

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND

Dr ARJUN LAL SAINI, ACCOUNTANT MEMBER

ITA No.1166/AHD/2016 (AY 2009-10)

ITA No.1167/AHD/2016 (AY 2010-11)

(Hearing in Virtual Court)

Raj Enterprises, 7-Nitinagar Society, Opp. VasantVihar Society, Udhana Magdalla Road, Surat – 395007 PAN: AAKFR 6024 M The	Vs	Deputy Commissioner of Income Tax, Circle-2(3), Surat.
Appellant/ Revenue		Respondent/ Assessee

ITA No.1164/AHD/2016 (AY 2010-11)

The Deputy Commissioner of Income Tax, Circle-2(3), Surat.	Vs	Raj Enterprises, 7-Nitinagar Society, Opp. VasantVihar Society, UdhanaMagdalla Road, Surat – 395007 PAN: AAKFR 6024 M
Appellant/ Revenue		Respondent/ Assessee

Assessee by	Shri Hiren Diwan – CA
Revenue by	Shri H.P. Meena –CIT-DR
Date of hearing	12/01/2022
Date of pronouncement	31/03/2022

Order under section 254(1) of Income Tax Act

PER PAWAN SINGH, JUDICIAL MEMBER:

1. These three appeals, out of which two cross appeals for assessment year (A.Y.) 2010-11 and one appeal by assessee for A.Y. 2009-10 are directed against the common order of learned Commissioner of Income Tax(Appeal)-4, Surat dated 15.02.2016, hereinafter called as “1d CIT(A)”. In all appeal,

the parties have raised certain common grounds of appeal, facts in both the years are also common, therefore, with the consent of the parties, all the appeals were clubbed, heard together and are decided in consolidated order to avoid the conflicting decisions. For appreciation of facts, the facts in A.Y. 2010-11 is treated as lead case. The assessee in its appeal for the A.Y. 2010-11 has raised the following grounds of appeal:

“(1) The ld. CIT(A) has erred in law and on facts in confirming the action of the ld. A.O. of rejecting the books of account of and the books results u/s. 145(3) of the Act.

It is, therefore, prayed that the above action of the ld. A.O. of rejecting books of accounts be quashed.

(2) The ld. CIT(A) has erred in law and on facts in confirming the action of the ld. A.O. of making addition in the appellant's case on the basis of estimation of sale rate at Rs.1,500/- per square yard.

It is, therefore, prayed that the above action of the ld. CIT (Appeals) be quashed.

(3) The ld. CIT(Appeals) has erred in law and on facts in concluding and sustaining the addition on the basis that the appellant earned unaccounted income at the rate of Rs.750/- per square yard from its project.

It is, therefore, prayed that the fair estimate of income from the project of the appellant and restricting the addition to that figure be done.

(4) The above grounds of appeal are independent of each other and that each ground of appeal is without prejudice to the other ground or grounds of grounds of appeal.

(5) The Appellant craves leave to add, amend, alter, modify, substitute, delete, change or vary all or any of the ground or Grounds of Appeal.”

2. The assessee vide its application dated 11.09.2021 has raised following two additional grounds of appeal and substituted Ground No.3 (for substituting original ground No.3).

Additional Grounds of appeals

1. *The ld CIT(A) erred in law and on facts in directing the ld AO to determine the income chargeable during the year in respect of all those plots which have either been registered in the name of customer during the year or have been given possession in part performance of contract of the nature referred to under section 53A of Transfer of Property Act, 1882 during the year.*
2. *The ld CIT(A) has erred in laws and on facts in not directing the ld AO to give setoff of the undisclosed income admitted during survey of Rs. 1.50 Crore against the undisclosed income finally getting determined in the appellant's case.*

Substituted Ground No. 3

The ld CIT(A) has erred in law and on facts in concluding and sustaining the addition on the basis that appellant earned unaccounted income at 50% of difference between Rs. 1500/- per Sq Yard (The average sale price upheld) and recorded sale price of the plots.

3. The Revenue in its Cross appeal for the A.Y. 2010-11 has raised the following grounds of appeal:

- “1. *On the facts and circumstances of the case and in Law, the Ld.CIT(A) has erred in deleting the addition of ~~Rs.25,34,125/- for AY 2009-10*~~ and Rs.4,00,29,713/- for AY 2010-11 on account of unaccounted income.*
2. *On the facts and in the circumstances of the case and in Law, the Ld. CIT(A) has not appreciated the fact that during the course of survey proceedings, Shri Rajesh J.Pengawala main person of the group has provided the certain details in respect of booking and indicating that rate was Rs.1400 to 1500 per sq. and*

also supported by Shri Gobarbhai, other working partner unequivocally who stated the rate was Rs.1500 per sq.

3. *On the facts and in the circumstances of the case and in Law, the Ld. CIT(A) has not appreciated the fact that during the course of survey proceedings, there was pocket diaries found and impounded in which the entries recorded are related to M/s Raj Enterprise.*
4. *On the facts and in the circumstances of the case and in Law, the Ld. CIT(A) has considered extraneous circumstances while directing to consider expenses, which are not at all warranted while computing on-money income.*
5. *On the facts and in the circumstances of the case and in Law, the Ld.CIT(A), Surat ought to have upheld the order of the Assessing Officer. It is, therefore, prayed that the order of the Ld.CIT(A)-I Surat may be set-aside and that of the Assessing Officer's order may be restored."*

**(appeal of revenue for AY 2009-10 was dismissed due to low tax effect vide order dated 23.08.2019 in ITA No. 1163/Ahd/ 2016)*

4. The learned Authorised Representative (ld.AR) for the assessee submits that he has filed application for admissions of additional grounds of appeal and to substitute ground No.3 with substituted grounds of appeal, vide application dated 11.09.2021. The assessee in its substituted ground has raised following additional grounds of appeal:

- “1. *The ld.CIT(A) has erred in law and on facts in directing the ld. A.O. to determine the income chargeable during the year in respect of all those plots which have either been registered in the name of the customer during the year or have been given possession in part performance of contract of the nature referred to u/s 53A of Transfer of Property Act, 1882 during the year.*
2. *The ld.CIT(A) has erred in law and on facts in not directing the ld.A.O. to give set off of undisclosed income admitted during survey of Rs.1.50 crores against undisclosed income finally getting determined in the appellant's case.”*

5. Brief facts of the case are that assessee is a partnership firm engaged in property development. During the relevant period under consideration, the assessee was developing “Water World Project”. The investigation wing of revenue carried out a survey action under section 133A of the Act at the business premises of assessee on 06.01.2010. During the survey operation, certain incriminating documents were found and impounded vide Annexure-BI-1 to BI-5. The survey team also recorded the statement of partners of assessee-firm namely Rajeshbhai Pengawala and Gobarbhai Gondalia. The partner in their statement admitted that assessee has earned unaccounted income of Rs.1.50 crore during the Financial Year (F.Y.) 2009-10, relevant to A.Y. 2010-11. The assessee filed its return of income for the A.Y. 2010-11 on 15.10.2010 declaring income of Rs.1.61 Crore. The assessee while filing return of income included the discloser of additional income of Rs.1.50 Crore in its total income. The case was selected for scrutiny and assessment was completed on 31.03.2013 under section 143(3) of the Act. During the assessment, the Assessing Officer (AO) recorded his observation about the survey carried out by Investigation Wing, statements of the partners and their accountant recorded during the survey and the lay out plan of project carried out by the assessee. The AO further recorded that on verification of details furnished by the assessee, the total area of plots

[remaining area divided equally to each plot] is 1,00,790 sq.mtr. However, the assessee purchased land of 1,40,032 sq.mtr. The assessee was asked to furnish the details of constructed bungalow, total number of units, area of each unit constructed, plots booked, sold and the explanation about the impounded material during the survey. The AO noted that assessee failed to provide required details. No closing stock and supporting evidence about the various information sought by the AO, was provided by the assessee. On the basis of aforesaid observation, the AO took his view that the book results are not complete and correct and not reliable and issued show cause notice dated 22.03.2013 to the assessee as to why books of accounts and result thereof should not be rejected.

6. The assessee filed its reply as recorded in para 5.2 of the assessment order. In the reply, the assessee stated that vide show cause notice dated 22.03.2013, the assessee was asked by referring the answer of question no.15 by partner that rate of sale of plot was Rs.1400 to 1500 per sq.yard and that there is no documentary evidence to prove the same. The assessee replied that there is nothing in response to the question no.15, it appears that instead of question no.13, the question/answer no.15 is referred. The assessee referred the question no.13 wherein it was asked during the survey that sale of some of plots that were made @ Rs.1400 to 1500 per Sq yard and

asked about the sale register and the rate of different plots. The partner replied that he did not have any record, account books or other material on the basis of which he can reply to the said question. Rajeshbhai Pengawala had not admitted the rate of sale of plot at Rs. 1400 to 1500 per sq.yard. Further, in response to question no.19, it was answered that sale of plot has mentioned in the pocket diary is made @ Rs.470 per sq. Yard. Thus, it is not correct that to say that main person of the group has indicated the rate of plot at Rs.1400 to 1500 per square yard. The assessee further explained that Gobarbhai Gondalia unequivocally clarified in his retraction letter dated 18.02.2010 that he never intended to said that sale rate of 'Water World Project' is Rs.1500 per square yardas no such rate really exist. On the statement of Reetesh Gheewala, Accountant, the assessee stated that copy of his statement is not provided, therefore, such information collected at the back of assessee cannot be used, unless such information is confronted with the assessee. The assessee provided the sanction plan of the project and number of plots carved out. The assessee explained that Water World Project is developed on 1,00,790 square meter and carried out on land in block No.560, 561, 562, 556-2 and 563-A2 only. The assessee purchased the land, which included the land in block no.470, 464 and on which no project of any kind, was going on during the period under consideration.

