IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, MUMBAI

BEFORE SHRI AMARJIT SINGH, ACCOUNTANT MEMBER &
MS. KAVITHA RAJAGOPAL, JUDICIAL MEMBER

ITA Nos.7088 to 7090/Mum/2018
(A.Ys. 2008-09, 2009-10 & 2012-13)

M/s R. Kantilal & Co. Tower-F(W),Office No. 7030, Bharat Diamond Bourse, Block, Bandra Kurla Complex, Bandra (E), Mumbai – 400 051	Vs.	DCIT, CC-6(1) Income Tax Office, 19th Floor, Air India building, Nariman Point, Mumbai – 400 021
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AACFR5384C		
Appellant	..	Respondent

ITA Nos.6772 to 6776/Mum/2018
(A.Ys. 2009-10 to 2013-14)

DCIT, CC-5(1) R. No. 1928, 19th Floor, Air India Building, Nariman Point, Mumbai – 400 021	Vs.	M/s Parag Suresh Kothari, 6 Krishna Mahal B Wing D Road Marine Drive, Mumbai - 400002
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AAEPK2549Q		
Respondent	..	Appellant

ITA Nos.6778 & 6779/Mum/2018
(A.Ys. 2008-09 & 2009-10)

Dy. Commissioner of Income Tax, Central Central- 5(1)	Vs.	M/s R. Kantilal & Company, Tower F, West Office No.

Room No. 1926, 19th Floor, Air India Building, Nariman Point, Mumbai – 400021		7030, Bharat diamond Bourse, Bandra Kurla Complex, Bandra (E), Mumbai 51
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AAEPK2549Q		
Respondent	..	Appellant

ITA Nos.6757, 6759 to 6761/Mum/2018
(A.Ys. 2008-09, 2011-12 to 2013-14)

DCIT, CC- 5(1) Room No. 1928, 19th Floor, Air India Building, Nariman Point, Mumbai – 400021	Vs.	M/s Pratik Suresh Kothari, No. 10, Rajhans G. Road 88 NS Road,Marine Drive Mumbai - 400002
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AAEPK2548R		
Respondent	..	Appellant

Appellant by :	Nishit Gandhi
Respondent by :	Dharm Veer Singh & Dinesh Singh

Date of Hearing	21.07.2022
Date of Pronouncement	27.09.2022

आदेश / O R D E R

Per Amarjit Singh (AM):

These 14 appeals are comprised off 11 appeals filed by the revenue and 3 by the asessee are based on identical issue on similar facts in the case of partnership firm M/s R. Kantilal & Company and two partners Shri Pratik Kothari & Shri Parag S. Kothari, therefore for the sake of convenience all these appeals are adjudicated together. We take the ITA No. 6779/Mum/2018 and ITA No. 7089/Mum/2018 based on similar

facts and issues filed by the revenue and assessee as a lead cases for adjudication and their finding will be applied to the other similar appeals as mutatis mutandis.

ITA No. 6779/Mum/2018: (Revenue's Appeal)

"1. Whether on the facts and circumstance of the case and in law, the Ld. CIT(A) has erred in reducing the net profit on non genuine purchases from 8% determined by the AO to 5.48%, without the assessee having brought on record any additional evidence or submission that had not been considered already by the AO while determining the net profit.

2. Whether on the facts and circumstance of the case and in law, the Ld. CIT(A) erred in determining the net profit of the assessee on non genuine purchases at 6% by relying on instruction of 2008 dated 22/06/2008 even though the facts of the case do not fall within the provisions of these instructions in so far the assessment was made u/s 153A r.w.s 143(3) pursuant to search and seizure operation.

3. Whether on the facts and circumstance of the case and in law, the Ld. CIT(A) erred in giving relief to the assessee by determining the net profit at 5.48% on non genuine purchases by relying on instruction of 2008 dated 22/06/2008 which required/specifies 6% of net profit on total turnover under the Benign Assessment scheme, while the assessee declaring only 0.52% net profit on total turnover.

4. Whether on the facts and circumstance of the case and in law, the Ld. CIT(A) erred on facts and in law by not upholding the addition of Rs.1,00,00,000/- u/s 68 even though the assessee was not able to prove the genuineness of the transaction as per provision of section 68 of the IT act.

The appellant prays that the order of Commissioner of Income-tax (Appeal) on the above ground be set aside and that of the Assessing Officer be restored. The appellant craves leave to amend or alter any grounds or add a new ground which may be necessary."

