

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
"C" BENCH, AHMEDABAD
(CONDUCTED THROUGH VIRTUAL COURT AT AHMEDABAD)

BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT
AND
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

| Sr. No. | ITA/IT(SS)A | Asstt. Year | Name of Appellant | Name of Respondent |
|---------|-----------------------|-------------|--|--|
| 1. | ITA No.2130/Ahd/2017 | 2012-13 | The Assistant Commissioner of Income Tax, Circle-2(1)(2), Ahmedabad | Jas Infra Space Pvt. Ltd. GF City Centre, Nr. Idgah Gas Circle, Asarwa, Ahmedabad-380016 PAN:AACCJ7331E |
| 2. | ITA No. 2131/Ahd/2017 | 2013-14 | The Assistant Commissioner of Income Tax, Circle-2(1)(2), Ahmedabad | Jas Infra Space Pvt. Ltd. GF City Centre, Nr. Idgah Gas Circle, Asarwa, Ahmedabad-380016 PAN:AACCJ7331E |
| 3. | ITA No. 398/Ahd/2018 | 2014-15 | Jas Infraspac Pvt. Ltd. New Manekchowk Mill Compound, City Centre, Idgah Gate Circle, Asarwa, Ahmedabad-380016 PAN:AACCJ7331E | D.C.I.T., Circle-2(2)(1), Pratyaksh Kar Bhavan, Ahmedabad. |
| 4. | ITA No. 547/Ahd/2018 | 2014-15 | The Assistant Commissioner of Income Tax, Circle-2(1)(2), Ahmedabad | Jas Infraspac Pvt. Ltd. New Manekchowk Mill Compound, City Centre, Idgah Gate Circle, Asarwa, Ahmedabad-380016 PAN:AACCJ7331E |

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| (Applicant) | | (Respondent) |
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| Assessee by : | Shri S.N. Soparkar, Sr. Advocate with Shri Parin Shah, A.R |
| Revenue by : | Shri Ajay Pratap Singh, CIT DR |

सुनवाई की तारीख/**Date of Hearing** : 22/12/2021
घोषणा की तारीख /**Date of Pronouncement**: 28/01/2022

आदेश/ORDER

PER WASEEM AHMED, AM:

In this bunch of appeals three appeals are filed by the Revenue and one appeal has been filed by the assessee against the orders of Ld. Commissioner of Income-Tax (Appeals) involving respective assessment years.

First we take ITA No. 2130/Ahd/2017 an appeal by Revenue for A.Y. 2012-13

2. The Revenue has raised the following grounds of appeal:

"1. *The Ld. CIT(A) has erred in law and on facts in deleting the addition u/s 69B of IT Act without considering the fact that the promoter group of the company selling the said land had accepted receipt of unaccounted cash from the assessee towards the sale of land and had declared the same before the Settlement Commission.*

1.1 *The Ld. CIT(A) has grossly erred in law and on facts by not giving due cognizance to the provisions of 292C of the IT. Act (with respect to the impounded documents during the course of survey u/s. 133A), which mandates that the contents of such impounded documents are to be presumed to be true.*

1.2 *The Ld. CIT(A) has grossly erred in law and on facts by invoking and travelling to the provisions of section 34 of the Evidence Act (which is with respect to the entries in books of accounts) when the relevant section for the said impounded documents is section 292C of the I.T. Act.*

1.3 *The Ld. CIT(A) has grossly erred in relying on the decisions of the Hon'ble Supreme Court which were in respect of criminal or quasi-criminal proceedings, which are not based on "proof beyond doubt", whereas the IT. proceedings are based on the principle of preponderance of probability and human behavior and are in governed by the rule of evidence as provided for in the IT. Act, in this case section 292C.*

1.4 *The Ld. CIT(A) has failed to appreciate that the statement of Shri Pradeep Agarwal was recorded u/s. 131 of the IT. Act which provide that the officers/IT. Authority have the same powers as are vested in a court under the Code of Civil Procedure 1908; therefore, such statement could not be taken lightly or dismissed outrightly, as has been done by the Ld. CIT(A).*

1.5 *The Ld. CIT(A) has failed to appreciate that the figure of unaccounted money was not a figment of imagination by the AO, but it was what was found recorded in the impounded documents.*

1.6 *The Ld. CIT(A) has failed to appreciate that the seller company i.e. M/s. Advance Life Style Ltd., the holding company of the SPV, namely M/s. Advance Life Spaces Pvt. Ltd., and M/s. Phulchand Exports Pvt. Ltd. are all related concerns and are controlled by Agarwal family, of which Shri Pradeep Agarwal S/o Shri Phulchand Agarwal is a member. Thus, CIT(A) erred in facts and law in observing*

that Shri Pradeep Agarwal whose statement was recorded and relied upon was a stranger.

1.7 The Ld. CIT(A) has failed to appreciate that the AO made the addition in two different A.Y.s based on the statement given by Shri Pradeep Agawal that Rs. 58.14 crores was paid in F.Y. 2012-13 and Rs. 33.92 crores was paid in F.Y. 2011-12 (relevant to the instant A.Y. 2012-13).

1.8 Without prejudice to the above, if the Ld CIT(A) was of the opinion that such amount belonged to only one F.Y, he erred in not directing the AO u/s. 150 of the I.T. Act to treat that as income in that relevant A.Y.s

1.9 In any case, the Ld. CIT(A) erred in law by not appreciating that violation of natural justice, if any, can not render the order void, but is liable to be remanded back to the AO to be done de novo.

2 The Ld CIT(A) has erred in law and on facts in deleting the addition u/s 68 of the IT Act the advance from Sundry debtors where the identity, creditworthiness of the parties could not be proved and genuineness of the transaction could not be established.

2.1 The Ld. CIT(A) has erred in law and on facts by holding that section 68 did not apply to the advances received for alleged sale of land.

3 The appellant craves leave to amend or alter any ground or add a new ground, which may be necessary."

3. The first issue raised by the Revenue is that the Ld. CIT-A erred in deleting the addition made by the AO for Rs. 33.92 crores on account of investments not disclosed in the books of accounts as required under section 69B of the Act.

4. The stated facts are that the assessee in the present case is a private company and engaged in the business of development of land. There was a property located at Manek Chowk which was known as 'New Manek Mills/ New Manek Chowk Textile Mills. The impugned property was purchased by M/s Advance Lifestyle Ltd. through its 'Special Purpose Vehicle' namely M/s. Advance Life Space Private Ltd. in an E-auction dated 31st December 2010. The impugned property was sold by National style Textile Corporation to Advance Life Space Private Ltd.

5. Afterward, the assessee purchased the shares of Advance Life Space Private Ltd which were held by M/s Advance Lifestyle Ltd vide MOU dated 17th January 2012 for a total consideration of Rs. 143.55 crores. Effectively, the

impugned property was transferred to the assessee by virtue of the transfer of shareholdings.

6. Subsequently, there was the survey operation under section 133A of the Act dated 12th December 2012 at the premises of M/s Phulchand Exports Pvt Ltd. wherein a disclosure of Rs. 94 crores was made based on the documents impounded during survey operation. The disclosure made during the survey operation was inclusive of Rs. 91.70 crores which was received against sale of the impugned property to the assessee. This fact of receiving the cash against the sale of impugned property was admitted by Shri Phulchand Aggarwal and his son Shri Pradeep Aggarwal. In addition to the above i.e. disclosure of Rs. 91.70 crores, there was found another receipt of Rs. 35 Lacs against the sale of impugned property. Thus, it was observed that the M/s Advance Lifestyle Ltd has received a sum of Rs. 92 crores in cash from the assessee against the sale of the impugned property. M/s Phulchand Exports Pvt. Ltd and M/s Advance Lifestyle Ltd have also admitted to have received a sum of Rs. 92 crores before the settlement commission against the sale of the impugned property to the assessee. The sum of Rs. 92 crores was received by M/s Advance Lifestyle Ltd in two different assessment years namely assessment year 2012-13 and 2013-14 for Rs. 33.92 crores and 58.14 crores respectively. Accordingly the proceedings under section 147 of the Act were initiated against the assessee for both the Assessment Years i.e. 2012-13 and 2013-14.

7. The assessee during the assessment proceedings contended that it has not paid any cash either to M/s Phulchand Exports Pvt. Ltd. or to M/s Advance Lifestyle Ltd. as alleged by the revenue against the purchase of the impugned property. As per the assessee, the ownership right in the impugned property was vested with M/s Advance Life Space Pvt. Ltd. It is for the reason that the assessee has acquired the shares of Advance Life Space Private Ltd. which were held by M/s Advance Lifestyle Ltd. Therefore, there was no change of the ownership of the impugned property.

8. The assessee also contended that there was not found any material /documentary evidence suggesting that the assessee has paid any cash against the purchase of the shares as discussed above. Therefore, merely on the basis of any statement, no addition can be made. Similarly, statement is also not reliable. It is for the reason that admission in the statement against question No. 14 and 26 was admitted to have received the total consideration at Rs. 160 crores whereas in application for the settlement it was mentioned at Rs. 235.61 crores cash. As such there was the mismatch in the amount of total consideration for the sale/purchase of the shares/property. Likewise, the survey was conducted at the third party premises and there was no material found for any cash transaction. Thus such statement cannot be relied upon.