The area of land in block no. 470 & 464 are 22,475 square meters and 16,767 square meter respectively. And if this area is added to the area under the project 'Water World Project' which will come to 1,40,032 square Meter. Thus, there is no discrepancy in the area. Therefore, the observation in the show cause notice dated 22.03.2013 that required details are not furnished, is incorrect. The assessee also furnished the name of the persons; area of Bungalow constructed and plotted area. The assessee also stated that cash book was also furnished on 15.12.2013 and copy of which is also furnished with the supporting evidence of closing stock, the assessee stated that such record was not demanded. However, the same was furnished. The assessee requested that proposal of rejection of books of account may be dropped.

7. The assessee in its alternative and without prejudice submissions stated that if the AO is not convinced with the submission of assessee and decided to adopt the sale value of plot in 'Water World Project' at Rs.1500/- per square yard, then such rate should be applied only to the sale of plots actually made during the year. As in real-estate, the real profit does not earn on the booking of plots (units) as certain bookings are cancelled due to various reasons and in case booking is cancelled and the profit which is already considered to have been earned by assessee would have to be reversed and

tax collected on such income subsequently to reverse will have to be refunded and there is no provision in the Income Tax Act to reverse the income already considered having been earned by the assessee. The assessee given instances of 20 such cases wherein bookings of plots were cancelled and the assessee had to return the booking amount. The name of such person along with the date of booking, plot no, booking amount, date of cancellation and amount of refund was furnished. The assessee further explained that if booking is equated with the sale than in case of assessee such income would get assessed, which has not been earned and even in subsequent year the assessee has to return such booking amount and no profit on such sale is said to have been accrued, it is in stock of the assessee. The assessee also relied on certain case laws.

8. The reply of assessee was not accepted by the AO by taking view that during the course of survey proceedings at the office premises of assessee, 5 pocket diaries were found and impounded as Annexure B1-1, BI-2, BI-3, BI-4 and BI-5. In the statement Reetesh Gheewala, Account of the assessee, recorded on oath during the survey, admitted that these diaries were written by him and he recorded the instalment of cash and balance of receipt of Water World Project. On perusal of such entries, it is evident that the diaries contain the details of cash payment in respect of various plots having specific plot

number. The AO recorded the instances of one plot number viz; plot No. A-306 by Rajubhai SK who had paid Rs.3.00 lakhs for a plot admeasuring 200 square yard. Similarly, for plot No. B-102 admeasuring 200 square yard one Praveen Kapchi paid Rs.3,50,000/-. On the basis of aforesaid two instances, the AO held that the two entries clearly indicates that sale of plot was in the range of Rs. 1500 per square yard which were corroborated by statement recorded on oath during survey and the copy of relevant entries in the diary. The AO further recorded that Shri Reetesh Gheewala in question No.10 stated that booking of 500 plots have already been made. On the basis of the aforesaid conclusion, the AO adopted at rate of Rs.1500 per square yard as reasonable and appropriate, to estimate the undisclosed income on account of on money received in the project. The AO rejected the books of accounts by holding that the triple onus cast upon the assessee was not discharge, on failure of which renders the books of accounts liable for rejection. The AO on the basis of number of plots for which sale deeds were executed in A.Y. 2010-11 to 2013-14 worked the average area of each plot 212.91 square yard. In the following manner:

“The assessee has provided year-wise summary of plots sold as under:

<i>Assessment Year</i>	<i>Number of Plot for which sale deed executed</i>	<i>Total area sold (In Sq. Meters)</i>	<i>Total Sale amount</i>
<i>2010-11</i>	<i>86</i>	<i>15,821</i>	<i>76,59,046</i>
<i>2011-12</i>	<i>62</i>	<i>10,988.93</i>	<i>52,46,874</i>

2012-13	68	11,802.94	60,14,350
2013-14	33	5,715.12	32,39,123
Total	249	44,328.29	2,21,59,393

On perusal of details submitted by the assessee it is observed that the average area of each plot works out to 212.91 sq. yard. The working is shown as under -

Total are of Plots	Area of Each Plot (sq. Yard)
44328.29 Sq Meters = 44328.29 * 1.196 =53016.63 Sq. Yard	53016.63 /249 = 212.91

9. Further, as per average rate of registered sale consideration, the AO worked out rate in following manner:

Total sales Amount (in Rs.)	Total area sold (Sq. Yards)	Average rate of Registered sale Consideration
22159393	53016.63	22159393/53016.63 =417.97

10. The AO further recorded that the assessee moved application before the Joint Commissioner of Income Tax(JCIT) for his direction under section 144A of the Act. The direction of Id. JCIT was received vide his letter dated 31.03.2013, which is extracted by the AO in para 5.9 of his order. In the said directions, it was directed that the total number of plots which needs to be considered for computing undisclosed income for the A.Y. 2010-11 should be taken at 411 plots. The AO accordingly, computed the undisclosed income in the following manner:

“5.11 Computation of undisclosed income on account of on money receipt:

As the Books of the assessee have been rejected, the total unaccounted income from the project needs to be computed. As discussed in the above paras, the assessee has received on-money payment of Rs.1082.03 (Rs.1500 –

*Rs.417.97)persq yard on an average basis. As per the direction of the Joint CIT, Range-6, Surat, under s.144A, the total number of plots to be considered during the year is 411. The average areas of each plot have been worked out at 212.91 sq yard. On basis of the same, the total unaccounted income comes to Rs.9,46,84,128/- (1082.03*212.91*411). As the assessee had already disclosed Rs.1.5 crores as his unaccounted income during the course of assessment proceedings, therefore an addition of Rs.7,96,84,128/- is made to the total income of the assessee. Penalty Proceedings u/s 271(1)(c) of the Act is initiated for furnishing inaccurate particulars of income/concealment of income.”*

11. On the basis of aforesaid observation, the AO made addition of Rs.7.96 crore to the total income of assessee.
12. Aggrieved by the order of AO, assessee filed appeal before the Id.CIT(A). Before the Id.CIT(A), the assessee filed detailed written submission. The submission of assessee is recorded on page No.36 to 47 of his order. The assessee in sum and substance submitted that the AO made huge addition on around Rs.8.00 crore (Approx), which is totally unjustified, unrealistic, and improper and deserves to be deleted. The assessee furnished the details of sale as per books of account at Rs.1,10,80,665/-, the AO added unaccounted value of sales. The AO determined the value of sale at Rs.9,46,84,128/- total of which comes to Rs.10,57,64,793/- (1,10,80,665 + 9,46,84,128). The assessee has down Net Profit at Rs.1,61,21,860/-, if the unaccounted income determined by the AO is added, the total profit on sales comes to Rs.9,58,05,988/- (7,96,84,128 + 1,61,21,860), which is 90.58% of

total sale. On the basis of aforesaid figure, the assessee submitted that as per the AO, the assessee earned the income @90.58% of sales. The presumptive income in the business of construction is at 8% of the gross profits, that too in cases on small contractor having turnover less than Rs.1.00 crore, surprisingly, the income of assessee estimated at 90.58% gross receipts which is around 11.50 times the rate provided under the Income Tax Act and prayed for deleting the addition, which is prima-facie unrealistic, unjustified impractical as no real-estate dealer can earn such rate of gross profit at Rs.91%.

13. The assessee further explained that a survey took place on 06.01.2010 during the assessment year under consideration. During survey, the assessee admitted additional unaccounted income of Rs.1.50 crore for this year. Normally, the assurance is given by the survey team to the assessee of making admission of unaccounted income during the survey that once unaccounted income is included in the total income of the assessee impugned year and due tax therein is paid by the concerned assessee, then during the course of assessment, no further addition would be made in case of such assessee. Admittedly such assurance is not given in writing by the officer of survey team, nor does any such assurance have any legal sanctity. Though, such practices is being followed by the Department to maintain the

trustworthy image of Department and to encourage the assessee to face the proceedings to meet out clean during the survey for making correct disclosure of undisclosed income. On such practice and assurance, the assessee included such additional admitted income of Rs.1.50 crore disclosed during survey in its total income and also paid due tax thereon. No incriminating evidence could be found during the course of survey, it is a fact, which should have been appreciated by the AO before making huge unrealistic and impractical addition. The assessee further stated that the AO made addition of Rs.7.96 crore considering that in all 433 plots in project during the current year, the assessee received unaccounted on money @Rs.1500 per square yard. In fact there are only 384 plots in the project. During the year, the assessee sold only 86 plots by executing the sale deed in favour of purchaser/customer and presented for registration before registering authority. As per the decision of Jurisdictional High Court in CIT Vs Asha Land Corporation (1982) 133 ITR 55 (GUJ) and CIT Vs Shah Doshi & Company (1982) 133 ITR 23 it was held that in case of real-estate dealer, the income from sale of the real-estate, become chargeable in the year in which the concerned real-estate dealer executes the sale deed in favours of the purchaser and when such sale deed is presented for registration. During the assessment proceedings, the assessee before the

ld.JCIT, in the course of proceedings under section 144A submitted that assessee executed sale deed of 86 purchasers and presented for registration. And in alternative, it was submitted that if at all the addition with regard to charging of on money @ Rs.1500 per square yard is to be made during the current year should be restricted in relation of plots which were sold by the assessee. The assessee also submitted that it was impractical and inconsistent that the provision of Income Tax Act to charge the amount received on booking of plot as income which even when the sale deed is not executed in favour of purchaser, merely on the booking on receiving of part payment. The assessee submitted that they have been following Mercantile System of Accounting and has been offering income for taxation on sale of plots in the year in which sale deeds of plots were executed. The assessee also furnished the complete bifurcation of number of booking in F.Y. 2007-08, 2008-09 and 2009-10, number of bookings cancelled during the relevant years and net booking during the year and explained that only 80 plots were booked during the Financial Year 2009-10.