ITA No. 7089/Mum/2018

"(a) rejecting the Ground of Appeal in which the appellant had contested the order" passed by the AO u/s 153A rws 143(3) of Income Tax Act, 1961 by claiming that there was lack of jurisdiction on the part of AO because the order was not based on any incriminating material unearthed during the search on the appellant.

(b) retaining part of addition made by the AO because in the view of the appellant, no addition could have been made by the AO while framing the

impugned assessment order, since the same were not based on any incriminating material unearthed during the course of search.

(c) without prejudice, making addition of Rs.2.55 Cr. as against addition made by AO of Rs. 1,62,95,785/- (Rs.1,00,00,000/- Rs.62,95,785/-) in the assessment order passed without giving Show Cause notice for enhancement of income.

(d) holding that the declaration made of Rs.4.07 Cr. in the statement recorded u/s 132(4) was binding on the appellant and the retraction of the same by the appellant is an afterthought.

(e) making addition of Rs.2.55 Cr. on account of loans borrowed because the actual loan borrowed by the appellant during the previous year relevant to assessment year under appeal is only Rs.1,00,00,000/-.

(f) confirming addition of Rs.43,12,612/- as against addition made by AO of Rs.62,95,785/-on account of profit from tainted purchases of Rs.7,85,97,313/-.

(g) directing that addition of Rs.1.75 Cr. is required to be made in AY 2011-12 of the appellant based on conclusion drawn in the order passed for AY 2009-10.

The appellant respectfully submits that no order can be passed u/s 153A rws 143(3) if no evidence is unearthed as a result of search u/s 132 on the appellant or that without prejudice no addition can be made in the order passed u/s 153A rws 143(3) of any item which is not unearthed during search on the appellant.

The appellant further respectfully submits that the appellant has only taken loan of Rs.1 Cr. and not Rs.2.55 Cr. and hence no addition on account of loan can be made in the hands of the appellant on account of loan taken by other members of the group. and that it has submitted all the details to establish the purchases, hence addition confirmed by the Learned CIT(A) of Rs.43,12,612/- is bad in law.

The appellant further respectfully submits that its declaration of additional income of Rs.4.07 Cr. was taken without any incriminating material found, hence it had rightly retracted the declaration of additional income.

The appellant further respectfully submits that it has independently proved all the loans taken by it as well as the partners of the appellant firm in their respective hands in assessment orders passed in their case in all the years connected with assessments made after search had also proved the loans. Hence directing that addition is required to be sustained in the hands of the appellant for loan taken by the group just because declaration was obtained u/s 132(4) (which was later retracted) is bad in law and such should be withdrawn. The addition made on account of loans sustained in various assessment years, as per the order of CIT(A), are as under:

A.Y.	*Addition made on account of loan (Rs.)*
2008-09	*1.2 Cr.*
2009-10	*2.55 Cr.*
2011-12	*1.75 Cr.*

The appellant submits that all the grounds of appeal are without prejudice to one another.

The appellant craves leave to add, amend, withdraw any grounds of appeal before the appellate order is passed."

2. The fact in brief is that a search action 132 of the Act was conducted on M/s R. Kantilal & Company on 05.05.2014. Thereafter a notice u/s 153A of the Act was issued on 23.0.2015. In response vide letter dated 09.09.2015 the assessee submitted that original return of income declaring total income of Rs.42,78,950/- filed on 05.08.2010 be treated as compliance to notice u/s 153A of the Act. The assessee company was engaged in the business of manufacturing and exporting of diamonds. The A.O stated that there was two issue that emanated pursuant to the search action i.e. bogus purchases made by the assessee and bogus unsecured loans.

3. During the course of search action the partner of the assessee firm Shri Pratik Kothari was asked to submit the copies of ledger account along with the bills/vouchers of the purchase made from the following parties:

Sr. No.	Name of the party	Amount	A.Y.
1.	Kushal Exports	1,56,60,000/-	2009-10
2.	Vaishali Gems	2,50,87,500/-	2009-10
3.	Mouli Gems	2,52,30,000/-	2009-10
4.	Surya Diam	1,27,19,813/-	2009-10
	Total	7,85,97,313/-	

4. The search in the case of the assessee was conducted on the basis of an earlier search u/s 132 in the case of entities belonging to Rajendra

Jain group on 03.10.2013. During the course of search copies of statements of Shri Yogendra Raj & Bhanwarlal Jain who were the directors/controllers of the above bogus companies were shown to Shri PratikKothari, partner of the asessee company. It was also explained to him that the aforesaid persons have stated in their statements that these four entities were not into actual business but they were merely providing accommodation entries against cash payment. However, Shri Pratik Kothari stated that purchases were actually made from these parties through brokers/agents. The A.O stated that assessee had failed to provide any of the detail of brokers through whom the purchases were made from the said four parties. The A.O stated that Shri Pratik Kothari also admitted that some purchases were actually made out of the unaccounted funds generated out of the regular business activities, since the sales were made to genuine parties and the payments were received in cheque, these bills were arranged from certain brokers to regularize the purchases made in cash. He was requested to explain as to why all the purchases made from the said bogus parties should not be treated as bogus. The A.O further stated that since the unaccounted money generated was out of the business, therefore, Shri Pratik Kothari requested that only the peak value to be taxed as unaccounted money generated out of the business operations.