9. The assessee further submitted that there was no supporting material furnished before the settlement commission evidencing the involvement of any cash transaction in the impugned deal for the purchase of shares/property. Furthermore, the order of the settlement commission is not binding on the third party.

10. There was also a survey operation at the premise of the assessee under section 133A of the Act dated 17 October 2013 but there was not found any document of incriminating nature suggesting any undisclosed transaction of cash in the impugned property deal.

11. However, the AO disregarded the contention of the assessee by observing that the directors of M/s Phulchand Exports Pvt. Ltd and M/s Advance Lifestyle Ltd. have categorically admitted to have received the cash from the assessee in the statement furnished during survey operation. This fact was also proved during the cross-examination with the assessee viz a viz the other parties i.e. M/s Phulchand Exports and M/s Advance Lifestyle Ltd. In the application to the settlement also, it was admitted to have received the cash from the assessee.

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12. There were certain shopkeepers at the premises/ property purchased by the assessee who were paid compensation for getting the property vacated in cash for the sum of ₹22 lacs, 10 lacs and 4 lacs respectively. In view of the above, the AO held that the assessee has made investments which were not disclosed in the books of accounts. Thus, the AO made the addition of Rs. 33.92 crores and 58.14 crores for the year under consideration as well as in the subsequent assessment year to the total income of the assessee.

13. Aggrieved assessee preferred an appeal to the Ld. CIT-A.

14. The assessee before the Ld. CIT-A submitted that the addition has been made by the AO merely on the basis of the statement of the third party and without bringing any material on record/ incriminating document suggesting the payment in cash. Thus, the addition has been made by the AO based on surmise and conjecture which cannot be done under the provisions of section 69B of the Act.

15. The Ld. CIT-A after considering the submission of the assessee deleted the addition made by the AO by observing that the information was gathered by the AO for making the addition for the alleged payment of cash in the hands of the assessee based on the survey operation under section 133A of the Act which was carried out at the premises of third party i.e. M/s Phulchand Export Pvt. There was no connection of whatsoever between the assessee and the third party being M/s Phulchan Exports Pvt. Ltd where the survey was carried out.

16. Furthermore, during the survey proceeding, no incriminating material was found suggesting that any cash payment was made by the assessee in connection with the acquisition of the shares of the company namely M/s Advance Life Space Pvt. Ltd which were held by M/s Advance Lifestyle Ltd. As such the entire basis of holding cash payment against purchase of share was of the statement of Shri Pradeep Aggarwal who is not connected with the assessee, Advance Life Space Private Ltd and Advance Lifestyle Ltd. As such, he was not the director in any of

the company. Therefore, no addition shall stand merely on the basis of the statement and that too of a third party.

17. For making any addition under the provisions of section 69B of the Act, there has to be some tangible materials indicating the investment made in cash which was not recorded in the books of accounts. In the absence of any tangible material, no addition under the provisions of section 69B can be made. Admittedly, in case of assessee no such material is available.

18. There were found certain loose papers/diaries containing the noting of certain amounts which cannot be equated as an evidence under the provision of section 34 of the Evidence Act, to draw an inference that there was unexplained investment made by the assessee. As such, these noting must be supported by corroborative materials. Even, Shri Pradeep Aggarwal in his statement recorded under section 131 of the Act failed to substantiate based on the documentary evidence that there was the cash payment made by the assessee. Even at the time of cross-examination, Shri Agarwal failed to substantiate to have received any money from the assessee except making statement. Thus such noting does not have any evidentiary value and statement of third party cannot be made basis for addition in the hands of the assessee. In holding so, the Ld. CIT-A has made reference to various case laws including the order of Hon'ble Supreme Court's which are incorporated in his order on pages 21 to 26.

19. Before the settlement commission, an income of Rs. 92 crores was offered by M/s Advance lifestyle Ltd and M/s Phulchand Exports Private Ltd. M/s Advance lifestyle Ltd has offered an income of Rs. 30.88 crores whereas M/s Phulchand Exports Pvt. Ltd has offered an amount of Rs. 61.17 crores. There was no connection of M/s Phulchand Export in the transaction for the sale of shares by M/s Advance Lifestyle Ltd to the assessee. Therefore, there was no occasion for M/s Phulchand Exports Pvt. Ltd to offer any income with respect to the transfer of the shares. Therefore, merely a party has offered an income to tax before the

settlement commission cannot bind the assessee. In view of the above, the learned CIT-A deleted the addition made by the AO.

20. Being aggrieved by the order of the learned CIT-A the revenue is in appeal before us.

21. The learned DR before us submitted that the facts of making the payment by the assessee in cash for the purchase of the property amounting to ₹92.30 crores over and above the documented price was duly admitted in the statement furnished by Shri Pardeep Aggarwal. Likewise, there was a disclosure by the parties namely M/s Phulchand Export and M/s Advance Lifestyle Ltd before the settlement commission for having received a sum of ₹92.30 crores in cash as discussed above. The learned DR also submitted that there is a direct connection between M/s Phulchand Export and M/s Advance Lifestyle Ltd as the former along with its associates was holding the shares in the later company. The learned DR vehemently supported the order of the AO.

22. On the other hand, the learned AR before us filed a paper book running from pages 1 to 323 and contended that there are contradiction in the statement furnished by Shri Pardeep Aggarwal and therefore the same cannot be relied upon. Likewise, Shri Pardeep Aggarwal, is a 3rd party and not related either with the assessee or the vendor. Furthermore, there was no iota of evidence available on record suggesting that the assessee has made any payment of cash as alleged by the AO. It was also contended by the learned AR that the decision of settlement commission cannot bind the assessee. The learned AR vehemently supported the order of the learned CIT-appeal.

23. We have heard the rival contentions of both the parties and perused the materials available on record. The facts of the case on hand have already been elaborated in the preceding paragraph which are not in dispute. Therefore, for the sake of brevity and convenience, we are not inclined to repeat the same. From the preceding discussion, we note that the addition in entirety was based on the

statement recorded in the course of survey operation under section 133A of the Act at the premises of the third party namely M/s Phulchand Export Pvt Ltd. The copy of the survey statement is placed on pages 82 to 101 of the paper book. On perusal of the same, it is deciphered that no material of incriminating nature has been referred therein indicating/suggesting that the assessee has made payment in cash for the acquisition of the shares of the company namely M/s Advance Life Space Pvt Ltd which were held by M/s Advance Life Style Ltd except a diary containing the date and amount. Moreover, we also note that there is a contradiction in the statement of Shri Pradeep Aggarwal recorded during the survey operation. At one place while giving answer to question no. 14 and 26 it was stated that the full value of consideration for shares acquired was at Rs. 160 crores including Rs. 5 crore for getting the property vacated from occupant whereas before the settlement commission the value was mention at Rs. 235.61 crores. Thus we note that there is a contradiction in the statement which has been relied by the AO for making the addition in the hands of the assessee.

24. During the survey proceedings under section 133A of the Act, a question was also put to Shri Pradeep Aggarwal to substantiate that the assessee has paid cash against the acquisition of shares. However, he categorically denied to substantiate his statement. For this purpose, we can refer the statement of Shri Pradeep Aggarwal. The relevant extract is reproduced as under

"Q.27 In reply to the question no. 9,14 to 18 and 21 & 22, you have stated that the source of unaccounted cash is from sale of property at Ahmedabad. However in order to substantiate your claim, despite repeated requests and after lapse of more than 12 hours, you have not been able to substantiate your claim.

In these circumstances, you are requested to explain as to why it should not be construed that whatever you are submitting before the undersigned is not supported by documentary evidences.

Ans. Sir, I do admit that although I am not able to furnish any supporting document that can substantiate my claim that the cash which is being received by the me is from sale of property at Ahmedabad, however still I adhere to my statement that cash is generated from real estate business.

In view of your above reply, you are once again requested to furnish any supporting document or anything, which can substantiate your claim. For this purpose recording of

the statement is adjourned for 3 hours and you are requested to take all necessary measures to collect the supporting documents, if any.

[Recording of statement is stopped at 8.00 a.m.]

[Recording of statement is resumed after 3 hours at 11.00 a.m.]

Q.28 Have you collected the supporting documents?

Ans. No Sir, despite of all my whole hearted efforts, I am not in position to produce any supporting document in respect of your query. Further I am convinced that I will not be in position to produce such evidences in future also."

25. We also note that the CBDT in instruction no 286/2/2003-IT(Inv.II) has instructed the revenue authority to make addition in search or survey proceeding only on the basis of cogent material found instead of mere admission. The relevant extract of the instruction reads as under:

Instances have come to the notice of the Board where assesseees have claimed that they have been forced to confess the undisclosed income during the course of the search & seizure and survey operations. Such confessions, if not based upon credible evidence, are later retracted by the concerned assesseees while filing returns of income. In these circumstances, such confessions during the course of search & seizure and survey operations do not serve any useful purpose. It is, therefore, advised that there should be focus and concentration on collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed before the Income-tax Department. Similarly, while recording statement during the course of search & seizure and survey operations no attempt should be made to obtain confession as to the undisclosed income. Any action on the contrary shall be viewed adversely.