14. The ld. Additional CIT in its direction under section 144A directed the AO to consider 433 plots in Water World Project. However, the total number of plots booked by assessee in the project is 403 only. The ld. Addl.CIT erred in concluding that there are 433 plots in the project. The assessee furnished

the original booking cancellation contract. Out of 403 bookings, the booking of 20 plots was cancelled and as a result of the real booking was restricted to 383 plots. The assessee submitted that as per sanctioned plan, the total numbers of plots in the Water World Project are 384 only.

15. The assessee further stated that the provision of section 44AD laid down statutory yard stick to determine the profit component out of the gross receipt of real-estate business and net income from gross receipt in the real-estate business can be fairly estimated at 8% of the gross profit. To support its submission, the assessee relied upon the decision of Hon'ble Gujarat High Court in DCIT Vs Panna Corporation (2012) 74 DTR 89 (GUJ) and CIT Vs Sharda Real Estate P. Ltd., (2104) 99 DTR 488 (GUJ).

16. On the basis of above mentioned submission, the assessee prayed that the AO be directed to make a fair estimation of income component as per the provision of Income tax Act and also @8% of the alleged unaccounted on money receipt, so as to tax only the income and not the gross receipt of the assessee's business. The assessee also furnished the evidence in respect of booking of plot no B-102 and A-306. The assessee with regard to booking of plot B-102, A-306 stated that they were not confronted with the specific entries in the impounded documents with the payment against the payments of these two plots before passing assessment order. The assessee submitted

that transactions recorded in the impounded diaries showing the booking against plot No.B-102 and A-306 are actually pertaining to some other projects and not belonging to assessee.

17.The Id.CIT(A) treated the material (information) in the written submissions as new evidence and remanded the matter to the AO for his remand report. The AO furnished his remand report with his letter dated 20.10.2014. The relevant contents of remand report is extracted by the Id.CIT(A) in para 9.2 of his order. In the remand report, the AO stated that the assessee submitted that they never confronted with the cash entry of Rs.3.00 lakhs and Rs.3.50 lakhs [plot no.B-102, A-306] in the impounded diaries on the basis of which the addition of unaccounted on money has been made. The AO mentioned that in the remand proceedings, summons under section 131 of the Act was issued to the partner namely Rajeshbhai Pengawala and Gobarbhai R. Gondalia and Reetesh Gheewala, Accountant. In response to same, Rajeshbhai Pengawala contended that during the survey proceedings his statement on oath was recorded. While recording the statement, the diary impounded during the course of survey was shown to him and confronted with the entries made therein. After verification of the same, in question no.16 Rajeshbhai Pengawala stated that all the impounded diaries are related to Raj Enterprises and were made by Riteesh Gheewala, Accountant as per

his direction or his father's direction who was specifically asked about the entries of the diary above Rs.3 lakhs and Rs.3.50 lakhs received on various dates in December, 2009. Shri Rajesh Bhai Pengawala did not have any idea regarding the said entries and Ritesh Gheewala could not explain the same. When he was asked to explain as to whether the entries recorded in the diary were included in the regular books of accounts, he stated that he had no idea of asking about the specific name of Pravin Kapchi[B102], the partner stated that he know Pravin Kapchiwho was a supplier of Kapachi [stone brick] to the project. When he was asked about the payment against kapachi is reflected in the books of accounts, if yes, he was asked to produce the same. The partner stated that he has no clue about the same and he could not produce any evidence.

18.In response to question no.8 and 9, partner stated that booking of plot in Water World Project in F.Y. 2009-10 was for Rs.400 per square yard and he did not remember as to how many plots actually booked. The statement of Riteesh Gheewala, Account was also recorded who admitted that all pocket diaries impounded during the survey are related to Raj Enterprise and in his hand writing. In question no.14, he stated that diary, it was impounded as per Annexure BI-4 consisted the details of cash receipt which were recorded as per direction of Rajeshbhai Pengawala, when he was asked to explain

whether entries recorded in the diary were included in the books of accounts, he stated that he has no idea and only partner can explain. Gobarbhai R. Gondalia, the other partner not attended nor filed any submission.

19. On the basis of proceedings during the remand proceedings, the AO concluded that partner of the firm and accountant have admitted that diaries have impounded during the course of survey are pertaining to the assessee and no other project was going on. Partner confirmed that entries were made by Accountant Riteesh Gheewala as per his direction; in turn Accountant admitted that entries made in such diaries are related to cash receipt, who could not explain where the same is recorded in the regular books. Rajesh Bhai Pengawala could not explain the authenticity or requirement of affidavit, in answer to most of the question, the partners is stated that he does not know the answer. The AO concluded that he was having 80% stacks in the firm and was trying to mislead the proceedings. The remand report was confronted with the assessee.

20. The assessee furnished/filed his rejoinder. The contents of rejoinder is recorded in para 9.3 of order of Id.CIT(A). The assessee in its rejoinder dated 08.11.2014, filed in response to remand report dated 20.10.2014 submitted that the AO in his remand report mentioned that Rajesh Pengawala in reply to question No.16 stated that all impounded diaries are

related to Raj Enterprises and all are written by Ritesh Gheewala as per his or his father's direction. The assessee reproduced the contents of question No. 16 in English viz; *“question No. 16: In the diary found from your office premises, last entry is of 3 lac and 3.50 lac. What you have to say about the same ?”*. *“Answer: yes, These diaries were found from my officer premises and all diaries were written by Riteesh Gheewala. I had signed these diaries during the course of survey proceedings.”* The assessee explained that in answer to question No.16, Rajesh Pengawala nowhere stated that impounded diaries were made by Riteesh Gheewala as per his directions or the direction of his father. The AO used the above statement to made huge unwarranted additions. The assessee further objected that Rajesh Pengawala admitted in his statement that he knew Praveen Kapchi and he supplied Kapchi in the water word project, he could not produce the books of accounts in support of his statement and therefore, rejected the books of accounts of assessee. The assessee explained that the perusal of copy of summon shows that the AO did not require Rajesh Pengawala to appeal with books of accounts of Raj Enterprises in response to summons issued to him. It was further explained that it is very obvious that one cannot show the details of Kapchi (gravel) purchased by the assessee-firm for project. The assessee produced the ledger accounts of Pravin Kapchi with copies of bills of purchases from Pravin

Kapchi. The assessee also explained the answers of various other question of partner of the assessee firm, wherein he was asked about the rate of plots and in answer to question No. 8 he explained that the booking was made at the rate of Rs. 400/- per square yard during financial year 2009-10. And in answer to question no. 11 he answered that sale was made at the rate around of Rs. 400/- per month. When the partner was confronted with the answer of other partner namely Gobarbhai Gondalia recorded during survey on 07.01.2010, where he stated the rate at Rs. 1500/- per square yard. The partner explained that Gobarbhai Gondalia is a farmer, he is working partner and he has shown incorrect rate. The assessee explained that the partner of assessee firm was repeatedly asked about the rate at which plots were sold in the water word project by framing different questions in different ways ,but the concerned partner consistently stated that rate of sale of plots were around. The assessee also explained the other answers made in response to various question made during the remand proceedings.

21.The Id.CIT(A) after considering the assessment order, submission and the additional evidence filed before the Id.CIT(A), remand report of AO and the rejoinder filed thereto held that addition of undisclosed income is made by holding that average rate of plot was actually Rs. 500/- per square yard and not the average rate of Rs. 417.9/- per square yard as per books of accounts.

The AO relied on various evidences consisting the statement of partner, accountant, and leaflet of sale of plot during the survey was confronted with the partners. The Id.CIT(A) on rejection of books for the A.Y. 2010-11 observed that assessee has no other income other than project developed by them. The assessee has already accepted and disclosed income of Rs.1.50 crore over and above the income recorded in the books of accounts. It is also accepted by the assessee that their accounts are not completed and do not record all material transaction, therefore, the Id.CIT(A) held that he do not find any reason for interfere in rejection of books of accounts and dismissed the ground against his rejection of books of accounts.

