. The affidavit does not mention the name of the person who handed over the cash, nor the name of the person who received it and the dates on which such cash was allegedly given. An important infirmity in the affidavit is that Manoj Garg became a director in M/s DDDPL as late as on 31.5.2012. This is available in the public domain through the web site of ROC. According to the SOF u/s 245C, filed by M/s DDDPL, cash had been paid to the appellant by 31.3.2011. Hence Manoj Garg, who became a director in May 2012, could not have been a witness to such transactions. The appellant's request for cross examination of Manoj Garg, was not acceded to by the assessing officer. That, the documents seized in the case of M/s DDDPL and its employees / associates cannot be considered as good evidence to affix liability on the assessee, more particularly when no opportunity to cross examine any such person was provided to the assessee at any stage of earlier proceedings.

25. We notice that the action of the Assessing Officer in making the impugned additions, is against all principles of law and further is not supported by the facts of the case. In arriving at the conclusion that the excel spread sheet is evidence of the appellant having received cash, the Assessing Officer has drawn presumptions that too in absence of desired cross-examinations, which are without

any basis in law. In its landmark judgment the Hon Apex Court in the case *of V.C.Shukla and Others Vs CBI* held as under

> *"However, S. 34 clearly lays down that even if a book of account is relevant and admissible in evidence, it is not, on its own, sufficient to fasten a liability on any person. There must be independent evidence of the monetary transactions, and the book of account would be in the nature of corroborative evidence only. Since there is no such independent evidence, S. 34 of the Indian Evidence Act will not apply in the facts of the case, and MR 71/91 cannot be accepted as evidence against the respondents. ".....even correct and authentic entries in books of account cannot without independent evidence of their trustworthiness, fix a liability upon a person.....even if we proceed on the assumption that the entries made in MR 71/91 are correct and the entries in the other books and loose sheets (which we have already found to be not admissible in evidence under Section 34) are admissible under Section 9 of the Act to support an inference about the formers' correctness still those entries would not be sufficient to charge ShriAdvani and Shri Shukla with the accusations levelled against them for there is not an iota of independent evidence in support thereof.....the statements of the four witnesses, who have admitted receipts of the payments as shown against them in MR 71/91, can at best be proof of reliability of the entries so far they are concerned and not others. In others words, the statements of the above witnesses cannot be independent evidence under Section 34 as against the above two respondents."*

26. Similar Rules of Evidence have also been incorporated in the Income Tax Act 1961 vide Sections 132(4A) and 292C (wef 1.10.1975) regarding materials found during search. The Hon'ble Supreme Court in *Metrani (P.R.) v CIT (2006) 287 ITR 209 (SC)* held as under:

> *The presumption under section 132(4A) is a rebuttable one.*
>
> *Section 132 is a self-contained code confined to search and seizure and the presumption for the purpose of seizure cannot hold good for regular assessment. It follows that presumption u/s.132(4A) cannot be carried to the regular assessment without considering any further argument or evidence, which may be furnished by the assessee.*
>
> *In this case, the Hon'ble Supreme Court has discussed the Indian Evidence Act and the presumptions available i.e., (i) may presume, (ii)*

shall presume, and (iii) conclusive proof. A presumption is an inference of fact drawn from known or proved facts. It is a rule of law under which courts are authorized to draw a particular inference from a particular fact unless and until the truth of such inference is disproved by other evidence. In the case of "may presume" it is left to the Court to make or not to make presumptions. Therefore, there is an option for the court to make such a presumption and even if it is made it is a rebuttable presumption. As may be seen from the sub-section (4A) the words used are "may be presumed", which are less onerous, as the presumption may or may not be invoked.

The presumptions contained in Section 132(4A) were carried forward into regular proceedings by introduction of section 292C with retrospective effect from 1.10.1975, vide Finance Act, 2007, It should be noted that section 292C also uses the term "may, in any proceeding under this Act be presumed". Hence, while Section 292C carries forward the presumptions into regular assessments, in view of the decision of the Hon'ble Supreme Court in the case of Metrani (P.R.) v CIT cited above, such presumptions are rebuttable and cannot be drawn without taking into account other corroborative factors. Further, as per the principles laid down by the Hon'ble Apex Court in the case of V C Shukla and Others, presumptions cannot be drawn on the basis of seized documents against third parties.