26. We also note that the Hon'ble Madras High Court in the case of CIT vs. Smt. Sakuntala Devi Khetan reported in 33 taxmann.com 98 has held that there cannot be any addition merely on the basis of the statement of a third party. The relevant judgment reads as under:

"8. The Tribunal, therefore, rightly found that the Department could not have made the addition merely on the basis of the statement of third parties. Consequently, the Tribunal set aside the order of the first appellate authority and directed the Assessing Officer to adopt the figures of turnover finally assessed by the sales tax Authorities and apply the G.P. rate accordingly. We find that the order passed by the Tribunal following the order passed by this Court in Anandha Metal Corpn's case (supra) is perfectly in order and does not warrant any interference."

27. We also find support and guidance from the order of coordinate bench of this tribunal in case of Jawharbhai Atmaram Hathiwalva vs. ITO reported in 128 TTJ 36, wherein the bench held as under:

"no evidence could be brought on record by the Revenue to show that in fact the assessee had paid 'on money' to the developers. No document containing signature of the assessee or handwriting of the assessee to corroborate the above making of payment by the assessee was found during the course of the search. Merely recording made by a third party or statement of a third party could not be treated as so sacrosanct so as to read as a positive material against the assessee. Therefore, addition in the hands of the assessee on account of 'on-money' was not justified"

28. At this juncture, it is also important to deal with another aspect which has been considered for the purpose of the addition. In the present case, M/s Phulchan Exports Pvt. Ltd. and M/s Advance Lifestyle Ltd have admitted before the settlement commission to have received the cash of Rs. 92.70 crores from the assessee against the transfer of shares. In other words, the impugned amount was offered to tax before the settlement commission which was accepted therein. In this regard, we note that the proceedings before the settlement commission were of M/s Phulchan Exports Pvt. Ltd. and M/s Advance Lifestyle Ltd and the assessee was not connected with such proceedings. Thus the decision of the Hon'ble Settlement Commission in the case of a third party cannot bind the assessee. In holding so we draw support and guidance from the judgment of Hon'ble Delhi High Court in the case of CIT vs. Vineeta Gupta reported in 46 taxmann.com 439 wherein it was held as under:

The impugned order does not call for any interference. The fact that sellers had declared a sum of Rs. 16 crores as undisclosed income in respect of the said transaction cannot bind the assessee and her husband. They were not privy to the settlement application filed on behalf of sellers. In any event, what the Settlement Commission has said in the order in respect of sellers is that as per their calculations the premium amount came to Rs 13.3 crores but since they had declared more than that, the disclosure needed no disturbance.

29. We have also analyzed the transaction from a different angle. For the sake of clarity but without admitting, assuming the assessee paid the amount in cash against the acquisition of the shares. In the present case, admittedly, the assessee acquired the shares of M/s Advance Life Space Pvt. Ltd from M/s Advance Lifestyle Ltd for certain value. If any consideration has been paid by the assessee outside the books of accounts against the acquisition of the shares, then the other party being the seller should suffer to tax and not the third party i.e. M/s Phulchand Export Pvt. Ltd. as the shares were held by M/s. Advance Lifestyle Ltd. which were transferred. There is no whisper that the shares of M/s Advance Life space were

held by M/s Phulchand Export Pvt. Ltd. Once the transaction on hand was not connected to M/s Phulchand Export Pvt. Ltd, then there was no reason for it (M/s Phulchand Export Pvt. Ltd.) to offer the income for the same transaction before the settlement commission for the transactions in which it was not party. Thus a doubt arises why Phulchand Export Pvt. Ltd has made a disclosure before the settlement commission in the transaction in which it was not the party even if it was the majority shareholder in the advance lifestyle Ltd. Therefore, we are not convinced with the finding of the AO.

30. We also note that there were certain loose papers/diary found during the survey operation containing certain date wise amount. On confrontation, one Shri Pradeep Aggarwal son of Shri Phulchand Aggarwal who was neither director in M/s Phulchand Export Pvt. Ltd or in M/s Advance Lifestyle Ltd stated that noting represent cash received from the assessee on hand against sale of the property at New Manik Mills. However, the name of the assessee, signature and address of the assessee was not appearing therein i.e. on the seized documents. Accordingly, we are of the view that such documents in the absence of other corroborative materials cannot substitute the evidence. The Hon'ble Supreme Court in case of Common Cause (A registered society) vs. Union of India reported in 77 taxmann.com 245, held that noting on loose sheet/diary does carry any evidentiary value under the provision of section 34 of the Evidence Act, the relevant extract reads as under:

Loose sheets of papers are wholly irrelevant as evidence being not admissible under section 34 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 this Court.

31. We also find that Hon'ble Supreme Court in CBI vs. V.C. Shukla [1998] (3) SCC 410 held that entry can be made by any person against the name of any other person in any sheet, paper or computer, but the same cannot be the basis of making charges against the person whose name noted on sheet without corroborating the same. The relevant extract reads as under:

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 part speaks, in a negative way, of its evidentiary value for charging a person with a liability. It will, therefore, be necessary for us to first ascertain whether the entries in the documents, with which we are concerned, fulfil the requirements of the above section so as to be admissible in evidence and if this question is answered in the affirmative then only its probative value need be assessed.

32. In view of the above and after considering the facts in totality, we are of the view that the order of the learned CIT-A does not require any inference. Accordingly we uphold the same. Hence the ground of appeal of the revenue is hereby dismissed.

33. The second issue raised by the Revenue in ground number 2 is that the Ld. CIT-A erred in deleting the addition made by the AO for Rs. 12,46,31,300/- under the provisions of section 68 of the Act.

34. There were certain credit entries appearing in the books of accounts for Rs. 12,46,31,300/- which were claimed by the assessee as receipt from the customer/members. However, the AO treated the same as unexplained cash credit under section 68 of the Act on the reasoning that the assessee has not filed any confirmation, addresses, PAN of the debtors except a list containing the name of the debtors/members. Accordingly, the AO added the same to the total income of the assessee.

35. Aggrieved assessee preferred an appeal to the Ld. CIT-A.

36. The assessee before the Ld. CIT-A submitted that the AO during the assessment proceedings required to furnish the details in a specified format to justify the credit entries. Thus the assessee accordingly furnished the necessary details by providing name, addresses, shop number booked, agreement date, and

cancellation of booking during the assessment proceedings. There was no further detailed required by the AO during the assessment proceedings.

37. In addition to the above, the assessee to justify its stand has also furnished the receipt copy and the details of the service tax paid on such advances/credit entries recorded in the books of accounts.

38. The Ld. CIT-A after considering the submission of the assessee deleted the addition made by the AO by observing as under:

"4.5. Having considered the facts and submissions, it is undoubtedly held that the appellant has receives) these advances from members which have been shown as advances from members in the balance sheet under the head of other current liabilities. Had those been the cash credits, the same would have been shown under the head of loans and advances and not under the head of other current liabilities in the balance sheet.

4.6. The appellant has also submitted that the advances received from the members, it has issued the receipt vouchers which contained the name of the member, shop / office allotted and cheque no., bank name and branch etc. in respect of the advances received from each of such members. These details were duly verifiable from the bank statement of the appellant in which such advances have been credited. Further oil the payments have been received through cheques. Therefore, there is no doubt about the genuineness of the advances received from the members as the same were through banking channels. The above were duly accounted for in the books of accounts of the appellant which were before the AO in the assessment proceedings.

4.7. The appellant has also submitted that it has maintained the ledger account copies of each of the parties in which the payments received from the member / sales effected to them and / or repayment of refund in case of cancellation has been accounted for. These ledger accounts are part of the books of accounts which have been produced before the AO in the assessment proceedings and the AO has not given any adverse finding over the same. Further, the appellant had also maintained the duly signed vouchers of the members whose shops / offices were cancelled and repayments to them have been made through cheques which were verifiable from the bank statement copy of the appellant. All such cancellation vouchers, signature of the recipient parties have been taken by the appellant. All these refunds of the advances were duly recorded in the books of account of the appellant and the same were before the AO in the assessment proceedings.

4.8. It has also been submitted that on the advances received towards booking from the members, the appellant has paid the total service tax of Rs.31,28,6927- during the year under consideration which also justifies the nature of receipts as advances received from the members. Had those not been the advances, the appellant would not have paid / deposited the service tax to the Service Tax Department. The appellant has also produced the service tax return copies and submitted the copy of service tax payment challans which also amply establishes the genuineness of the payment of the service tax. The AO has not doubted the service tax payment made by the appellant to the service tax department and granted the claim made by the appellant in its books of accounts. All these were duly recorded in the books of account of the appellant and were available before the AO in the assessment proceedings.

4.9. *From the above, it is apparent that the amount of advances received were not the cash credits or loans, therefore, the provisions of section 68 of the I. T. Act, 1961 does not apply on such advances received towards sales. From the members towards booking of the shops / offices. The Honourable ITAT, Kolkata in the case of M/s. Saha Enterprises Vs. ITO in ITA No. 2141/KOL/2014 dated 06/02/2015 has held that the trade advances cannot be treated as cash credits u/s. 68 of the I. T. Act, 1961 and the addition thereof was not sustainable.*

4.10. *In view of the aforesaid discussion, it is apparent that the addition made by the AO is not justified and hence, the same is deleted."*

39. Being aggrieved by the order of the Ld. CIT-A, The revenue is in appeal before us.

40. Both the Ld. DR and the AR before us vehemently supported the order of the authorities below as favourable to them.

41. We have heard the rival contentions of both the parties and perused the materials available on record. In the present case there were certain credit entries appearing in the books of accounts of the assessee which were treated as unexplained cash credit under the provisions of section 68 of the Act. Admittedly the onus lies upon the assessee under the provisions of section 68 of the Act to offer an explanation based on the documentary evidence about the nature and source of such cash credit entries. As such the assessee, has to justify the identity, creditworthiness of the parties and genuineness of the transactions.