22. On the addition of undisclosed income, the Id.CIT(A) observed that he has considered the statement of both the partners, accountant and other evidences found during the survey. The Id.CIT(A) held that Gobarbhai R. Gondalia has given his statement voluntarily without coercion and not under duress. There was printed leaflet meant for advertisement for sale which were found during the survey and confronted to active partners Rajesh Bhai Pengawalain question no.17 of his statement. The offer rate as per leaflet was Rs.2500/- per square yard, which has not been disputed. The Id.CIT(A) further observed that by any stretch of imagination and human behaviour it cannot be accepted that plots which were from the office advertised and

offered at Rs. 2500 per square meter were sold only for Rs. 420 per square yard as per assessee's claim. There is no discount offer in the leaflet. The partners claimed that the rate was for giving an idea to customers, what type of idea a customer will get if as per the assessee's contention, the land is purchased Rs.10 square yard and sold for 420 square yard and advertised per Rs.2500 square yard. The SMS on the mobile phone of Rajesh Bhai Pengawala was mentioning certain transactions, who was confronted with these question no.21 of his statement and was asked to explain whether these were recorded in the books of accounts who evaded the question immediately in the next question, he was asked to come with voluntary question, he accepted Rs.1.50 crore as undisclosed unaccounted income which reinforces the conclusion that transactions were substantially out of books. The submission and contention of assessee that transactions recorded in the impounded diaries showing the booking against plot No.B-102 and A-306 are actually pertaining to other projects and not belonging to assessee, the Id CIT(A) concluded that such contention of assessee is not acceptable to him for the reasons that not only Riteesh Gheewala, Accountant submitted that transactions was recorded for the assessee, even the partner Rajesh Bhai Pengawala was also confronted with the entries in the diaries during the course of survey itself submitted that except amount withdrawn from the

bank, the other transaction represent unaccounted business income. He has not refuted that the transaction do not belong to his firm. The Id CIT(A) concluded in the following way.

(a) Not only did Shri Ritesh Gheewala accounting assistant submit that the transactions were recorded for the appellant only but even the partner Shri Rajesh Pengawala was confronted with these diaries during the course of survey itself (refer to Q. No. 18) and he submitted that except amounts withdrawn from bank account the other transactions represent unaccounted business income.No where he refuted that the transactions do not belong to his firm.

(b) During the assessment proceedings for A.Y.2010-11, the appellant was specifically asked to give details of these diaries after these were confronted to it. The appellant has submitted in its reply (reproduced as answer 9 at page 7 of the order) that the details have already been given. Nowhere, it has been even then claimed that the transactions do not belong to the firm.

(c) Neither the name of the claimed purchaser as per appellants claim match with the diary nor does the payments of Rs.3,00,000/- in cash match with the registered deed submitted.

23. On the basis of aforesaid reasoning, the Id.CIT(A) took his view that average rate of all sale of plots adopted at Rs. 1500/- per square yard is justified and upheld the order of AO. However, on the issue of Revenue recognition, and profit taxable, the Id.CIT(A) held that assessee has already booked huge expenses and there is a possibility that expenses have been inflated as the land cost was highly under reported. The assessee is mainly in the plotting

scheme and development cost other than land is not much, therefore, looking into the entirety of facts, including the upholding of the additions on the basis of understatement of land cost directed to work out the addition @50% of addition. It was further directed that in case of working of undisclosed profit for the A.Y. 2010-11, comes out at less than Rs.1.50 crore, as directed, it is already accepted, declared by the assessee in the return of income and introduced in the accounts, then figures could be taken at Rs.1.50 crore for AY 2010-11.

24. Aggrieved by the order of Id.CIT(A), both the parties have filed their respective appeals. The Revenue has challenged the deleting of addition to the extent of Rs.4,00,29,713/-. And the assessee has basically challenged the sustaining of addition on the basis of unaccounted income at 50% of difference between Rs.1500/- per square yard.

25. We have heard the submission learned Authorised Representative (Id.AR) of the Assessee and the learned Commissioner of Income Tax- departmental representative (CIT-DR) for the Revenue and have perused the material available on record. The Ld. AR for the assessee submits that he has raised two additional ground of appeals and intends to substitute ground no. 3 raised in original grounds of appeal. No new facts are necessary to brought on record for adjudication of additional grounds of appeal and for

substitution of ground No.3. The facts relating to such additional grounds are emanating from the order of lower authorities. So far as substitution of original ground no. 3 is concerned, the assessee intends to substitute ground no. 3 which is more specific. To substantiate all grounds of appeal, the ld. AR of the assessee made his submissions extensively. In addition to oral submission, the ld. AR of the assessee filed detailed written submission running into twenty seven pages which are taken on record.

26. On the other hand the ld CIT-DR for the revenue objected for raising additional grounds of appeal and for substituting the original ground No.3 of appeal. The ld CIT-DR for the revenue further submits that the assessee is raising new pleas, which were not raised before lower authorities.

27. We have considered the rival submissions of both the learned representative of the parties. On perusal of the facts we find that the assessee has not raised new facts or pleas as raised hereinabove, with regards to additional grounds of appeal, the facts related to these additional grounds of appeal are emanating from the order of ld CIT(A). So far as substitution of ground No. 3 is concern, we find that there is no material change in substituted ground No. 3, which is more now specific in the form of substituted ground. Further no new facts are required to be brought on record for adjudication of additional and as well as substituted grounds of appeal. Thus, we admit the

additional grounds of appeal as well as substituted ground No, 3 of the appeal raised vide application dated 11.09.20121. Now adverting to the adjudication of various grounds of appeal,

28. Ground No. 1 relates to rejection books of accounts. The ld. AR for the assessee submits that ld. CIT(A) confirmed the action of the Assessing Officer in rejecting the books of accounts on the ground that during the survey, the assessee declared undisclosed income of the Rs.1.50 crores, which were not recorded in the books of accounts, when survey took place. The Ld. AR of the assessee submits that assessee included the undisclosed income declares during the survey and duly accounted the said income which is appeared in profit and loss account and can be verified from the accounts. The relevant part of the accounts is placed on record as per page no. 107, 109 and 123 of paper book. The books of accounts are correct and were furnished during the course of assessment proceedings which cannot be said to be incorrect income. The ld. CIT(A) while confirming the action of Assessing Officer in rejection of books of accounts noted that expenditure of Rs.15,000/- was not found debited in the books. The ld. AR for the assessee submits that the small expenditure of Rs.15,000/- being not found debited from books showing turn over from amount of Rs.1.10 crores and income of Rs.1.16 crore cannot be ground for rejection of books of accounts. The

books of accounts were audited and the auditors have not given any adverse findings/ qualification. To support his submission, the ld. AR relied upon the following decision:

- *CIT Vs Padamchand Ramgopal (1970) 76 ITR 719 (SC).*
- *CIT Vs Margadarsi Chit Funds (P) Ltd. (1985) 44 CTR (AP) 5*
- *B. F. Varghese Vs State of Kerala (1969) 72 ITR 726 (Ker.)*

29. Ground no. 2 which relates to estimation of rate of sale of plots at Rs.1,500/- per square yard. The ld. AR for the assessee submits that ld. CIT(A) after confirming the action of the Assessing Officer in rejection of books of accounts under section 145(3) confirmed estimation of sale at Rs.1,500/-, which is liable to be rejected. The Assessing Officer in page no. 17 in his order referring statement and the evidences on the basis of which the Assessing Officer concluded that the assessee charged on-money of around Rs.1,500/- per square yard on sale of plots in water world project. On the basis of statement of Ritesh Gheewala recorded on 06.01.2010 during survey proceedings. Shri Ritesh Gheewala retracted from his statement by filing retraction letter filing before the Assessing Officer, copy of which is filed on record. The said statement was provided to the assessee just one day before passing the assessment order. The Assessing Officer has not examined Ritesh Gheewala, on the affidavit of retraction. In absence of cross-examination, the contains of affidavit wherein Shri Ritesh Gheewala

retracted should be accepted as corrected. It has been held so by Hon'ble Apex Court in the case of Mehta Parikh and Co. vs CIT (1956) 30 ITR 181 (SC), Gujarat High Court in the case of Glasslines Equipments Company Ltd. Vs CIT (2002) 253 ITR 454 (Guj).

30. The Ld. AR for the assessee submits that copy of a statement of Shri Ritesh Gheewala was provided just one day before the passing of the assessment order, the statement of Shri Ritesh Gheewala is not admissible as evidence as no cross-examination as of Ritesh Gheewala was allowed by Assessing Officer. To support his submission, the ld. AR relied upon on the decision in the case of Andaman Timber Industries vs CCE (2015) 281 CTR 241 (SC), PCIT Vs Kanubhai Maganlal Patel (2017) 79 taxmann.com 257 (Guj.), CIT Vs Indrajit Singh Suri (2013) 33 taxmann.com 281 (Guj.), H. R. Mehta vs ACIT (2016) 72 taxmann.com 110 (Mum), ITO Vs Softline Creations (P) Ltd. (2017) 81 taxmann.com 139 (Delhi Trib.), R. W. Promotions (P.) Ltd. ACIT (2015) 61 taxmann.com 54 (Bom.), CIT Vs Ashwani Gupta (2010) 191 taxman 51 (Del.), CIT Vs Eastern Commercial Enterprises (1994) 210 ITR 103 (Cal.).