- *Thus, the principles laid down in the above cases are that;*

➢ *Without independent corroborative evidence a monetary liability cannot be fastened on a person based on documents seized from some third person.*

➢ *The presumption regarding documents seized during search is against the person from whom such document has been seized.*

➢ *Even in such case the presumption is rebuttable and the assessing officer has to bring on record corroborative evidence to support action based on such documents.*

27. We find that the assessee place reliance upon the plethora of decisions mentioned below, wherein it is been held by various Hon'ble courts including the jurisdictional Hon'ble M.P. High Court that without independent corroborative evidence a monetary liability cannot be fastened on a person based on documents seized from some third person or any statements made by such person;

The Principal Commissioner of Income Tax-I Vs. ShriPukhrajSoni Income Tax Appeal No.53 of 2017 (M.P.) (HC),

- *Commissioner of Income-tax, (C) – III v. Vineeta Gupta [2014] 46 taxmann.com 439 (Delhi) (HC),*

- *The Principal Commissioner Of Income Tax-4 Vs. MukeshKeshavlal Patel, R/Tax Appeal No. 838, 840 of 2019(HC)(Gujrat),*

- *The Commissioner of Income Tax 11, Mumbai Vs. Dr. Avinash C. Tiwari Income Tax Appeal No.176 OF 2014, (HC)(Bombay)*

28. In case of The *Principal Commissioner of Income Tax-I Vs. Shri Pukhraj Soni Income Tax Appeal No.53 of 2017*, Hon'ble M.P. High Court held that*:*

4. The Tribunal has held that the Commissioner (Appeal) was justified in allowing the appeal as the Assessing Officer has done the addition on the basis of notings found in the books of third person. It is again an undisputed fact that the assessment has been done on the basis of notings found in the books of third person.

5. Shri Sumit Nema, learned Senior Counsel with Shri A. Gupta, learned Counsel for the respondent has placed reliance upon a judgment delivered in the case of Central Bureau of Investigation Versus V. C. Shukla and others reported in (1998) 3 SCC 410. Paras 17, 18, 24, 25, 26, 27, 34, 37 and 39 reads asunder:-

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

18. 'Book' ordinarily means a collection of sheets of paper or other
material, blank, written, or printed, fastened or bound together so as to form a material whole. Loose sheets or scraps of paper cannot be termed

as 'book' for they can be easily detached and replaced. In dealing with the work 'book' appearing in Section 34 in Mukundram vs. Dayaram [AIR 1914 Nagpur 44], a decision on which both sides have placed reliance, the Court observed:-

" In its ordinary sense it signifies a collection of sheets of paper bound together in a manner which cannot be disturbed or altered except by tearing apart. The binding is of a kind which is not intended to the moveable in the sense of being undone and put together again. A collection of papers in a portfolio, or clip, or strung together on a piece of twine which is intended to be untied at will, would not, in ordinary English, be called a book I think the term "book" in S. 34 aforesaid may properly' be taken to signify, ordinarily, a collection of sheets of paper bound together with the intention that such binding shall be permanent and the papers used collectively in one volume. It is easier however to say what is not a book for the purposes of S. 34, and I have no hesitation in holding that unbound sheets of paper in whatever quantity, though filled up with one continuous account, are not a book of account within the purview of S. 34."

We must observe that the aforesaid approach is in accord with good reasoning and we are in full agreement with it. Applying the above tests it must be held that the two spiral note books (MR 68/91 and 71/91) and the two spiral pads (MR 69/91 and MR 70/91) are "books" within the meaning of Section 34, but not the loose sheets of papers contained in the two files (MR 72/91 and MR 73/91).