In view of the above facts as elaborated above the assessee was asked to establish the genuineness of the purchases made from M/s Kushal Exports, M/s Vaishali Gems, M/s Mouli Gems, Surya Diam. It was asked to furnish the following:

"i. copy of invoice/bills received from them.
ii. Present address of the parties
iii. Copy of delivery challans

iv. Copy of transportation receipts.
v. Copy of octroi paid
vi. Copy of stock register
vii. Copy of corresponding sales bills of the goods purchased.
viii. The name, PAN and address of the brokers who arranged these purchases as stated by Sh. Pratik Kothari in his reply to Q.18 of his statement recorded on oath u/s132(4) of the Act. Also, the details of the brokerage paid to them and its treatment in the books was called for."

In response, the assessee submitted that the purchases from Kushal Exports during the year were made to the amount of Rs.1,56,60,000/- and not Rs.2,70,63,000/-. The purchases made in A.Y. 2008-09 from this party was Rs.1,14,03,000/- and the same have been dealt with in the reassessment order passed for assessment year 2008-09 on 20.03.2016. The assessee has submitted the following detail:

"i. Sales bills issued by the suppliers
ii. Rough diamond/polished diamond stock register showing inward receipt.
iii. Labour bills of persons who did work on these.
iv. Polished diamond extract register showing polished diamonds received back from the labourers.
v. Bank statement of the assessee.
vi. Bank statement of the suppliers. It was emphasised that there are no simultaneous cash withdrawals by them against deposit of assessee's cheques.
vii. Bank showing payment made to labour parties
viii. Ledger account of the suppliers in assessee's books.
ix. Affidavit from the suppliers confirming the sale of diamonds X. PAN card of the suppliers
xi. ITR V of the suppliers"

It was also explained that unlike import transactions local purchases were made on the basis of interaction between parties etc. It was also explained that no delivery challan system was prevalent in the business and same were generally handled by persons because of small packets. The A.O has not accepted supporting evidences filed by the assessee on the basis of search action u/s 132 of the Act which carried out on the

concern of Shri Bhanwarlal Jain, Rajendra Jain, Shri Dharmachand Jain, Shri Yograj Singhvi on 03.10.2013 before conducting the search action in the case of the assessee. The A.O stated these concerns issue bills/give accommodation entries for a commission to a various parties who normally purchases diamond in the cash from undisclosed parties and give bills to show purchases against sale in their account. It is also stated that these concerns also provide accommodation entries of unsecured loan against cash.

Regarding unsecured loan transactions the A.O stated during the course of search action while recording statement of Shri Pratik Kothari, the detail of loan taken by Shri Pratik Kothari and Shri Parag Kothari M/s R. Kantilal & Company from assessment year 2007-08 onwards were asked for. On perusal of the ledger it was inter alia seen that the following loans have been taken during the year under consideration:

Sr. No.	Amount of loan	Name of the entity	A.Y.
1.	1,00,00,000	Kriya Impex Pvt Ltd.	2009-10

It was also brought to his knowledge that the aforesaid concern was run by Shri Bhanwarlal Jain, Rajendra Jain, Shri Dharmachand Jain, Shri Yograj Singhvi who were into the business of providing accommodation entries. It was explained to Shri Pratik Kothari that during the course of search proceedings in the case Shri Rajendra Jain Group on 3.10.2013 they had accepted that they were into the business of providing accommodation entries in the form of unsecured loan, tax purchases etc. Therefore, it was requested to explain by not the unsecured loan taken from the above party be treated as accommodation entry. The A.O stated that Shri PratikKothari admitted the said accommodation entries of unsecured loan taken by paying the equivalent amount of cash generated

out of the regular business activities of the firm and requested that the credit of working out of the peak may be given to them and only the peak should be brought to tax as same was used to pay the loans and take new ones.