42. It was contended by the assessee that the impugned credit entries were representing the advance booking received from the members. The assessee qua to such credit entries has also furnished name, addresses, booking of the shop, agreement date and the cancellation deed. This fact can be verified from the details placed on pages 217 to 237 of the paper book. Likewise, the assessee has also furnished the booking receipts and service tax paid on such booking advance which is evident from pages 235 to 245 of the paper book. It is also not out of place to mention that in majority of the cases the PAN of the sundry debtors representing the advance booking were available on record. As far as the details as discussed aforesaid, there is no dispute. The learned DR at the time of hearing

has also not brought anything on record contrary to the impugned details placed in the paper book. Thus, it appears that the assessee has discharged its primary onus imposed under section 68 of the Act. Thus the onus has been shifted upon the revenue to disprove the contention of the assessee and that too based on the cogent materials. It is also pertinent to note that the AO has not carried out any exercise by resorting to the provisions of section 133(6) and 131 of the Act in order to dig out the truth from the submissions filed by the assessee. As such, all the details furnished by the assessee cannot be brushed aside without assigning any reason. Accordingly, the provisions of section 68 of the Act cannot be invoked in the given facts and circumstances. In view of the above, we do not find any reason to interfere in the finding of the Ld. CIT-A. Hence, the ground of appeal of the revenue is hereby dismissed.

43. In the result, appeal filed the Revenue is dismissed

Coming to ITA No 2131/Ahd/2017, an appeal by the revenue for A.Y. 2013-14

44. The revenue has raised following grounds of appeal:

"1 *The Ld. CIT(A) has erred in law and on facts in deleting the addition u/s 69B of IT Act without considering the fact that the promoter group of the company selling the said land had accepted receipt of unaccounted cash from the assessee towards the sale of land and had declared the same before the Settlement Commission.*

1.1 *The Ld. CIT(A) has grossly erred in law and on facts by not giving due cognizance to the provisions of 292C of the I.T. Act (with respect to the impounded documents during the course of survey u/s. 133A), which mandates that the contents of such impounded documents are to be presumed to be true.*

1.2 *The Ld. CIT(A) has grossly erred in law and on facts by invoking and travelling to the provisions of section 34 of the Evidence Act (which is with respect to the entries in books of accounts) when the relevant section for the said impounded documents is section 292C of the I.T. Act.*

1.3 *The Ld. CIT(A) has grossly erred in relying on the decisions of the Hon'ble Supreme Court which were in respect of criminal or quasi-criminal proceedings, which are not based on "proof beyond doubt", whereas the I.T. proceedings are based on the principle of preponderance of probability and human behavior and are in governed by the rule of evidence as provided for in the I.T. Act, in this case section 292C.*

1.4 The Ld. CIT(A) has failed to appreciate that the statement of Shri Pradeep Agarwal was recorded u/s. 131 of the I.T. Act which provide that the officers/I.T. Authority have the same powers as are vested in a court under the Code of Civil Procedure 1908; therefore, such statement could not be taken lightly or dismissed outrightly, as has been done by the Ld. CIT(A).

1.5 The Ld. CIT(A) has failed to appreciate that the figure of unaccounted money was not a figment of imagination by the AO, but it was what was found recorded in the impounded documents.

1.6 The Ld. CIT(A) has failed to appreciate that the seller company i.e. M/s. Advance Life Style Ltd., the holding company of the SPV, namely M/s. Advance Life Spaces Pvt. Ltd., and M/s. Phulchand Exports Pvt. Ltd. are all related concerns and are controlled by Agarwal family, of which Shri Pradeep Agarwal S/o Shri Phulchand Agarwal is a member. Thus, CIT(A) erred in facts and law in observing that Shri Pradeep Agarwal whose statement was recorded and relied upon was a stranger.

1.7 The Ld. CIT(A) has failed to appreciate that the AO made the addition in two different A.Y.s based on the statement given by Shri Pradeep Agawal that Rs. 58.14 crores was paid in F.Y. 2012-13 and Rs. 33.92 crores was paid in F.Y. 2011-12 (relevant to the instant A.Y. 2012-13).

1.8 Without prejudice to the above, if the Ld CIT(A) was of the opinion that such amount belonged to only one F.Y., he erred in not directing the AO u/s. 150 of the I.T. Act to treat that as income in that relevant A.Y.s

1.9 In any case, the Ld. CIT(A) erred in law by not appreciating that violation of natural justice, if any, can not render the order void, but is liable to be remanded back to the AO to be done de novo.

2 The appellant craves leave to amend or alter any ground or add a new ground, which may be necessary."

45. The only effective issue raised by the Revenue is that the Ld. CIT-A erred in deleting the addition made by the AO for Rs. 58.14 crores on account of investments not disclosed in the books of accounts as required under section 69B of the Act.

46. At the outset we note that the issues raised by the Revenue in its ground of appeal for the AY 2013-14 are identical to the issues raised by the Revenue in ITA No. 2130/AHD/2017 for the assessment year 2012-13. Therefore, the findings given in ITA No. 2130/AHD/2017 shall also be applicable for the year under consideration i.e. AY 2013-14. The appeal of the Revenue for the assessment year 2012-13 has been decided by us vide paragraph Nos. 23 to 32 of this order against the Revenue. The Ld. AR and the DR also agreed that whatever will be the

findings for the assessment year 2012-13 shall also be applied for the year under consideration i.e. A.Y. 2013-14. Hence, the grounds of appeal filed by the Revenue is dismissed.

47. In the result, appeal of the revenue is dismissed.

Coming to ITA No 398/Ahd/2018, an appeal by the assessee for A.Y. 2014-15

48. The assessee has raised following ground of appeal:

"1. Ld. CIT (A) erred in law and on facts in confirming addition in respect of alleged unexplained expenditure in respect of work in progress to the extent of Rs. 41,60,76,489/- made on the basis of estimated working regarding working in rough diary which was made for bank loan purpose as categorically stated in the statement recorded during the course of survey. Addition retained without corroborative evidence ignoring the audited accounts is patently wrong. It be so held now and entire addition of work in progress be directed to be deleted.

2. The Ld. CIT (A) erred in law and on facts in ignoring the submission that estimated WIP working includes the land value and if land value from estimated WIP is removed then estimated working tallies as per the audited books of accounts. Ld. CIT (A) ought to have considered the submission and ought to have deleted the addition in toto. It be so held now.

3. Ld. CIT (A) erred in law and on facts in confirming addition of WIP of Rs. 41,60,76,489/- without rejecting the books of accounts of the appellant u/s 145(3) or without pointing out any defects in book results. Ld. CIT (A) ought to have considered the fact that books of account of appellant are audited under Companies Act as well as under income tax Act and there was no qualification under both audits and accordingly ought to have accepted book results. It be so held now.

4. Without prejudice to the above grounds the Ld. CIT (A) miserably failed to appreciate that even as per the show cause notice issued by the AO dated 21.11.2016, the alleged difference sought to be added by AO was only Rs. 25,71,89,931/- after giving credit of Rs. 15,88,86,558/- declared by the appellant from Rs. 41,60,76,489/- (alleged unexplained expenditure in work in progress). The Id. CIT (A) ought to have considered the said income declared by the appellant while confirming the erroneous addition.

5. Ld. CIT (A) erred in law and on facts in not adjudicating ground no. 3 raised against addition on estimated income alleged to be declared less by Rs. 6,75, 66, 545/- wrongly estimated by AO when the appellant had declared correctly profit on the basis of percentage completion method adopted during the year under consideration. The Id. CIT (A) ought to have considered the submissions of the appellant and ought not to have dismissed the ground considering the same as in-fructuous. It be so held now.

6. Ld. CIT (A) erred in law and on facts in confirming disallowance of encroachment expenses of Rs. 1,36,25,000/- by observing that such expenditure is not liability of the appellant as per MOU ignoring fact that MOU was subsequently cancelled by both the

parties. Ld. CIT (A) ought to have considered above expenses actually incurred by appellant for business purpose and out of commercial expediency which is required to be allowed u/s 37 of the Income Tax Act, 1961. It be so held now and disallowance be directed to be deleted

7. LD. CIT (A) erred in law and on facts in confirming addition of Rs. 14,42,90,465/- u/s 68 for unsecured loan received during the when the primary onus was duly discharged by appellant by furnishing confirmation with PAN, income tax returns and evidence of amounts received through cheques, Ld. CIT (A) ought to have considered the submission of the appellant and ought to have deleted addition. It be so held now and addition be directed to be deleted.

8. On the facts & circumstances, Ld. CIT (A) ought to have accepted book results & deleted addition / disallowance made by AO in toto.

9. Levy of interest u/s 234A, 234B, 234C & 234D of the Act is unjustified.

10. Initiation of penalty proceedings u/s 271(l)(c) of the Act is unjustified.

The appellant craves leave to add, amend, alter, edit, delete, modify or change all or any of the grounds of appeal at the time of or before the hearing of the appeal."