31. The ld. AR further submits that the statement recorded during the survey does not have any evidence more so when the statement was retracted by the

deponent. To support his submission, ld. AR relied upon the following decisions:

- *CIT vs S. Khader Khan Son (2012) 254 CTR 228 (SC)*
- *CIT vs Golden Finance (2013) 40 Taxman.com 329 (Guj.)*
- *M/s Sashi Wines vs ITO (ITA No. 882/AHD/2017)*
- *CIT vs Digambar Kumar Jain (HUF) (2013) 84 DTR 365 (MP)*
- *CIT vs Dhingra Metal Works (2010) 236 CTR 621 (Del)*
- *CIT vs P. Balasubramanian (2013) 354 ITR 116 (Mad)*
- *ITO vs Vijay Kumar Kesar (2010) 231 CTR 165 (Chattisgarh)*
- *CIT vs S. Khader Khan Son (2008) 214 CTR 589 (Mad.)*

32. The ld. AR submits that statement of Shri Ritesh Gheewala was recorded on oath whereas the provisions of section 133A(3)(iii) do not permit the recording of his statement on oath during survey proceedings, thus, the statement of Shri Ritesh Gheewala is illegally and invalidly recorded. As provisions of section 133(1), the record to provisions of section 133A of the Act can be had only concerned refuses to have his statement recorded or does not cooperate in recording the statement during the survey proceedings. There is no such claim of non-cooperation recorded by survey team; therefore the course to section 131(1) for recording his statement is illegal and invalid. To support his submission, the ld. AR for the assessee relied upon the following decisions:

- *Pawan Kumar Goel vs UOI (2019) 107 taxmann.com 21(P&H)*
- *CIT vs Mool Chand Salecha (2002) 124 Taxman 898 (Raj)*

- *Shri Venkateshwara Tourist Home P. Ltd. Vs ADIT (1998) 101 taxman 710 (Kar.)*
- *Maruti Mills Pvt. Ltd. Vs UOI & Ors (2000) 159 CTR 142 (Raj.)*
- *Dr. Vijay Phawa vs Samir Mukhopadhyay (1995) 129 CTR 64 (Cal.)*
- *Gheru Lal Bal Chand vs ITO (1982) 137 ITR 190 (P&H)*
- *Ram Saroop Pawan Kumar vs ITO (1980) 18 CTR 101 (P&H)*

33. The ld. AR further submits that superiors High Courts have consistently held that no addition can be made merely on the basis of statements recording during the survey unless there is corroborating evidences to support such statement. The Assessing Officer solely relied upon the impugned diary in respect of properties at A-306 and B-102 which pertains to altogether different project than the project developed by assessee. The authorities below relied upon the statement of Shri Ritesh Gheewala without showing order leading any corroborating evidences. Therefore, reliance on such retracted statement is illegal and invalid. To support his submission, the ld. AR of the assessee relied on the following decisions:

- *CIT Vs Chandra kumar Jethmal Kochar (2015) 55 taxmann.com 292 (Guj.)*
- *Kailashben Manharlal Chokshi Vs CIT (2010) 328 ITR 411 (Guj.)*
- *DCIT Vs Ratan Corporation (2005) 197 CTR 536 (Guj.)*
- *M/s Sashi Wines Vs ITO (ITA No. 882/AHD/2017)*
- *PCIT vs Sunshine Imports & Exports P. Ltd. (2020) 118 taxmann.com 123 (Bom.)*
- *CIT Vs S. Jayalaxmi Ammal (2016) 74 taxmann.com 35 (Mad.)*

- *DCIT Vs Pramukh Builders (2008) 115 TTJ 330 (Ahd.)(TM)*
- *ACIT Vs Ramanbhai B. Patel (2008) 12 DTR 471 (Ahd) (Trib)*
- *ACIT Vs Jorawar Singh M. Rathod (2005) 94 TTJ 867 (Ahd.)*

34. So far as statement of partner Mr. Rajesh Pengawala is concerned. The ld. AR submits that in his statement was recorded on 06.01.2010 during the survey from copy of pages placed on record. Though the Assessing Officer recorded in the table that Rajesh Pengawala in his statement stated during the survey that plot in his project are sold @ Rs. 1,400/- to 1,500/- per square yard, the perusal of the statement shows that he never made any such statement. On the contrary, he categorically submitted before survey team that rate of sale and plot in the project were Rs.470/- per sq. yard. The ld. CIT(A) erred in relying misleading and incorrect observation of Assessing Officer, though this statement was available with him, even otherwise the statement of Mr. Rajesh recorded during survey proceeding does not for any evidential record as argued earlier. Further, from the statement of Mr. Rajesh, it emerges said statement was recorded on oath whereas the provisions of section 133A(3)(iii) do not permit the recording of statement on oath during survey proceedings. Thus, the statement of Mr. Rajesh was not claim of Revenue's answers are that this statement was recorded under section 131(1) then also the statement of Mr. Rajesh is illegal and invalid as the provisions of section 133A(6), the recourse to provisions of section

131(1) of the Act can be held only one person concerned refuses to have his statement recorded or does not cooperate in recording his statement during the survey. There is no such reference recorded by survey team. Therefore, recourse to section 131(1) for recording statement on oath is invalid and illegal on the basis of various decisions cited earlier.

35. The ld. AR for assessee further submits that Assessing Officer relied upon the entry in the impugned diary in respect of property at A-306 and B-102 which pertains to a different project than the project of assessee.

36. On the statement of Gobarbhai Gondalia, ld. AR for the assessee submits that statement was recorded on 07.01.2010 during the survey proceeding, copy of which is filed on record. In his statement was recorded at 3.30 AM during night hours on 07.01.2010. The Gujarat High Court in the case of Kailashben Manharlal Choksi Vs CIT (2010) 328 ITR 411 (Guj.) wherein held that no reliance can be placed and no evidence can be attached to his statement recorded during odd night hours. The ld. CIT(A) observed that there is no proof that in his statement was recorded at mid night. The assessee made similar claim before Assessing Officer during assessment that his statement was recorded at mid night, but the Assessing Officer did not controvert such claim of the assessee. Despite the fact that Assessing Officer is executed to be better in form in this regard. Mr. Gobarbhai belongs to a

traditional agriculturist family was not highly qualified having studied upto 7th standard only. During recording of his statement, he was nervous, upset, stressed, and uncomfortable and was trying to get rid of his statement. Therefore, his statement without understanding the question took by the survey team. Even he did not remember the question of the argue answer returning his name. The statement was recorded of the directions of the senior officers. He demanded copy of his statement recorded during survey. On receipt of his statement, he immediately filed retraction letter dated 18.02.2010 copy of which is filed on record. The perusal of contains of retraction clearly shows that there were incorrect facts as noted by survey team. To strengthen his submission that in his statement is not admissible, the Id. AR relied on the decision as relied in his submission.

37. On the observation of Assessing Officer with regard to e-mail and leaflets of advertisement, the Id. AR of the assessee submits that e-mails were send to customers abroad and plots were offered at higher rates, for earning foreign currency but from such facts it cannot inferred that the plot in the project are sold to local customers or customer abroad at such offered rate. For the purpose that the plots were sold at Rs.1,500/- per square yard, the Assessing Officer has to brought evidence on record. Similarly, the rate quoted in the leaflet cannot be considered to be the rate realized by the assessee.

38. On the specific identification of property no. A-306 and B-102, the ld. AR submits that the entries related to such properties were not related to the projects of assessee, which pertains to different project known as “Shivalik Heights” constructed by some other firm M/s Shivalik Enterprises. In Shivalik Enterprises, none of the partners of assessee were partners. The assessee clarified these facts that Accountant to Shivalik Enterprises and of assessee firm is common, the above diaries maintained by the common accountant of both the firms were found from the assessee’s premises. To prove his submission, the ld. AR of the assessee submits that copy of sale deed of flat no. B-102 in Shivalik Heights is placed on record and the particulars of properties, sale and seller and purchases are clearly discernable which altogether different project is. Similarly, for flat no. A-306 which was purchased by Rajubhai in “Shivalik Heights”, the purchaser of flat no. 310 is Mr. Parvin Virash who is carrying the business of construction and was also selling building materials, thus he supplied certain building material to the assessee, and further no plot was booked by him. The assessee furnished the booking details and plot no. A-306 is booked by Kokila M. Lalwala and not by Shri Rajubhai. The Assessing Officer ignores the documentary evidence furnished by assessee and confirmed the action of Assessing Officer. As a matter of fact, diary is appeared directly in the assessment order and there is

no whisper of same during the course of assessment proceedings for which the Assessing Officer had to call a remand proceeding. None of the evidence established that sale rate of assessee was more than the sale rate recorded in the books of accounts at Rs.407/- per square yard.

39. On ground No. 3 which relates to estimate the unaccounted income at 50% of difference between Rs.1500/- per square yard and the recorded sale price of plots by assessee, the ld. AR submits that since rejection of books of accounts is not justified, therefore the estimation of income is also liable to quash. The ld AR for the assessee submits that on the basis of estimation of income directed to be made by ld. CIT(A) the NP percentage is worked out as under,

<i>Sr. No.</i>	<i>Particulars</i>	<i>Amount (Rs.)</i>	<i>Amount (Rs.)</i>
<i>(1)</i>	<i>Sales as per books of accounts</i>	<i>1,10,80,665</i>	
<i>(2)</i>	<i>Add: Unaccounted value of sales determined by the ld. CIT(A) at confirmed rate of Rs.1500 per sq. yard.</i>	<i>9,46,84,128</i>	
<i>(3)</i>	<i>Total sales value as per order of the ld. CIT(A) (1 +2)</i>		<i>10,57,64,793</i>
<i>(4)</i>	<i>Net profit shown by the appellant</i>	<i>1,61,21,860</i>	
<i>(5)</i>	<i>Unaccounted income as determined by the order of the ld. CIT(A) (50% of Rs.1500 per sq. yard sale rate upheld by ld. CIT(A) – Rs.470</i>	<i>4,50,65,595</i>	

	<i>per sq. yard average sale rate recorded in the books of the appellant i.e., Rs.515 * 212.91 average area of the plots booked * 411 the number of plots booked)</i>		
<i>(6)</i>	<i>Total income from the project as per the order of the ld. CIT(A) (4 + 5)</i>		<i>6,11,87,455</i>
<i>(7)</i>	<i>Percentage of net profit in relation to the sales [(6) * 100/ (3)] i.e., 6,11,87,455 * 100/10,57,64,793</i>		<i>57.85%</i>

40. On the basis of aforesaid working, the ld. CIT(A) concluded that on the business of selling of building, assessee would earn the rate of around 58% worth presumptive income directed to be accepted by Income Tax Act itself as per provisions of section 44AD. The Ld. A R for the assessee submits that Ld. CIT(A) grossly erred in estimating the net income in assessee's case at 50% of difference between the alleged sale rate of Rs. 1500/- per square yard and the average rate of Rs. 470/- per square yard recorded in the books of the assessee. The estimation of profit element in estimated sale is required to be made in assessee's case, such estimate cannot be in any case exceed 8% percent of the sale rate in view of the provisions of section 44AD.