24. It cannot be gainsaid that the words 'account', 'books of account', 'business' and 'regularly kept' appearing in Section 34 are of general import. necessarily, therefore, such words must receive a general construction unless there is something in the Act itself, such as the subject matter with which the Act is dealing, or the context in which the words are used, to show the intention of the legislature that they must be given a restrictive meaning.
1.
25. Indubitably, the Act lays down the rules of evidence to be applied and followed in all judicial proceedings in or before any Court including some Courts - martial. Keep in view the purpose for which the Act was brought into the statute book and its sweep, the words appearing in Section 34 have got to be given their ordinary, natural and grammatical meaning, more so, when neither the context nor any principle of construction requires their restrictive meaning. While on this point we may refer to Section 209 of the Companies Act, 1956 which expressly lays down what 'books of account' to be maintained thereunder must contain and, therefore, the general meaning of the above words under the Act may not be applicable there.

26. In Mukundram (supra) after dealing with the word 'book' (to which we have earlier referred) the Court proceeded to consider what is

meant by a 'book of account' under Section 34 and stated as under:

" To account is to reckon, and I an unable to conceive any accounting which does not involve either addition or subtraction or both of these operations of arithmetic. A book which contains successive entries of items may be a good memorandum book; but until those entries are totalled or balanced, or both, as the case may be, there is no reckoning and no account. In the making of totals and striking of balances from time to time lies the chief safeguard under which books of account have been distinguished from other private records as capable of containing substantive evidence on which reliance may be placed."

(emphasis supplied)

We have no hesitation in adopting the reasoning adumbrated in the above observations. The underlined portion of the above passage supports the contention of Mr. Altaf Ahmed and rebuts that of mr. Sibal that Mr 71/91 is only a memorandum for the entries made therein are totalled and balanced. We are, therefore, of the opinion that MR71/91 is a 'book of account' as it records monetary transactions duly reckoned.

27. Coming now to the word ' business' , we need not search for its meaning in Black's Law Dictionary, or words and Phrases for this Court has dealt with the word in a number of cases. In Narain Swadesh Weaving Mills vs. The Commissioner of Excess profits Tax [1955 (1) SCR 952], a five judge bench of this Court held that the word 'business' connotes some real, substantial and systematic or organised course of activity or conduct with a set purpose' and the above interpretation was quoted with approval in Mazagaon Dock Ltd. vs. The Commissioner of Income Tax and Excess Profits Tax [1959 SCR 848]. Again in Barendra Prasad Ray vs. I.T.O. [1981 92) SCC 693] this court observed that the word 'business' is one of wide import ad it means an activity carried on continuously and systematically by a person by the application of his labour or skill with a view to earning an income. The activities of the Jain brothers, as sought to be projected by the prosecution now on the basis of the materials collected during investigation (detailed earlier) would, therefore, be 'business' for they were being carried on continuously in an organised manner, with a set purpose (be it illegal) to augment their own resources. mr. 71/91 is, therefore, a book of account kept in the course of business.

34. The rationale behind admissibility of parties' books of account as evidence is that the regularity of habit, the difficulty of falsification and the fair certainty of ultimate detection give them in a sufficient degree a probability of trustworthiness (wigmore on evidence $ 1546). Since, however, an element of self interest and partisanship of the entrant to make a person - behind whose back and without whose knowledge the entry is made - liable cannot be ruled out the additional safeguard of insistence upon other independent evidence to fasten him with such liability, aha been provided for in Section 34 by incorporating

the words such statements shall not alone be sufficient to charge any person with liability.

37. In Beni Vs. Bisan Dayal [A. I. R 1925 Nagpur 445] it wasobserved tat entries in book s 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 an din 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 Vs. Ram Rakha [A. I. R. 1953 Pepsu 113] the High Court, while negativing 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 prove, 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 re 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 the were in accordance with facts.