49. The first issue raised by the assessee in ground Nos. 1 to 4 of its appeal is that the Ld. CIT-A erred in confirming the addition of Rs. 41,60,76,489/- out of the total addition made by the AO at Rs. 68,93,96,668/- instead of deleting the same in entirety.

50. There was a survey operation under section 133A of the Act dated 17th October 2013 at the premises of the assessee. In the course of survey operation, a diary marked as annexure AS-2 was found wherein the construction cost as on the date of survey was recorded at Rs. 90,63,11,765/- whereas the construction cost in the books of accounts was recorded at Rs. 49,02,35,276/- only. The director of the company namely Shri Bharatbhai Shah has admitted the difference in the construction cost recorded in the books viz a viz found in the impugned diary for a sum of Rs. 41,60,76,489/- as unaccounted income of the assessee. However, the assessee in the return of income disclosed an income of Rs. 15,88,86,558/- based on percentage completion method.

51. On question by the AO, the assessee submitted that it does not have the seized document being diary and the statement recorded during the survey

operation for the proper reply. Accordingly, the assessee requested to supply the copy of the diary and the statement for the rebuttal.

52. The assessee without prejudice to the above also submitted that there was the estimate of the total project recorded in the diary which was for the purpose of bank loan. The actual figure shown in the books of accounts was the actual construction expenses.

53. However, the AO rejected the contention of the assessee by observing that the unaccounted income was duly accepted during survey operation under section 133A of the Act.

54. Generally, in the real estate projects, the customers make the payment for the money to the builder in accordance with the degree of construction activity carried out by the assessee. In the present case, the assessee has shown an advance at Rs. 87,08,63,170/- as on the survey date which is matching with the construction expenses of Rs. 90,63,11,765/- as recorded in the diary.

55. The estimated total project cost furnished by the assessee stands at Rs. 267,94,01,400/- and the profit from the project based on estimation stands Rs. 27,3758,452/-. Thus the profit works out at 10.21% of the total project value at Rs. 267,94,01,400/-. The assessee during the year has disclosed profit at Rs. 15,88,86,558/-. Thus, based on the rate of profit i.e. 10.21% on estimates furnished by the assessee, the total project cost at the end of the year under consideration was works out at Rs. 155,61,00,000/- (15,88,86,558 /10.21%) by the AO whereas the assessee has shown project cost as on 31st March 2014 at Rs. 71,58,16,790/- only. Thus the unaccounted work in progress arises at Rs. 84,82,83,218/- being the difference in the cost worked out by the AO and actual cost reflected in the books (Rs. 155,61,00,000/- - Rs. 71,58,16,790/-). Thus the addition of Rs. 68,93,96,668/- (Rs. 84.82 -15.88 crores income shown by the assessee) was added on account of unexplained expenditure to the total income of the assessee.

56. Aggrieved assessee preferred an appeal to the Ld. CIT-A.

57. The assessee before the Ld. CIT-A submitted that there was no material found during the survey operation suggesting that the assessee has incurred any expense on the construction outside the books of accounts. In fact, noting in the diary is the working for the estimated market value for the purpose of availing the bank loan facilities. Thus, the addition has been made by the AO without any proper basis.

58. The assessee also admitted that in the statement, it was duly furnished that the project cost has been estimated at market value for the purpose of the bank loan. Accordingly, no credential could be given to the value recorded in the diary for the project construction cost as no any other corroborative material was found. The assessee also submitted that the statement obtained during the survey proceedings has no evidentiary value and therefore there cannot be any addition based on the same.

59. The assessee further submitted that estimated project revenue at Rs. 267,94,01,400/- includes the value of the land which does not belong to the assessee. If the value of land is reduced/ excluded from the estimated revenue the profit declared by the assessee will be in the line of estimated profit. On the basis of the above the assessee prayed that that the addition made by the AO is not sustainable.

60. However the Ld. CIT-A partly confirmed the order of the AO by observing as under:

"3.5. I have considered submission of the appellant and all the judicial pronouncements. In the appellant's case, a survey was conducted and detailed working of WIP of Rs.90,28,11,765/- for block A, B, C, D, E, F, G and basement was found. The documents found were confronted to the Director of the company Shri Bharat S. Shah who in his statement recorded (in 23 pages) u/s. 131 of the I.T. Act, 1961 on oath has admitted that Rs.41,60,76,489/- is unaccounted WIP in the project. The appellant's contention that WIP estimation was for bank purpose does not mean that WIP worked out was not correct. The Honourable Gauhati High Court in the case of Dhansiram Agarwalla Vs. CIT [201 ITR 192] has observed as under:-

"We are not convinced that any such practice is shown to exist or that it has been recognised in the commercial circles or by courts. Even assuming that such a practice exists the Tribunal is not expected to take judicial notice of such substandard morality on the part of the assessee so as to enable them to go back on their own sworn statements given to the banks as to the stocks held and hypothecated by them to the banks. In a case like this where the assessee is confronted with his own sworn statements which show a different state of affairs than the one shown in his own books of account, a heavy burden lies on the assessee to prove that the books of account alone give the correct picture, and the sworn statements given to the banks were motivated . . . Having regard to the assessee's own statements given to the banks which show a larger stock of cotton in respect of CO. 4 and Cambodia than had been actually shown in the account j books, it cannot be said that the rejection of the stock account of the assessee is not warranted, so long as the assessee's explanation that the stocks were purposely inflated for the purpose of getting higher overdraft facilities from the banks had not been accepted."

13. *We are in respectful agreement with the above view.*

14. *The Commissioner of Income-tax endorsed the argument of the assessee that there was such an immoral practice among the traders, without seeking any material or evidence in support thereof. In our opinion, it is not merely a question of morality; such conduct may involve criminality also. The authority should be wary in accepting the self-serving explanation that the assessee deliberately" inflated the stock in the declaration to the bank with a view to obtain higher loan-facility. In any event, the mere statement of the assessee in that behalf could never be accepted. The Tribunal has considered all relevant materials in this behalf and its view is reasonable."*

3.6 *Appellant has further relied on the decision of CIT vs. Kaderkhan (supra) that statement recorded u/s. 133A does not have evidential value. The appellant's reliance is misplaced as the unaccounted WIP mentioned by AO in the assessment order is based on the impounded material which has been affirmed by Director of the company in his detailed statement recorded on oath u/s. 131 of the Income Tax Act, 1961. The reliance of appellant on other case laws are distinguishable on facts. In view of the above, it is held that appellant has unaccounted WIP of Rs. 41,60,76,489/-. Accordingly the addition made by the AO to the extent of Rs. 41,60,76,489/- on account of WIP is confirmed. Relief is granted for the balance amount. The ground of appeal is accordingly partly allowed."*

61. Being aggrieved by the order of the Ld. CIT-A, both the assessee and the revenue are in appeal before us. The assessee is in appeal against confirmation of Rs. 41,60,76,489/- whereas the Revenue is in appeal for not considering the estimated profit rate of 10.21% for calculating closing WIP. There relevant ground of the Revenue appeal reads as under:

"1. *The Ld. CIT(A) has erred in law and on facts in restricting the unexplained work in progress without taking into consideration the fact that the assessee has adopted percentage completion method for determining the revenue during the year under consideration.*

1.1 The Ld. CIT(A) failed to appreciate that the assessee has by its own submission estimated the net profit at 10.21% of the total estimates sales."

62. The learned AR before us submitted that the seized documents used by the AO for the purpose of the addition are the dumb documents which were prepared for the purpose of the bank on estimated basis. However none of the paper was filed before the bank for availing the loan facility. Therefore no addition can be made.

63. The learned DR before us contended that addition was made based on the seized documents and on the basis of the statement recorded during the survey proceedings.

64. Both the learned AR and the AR before us relied on the order of the authorities below the extent favourable to them.

65. We have heard the rival contentions of both the parties and perused the materials available on record. Admittedly, there were documents found during survey operation under the provisions of section 133A of the Act. These documents were marked as AS-2. These Documents were confronted to the director of the assessee company namely Shri Bhratbhai Shah, who has admitted to have made an investment in the construction of Rs. 41,60,76,489/- out of the unaccounted income. But the AO made addition of Rs. 68,93,96,668/- for the reason detailed as above. However the learned CIT-A reduced the addition to the extent of Rs. 41,60,76,489/- as admitted by the assessee during survey.

66. We have perused the documents which were used for making the impugned addition. On perusal of such document, we note that some figure has been recorded in such document. The question arises whether such figure represents the income of the assessee. Admittedly, in any survey operation, there are various documents found by the authorities but such documents cannot be said representing the income of the assessee until and unless those are

corroborated on the basis of some documentary evidence. For example, a loose paper containing various financial transactions should be matched with the books of accounts of the assessee at least to some extent. If part of the transactions recorded in a loose paper are matching with the books of accounts of the assessee then the remaining transactions can be assumed that these are actual transactions. Similarly, noting in loose paper should corroborate with some other documents or material suggesting the genuineness of the noting found in the survey proceeding then it can be assumed as actual transaction. There can be a situation that the assessee for any purpose has made noting of certain figures but the same cannot be characterized as income of the assessee until and unless some supporting documents are found qua to such loose papers.