41. On additional ground No. 1 of appeal, the ld. AR for the assessee submits that definition of transfer is defined in section 2(47) of the Act. The ld. CIT(A) in his order erred in applying definition of transfer as defined in section 2(47) of the Act to the case of assessee for whom the plots of land

are stock in trade. The provisions of section 2(47) apply to capital asset only and the action of the Assessing Officer is liable to be quashed which is inconsistent to provision of the Act. To support his submission, the ld. AR of the assessee relied upon the following decisions:

- *CIT vs Motilal C. Patel & Co. (1988)71 CTR 0098(Guj)*
- *CIT vs Ashaland Corporation (1981) 25 CTR294 (Guj)*
- *CIT vs Shah Doshi & Co. (1981) 23 CTR 307 (Guj)*
- *ITO vs Shri Shiddarth S. Patel (ITA No.1852 & 1853/Ahd/2003 and ITA No.2959/Ahd/2003)*

42. The ld. AR submits that in the aforesaid decision, the Hon'ble jurisdictional High Court clearly laid down that in case of a dealer in immovable property, the profit can be considered to be earned by the dealer only in respect of immovable property for which registered sale deed is executed in favour of the customer by the dealer. The Assessing Officer in page no. 18 of the assessment order recorded that during the year the assessee executed registered sale deed in favour of 68 customers/purchasers. Accordingly, the Assessing Officer to set off of undisclosed income admitted during the survey of Rs.1.50 crore against undisclosed income finally getting determined in assessee's case to our double taxation. To support various contention the ld AR for the assessee also relied on the following decisions;

- ❖ *Kailashben Manharlal Chokshi Vs CIT (2010) 328 ITR 411 (Guj),*
- ❖ *CIT Vs Golden Finance (2013) 40 taxmann.com 329 (Guj),*
- ❖ *ACIT Vs Ramanbhai Patel (2007) 26 CCH 0179 (Ahd Trib),*

- ❖ CIT Vs Padam Chand Ramgopal (1970) 76 ITR 719-SC,
- ❖ CIT Vs Margdarsi Chit Funds (P) Ltd (1985) 155 ITR 442 (AP),
- ❖ Glass Lines Equipments Vs CIT (2002) 253 ITR 454 (Guj),
- ❖ CIT Vs Motilal Patel & Co. (1988) 173 ITR 666 (Guj),
- ❖ CIT Vs Ashaland Corporation (1982) !33 ITR55 (Guj),
- ❖ ITO Vs Sidharath S Patel (ITA No. 1852 & 1853/Ahd/2003),
- ❖ PCIT Vs Marg Ltd (2017) 84 taxmann.com 52(Madras),
- ❖ CIT Vs Ani Kumar & Co (2016) 67 taxmann.com 278 (Kar),
- ❖ CIT Vs Regional KisanGramin Bank (2014) 42 taxmann.com 578 (All),
- ❖ CIT Vs UP State Food & Essential Commodities (ITA No. 64 of 2008).

43. On additional ground No. 2 the Ld. AR for the assessee submits that the assessee admitted undisclosed income of Rs. 1.50 Crore during the survey. The Ld. CIT(A) erred in not directing the A.O. to give setoff of undisclosed income admitted during the survey against the undisclosed income finally getting determined in assessee's case to avoid double taxation.

44. The assessee also filed the following documents on record:

Sr. No.	Particulars	Pages
1	Written submissions before CIT(A) date 05.06.2014	01-71
2	Impounded material:- Diaries B1 to B5	72-99
3	Notarized affidavit of Mr Ritesh Gheewala dated 18.06.2014	100-104
4	Notarized affidavit of Mr Parvin Virash dated 18.06.2014	105-106
5	Audit Report along with annexure for the year ending 31.03.2010	107-143

6	Letter to AO dated 28.03.2013 with affidavit of Mr Ritesh Gheewala	144-147
7	Remand Report by AO dated 21.01.2014 along with statements of Rajesh Pangawala & Ritesh Gheewala dated 13.10.2014	148-154 155-169
8	Rejoinder to Remand Report dated 08.11.2014 along with (i) Statement of Shri Rajesh Pengawala dated 06.01.2009 (Gujarat) (ii) Free English translation of statement of Rajesh Pengawala (iii) Statement of Shri Ritesh Gheewala dated 06.01.2014 (Gujarati) (iv) Free English translation of statement of Ritesh Gheewala (v) Free English translation of statement of Rajesh Pengawala 3.10.2014 (vi) Free English translation of statement of Ritesh Gheewala 13.10.2014	170-180 181-190 191-197 198-199 200-201 209-212

45. The assessee in his separate paper books also filed following documents on record.

- (1) Copy of recorded statement of Ritesh Gheewala dated 06.01.2010,
- (2) Copy of retracting affidavit of Ritesh Gheewala dated 28.03.2013,
- (3) Copy of recorded statement of Rajesh Pengawala dated 06.01.2010,
- (4) Copy of recorded statement of Gondalia dated 07.01.2010 recorded during survey, with retraction statement,
- (5) Copy of impounded diary in relation to property No, A-306 and B-102,
- (6) Copy of affidavit of Praveen Kapachi dated 18.06.2015,
- (7) Relevant details of booking of plot made by customers in water work project about Plot No. A-306, booked by Kokila M Lalwala,

(8) Copy of sale deed dated 25.06.2012 in respect of Flat No. A/102 Shivalik Height Apartment with its true English translation.

46. On the other hand, the ld. CIT-DR for the Revenue supported the order of the Assessing Officer. The ld. CIT-DR also filed his written submission in running into eight pages, which were taken on record. The ld. CIT-DR submits that during the course of survey proceedings certain incriminating documents found in impounded. The survey team recorded the statement of partners of assessee Shri Rajesh Pengawala and Shri Gobarbhai Gondalia. In the statement, the partners admitted unaccounted income of Rs.1.50 crores during the AY.2010-11. During the course of survey proceeding, five pocket diaries were found and impounded and were seized vide Annexure- BI-1, BI-2, BI-3, BI-4 and BI-5. This diary contents various entries some of which date-wise records of cash receipts and payments relating to Water World Project. On considering such evidence, it indicates the rate of plot @ 1,500/- per sq. yard. The Assessing Officer adopted the same rate of plot which was most reasonable and minimum possible rate. Both the partners in their statement also admitted the same rate. The average area of the plots is 212.91 Square yard. The average rate of registered sale consideration per square yard works out by assessee is Rs.417.97 per square yard. Thus, unaccounted income of the assessee was worked out at Rs. 1082.03 (1500-

417) per square yard. For AY 2009-10, the AO worked out addition of Rs. 56,68,250/- (1082.03 x 22 x 417.97) and for AY 2010-11, worked out at Rs. 7,96,84,128/- (1082.03 x 417.97 x 411 =9,60,61,640- 1,50,00,000). The ld. CIT(A) in his consolidated order dated 15.02.2016, allowed part relief to the assessee. The decision of ld. CIT(A) in granting part of the assessee is not acceptable, as in the statement recorded during course of survey, the main partner Shri Rajesh Pengawala provided explanation regarding various marking signs placed in the lay out and also given rate at which booking was made. While explaining the date, he indicated the rate of Rs.1400/- to Rs.1500/- per square yard, even though he did not have any documentary evidence. In reply to question no. 19, Gobarbhai Gondalia was asked about the rate at which booking were made in the project; he stated that rate was at Rs.1500/- per sq. yard. Shri Riteesh Gheewala, accountant of assessee firm also made his statement about recording pocket diary found and impounded during survey. In his statement on oath, the accountant admitted unequivocally in response to question no. 3 that it is the person maintaining the diaries and receiving the payments in cash and cheque. In the light of submission made by assessee regarding the booking during post-survey enquiry and also taking into consideration, the statement of the partners and the accountants, recording during the survey, it would be judicious to

consider that total number of 433 plots in respect of the assessee received money till 31.03.2010. The assessee contended that total places were sold in AY.2009-10, therefore the undisclosed income in respect of 22 plots were considered in AY.2009-10 and for remaining 411 plots undisclosed income earned by way of receipt of on-money were brought to tax in AY.2010-11. During the assessment proceeding, the statement of Shri Rajesh Pengawala was recorded on oath. In the statement on oath, his statement of Shri Riteesh Pengawala was also recorded in his statement of Shri Riteesh Pengawala admitted that all pocket diaries impounded during the course of survey and all entries recorded by him in his own hand writing. And on being asked during the statement he did not remember as to how show. The ld. CIT-DR submits that disclosure statements are having evidentiary value while defined as section 17 to 31 of the Indian Evidence Act. The general rule with regard to admission is that the party or their representative says about the matter in dispute or facts relevant thereto which throw light on the issue in dispute are substantive evidence. To support his submission, the ld. CIT-DR relied on the decision of Supreme Court in the case of Thiru Jon vs Returning Officer, AIR 1977 SC-1724. In the present case there is no allegation of coercion. The superior courts have held that the confession need not be ruled out merely because of allegation of coercion. The