39. A conspectus of the above decisions makes it evident that even correct and authentic entries in books of account cannot without independent evidence of their trustworthiness, fix a liability upon a person. Keeping in view the above principles, even if we proceed on the assumption that the entries made in MR 71/91 are correct and the entries in the other books and loose sheets which we have already found to be not admissible in evidence under Section 34) are admissible under Section 9 of the Act to support an inference about the formers' correctness still those entries would not be sufficient to charge Shri Advani and Shri Shukla with the accusations levelled against them for there is not an iota of independent evidence in support thereof. In that view of the matter we need not discuss, deleve into or decide upon the contention raised by Mr. Altaf Ahmed in this regard. Suffice it to say that the statements of the for witnesses, who have admitted receipts of the payments as shown against them in MR 71/91, can at best be proof of reliability of the entries so far they are concerned and not others. In other words, the statements of the above witnesses cannot be independent evidence under Section 34 as against the above two respondents. So far as Shri Advani is concerned Section 34 would not come in aid of the prosecution for another reason also. According to the prosecution case itself his name finds place only in one of the loose sheets (sheet No. 8) and not in MR 71/91. Resultantly, in view of our earlier discussion, section 34 cannot at all be pressed into

service against him."

6. The Tribunal has considered the aforesaid judgment while dismissing the appeal of the Revenue. The Apex Court in the case of Common Cause (A Registered Society) Versus Union of India reported in [2017] 77 taxmann.com 245 (SC) 22, 24 and 27 has held as under:-

22. In case of Sahara, in addition we have the adjudication by the Income Tax Settlement Commission. The order has been placed on record along with I.A.No.4. The Settlement Commission has observed that the scrutiny of entries on loose papers, computer prints, hard disk, pen drives etc. have revealed that the transactions noted on documents were not genuine and have no evidentiary value and that details in these loose papers, computer print outs, hard disk and pen drive etc. do not comply with the requirement of the Indian Evidence Act and are not admissible evidence. It further observed that the department has no evidence to prove that entries in these loose papers and electronic data were kept regularly during the course of business of the concerned business house and the fact that these entries were fabricated, non-genuine was proved. It held as well that the PCIT/DR have not been able to show and substantiate the nature and source of receipts as well as nature and reason of payments and have failed to prove evidentiary value of loose papers and electronic documents within the legal parameters. The Commission has also observed that Department has not been able to make out a clear case of taxing such income in the hands of the applicant firm on the basis of these documents.

24. Since it is not disputed that for entries relied on in these loose papers and electronic data were not regularly kept during course of business, such entries were discussed in the order dated 11.11.2016 passed in Sahara's case by the Settlement Commission and the documents have not been relied upon by the Commission against assessee, and thus such documents have no evidentiary value against third parties. On the basis of the materials which have been placed on record, we are of the considered opinion that no case is made out to direct investigation against any of the persons named in the Birla's documents or in the documents A-8, A-9 and A- 10 etc. of Sahara.

27. Considering the aforesaid principles which have been laid down, we are of the opinion that the materials in question are not good enough to constitute offences to direct the registration of F.I.R. and investigation therein. The materials should qualify the test as per the aforesaid decision. The complaint should not be improbable and must show sufficient ground and commission of offence on the basis of which registration of a case can be ordered. The materials in question are not only irrelevant but are also legally inadmissible under Section 34 of the Evidence Act, more so with respect to third parties and considering the explanation which have been made by the Birla Group and Sahara Group, we are of the opinion that it would not be legally justified, safe, just and proper to direct

investigation, keeping in view principles laid down in the cases of Bhajan Lal and V.C. Shukla (supra).

7. The Apex Court has taken into account in similar circumstances the incriminating materials in form of random sheets, loose papers, computer prints, hard disk and pen drive etc. and has held that they are inadmissible in evidence, as they are in the form ofloose papers.

8. In the present case also entries found during search and seizure which are on loose papers are being made the basis to add income of this respondent.

9. Resultantly, in light of the Supreme Court judgments, referred above, no case for interference is made out with the order passed by the Tribunal. Moreover no substantial question of law arises in the present appeal, the appeal is dismissed.