66.1 Likewise, there can be loose papers having financial transactions, part of which are matching with the bank account of the assessee. Then, such loose paper can be termed as incriminating document having bearing on the income of the assessee. To our understanding, finding of loose papers in the course of survey containing certain financial transactions cannot ipso facto represent income of the assessee.

67. It shall not be out to place to mention that the Hon'ble Supreme Court in the case of *K.P. Varghese v. ITO* [1981] 7 Taxman 13/131 ITR 597 held that the fictional receipt cannot be deemed to be a receipt in the absence of any cogent material to support the factum of actual receipt.

67.1 Similarly the Hon'ble High Court of Delhi in case of *CIT v. D.K. Gupta* [2008] 174 Taxman 476 upheld the order of the tribunal wherein it was held that Ad-Hoc/Dumb Documents without any corroborative evidence/finding that the alleged documents have materialized into transactions cannot be deemed to be the income of the assessee. The relevant part of the judgment is reproduced herein under:-

"The tribunal returned a finding of fact that there is no corroborative or direct evidence to presume that the notings/jottings had materialised into transactions giving rise to income not disclosed in the regular books of account.

4. Consequently, the tribunal upheld the findings of the Commissioner of Income-tax (Appeals) and agreed with the view taken by the latter that the assessee was liable to tax only on those receipts which had been proved to be income in the hands of the recipient. As a result thereof, the Tribunal found no reason to interfere with the findings recorded by the Commissioner of Income-tax (Appeals) on the ground that the same were based on valid and cogent materials placed on record and also produced before the Assessing Officer during the course of assessment proceedings. The Tribunal also noted that all the evidences, materials, explanations were furnished before the Assessing Officer and it is on the basis of such material that the Commissioner of Income-tax (Appeals) had arrived at the conclusion that no addition was warranted on the basis of the seized diaries.

5. We have examined the impugned order in detail and have also heard the counsel for the parties and we find that the issues sought to be raised before us are purely issues of fact. The Tribunal, being the final fact-finding authority, has returned a certain set of facts. We find no perversity in such findings and, consequently, no question of law, what to speak of a substantial question of law, arises for our consideration.

68. Further, the Hon'ble Delhi ITAT on similar lines in case of *Ashwini Kumar v. ITO* [1991] 39 ITD 183 held that in the case of dumb document, revenue should collect necessary evidence to prove that the figures represent incomes earned by the assessee.

69. In view of the above and after considering the facts in totality, we are of the view that there cannot be any addition merely on the basis of loose papers found during the survey operation until and unless there were some corroborating evidences found.

70. At this juncture, it is also pertinent to note that the revenue is authorized record the statement under section 133A(3)(iii) of the Act during the survey operation. There is no provision for recording the statement under section 131(1) in survey operation except the circumstances provided under subsection 6 to the section 133A of the Act. In other words the revenue can resort to the provisions of section 131 of the Act if the assessee doesn't co-operate during the survey proceedings or tries to evade the relevant formations. However in the case on hand, we note that there is no such allegation that the assessee was not cooperating during the assessment proceedings. Thus we hold that the revenue

has acted beyond the jurisdiction by recording the statement under section 131 of the Act. Accordingly, no reference can be made to such statements.

71. We also note that the Ld. CIT-A has made the reference to the judgment of Hon'ble Gujarat High Court in the case of Dhansiram Aggarwal vs. CIT reported in 201 ITR 192 while confirming the order of the AO in part. However, the facts of those case are distinguishable from the facts of the present case. In the case of Hon'ble Gujarat High Court, there was the reports which were submitted to the bank whereas in the case on hand, it is no discernible that any information was furnished to the bank for the purpose of loan. Furthermore, when the assessee approaches to a bank for the purpose of the loan, he has to furnish the details in a proper manner in the form of the project report containing the details of sales, purchase, capital employed, turnover ratio, debt recovery ratio, current ratio, debt ratio etc. But in the case on hand there was a loose paper containing the figure of construction cost which the assessee had made for the purpose of the bank loan. Such information was improperly written on a piece of paper which is nothing but a dumb documents. Therefore, it cannot be said that such information was furnished to the bank.

72. In view of the above and after considering the facts in totality, we disagree with the order of the authorities below. Accordingly we set aside the finding of the Ld. CIT-A, and direct the AO to delete the addition made by him. Hence, the ground of appeal of the assessee is allowed whereas the ground of appeal of the Revenue is dismissed.

73. The second issue raised by the assessee in ground no. 5 of its appeal is that the Ld. CIT-A erred in not considering the ground number-3 raised before him.

74. The assessee during the assessment proceedings claimed that it was following project completion method for recognizing income in its books of accounts with respect to the projects carried on by it. As there was no project

completed in the year under consideration, therefore there was no possibility of having income for the year under consideration. However, the assessee in the year under consideration has changed method of accounting for recognizing the income from project completion method to percentage completion method. Based on such change in the method of recognizing the income, the assessee computed an income of Rs. 15,87,80,951/- crores and offered the same to tax in the income tax return.

75. However, the AO found that the assessee was to construct 8,20,589 sq. ft. area for its project. Out of such total construction area, the assessee has already made sale/received booking advance for 6,78,475 sq. ft. area. The AO also found that the assessee has estimated the total profit for its project at ₹27,37,58,452/- crores which is applicable to the total construction area of 8,20,589 sq. ft. Thus the AO worked out the profit attributable to the area i.e. 678475 sq. ft. sold by the assessee in the year under consideration amounting to Rs. 22,63,47,496/- and compared the same with the amount of profit declared by the assessee at Rs.15,87,80,951/-. Thus it was also found out by the AO that the assessee has declared less profit by Rs.6,75,66,545/- (Rs.22,63,47,496/ - Rs.15,87,80,951/-). However, the AO has not made any addition for such amount of profit in the total income of the assessee on the reasoning that there has already been made an addition of Rs.68,93,96,668/- to the total income of the assessee on account of unexplained expenditure.

76. Aggrieved assessee preferred an appeal to the Ld. CIT-A.

77. The assessee before the Ld. CIT-A contended that it has not made sale of any constructed area as alleged by the AO in his order. As such the AO on wrong assumption of facts has held that the assessee has sold 678475 sq. ft. area. Likewise, the AO has also not correctly applied method for working out the profit under percentage completion method.

78. The Ld. CIT-A after considering the submission of the assessee has held that there was no addition made by the AO of Rs. 6,75,66,545/- therefore there is no need to adjudicate the issue raised by the assessee . As such the ground raised by the assessee becomes infructuous.

79. Being aggrieved by the order of the Ld. CIT-A, the assessee is in appeal before us.

80. The learned AR before us contended that the assessee has already disclosed the income in the books of accounts based on percentage completion method. Therefore no such addition is required to be made.

81. On the contrary the learned DR before us vehemently supported the order of the authorities.

82. We have heard the rival contentions of both the parties and perused the materials available on record. Admittedly there was no addition made by the AO for Rs. 6,75,66,545/- in the assessment order on account of declaration of less income by the assessee. It was not added for the reason that the AO has made an addition of an amount of Rs. 68,93,96,668/- by treating as unexplained expenditure. Thus the AO was of the view that if any addition is made for Rs. 6,75,66,545/- that will be an application of income attributable to the unexplained expenditure of Rs. 68,93,96,668/-. Thus, to this extent we do not find any infirmity in the order of the AO. However, it is important to note that this addition shall stand revived in the event the addition of unexplained expenditure for Rs. 68,93,96,668/- is deleted by the higher forum. Undeniably, we have deleted the addition of Rs. 68,93,96,668/- made by the AO on account of unexplained expenditure vide paragraph Nos. 65 to 72 of this order. Thus, we are of the view that such addition of Rs. 6,75,66,545/- gets revived in the given facts and circumstances. Accordingly, it becomes necessary to adjudicate the issue on hand with respect to the addition of Rs. 6,75,66,545/.

83. From the preceding discussion we note that the assessee has claimed to have adopted percentage completion method and computed the profit of Rs.15,87,80,951/- whereas the revenue has computed the profit at Rs.22,63,47,496/ on the basis of the sales of the constructed area made by the assessee leading to a difference of Rs.6,75,66,545/ only. Under percentage completion method, the profits is determined in the manner as detailed below:

Revenue = cost incurred to date / estimated total cost x contract price – revenue already recognized

84. Based on the above method, there is no reference to be made to the value of the sales. In other words, under percentage completion method, income of the assessee is computed based on cost incurred to date in proportionate with total estimated cost and total estimated revenue. This method of recognizing the profit is very well accepted by the industries engaged in the business of construction of the projects. There was no defect pointed out by the AO in the method adopted by the assessee.

85. It is also pertinent to note that the assessee has shown revenue in the financial statements based on percentage completion method despite the fact that there was no actual sales made by the assessee in the year under consideration. The question of making the sale arises when the project/the property is handed over to the prospective buyer and the conveyance deed is registered in favour of the party. But no such conveyance deed has been registered in the year under consideration. This fact was brought to the notice of the AO in response to the notice issued under section 142(1) of the. The relevant extract of the reply of the assessee reads as under:

"13. In connection with Para xi of your notice, we have to submit that till the date of 31/03/2014 our client has not sold any unit. Our client has accounted revenue on the basis of percentage of completion method. Therefore, income is recognized accordingly."