confessions are to be considered as a whole and not in any undivided form. In the case of assessee, there is no allegation of coercion. The ld. CIT-DR submits that even retracted confession was held be binding. To support his submission, the ld. CIT-DR relied on the decision in Surjit Singh Chhabra (1997) ISCC 508, 509 (SC) and State of UP Vs Boota Singh, AIR 1978 SC 1770. The ld. CIT-DR further submits that the Hon'ble Supreme Court in the case of Pullangode Rubber Produce Co. Ltd. Vs State of Kerala (1973) 91 ITR 18 held that admission is an extremely important piece of evidence though it is not conclusive. The statement made voluntarily by the assessee could form the basis of assessment. The mere fact that the assessee retracted the statement could not make the statement unacceptable. The burden lie on the assessee to establish that this admission made during the survey was wrong and in fact there was no additional income. This burden even seems to have been admitted to be discharged. The ld. CIT-DR further retracted that the retracted that the admission is a cut piece of evidence, though not conclusive and same can be used against a person who makes it. The reason behind this is that a person making a statement stops the opposite party for making further investigation. The retraction can be made under certain circumstances on the ground no. (i) whereas statements is not given voluntarily but it was obtained under coercion, threat or undue influence.

Though assessee can discharge his pertains by giving direct evidence of coercion by circumstantial evidence. The time gap between the statement and the retraction would also one important points to be taken into consideration, whether statement was volunteer or not and (ii) the other circumstances where the statement was given under mistaken belief of either fact or law. Here again burden is upon the person giving the statement to prove that the statement given by him was factually incorrect or was untenable in law. The facts disclosed during the statement were within the exclusive knowledge of the partners of the assessee, one disclosed in full consciousness, were binding on the assessee, as no contrary is proved. To support his submission, the ld. CIT-DR relied on the decision of Manharlal Kasturchand Choksi Vs ACIT (1997) 61 ITD 55 (Ahd.). The retraction of assessee is suffered from other procedural defects. The assessee being responsible for execution of project voluntarily gives statement under section 133A on a particular of times. It does not indicate any sort of pressure or coercion but alert presence of mind and clarity of thought of the person who was deposing. In other statement, it was categorically and unequivocally stated that there were maintaining proper books of accounts, these facts were within exclusive knowledge of partners who voluntarily stated in the same. These facts were in exclusive knowledge, once disclosed

voluntarily in full consciousness, were binding of the assessee has no contrary was proved. The seized documents and the statement recorded under section 133A constitute valid piece of evidence which can be used in assessing undisclosed income. This has been held by Pune Tribunal in the case of Chander Mohan Mehra Vs ACIT (Inv.) (1999) 65 TTJ 327 (Pune). The claims of assessee are baseless as no offer was made by assessee to inform instances during post-survey enquiry which shows assessee is taken a plea to get away from his voluntary statement is on afterthought story. The ld. AR submits that belated retraction would following the category of afterthought instead of being retracted as held by Gujarat High Court in the case of Council of Institute of Chartered Accountant of India Vs Mukesh R. Shah (2004) 186 CTR 579 (Guj.). The ld. CIT-DR for revenue further submits that from the facts of the present case it emerges that retraction was made after a period of one month, it was never communicated to the Departmental Authority. From the record, it is impossible to hold that any threat, coercion has been exerted during the recording of confession statement of assessee. The statement was voluntarily; therefore the action of Assessing Officer is to be confirmed.

47. We have considered the rival submission of both the parties and gone through the order passed by the lower authorities carefully. We have also

gone through the order of lower authorities carefully. We have also deliberated on various case laws relied by both the parties. We have also seen the statement recorded during the survey action and post survey investigation. First ground of appeal relates to rejection of books of account and second grounds of appeal relates to estimating the addition. Both the grounds of appeal are interconnected. Similarly, third (substituted) grounds of appeal is relates to sustain the addition to the extent of 50% of the difference rate between recorded sale and estimated rate of sale. All three issues are interconnected therefore, we will discussed all these issues altogether. During assessment the AO rejected the books of account and estimated the income on the basis of statement of partners of the assessee-firm and accountant, recorded during survey action and the investigation carried out post survey action. The AO rejected books of accounts (para 5.10 of his order), mainly for two reasons by taking view; (i) that the sale consideration recorded in the books of accounts are significantly lower than actual sale consideration as large part of sale consideration is received in cash, which is amply clear from the entry in the diaries impounded during survey, wherein entry with regard to plot no. A-306 purchased by Suresh SK is Rs.3,00,000/- and against plot No. B-102 purchased by Praveen Kapachi is Rs. 3,50,000/-and (ii) on perusal of details of certain payment the AO

found that assessee has shown commissions payment of Rs. 15,000/- to Dhirajbhai Manilal Rana on 26.12.2009, however, on verification of cash book it was found that no such entry is reflected, these facts leads to the conclusion that books of accounts are not complete. The Id CIT(A) confirmed the action of AO by taking view that the books of account of the assessee not complete and are incorrect and do not record all material transaction. However, for AY 2009-10, the Id CIT(A) recorded that no ground of appeal in challenging the rejection of books of accounts was raised by assessee. It was also held that if the specific condition of section 145(3) that accounts are not correct have been proved by AO, then even if profits were estimated in the spirit of section 144, is justified.

48. Before us, the Id AR for the assessee vehemently submitted that during the survey action the assessee declared additional income of Rs. 1.50 Crore as undisclosed income which is duly accounted while preparing profit and loss account and which can be verified from the accounts. The books of accounts are correct and were furnished during the course of assessment proceedings which cannot be said to be incorrect income, the small expenditure of Rs.15,000/- being not found debited from books showing turn over from amount of Rs.1.10 crores and income of Rs.1.16 crore cannot be ground for rejection of books of accounts. Further the books of accounts were audited

and the auditors have not given any adverse findings/ qualification. With regards to alleged entries in the seized diaries about Plot No. B-102 and A-306, the Id. AR for the assessee submitted that the said transactions are not related with the assessee. Further, the statement of Reetesh Gheewala was recorded illegally and invalidly, as the process of recording statement under section 133A can be had only when, when he refuse to give his statement or does not co-operate in recording statement during survey and there is no such non-cooperation recorded by survey team.

49. Now let us advert to examine the factual submission placed by Id. AR for the assessee. There is no dispute that during the survey the assessee has declared additional undisclosed income from the project of Rs. 1.50 Crore. The assessee included the said undisclosed income in its total income while filing return of income and paid due tax thereon. As noted above the AO has mainly two reasons for rejecting books of account of the assessee, firstly the transaction with regards to plot No. A-306 and plot No. B-102 and secondly non-recording the commissions expenses of Rs. 15,000/-. The assessee right from the beginning stated that the alleged transaction with regards to plot No. A-306 and plot No. B-102, recording in the impounded diaries is not related to the assessee. So far as plot No. B-102, allegedly purchased by 'Praveen Kapchi' is concerned, the assessee has placed on record the copy of

sale deed in respect of flat No. B-102 Shivalik Heights, Vesu Surat, dated 25.06.2012 executed by Shivalik Enterprises in favour of Praveen Kapchi (page No. 28 to 53 of PB). The assessee also filed affidavit of Praveen Kapchi (page No. 105 & 106 of PB), wherein, the said Praveen Kapchi made statement that he had not invested, booked or purchased any plot or Bungalow in 'water word project'. For other transaction with regards to A-306, the entry is also not related with the project of the assessee. We find that the assessee has placed on record the details of the booking of plot No. A-306, which was booked by Kokila M Lalwala and he has paid Rs. 80,000/- (page No79 of PB). Thus, from the aforesaid documentary evidences the assessee has proved that the entry with regards to plot No. A306 and B-102 allegedly recorded in the impounded diary are not related with the assessee. The said diary was recovered from the possession of Accountant Reetesh Gheewala. Statement of Reetesh was recorded by survey team on 06.01.2010. We have seen the statement of Reetesh Accountant. Total 10 questions were asked to him. None of the question was related with plot No. A-306 or B-102 allegedly recorded in the seized diaries was asked to Reetesh accountant. In answer to question No. 9, Reetesh Accountant replied "*I was telling wrong that the price of the plot is Rs. 2.5*

lack to Rs.2.7 lacs. Its actual price is approximately around Rs. 5.0 lacs to Rs. 6.0 lacs.”

50. We have also gone through the statement of Rajesh Pengawala recorded by survey team on 06.01.2010. Total 22 questions were asked to him. The relevant question and answers are extracted as under;

- *Question No. 13: during the course of survey proceedings, you have informed that sale of some of your plots is made at Rs. 1,400/- to 1500/- per Square yard, kindly therefore, informs as per your sale register which plot were sold at rate of Rs.1400/- to Rs.1500/- per Sq Yd.*
- *Answer-13 I do not have any record, accounting books or other material on the basis of which I can reply to your question.*
- *Question No.17: A leaflet of NRI & investor is being shown to you in respect of your project Water World, Ubhrat, wherein the rate of Rs.2,500/sq. ft. is shown. Therefore, please inform that as to why your advertisement is misleading to the customers and is false and also inform whether the said rate of Rs.2,500/sq. ft. is correct or not?*
- *Answer No.17: The said project's leaflet is of our firm and of our project namely Water World at Ubhrat. Therein the rate of Rs.2,500/sq. ft. described is to give an idea to the customers. Besides this, I would like to inform that I have not made any sales of the plot at this rate.*
- *Question No.18: Today, during the course of survey proceedings, 5 different small pocket diaries were found from your office premises. The said 5 pocket diaries are identified by serial nos. 1 to 5 under*

the Annexure - BI and were impounded. Give explanation regarding the details recorded in all these diaries. Also, state that whether such details were recorded in your books of account? Give explanation thereof.