12. In view of the concurrent findings of fact recorded by the two authorities, we are of the view that the question of law as proposed by the Revenue cannot be termed as a substantial question of law.

13. In the result, this appeal fails and is hereby dismissed.

29. In case of The Commissioner of Income Tax 11, Mumbai Vs. Dr. Avinash C. Tiwari Income Tax Appeal No.176 OF 2014, (HC)(Bombay) it was held that:

We find that both the CIT(A) as well as the Tribunal have on the basis of the evidence before it, rendered a finding that the document does not indicate that the amount of Rs.4.22 crores has been invested by the respondent assessee in M/s. Avis Motors Pvt. Ltd. This is more particularly so as the entire case of the Revenue is on the document which is found in possession of a third party, indicating certain amounts payable by the respondent assessee, when the same has been denied by the respondent assessee at all times. This denial on the part of the respondent assessee of the document has not been addressed to by the Revenue.

In the above view, as the two Authorities have rendered concurrent finding of fact which is not shown to be perverse and / or arbitrary, the question as formulated does not give rise to any substantial question of law. Thus, not entertained.

30. In case of The Principal Commissioner Of Income Tax-4 Vs. Mukesh Keshavlal Patel, R/Tax Appeal No. 838, 840 of 2019, Hon'ble Gujarat High Court held that:

> *9. The entire edifice of the revenue's case is the statement made by Bhikhu bhai Padsala before the Settlement Commission. Shri Bhikhu bhai Padsala stated before the Settlement Commission that he had received the amount in cash from the assessee for the purpose of purchase of the land at Village Jagatpur.*
> *According to the Assessing Officer, the same was sufficient for the purpose of addition under Section68 of the Act.*
>
> *10. In the aforesaid context, many decisions of the Supreme Court as well as this High Court and other High Courts have been relied upon by the CIT(A). One common principle in all the said decisions is that the assessee need not to be asked to explain the entries or notings in the books of a third party. In the absence of any other independent material to corroborate the statement of Shri Bhikhu bhai Padsala made before the Settlement Commission, it would not be prudent to take the view that there was a transaction between the assessee and Shri Bhikhu bhai Padsala in cash with regard to the purchase of certain parcels of land.*
>
> *11. It appears that the CIT(A) relied upon the decision of the Delhi High Court in the case of CIT Vs. Vineeta Gupta (2014) 46 taxman.com 439 (Delhi), wherein, the view taken is that the declaration made by another party before the Settlement Commission is not binding upon the assessee, therefore, no additions can be made in absence of any independent material.*

31. In the light of the above judgment and considering the arguments made by the Ld. D.R. as well as looking to the present facts and circumstance of the case apart from the statement made by M/s DDDPL i.e. the search party before the Hon'ble ITSC and the impugned excel sheet in which even the name of the respondent firm is missing and this excel sheet in our view is "dumb document" so far as the case of the assessee is concerned, there is no mention of any "on money" received by the respondent

firm, date of receipt of such alleged "on money" is missing, etc., not even a single iota of evidence is on record suggesting receipt of any "on money" by the respondent firm either directly from buyer or from M/s DDDPL and Ld. AO has not made any independent inquiry and simply relied on SOF filed by DDDPL before ITSC ignoring the fact that assessee was not a party before ITSC. Similarly, Hon'ble M.P. High Court in case of respondent firm has directed AO to complete the reassessment proceedings on merits of the case and without getting influenced by the order of settlement commission or by the order of the Hon'ble High court. However, in absence of any cogent and corroborative material brought on record, it is clear that the AO has placed complete reliance on impugned excel sheet found during the course of search at third party premises as well as only on bare statements made by M/s DDDPL before the ITSC. Thus, following the judgement of Hon'ble M.P. High Court in case of The *Principal Commissioner of Income Tax-I Vs. Shri Pukhraj Soni (supra)* wherein the Hon'ble court taken into account in similar circumstances that the material in the form of random sheets, loose papers, computer prints, hard disk and pen drive etc. are inadmissible as evidence as the same are in the form of loose papers and finding of Hon'ble jurisdictional High Court in case of Pukhraj Soni (supra) is applicable on the instant appeal. Therefore, we find merit in the findings of the Ld. CIT(A) that the impugned excel sheet and mere making of any allegation or declaration by M/s DDDPL is of no proof and in absence of any cogent evidence the additions are devoid of any merit and should be deleted. Similarly in view of the decision of Hon'ble Gujarat