86. We also note that, the AO in his order has recorded the fact that the assessee has made sales of 6,78,475 Sq. ft. area after making the reference to the reply submitted by the assessee vide letter dated 25th 11-2016 which is placed on pages 93 to 95 of the paper book. However, on reference to such letter, we find that there is no whisper about the sales of the area as alleged by the AO. At the time of hearing, the learned DR has also not brought anything in support of the order of the AO. Accordingly we are not convinced with the finding of the AO. In view of the above and after considering the facts in totality, we set aside the finding of the authorities below and direct the AO to delete the addition made by him. Hence the ground of appeal of the assessee is allowed.

87. The third issue raised by the assessee in ground number 6 of its appeal is that the Ld. CIT-A erred confirming the addition made by the AO for Rs.1,36,25,000/-representing the expenses incurred for getting the property vacated from the occupants/shopkeepers.

88. The assessee in its books of accounts has claimed an expense of Rs.1,36,2,000/- on account of getting the property vacated from the encroachments. As per the assessee, it has acquired a property being New Manik Mill for constructing the commercial building under the project name City Centre. There were certain encroachments on such property which were cleared after incurring an expense of Rs.1,36,25,000/-. Thus the assessee contended that such expenses were incurred in the course of the business and therefore the same are eligible for deduction under the provisions of law.

89. However, the AO was not satisfied with the contention of the assessee on the reasoning that as per the agreement between the assessee and the vendor, it was the duty of the vendor to incur such expenses. Therefore, it was proposed by the AO that the assessee has not incurred such expenses in the course of the business.

90. Nevertheless, the assessee on the question by the AO, submitted that the MOU was cancelled and thereafter development agreement was entered with the owner of the impugned property. As such, the assessee being a developer, was under the obligation to complete the project on time hence incurred such expenses to get the property vacated. As per the assessee, such expenses were incurred in the course of the business.

91. However, the AO disregarded the contention of the assessee by observing that there is no document evidencing that the MOU was cancelled. Therefore, as per the AO the MOU entered dated 17-01-2012 is a valid piece of evidence which cast a duty upon the vendor to incur such expenses. As per the MOU, there was included the sum of Rs. 5 crores in the cost of the land purchased by the assessee towards getting the property vacated from the occupants. Accordingly, the AO disallowed the sum of Rs. 1,36,25,000/- and added to the total income of the assessee.

92. Aggrieved assessee preferred an appeal to the Ld. CIT-A.

93. The assessee besides reiterating the submissions as made before the AO at the time of assessment further contended that the income tax authorities cannot decide the expenses which the assessee should incur for the purpose of the business. As per the assessee, the vendor of the land was supposed to get the property vacated from the occupants but failed to do so. Therefore the assessee has to incur such expenses for its business purposes and for the commercial expediency and therefore, the same should be allowed as deduction.

94. However, the Ld. CIT-A disregarded the contention of the assessee by observing as under:

"5.3. I have carefully considered the facts of the case, assessment order and submission of the appellant. The AO has disallowed the claim of encroachment expenses of Rs.1,36,25,000/- on the ground that expenditure claimed was not appellant's liability. Appellant has purchased land for development of City Centre from M/s. Advance Life Style Limited. As per the MOU, the amount is paid, spent or incurred for vacating, clearing or removing the existing occupant of shop was to be borne by the seller M/s. Advance Life

Style Limited. Appellant has claimed that MOU was later cancelled and encroachment expenditure was paid by the appellant and since the expenditure was for the business, it has been claimed as business expenditure.

5.4. It is seen that appellant has acquired the property from M/s. Advance Life Style Limited (owner) vide agreement dated 06/05/2014. As per Clause 25(2) of the agreement-

"25(2) all liabilities for any defects in title of the land shall be to the account of the owners and the owners shall be liable and responsible to clear and / or rectify the same at its cost and expenses."

5.5 On perusal of the record, it also reveals that appellant has purchased the land from M/s. Advance Life Style Limited for Rs. 160 crore which included Rs. 5 crore on account of vacation of shops. As the liability to clear the encroachment was of M/s. Advance Life Style Limited, AO has correctly disallowed the claim. In view of the above, the ground of appeal is dismissed."

95. Being aggrieved by the order of the Ld. CIT-A, the assessee is in appeal before us.

95.1 The Id. AR before us contended that impugned expense has been incurred in the course of the business and therefore the same is eligible for deduction.

95.2 On the other hand, the Id. DR before us vehemently supported the order of the authorities below.

96. We have heard the rival contentions of both the parties and perused the materials available on record. From the preceding discussion, we note that the authorities below has made the disallowance on the reasoning that the assessee was not under the obligation to incur such expenses as provided in the MOU with the M/s Advance Lifestyle Ltd. First of all we note that the genuineness of the expenses have nowhere in doubted by the authorities below. It is also an admitted fact on records that the assessee was constructing its project on the land held by M/s Advance Life Space Pvt. Ltd under the development agreement in the name of City Centre. The assessee to carry out its project needed the vacated land for smooth running of its construction business, therefore it has incurred an expense of Rs. 1,36,25,000/- by way of making the payment to the encroachments.

97. From the above discussion, it also appears that the assessee was not under the obligation to incur such expenses. As such it was the duty of the other party to handover the land to the assessee free from all encumbrances. We note that the other party failed to do so. Under the situation the assessee has to incur the expenses which was supposed to be borne by the other party. Provisions of section 37 Act deals for the admissibility of the expenses which have been incurred for the purpose of the business. The expenses which are personal and capital in nature, and not incurred for the purpose of the business cannot be allowed as deduction under section 37 the Act. Now to decide, whether the assessee has incurred the expenses for the purpose of the business, there are various factors which needs to be considered beyond the documents. Indeed, it appears to us from the finding of the authorities below that it was the duty of the other party to incur the expenses and not of the assessee. But the question arises what the assessee will do in situation where the other party delays or denies to get property vacated and free form encumbrance. In such facts and circumstances, the assessee at the best of his wisdom has decided to incur the expenses which are purely for the purpose of commercial expediency.

98. In view of the above and after considering the facts in totality, we are inclined to hold that the expenses incurred by the assessee are in course of the business and therefore the same are eligible for deduction under section 37 of the Act. Hence, we set aside the finding of the learned CIT-A, and direct the AO to delete the addition made by him. Hence the ground of appeal raised by the assessee is allowed.

99. The last issue raised by the assessee is that the learned CIT-A erred in confirming the addition made by the AO for Rs. 14,42,90,465/- under the provisions of section 68 of the Act on account of low creditworthiness of the loan parties.

100. The AO during the assessment proceedings, inter-alia, found that the assessee has taken loan from the following 5 parties:

| | |
|---|---------------------------------|
| <i>"Hannah Enterprises Pvt. Ltd.</i> | <i>Rs. 14,14,291/-</i> |
| <i>Boaston Tradelinks Pvt. Ltd.</i> | <i>Rs. 2,87,50,414/-</i> |
| <i>Biraj Manimpex Pvt. Ltd.</i> | <i>Rs. 2,64,81,455/-</i> |
| <i>Vansh Glass Industries Pvt. Ltd.</i> | <i>Rs. 3,36,84,947/-</i> |
| <i>Sawaca Business Machines Ltd.</i> | <i><u>Rs. 5,39,59,358/-</u></i> |
| <i>Total</i> | <i>Rs. 14,42,90,465/-"</i> |

101. The AO required the assessee to produce the above 5 parties personally for the purpose of verifying the identity/genuineness of the transaction and creditworthiness of the parties. But the assessee failed to produce such parties. Therefore the AO treated the same as unexplained cash credit under section 68 of the Act and added to the total income of the assessee.

102. Aggrieved assessee preferred an appeal to the Ld. CIT-A

103. The assessee before the Ld. CIT-A contended that it has furnished the primary documentary evidence in support of such loan parties. These primary documents include the copy of the PAN, bank statement and the income tax returns. Therefore, the assessee has discharged its onus imposed under section 68 of the Act. Therefore, the addition required to be deleted.

104. The Ld. CIT-A after considering the submission of the assessee confirmed the order of the AO by observing as under:

"6.3. I have carefully considered the facts of the case, assessment order and submission of the appellant. The AO has made the addition of unsecured loan of Rs. 14,42,90,465/- under section 68 of the I. T. Act, 1961 in respect of following persons on the ground that appellant failed to produce above persons, and therefore, identity, genuineness and creditworthiness have not been proved.

| | |
|---|---------------------------------|
| <i>Hannah Enterprises Pvt. Ltd.</i> | <i>Rs. 14,14,291/-</i> |
| <i>Boaston Tradelinks Pvt. Ltd.</i> | <i>Rs. 2,87,50,414/-</i> |
| <i>Biraj Manimpex Pvt. Ltd.</i> | <i>Rs. 2,64,81,455/-</i> |
| <i>Vansh Glass Industries Pvt. Ltd.</i> | <i>Rs. 3,36,84,947/-</i> |
| <i>Sawaca Business Machines Ltd.</i> | <i><u>Rs. 5,39,59,358/-</u></i> |
| <i>Total</i> | <i>Rs. 14,42,90,465/-</i> |

6.4. Appellant on the other hand has submitted that it has filed confirmation with PAN, income tax return of lender wherever received and amount received are all by account payee cheques, therefore, section 68 is not attracted. Appellant has also submitted copy of bank statement to show the genuineness of transaction. Appellant has relied on various case laws in support of its contention.