- *Answer No. 18: The noting of the said diaries represent our business receipts. Out of which the amount withdrawn from the bank are recorded in our books of account. The rest of the transaction are not recorded in our books of account and hence it is our unaccounted business income.*
- *Question No.19: At what rate the sale of plots has been made against which payment has been accepted as per said pocket diary?*
- *Answer No. 19: The sale of plots stated in the said pocket diary is made at Rs. 470/- per sq.yd.*
- *Question No.20: According to the details of said found diaries, it seems that you are making us write wrong details in answering to question no. 19. If you are lying, give explanation for it.*
- *Answer No.20: No Sir. I am making you write the correct details.*
- *Question No.21: You have received a SMS on your mobile from a person named Siddharth Shah on 4.1.2010 at 8:11 p.m., wherein the names of foreign customers and the details of financial transactions made from there are written. Moreover, SMS received in respect of payment details from Kuntesh dated 30.10.2009 at 3:17 p.m. and from Rajiv on 1.10.2009 at 3:58 a.m. mentioning about finance. Give explanation regarding these transactions and inform about whether such details are recorded in the books of account or not?*
- *Answer No.21: At present, I have no idea about such financial transactions made with such persons.*
- *Question No..22: Do you want to say anything specific?*
- *Answer No.22: Yes, Sir, taking into the account, the books of account, laptop, loose papers, mobile, etc found from my office premises, today during the course of survey proceedings, I want to inform that the amount of Rs.1,50,00,000/- (Rupees One Crore and fifty lac) is my net unaccounted business income after deducting all*

business expenses. In addition to that I want to inform that said Rs. 1,50,00,000/- is net unaccounted income. It is my additional income over and above my accounted income. I assure that I will timely pay due tax thereon.

51. From the aforesaid statement of Reetesh Accountant and Rajesh Pengawala recorded by survey team on 06.01.2010, it cannot be inferred that they admitted the rate of plots at Rs. 1400/- or Rs. 1500/- per square yard. Rather by bringing the sufficient material on record the assessee has proved that the alleged entry in the seized material / diaries are no where related with the plot No. A-306 or B-102 of water word project developed by the assessee. Therefore, the first basis of rejection of books of account has no leg to stand.
52. The second ground of rejection of the books of accounts was non-recording the commissions payment of Rs.15,000/-. As noted above that the ld AR for the assessee vehemently argued that a small expenditure not found debited in the books when the assessee has shown turnover of more than Rs. 1.10 Crore and income of Rs. 1.61 Crore cannot be a ground of rejection of books of accounts. We find that Hon'ble Supreme Court in CIT Vs Padam Chand Ram Gopal (supra) held that insignificant mistake noticed in one year cannot be a ground of rejection of books of accounts, when no other mistake was found in any other year's books. Further, Hon'ble Andhra Pradesh High Court in CIT Vs Margadarsi Chit Funds (P) ltd (supra) held that the Income Tax Officer is obliged to state the defects inherent in the method followed by

the assessee and also to record a clear finding that system of accounting is such that correct profit cannot be deducted from the books before rejecting the books. We have noted that the AO has not pointed out any other serious mistake in the books of assessee. Moreover, the additional income of Rs. 1.50 Crore disclosed by the assessee was included in the profit and due tax has been paid thereon. Therefore, in our considered view the rejection of books of account by AO is not justified in absence of serious defects. Hence, the action of AO in rejecting the books of the assessee is set-aside.

53. Now advertent to the estimation of income by the assessing officer on the basis of statement of Reetesh Accountant and the partner of the assessee. The ld AR for the assessee also vehemently submitted that recording of statement under section 131(1) during the course of survey is illegal and invalid unless there is satisfaction of survey party that the person refuses to make his statement or does not co-operate in recording statement during survey. We have already extracted the relevant part of statement of the person, on the basis of which the AO made estimation of rate of sale price of various plots in water word project, which was being developed by the assessee during the relevant period of time. The statement of those persons was recorded under section 131(1), however, there is no endorsement of the survey party that the partners of the assessee-firm refused to have their

statement or not co-operated during survey. We find that Hon'ble Gujarat high Court in Pawan Kumar Goel Vs Union of India (supra) held that provision of section 133A(4) prohibits the income tax authority to remove cash, stock or other valuable article and it is only upon non-cooperation or refusal by the person under search that power under section 131(1) can be resorted. It was further held that when the revenue authorities have not demonstrated from the material as to whether the assessee failed to co-operate, which is an eventuality where the income tax authority would required to record its reasons to resort to the provisions of section 131(1) and convert the whole process into a search and seizure. When such facts are completely missing in the process and that such violation is fatal which can turn draconian to inherent safe guard of at least recording of such reason and satisfaction of non-cooperation to resort to other coercive steps needs to be set clearly by the income tax authority.

54. We further find that the AO has not investigated in the facts, either by examining the purchaser in the project of the assessee-firm nor collected any evidence from the officer of sub-registrar about the rate of sale of the various plots. No adverse material collected by AO except rely of the statement recorded during the survey. It is settled law that the statement recorded during the survey is not admissible in evidence unless it is corroborated with

the material evidences. The AO worked out average rate of all the plots in the project. It is a matter of general practice that no uniform rate of sale is applicable in the private projects, the rate may vary depending on various factors like size, location, time of booking and number of bookings. So uniform rate is not applicable in such private project.

55. In view of the aforesaid legal position, we also held that the recording of the statement by survey team under section 131(1) is not valid. Thus, no cognizance of such statement could be taken. Hence, the addition which is also based on the statement is not legally sustainable. In view of the aforesaid factual and legal discussions, we hold that rejection of books of accounts was not valid and further no such estimation of rate of plot which is based on the statement of partner and accountant is not legally sustainable in absence of other corroborative evidence on record. Thus, the assessee also succeeded on this submission as well. Hence, the ground No. 1, 2 & substituted ground No. 3 is allowed.

56. Considering the facts that we have allowed ground No. 1, 2 & substituted ground No. 3, therefore, consideration on other submissions and adjudication of other and additional grounds of appeal have become academic,

57. In the result, the appeal of the assessee for AY 2010-11 is allowed and the cross appeal of the revenue is dismissed.

ITA No. 1166/Ahd/2016 appeal by assessee for AY 2009-10

58. The assessee has raised following grounds of appeals:

- (1) *The Id. CIT(A) has erred in law and on facts in confirming the action of the Id. A.O. of making estimation of sale rate per square yard as well as of the income from the project of the appellant without rejecting the books of accounts and the book results in the appellant's case by invoking the provisions of sec. 145 of the Act*

It is, therefore, prayed that the relevant addition confirmed by the Id. CIT (Appeals) on the basis of estimation of the sale rate per square yard as well as the income from the project of the appellant be deleted.

- (2) *The Id. CIT(A) has erred in law and on facts in confirming the action of the Id. A. O. of making addition in the appellant's case on the basis of estimation of sale rate at Rs. 1,500/- per square yard.*

It is, therefore, prayed that the above action of the Id. CIT (Appeals) be quashed.

- (3) *The Id. CIT (Appeals) has erred in law and on facts in concluding and sustaining the addition on the basis that the appellant earned unaccounted income at the rate of Rs.750/- per square yard from its project.*

It is, therefore, prayed that the fair estimate of income from the project of the appellant and restricting the addition to that figure be done.

- (4) *The above grounds of appeal are independent of each other and that each ground of appeal is without prejudice to the other ground or grounds of grounds of appeal.*

The Appellant craves leave to add, amend, alter, modify, substitute, delete, change or vary all or any of the ground or grounds of Grounds of Appeal.

59. We find that the assessee has raised similar grounds of appeal as raised in appeal for AY 2010-11, facts in the year under consideration are common.

Thus, considering the fact that we have allowed the appeal of assessee for AY 2010-11, therefore, following the principle of consistency, the appeal for AY 2009-10 is also allowed with similar directions.

60. In the result, the appeal of the assessee for AY 2009-10 is also allowed.

Order announced on this 31st day of March, 2022 in the open court and result was also placed on the notice board.

Sd/-
(Dr ARJUN LAL SAINI)
ACCOUNTANT MEMBER
Surat Dated: 31/03/2022 /SGR*

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Copy to:

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

By Order

Sr. Pvt. Secretary, ITAT Surat

	Date	Initial	
Draft order verbally dictated by author (JM) part of the order was prepared by author either on dragon or directly on system	15/03/2022		
Draft placed before author	15/03/2022		
Draft proposed & placed before the second member	/02/2022		
Draft discussed/approved by Second Member.	/02/2022		
Approved Draft comes to the Sr.PS/PS	/02/2022		
Kept for pronouncement on	/02/2022		
File sent to the Bench Clerk	/02/2022		
Date on which file goes to the AR	/02/2022		
Date on which file goes to the Head Clerk.			
Date of dispatch of Order.			
Draft dictation sheets are attached			