High Court in case of *The Principal Commissioner Of Income Tax-4 Vs. Mukesh Keshavlal Patel, (Supra),* wherein the Hon'ble Gujarat High Court following the decision of Hon'ble Delhi HC in the case of CIT Vs. Vineeta Gupta (2014) 46 taxman.com 439 (Delhi), held that, the declaration made by another party before the Settlement Commission is not binding upon the assessee, therefore, no additions can be made in absence of any independent material. We find that in the instant case also the addition made is solely relying upon the statement made by third party and on the basis of loose sheets found at the third-party premises and in absence of independent corroborative material on record by the revenue.

32. We, therefore, under the given facts and circumstances of the case and in the light of judicial pronouncement referred hereinabove relied by Ld. counsel for the assessee, find that on examination of the facts the alleged excel sheet found during the course of search from the premises of third party is nothing but a 'dumb documents' as it does not contain any reference of the assessee. We also find that during the course of search proceedings nothing incriminating material was found pertaining/belonging to the assessee, also during the course of search and post search statements no reference was made about the alleged transaction giving rise to unaccounted "on money" by searched person in the statement given u/s 132(4) of the Act. We also find that the alleged allegation that assessee was a part of development agreement for developing the land is not correct rather it was a mere arrangement made between the assessee with DDDPL to recover its remaining

sale consideration against the land sold to DDDPL. We also find that Ld. AO has made the additions merely on the basis of statement of fact filed by DDDPL before the Income Tax Settlement Commission and no efforts whatsoever were made independently by the ld. AO to come to a finding that the assessee has received "on money" nor the Ld. AO took any statement from the ultimate buyers of the plot of land that they have paid any 'On money" and nor any evidence has been filed to show that the assessee was a party to the transactions of sale of plot of land between the DDDPL and the final buyers of the plot of land. We, therefore fail to find any infirmity in the finding of Ld. CIT(A) given after discussing the facts in detail and placing reliance on settled judicial precedents in order to delete the impugned addition of Rs. 17,16,77,580/- & Rs.18,64,46,687/- made by the Ld. AO for the alleged unaccounted "on money" received by the assessee from DDDPL for A.Y. 2010-11 & 2011-12.

33. In the result all the grounds raised by the revenue for A.Y. 2010-11 & 2011-12 are dismissed.

Now we take up Cross objections filed by the assessee bearing C.O. Nos. 27/Ind/2021 & 28/Ind/2021 for the A.Y. 2010-11 and A.Y. 2011-12 respectively.

34. Through cross objections assessee has challenged the jurisdiction of issuance of notice u/s 148 of the Act and validity of reassessment proceeding u/s 147 of the act in case of appellant

being beyond the period of 4 year, as the case of the appellant has already been assessed u/s 143(3) of the Act and also raised the legal issue that the assessee has been wrongly assessed under the provision of section 147 of the Act rather than 153C of the Act because reason to believe has been formed on the basis of the documents seized at the time of search from the premises of the third party. In regards to such contention detailed paper book along with written submissions were placed on record.

35. On the other hand, the Ld. DR has drawn our attention towards the order of Hon'ble M.P. High Court in case of the appellant wherein the Hon'ble M.P. High Court has held that the court did not find any reason to interfere with the notice u/s 148 of the Act and the proper course of action for the petitioner is to file return and if he so desires, to seek reasons/ documents for issuing such notices and in case of any application is preferred for demand of material on the basis of which assessment has been done, the material shall be given to the petitioner enabling him to defend his case. The assessing officer after granting opportunity of hearing to the petitioner and after taking into account the objection and the material shall pass a speaking order in accordance with the law.