5. However, in the return of income filed in response to notice u/s 153 of the Act the A.O noticed that neither the peak value for the entire period as mentioned in the statement u/s 132(4) of the Act was offered to tax nor any additional income offered in the respective assessment years.

6. Regarding the unsecured loan the assessee was asked to establish the identity its creditworthiness and the genuineness of the transaction made with Kriya Impex Pvt. Ltd. In response the same assessee submit the following:

"i. Ledger confirmation
ii. Copy of PAN card
iii. ITR-V of the lender
iv. Bank statement of the lender showing the loan given and returned. It has been stated that it is evident that the source of the deposit is not cash deposited or that cash was withdrawn after payment.
v. Bank statement of the assessee showing loan taken and repaid to Kriya Impex P. Ltd.
vi. Copy of affidavit from the lender confirming the transaction"

The assessee submitted the ledger confirmation, PAN copy, ITR-V, lender bank statement and an affidavit confirming the impugned transaction. The A.O has not accepted the submission of the assessee stating that these documents do not prove that the parties had genuine transactions. The A.O also stated that no response was made to the notice u/s 133(6) of the Act. The A.O had not accepted the contentions of the assessee that shri Rajendra Jain and others had retracted these statements and no incriminating material was found during the course of search action. It was stated that retraction made by Shri Pratik Kothari was not

acceptable. The A.O observed that a statement recorded u/s 132(4) had evidentiary value and it cannot be retracted without disproving it.

7. The assessee was asked to show as to why the purchases made from the said parties and the loan transaction with Kriya Impex should not be brought to tax in view of search finding. In response the assessee submitted that the books of account revealed that all the loan were duly accounted and received by account payee cheque and subsequently paid by account payee cheque. In respect of purchases the assessee submitted that same have been accounted in the regular books and over the period of time have been sold resulting into sale receipts by account payee cheque only. It has been submitted that no sale have been made in cash. The A.O further stated that search action taken place in the case of Shri Bhanwarlal Jain and Shri Rajendra Jain had revealed their modus operandi and furnished the complete list of the concern operated and controlled by them which were used for the sole purpose of providing accommodation entries. The A.O stated that assessee has retracted his statement recorded u/s 132(4). The statement was recorded on 06.05.2014 but it had been retracted only in the month of September, 2015. The assessee stated that in the search proceeding conducted in the case of Shri Rajendra Jain and other parties no incriminating evidence of any nature was found nor did the name of the assessee featured in their statement. In respect of delay in retracting the statement the assessee submitted that it was retracted in the month of September, 2015 because the copy of statement was provided only in the month of August. In the retraction filed the assessee stated that it was solely on the basis of claim made by the authorized officer with a view to close the search/survey proceedings during which they were grilled beyond the capacity but withstand that they agreed to sign the

statement on the dotted line as recorded by the authorized officer. The assessee further stated that before making retraction Shri Rajendra Jain informed that their statement was extracted forcibly by the department and he had retracted it. Therefore, the assessee submitted that consequently the declaration of Rs.4.07 crores made by it u/s 132(4) of the Act required reconsideration and revisit as same was obtained due to misrepresentation of the facts. The assessee further submitted that the basis of the declaration made by it did not survive anymore in respect of such parties had categorically disowned all the declaration made by them. Therefore, the declaration made by the assessee was retracted saying that it was based on incorrect facts and abnormal circumstances. The assessee further stated that the loans and purchases were genuine and not addition was warranted u/s 68 of the Act. The A.O stated that assessee failed to establish the genuineness of the purchases and also failed to establish the actual delivery of the diamonds and stated that gross profit when the bills were obtained from entry providers always remained higher than the average gross profit. Therefore the A.O disallowed 8% of purchases of Rs.900,00,313/- i.e purchaser to the amount of Rs.72,00,025/- and made addition of Rs.62,95,785/- to the total income of the assessee. In respect of unsecured loan the A.O stated that no reply was received in response to the notice u/s 133(6) of the Act and identity of the lender had not been established. The ld. CIT(A) has partly allowed the appeal of the assessee in respect of disallowance made on account of purchases. The relevant part of the decision of Ld. CIT(A) regarding purchases as under:

> *"6.3 I have considered the submissions carefully. When it was pointed out that the assessing officer has noticed that notices u/s 133(6) were not complied with while it was contended before me that it was complied with the appellant submitted even if such notices were not complied with, no additions can be made. The modus operandi involved in diamond trade has been elaborated earlier. The purchases could not be substantiated at the time of search action. These purchases were admitted to be unsubstantiated. The appellant did not have any evidence for the movement or dispatch of goods purchased and sold. It is also*

noted that the capacity of the parties from whom the appellant had made purchases and the parties to: whom the appellant made sales was not established. Discrepancies have been highlighted by the assessing officer. Despite strenuous efforts of the appellant, the doubts are not dispelled. The party Kushal Exports has shown a loss on trading and the meagre profit is on account of interest income claimed. The entity belongs to the group of Rajendra Jain and others. In the search action in those cases, no actual stock of diamonds were found even though the same was reflected in books. The bogus nature transactions as per books was admitted. The statements recorded were not bland statements. There was admission of modus operandi, listing of key evidence of communication with beneficiaries, listing of entities indulging in bogus transactions These statements were given in the presence of independent Panchas. This cannot be summarily disowned by merely filing a self-serving retraction later. It is in the light of these evidences that Shri Pratik Kothari admitted to bogus purchases. The disallowance of purchases is certainly warranted. The assessing officer has not disallowed the entire purchases. He has assumed that purchases have been made in cash and bills obtained from the impugned party. The assessing officer has assumed profit element @ 8% on the impugned purchases and as made the disallowance based on this.

6.4. In such a scenario, where on one hand the genuineness of the purchase from the party claimed is doubted, but the genuineness of purchase as a whole cannot be doubted, the Courts have taken a view that only the profit margin embedded in such a transaction could be taxed. This is a fairly accepted principle and the same would apply in this case also. Further, a dealer operating in the market is always aware of the GP which he earns in any transaction. Taking into consideration all these aspects, the issue arrives, as to what would be the margin, one can expect while buying the material from grey market instead of normal course. Firstly, these diamonds in the grey market are always cheaper than the diamonds sources from the genuine dealer. Secondly, there is always an element of discount in the case of instant cash purchases.
6.5. A perusal of the copy of appellate orders in the case of Naitik Gems filed by the appellant shows that the issue involved purchases from entities belonging to Rajendra Jain entities and the purchases were from Sparsh Exports Pvt. Ltd. The assessing officer made a disallowance of 6% of such purchases. This was based on the Instruction no 2 of 2008 related to benign assessment in the cases of assesses in the diamond business. The Ld. CIT(A) reduced the disallowance to 3% of the purchases based on the recommendation of the Task Force group for diamond industry set up by the Government of India, Ministry of Commerce and Industry which after considering the Benign Assessment Procedure (BAP) scheme recommended a net profit of 2% for trading activity, 3% for manufacturing activity and 2.5% across the board for diamond industry. The appeal filed by the assesse in ITA No. 4760/Mum /2017 was dismissed vide order dated 2.11.2017. In the case of Renisha Impex P. Ltd. in ITA 4464/M/16 and ITA 4453/M/16 in the order dated 12.9.2017, as against 100% disallowance made by the assessing officer, the Hon'ble ITAT upheld disallowance of 4% of impugned purchases. This was a case of purchases from Praveen Jain entity. In the case of Suresh L. Satyani in ITA 3452/M/16 vide order dated 8.3.2017, the Hon'ble ITAT upheld the order of CIT(A) who had considered the disallowance @ 9% but considered

granting credit for net profit offered. This was a case where purchases were from Bhanwarlal Jain entities.

6.6. In the case of the appellant, therefore the fair and reasonable margin is considered to be @ 6% of the impugned purchases. The appellant in the case before me has shown Income From Business at Rs.46,07,243/-in its computation of income in the current AY 2009-10, which is 0.52 % of the turnover. Thus after considering the net profit disclosed, disallowance is computed @ 5.48%of the impugned purchases. It is noted that in the table in Para 6.1 of the assessment order, there is a totaling mistake. The correct total of impugned purchases is Rs.7,86,97,313/- whereas it is erroneously stated as 7,85,97,313/- Further while the assessing officer in Para 10.2 of the assessment order has accepted that purchases of Rs. 1,14,03,000/- out of purchases of Rs 2,70,63,000/- from Kushal Exports has been considered in AY 2008-09, he has while computing the disallowance erroneously computed it on purchases of Rs 9,00,00,313/- in Para 21 of the assessment order. Further having computed it at Rs.72,00,025/- he made disallowance of Rs.62,95,785/-. The correct figure of Rs.7,86,97,313/- is considered in this appellate order.

6.7. Accordingly, the addition to the total income is restricted to 5.48% of the purchases of Rs.7.86,97,313/- which works out to Rs.43,12,612/-. The appellant gets a relief of Rs.19,83,173/-. Accordingly, ground of appeal is partly allowed. (reference may be also. made to Para 7.35 of this order wherein both the disallowance as bogus purchase and loans is considered)."