6.5. As regard to Hannah Enterprises Pvt. Ltd., appellant has submitted copy of confirmation and proof of filing I. T. return before the AO, The AO has stated that the appellant has failed to produce the director of company. Appellant has filed the copy of return of income and annual account of the company. It is seen from the documents that the account of the company. It is seen from the documents that the company has been incorporated on 21/07/2011 and it has a share capital of Rs.10 lacs, reserves and surplus of Rs.6,66,052/-. The company has income of Rs.2,60,279/- for A.Y. 2014-15. Considering the above facts, capacity of the company to lend Rs. 14,14,291/- is not proved.

6.6. As regard Boaston Tradelinks Pvt. Ltd., appellant has submitted copy of confirmation, copy of annual report and copy of acknowledgement of I.T. return before the AO. The appellant has shown unsecured loan of Rs.2,87,50,414/- from the above company. On perusal of balance sheet, it is seen that the company has share capital of Rs. 1 lac and reserve and surplus of Rs.6,14,633/-. The income of the company for A. Y. 2014-15 is Rs.3,15,621/-. In view of the above, capacity of lender is not proved.

6.7. As regard Biraj Manimpex Pvt. Ltd., appellant has submitted copy of confirmation, copy of annual report and copy of acknowledgement of I. T. return before the AO. The appellant has shown unsecured loan of Rs. 2,64,81,455/- from the above company. The income of the company for A.Y. 2014-15 is Rs.9,01,581/. In view of the above, capacity of lender is not proved.

6.8. As regard Vansh Glass Industries Pvt. Ltd., appellant has submitted copy of confirmation and copy of acknowledgement of I. T. return before the AO. The appellant has shown unsecured loan of Rs.3,36,84,947/-from the above company. The company is incorporated on 24/02/2012 and the income shown A. Y. 2014-15 is Rs.2,04,603/-. In view of the above, capacity of lender is not proved.

6.9. As regard Sawaca Business Machines Ltd., appellant has submitted copy acknowledgement of I. T. return and copy of annual account without notes before the AO. The appellant has shown unsecured loan of Rs.5,39,59,358/- from the above company. The income of the company for A. Y. 2014-15 is Rs,20,31,501/-. In view of the above, capacity of lender-is not proved.

6.10. It is seen that M/s. Biraj Manimpex Pvt. Ltd., Boaston Tradelinks M Ltd., and Vansh Glass Industries Pvt. Ltd., have the same common address of New York Tower, Ahmedabad. Appellant has failed to produce the lender before the AO.

6.10. Prima facie onus is always on the assessee to prove the cash credit entry found in the books of account of the assessee. In the land mark cases like Kale Khan Mohammad Hanif Vs. CIT [1963] 50 ITR I (SC), and Roshan Di Hafti Vs. CIT 11977] 107 ITR (SC), it has been held that the law is well settled that the onus of proving the source of a sum of money found to have been received by an assessee, is on him. Where the nature and source thereof cannot be explained satisfactorily, it is open to the revenue to hold that it is the income of the assessee and no further burden is on the revenue to show that the income is from any particular source.

6.11. In view of the above facts, as the capacity of the lender has not been proved, addition made by the AO is confirmed. The ground of appeal is accordingly dismissed."

105. The AR before us submitted that all the documents in support of the cash credit entries were duly furnished in the course of the assessment proceedings. As such the assessee has discharged the onus cast upon it under the provisions of section 68 of the Act. Therefore no addition on account of unexplained cash credit is warranted.

106. On the contrary learned DR before us vehemently supported the order of the authorities below.

107. We have heard the rival contentions of both the parties and perused the materials available on record. The provisions of section 68 of the Act fastens the liability on the assessee to provide the identity of the lenders, establish the genuineness of the transactions and creditworthiness of the parties. These liabilities on the assessee were imposed to justify the cash credit entries under section 68 of the Act by the Hon'ble Calcutta High Court in the case of CIT Vs. Precision finance (p) Ltd reported in 208 ITR 465 wherein it was held as under:

"It was for the assessee to prove the identity of the creditors, their creditworthiness and the genuineness of the transactions. On the facts of this case, the Tribunal did not take into account all these ingredients which had to be satisfied by the assessee. Mere furnishing of the particulars was not enough. The enquiry of the ITO revealed that either the assessee was not traceable or there was no such file and, accordingly, the first ingredient as to the identity of the creditors had not been established. If the identity of the creditors had not been established, consequently, the question of establishment of the genuineness of the transactions or the creditworthiness of the creditors did not and could not arise. The Tribunal did not apply its mind to the facts of this particular case and proceeded on the footing that since the transactions were through the bank account, it was to be presumed that the transactions were genuine. It was not for the ITO to find out by making investigation from the bank accounts unless the assessee proved the identity of the creditors and their creditworthiness. Mere payment by account payee cheque was not sacrosanct nor could it make a non-genuine transaction genuine."

108. In the given case, the assessee has discharged its onus by furnishing the necessary details such as a copy of PAN, bank details, and ITR etc. in support of identity of the parties, genuineness of transaction and creditworthiness of the parties. Admittedly the learned CIT-A has not doubted on the identity and genuineness of transaction but doubted the credit worthiness of the all parties.

Hence the learned CIT(A) sustained the addition made by the AO by holding that the assessee has not discharged the primary onus cast under section 68 of the Act.

109. Now coming to the third condition, i.e. creditworthiness of the parties, regarding this we note that the assessee has submitted that the fund was received through the through banking channel from all the parties. In support, the assessee has submitted their bank accounts, copy of returned and annual accounts.

110. But the authority below have not pointed out any defect in the submission made by the assessee. As such the learned CIT-A sustained the addition merely on the basis that the loan parties have declared low income in comparison to the amount of loan advanced. In our considered view once the assessee has filed primary details evidencing the identity of the party, genuineness of transaction and credit worthiness of the party, the authorities should have made enquiry from the parties who have advanced the loan to find out the sources of funds in their respective hands. As such, the assessee has explained the sources of fund in its hands by producing the identity and bank statement demonstrating that the funds were received through banking channel, which means that at the time of advancing the the laon there was sufficient amount in their banks accounts. If the revenue authorities have doubt with respect to the capacity of lender then it should have carried out necessary investigation as provided under the provision of the Act. The assessee on hand is only liable to explain the sources of credit in its hand only but not liable to explain the source of source. Therefore in our considered view, the assessee has discharged its onus imposed under section 68 of the Act.

111. In view of the above, we set aside the finding of Ld. CIT (A) and direct the AO to delete the addition made by him. Hence the ground of appeal of the assessee is allowed.

112. In the result, appeal of the assessee is allowed.

Coming to ITA No. 547/Ahd/2018 an appeal by the Revenue for A.Y. 2014-15

113. The Revenue has raised following grounds of appeal:

"1. The Ld. CIT(A) has erred in law and on facts in restricting the unexplained work in progress without taking into consideration the fact that the assessee has adopted percentage completion method for determining the revenue during the under consideration

1.1 The Ld CIT(A) failed to appreciate that the assessee has by its own submission estimated the net profit at 10.21% of the total estimated sales

1.2 The Ld. CIT(A) has erred in law and on facts in deleting the addition u/s 69 of the Act Rs. 38,69,50,307/- on account of bogus Booking Advances

2.1 The Ld CIT(A) failed to appreciate that the assessee has riot produced any material confirmation, PAN, address etc of the persons to prove the genuineness of the transaction

2.2 The Ld CIT(A) ought to have remanded the matter back to the file of the AO under Rule 46A"

114. The first issue raised by the revenue is that the learned CIT-A erred in deleting the addition made by the AO on without considering the fact that the assessee has disclosed income under project completion method.

115. At the outset, we note issue raised by the revenue has been decided along the issue raised by the assessee in ITA No. 398/Ahd/2018 for AY 2014-15. The impugned issue was decided vide paragraph no. 65 to 72 of this order in favour of the assessee and against the Revenue. For the detail discussion, please refer the above paragraph. Hence, the ground of appeal raised by the Revenue is hereby dismissed

116. The second issue raised by the Revenue is that the Ld. CIT-A erred in deleting the addition of Rs. 38,69,50,307/- under section 68 of the Act being bogus booking advance.

116.1 At the outset we note that the issues raised by the Revenue in its ground of appeal for the AY 2014-15 are identical to the issues raised by the Revenue in ITA No. 2130/AHD/2017 for the assessment year 2012-13. Therefore, the findings given in ITA No. 2130/AHD/2017 shall also be applicable for the year under consideration i.e. AY 2014-15. The appeal of the Revenue for the assessment 2012-13 has been decided by us vide paragraph No. 41 & 42 of this order and against the Revenue. The Ld. AR and the DR also agreed that whatever will be the findings for the assessment year 2012-13 shall also be applied for the year under consideration i.e. AY 2014-15. Hence, the grounds of appeal filed by the Revenue is dismissed.

117. In the result, appeal of the Revenue is dismissed.

118. In the combined result, the appeals filed by the Revenue are dismissed whereas assessee's appeal are allowed.

Order pronounced in the Court on 28/01/2022.

Sd/-
(RAJPAL YADAV)
VICE PRESIDENT

Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER

Ahmedabad; Dated **(True Copy)**
28/01/2022

Tanmay