36. We have heard rival contentions and perused the records placed before us. As regards Cross objections raised by the assessee challenging the jurisdiction of issuance of notice u/s 148 of the Act we fail to find any merit in assessee's contention, in light

of the fact that the assessee has challenged the issuance of notice u/s 148 of the Act. Before Hon'ble jurisdictional High Court by way of filing writ petition contending that based upon the order passed by the Settlement Commission proceedings have been inserted by issuing notice u/s 148 of the Act and as the petitioner was not heard by the Settlement Commission notice issued by the Ld. AO deserves to be quashed. On perusal of the order of the Hon'ble Jurisdictional High Court placed at paper book page no.51 to 69 the Hon'ble court declined the admission of writ petition observing as follows:

> *In the light of the aforesaid judgments, this court is of the considered opinion that under the provisions of the Income Tax Act, 1961 if certain facts have been brought to the notice of the Assessing Officer relating to escapement of income chargeable to tax, he is bound to reassess the income of the assessee of the relevant years. The assessee does have a remedy to file objection and related documents which may be provided by the Assessing Officer. Not only this, the No.5 has not given any finding in respect of taxability or otherwise or unaccounted receipts / income in respect of the petitioner and has held that the Department shall be free to complete the proceedings initiated u/s. 148 on the basis of information 1 evidence available and after following the provisions of law. Resultantly, this Court is of the considered opinion that the order passed by the Settlement Commission dt. 18/5/2016 does not warrant interference at the behest of the petitioner. The Settlement Commission, based upon the . documents*

submitted by the respondent No.5 has passed a final order. So far as notices which have been issued u/s. 148 for the assessment year 2010-2011 and 2011-2012 is concerned, the proper course of action for the petitioner is to file return and if he so desires, to seek reasons 1 documents for issuing such notices and in case any application is preferred for demand of material on the basis of which. assessment has been done, the material shall be given to the petitioner enabling him to defend his case. The assessing officer, after granting opportunity of hearing to the petition and after taking into account the objections and the material, shall pass a speaking order in accordance with law.

This Court does not find any reason to interfere with the order passed by the Settlement Commission at the behest of the petitioner which has been passed in respect of respondent no.5 nor does find any reason to interfere with the notices u/s 148 of the Income Tax Act,1961.

The assessing officer shall pass an order on merits without being influcenced by the order passed by the Settlement commission and without being influced by the order passed by this court by taking into account the material available on record.

37. From going through above finding of jurisdictional High Court has specifically observed that so far as the notice which have been issued u/s 148 of the Act, the proper course of action for the petitioner is to file the return and if he show desire then seek

reasons/documents for issuing such notices. Hon'ble Court further find no reason to interfere with the notices issued u/s 148 of the Act.

38. Under these given facts and circumstances and respectfully following the judgment of Hon'ble High Court in the case of assessee challenging issuing of notice u/s 148 of the Act through writ petition, we are inclined to hold that notice issued u/s 148 of the Act for A.Y.2010-11 & 2011-12 is valid and was are the assessment proceedings carried out u/s 147 of the Act. We also hold that Ld. AO was justified in invoking provisions of section 147 of the Act and not section 153C of the Act as contended by Ld. counsel for the assessee because nothing incriminating was found belonging to the assessee during the course of search carried out in the case of DDDPL. Thus, assessee fails to succeed on any of the legal ground raised in the cross objections.

39. In the result, revenue's appeals ITANo.51 & 51/Ind/2021 are dismissed and assessee's C.O.No.27 & 28/Ind/2021 are also dismissed.

The order pronounced as per Rule 34 of ITAT Rules, 1963 on 17.01.2022.

Sd/-	Sd/-
(MAHAVIR PRASAD)	(MANISH BORAD)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

दिनांक /Dated :17.01.2022
Patel/PS

Copy to: The Appellant/Respondent/CIT concerned/CIT(A) concerned/ DR, ITAT, Indore/Guard file.

By Order,
Asstt.Registrar, I.T.A.T., Indore