The A.O further stated that from the ITR-V submitted by the assessee, the creditworthiness of the said party has not been established. The A.O further stated that mere use of banking channel cannot decide the genuineness of the transaction therefore the amount of Rs.1 crore received from Kriya Impex Pvt. Ltd. was treated as unexplained cash credit u/s 68 of the Act and added to the total income of the assessee.

8. Aggrieved, the assessee filed the appeal before the ld. CIT(A). The ld. CIT(A) has partly allowed the appeal of the assessee. The relevant operating para of the decision of the CIT(A) is as under:

"7.3. I have considered the submissions carefully. As noted earlier that there was a search action in this case and loans shown by R. Kantilal & Co., Parag Kothari and Pratik Kothari were examined. The suspected non genuine loans were identified. These loan entries were from concerns who were found to be engaged in providing such entries against cash for

commission. Shri Pratik Kothari admitted to these loans being accommodation entries and offered additional income of Rs.4.07 crores based on peak credit basis. His statement has been reproduced earlier in this order. The appellant has retracted from the admission made by Shri Pratik Kothari which was confirmed by Shri Parag Kothari in their statements recorded u/s 132(4) in the course of search. The assessing officer has not accepted the retraction.

7.4 It is noted that loan has been taken by appellant of Rs 1,00,00,000 from Kriya Impex Pvt. Ltd. The entity belonged to Rajendra Jain. This entity has a meagre income an against which huge loan is advanced. Financial statement of lender is not filed The credit worthiness is not established. The bank statement shows large credits before loan is advanced. Interestingly, the huge loans are received interest free by appellant which clearly shows the lack of genuineness. Why would an unrelated entity give huge amounts without expecting any return? There is not even a whisper of how the unrelated lender was contacted, convinced to extend interest free unsecured huge loan

7.5 The appellant has referred to the retraction made by Shri Pratik Kothari through the letter filed before the assessing officer dated 9.9.2015 It is noted that the retraction is filed 16 months after the statement was recorded u/s 132(4) on 6.5.2014 There is no explanation of such huge delay. It is noted that there is no evidence of any coercion or threat as witnessed by Panchas when statements were recorded u/s 132(4). It is only submitted that the appellant got to know that Rajendra Jain and others had retracted their statements and hence they are retracting their admission made earlier. It is not mentioned how and when they obtained information from Rajendra Jain regarding their retraction

7.6 At the outset, it is clarified that the finding that the Rajendra Jain and other entities are engaged in the business of providing accommodation entries is not merely based on the statements of the Appellant recorded u/s 132(4) of the Act. It is pertinent to note that the various conclusions in the case of the Rajendra Jain and other entities have been arrived at, on the basis of incriminating seized record, documents, recorded statements, as also the systematic and voluminous electronic data found during the course of search operation. Thus, the findings of the search operation are based not only on the confessional statements of the Rajendra Jain group but also several other individuals, who are part & parcel of the entry operation business of the the Rajendra Jain group.

7.7 It is noted from the orders in the case of Rajendra Jain that there is no dearth of third party evidence and circumstantial evidences on record.. which clearly points towards the carrying on of the entry operators business by Shri Rajendra Jain in an organized and systematic manner.

Independent searches have been conducted on few beneficiaries, based on the inputs of the search on the Rajendra Jain group and such beneficiaries have admitted taking of accommodation entries from the group concerns of the Rajendra Jain group.

7.8. The material on record reveals that there was no threat or coercion, which have been applied on the appellant or in the case of Hawala operators. It is pertinent to note that the panchas in their Panchnama has not recorded any incident of coercion, threat or duress by the Department. A perusal of the Panchanamas on record clearly reveals that all the searchi proceedings were conducted & completed in a peaceful manner.

7.9. The declaration made by the appellant under section 132(4) clearly fall under the provisions of section 115 of the Indian Evidence Act and hence, the same is hit by provisions of section 115 of the Indian Evidence Act.

7.10. At this juncture, it may be worthwhile to refer to the provision of section 114 and 115 of the Indian Evidence Act, 1872, which are reproduced hereunder for the sake of ready reference:

> *"114. Court may presume existence of certain acts*
>
> *The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of particular case.*
>
> *Illustration*
>
> *In such scenario, the court may presume-*
>
> *(h) That if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given would be unfavorable to him."*
>
> *"115. Estoppel*
>
> *When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such behalf, neither he or his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."*

7.11. The provisions of section 114 creates a basic presumption, based on preponderance of probabilities. Further, a bare reading of the provisions of section 115 makes it abundantly clear that statements in the nature of declarations, are binding on the declarant. They can neither be retracted nor do they require any corroboration.

7.12. Furthermore, the provisions of sub-section (4) of section 132 create rebuttable presumption in favour of the statements recorded there under and authorize their use as evidence in any proceeding under the Act. The burden is, therefore, squarely on the person who alleges that the statement was not made to prove that it was involuntarily made or made under or undue influence or that it was made under mistaken belief or was obtained by fraud or misrepresentation. Thus, mere allegation by the Appellant, in this regard will not suffice.

7.13. Moreover under the Act, the Legislature itself has provided that the statement given under section 132(4) can be used against the person giving such statement. It is well settled law that admission by a person is a good piece of evidence and the same can be used against the person, who makes it. The rationale behind holding this view is that a person making a statement is well versed with his own affairs/ business, than any other person.

7.14. On the issue of retraction of the statement made u/s 132(4), reliance is placed on the judgment of Dr. 8C Gupta Vs CIT (Allahabad High Court) 248 ITR 782, wherein it was held as under:

> *"As held by the Supreme Court in Pillangode Rubber Prochice Co. Ltd. vs. State of Kerala 1972 CTR (SC) 253, an admission is an extremely important piece of evidence though it is not conclusive. Therefore, a statement made voluntarily by the assessee could from the basis of assessment. The mere fact that the assessee retracted the statement could not make the statement unacceptable. The burden lay on the assessee to establish that the admission made in the statement at the time of survey was wrong and in fact there was no additional income."*

7.15. Further it has been held in CIT Vs Lekh Raj Dhunna, 344 ITR 352. (Punjab and Haryana High Court) as under.-

> *"Retraction from the statement during the assessment proceedings was not valid as no plausible explanation has been furnished as to why the said statement could not be withdrawn earlier."*

7.16. In the case of RamjasNawalVs. CIT &Anr., (2003) 183 CTR 144, (Raj.). it was held as under:-

> *"….If statements are given under threat or duress, the assessee can retract from his statements given under threat or duress during search. But the material on fact shows otherwise."*

7.17. In the case of Puram Anand Builders Pvt. Ltd. Vs ITO, (1996) 56 TTJ (Mumbai) 21:59 ITD 29, the Hon'ble ITAT has held as under:

"There is nothing on record to indicate that IT authorities have employed third degree methods to force some persons to make confessions or admissions. This is all the more unacceptable when independent witnesses were present at the time of search. Even if for the sake of argument it is accepted for a moment that the Revenue authorities had given some threat to the assessee and its employees, there is nothing to stop the assessee and its employees to either meet personally or through their authorised representatives the higher authorities or bringing to the notice of higher authorities through written communications that any statement or admission made by them before the search party was on account of threat coercion, or undue influence.

The subsequent affidavits or retraction supposed to have been made by the accountant carry no evidentiary value because there can be no doubt that they must have been made under the coercion, threat or undue influence of the assessee who is the employer and to whose interests his statement was very damaging."

7.18. The position as regards to the evidentiary value of a statement made under section 132(4) has been explained eloquently by the ITAT in Hotel Kiran u. ACIT (2002) 82 ITD 453 (Pune), as follows:

"It is settled law that admission by a person is a good piece of evidence though not conclusive and the same can be used against a person who makes it. The reason behind this is, a person making a statement stops the opposite party from making further investigation. This principle is also embedded in the provisions of the Evidence Act. But the statement recorded under section 132(4) is on a different footing. The Legislature in its wisdom has provided that such a statement may be used in evidence in any proceedings under the Act. Therefore, great evidentiary value has been attached to such statement.

In view of the above discussion, admission made in statement under section 132(4) has great evidentiary value and is binding on a person who makes it. Therefore, the admission can be made on the basis of such admission by using the same in evidence. The Legislature was well aware that under the general law mere admission may not be conclusive one. The Income-tax Act is a specific Act and assessment has to be made on the basis of material gathered by the Assessing Officer. For this purpose, vast powers have been conferred on the income-tax authorities for making investigation including the powers of search. If in the course of such search, the assessee makes some admission, he debars the authorised officer from making further investigation. In view of this, Legislature in its wisdom has provided that such statement can be used in evidence and the assessment can be made on the basis of such statement."

7.19. In Kantilal C. Shah v. ACIT (2011) 14 Taxmann.com 108 (Ahmedabad Trib.), the Ahmedabad Bench held that a statement under

section 132(4) is an evidence in itself and a retraction should be supported by strong evidence to demonstrate that the evidence recorded was under coercion. It was also held that the question of evidentiary value of a statement recorded under section 132(4) is no more res-integra. When an assessee had made a statement of facts, he can have no grievance, if he is taxed in accordance with that statement.

7.20. In Sudarshan P. Amin V. ACIT [Tax Appeal No.386 of 2012, the Hon'ble Gujarat High Court declined to interfere with the decision of the ITAT holding that the assessee had stopped the investigating authority from probing the matter further into the investment made by the assessee on account of his admission in his statement under section 132(4), and upheld the order of the CIT(A) confirming the assessment order.

7.21. The Mumbai Bench has also upheld the sanctity of statement under section 132(4) in Arvind M. Kaniya v. ACIT (2013) 153 TTJ 0422: (2013) 85 DTR 0089The Hon'ble Tribunal has held that retraction from a statement made under section 132(4) was clearly against the rule of estoppel, as provided under the Evidence Act, because believing on the truth of the statement made by the assessee, the department changed its position to its detriment, and, therefore the assessee is stopped from denying from the truth of his statement earlier made.

7.22. Identical view has been held by the Hon'ble ITAT Ahmedabad Bench in the case of DCIT Vs. Bhogilal MulchandKandoi reported in (2005) 96 ITD 34 (Ahd). In this case, Hon'ble ITAT has held that the disclosure made u/s. 132(4) was voluntary and therefore, the addition made by the AO on the basis of the statement recorded at the time of search was sustainable. It was also held that retraction of the statement after the without any evidence of coercion or threat was not valid.

7.23 Reliance is also placed on the judgment of Hon'ble Apex court in the case of P.S.Barkathali Vs Directorate of Enforcement, New Delhi AIR 1981 KER 81. The Hon'ble Apex Court, in the case of PS Barkathali, referred supra, has inter alia held as under "Even though the statement was subsequently retracted, the of admission in the first place cannot be under mined. It is well established that mere bald retraction cannot take away the importance and evidentiary value of the original confession, especially in view of the fact that in this case, the deponent of the statement had provided the minute details relating to the transactions. It appears that the retraction statement was made purely to avoid clutches of law which had caught up with him/her and laid bare his/her nefarious activities.

7.24. The Hon'ble Apex Court judgement in the case of Sumati Dayal V. CIT (1995) 214 ITR 801, 806, 808-809 (SC), has observed that apparent must be considered real, until it is shown that there are reasons to that the apparent is not the real and that the taxing authorities are entitled to look

into the surrounding circumstances to find out the reality and matter has to be considered by applying the test of human probabilities

7.25 In the another case of Dewan Bahadur Seth Gopal Das Mohta Vs The Union of India & Ors (SC) 26 ITR 722, it has been held by the Hon'ble Apex Court that an admission is the best evidence that an opposing party can rely upon and though not conclusive, is decisive of the matter, unless successfully withdrawn or proved erroneous

226 In the case of Pakani Swami v. State of Tamil Nadu, AIR 1956 SC 593, the Hon'ble Apex Court has held that corroboration was necessary when a suspicion was cast on the genuineness of a confession. Similarly, in the case of Pangambam Kalanjay Singh State of Manipur, AIR 1956 AIR SC, it been observed that if confession is retracted, it has to be

corroborated on the basis of independent evidence. It may be noted in the present case at hand, the Revenue has been successful in corroborating the original confessional statement of the Appellant, by placing on record incriminating seized material, documents and other third party statements.

7.27 The Hon'ble Supreme Court in the case of Surjeet Singh Chhabra v Union of India 1997 (89) ELT 646 has categorically held that where a confession has been made by a person before the customs officers and later on the retracts from the same, the corifessional statement made before the customs officials, though retracted within six days, is an admission and binding, since customs officers are not police officers.

7.28. In the case of Meghraj Jain vs UOI(2009), the Hon'ble Bombay High Court has inter alia held that the retracted confessions can be acted upon. In this regard, the relevant portion of the judgment is reproduced as under:

> *"On facts, the appellant took more than two days to retract the statement even after production before the Magistrate. There is no plausible explanation retraction was not done at first available opportunity. Further, foreign exchange was recovered and when asked to explain the same, confessional statements were made by the appellant and Narendra Mirani. The confessions accordingly stand corroborated by the foreign exchange. In these circumstances, the confessional statements cannot be said to be made under force, duress, coercion or because of inducement from any person in authority. Accordingly, they can be acted upon despite retraction"*

7.29. During the course of the search operation in the case of Rajendra Jain, clinching documentary evidence in the form of handwritten Estimate Sheets have been found during the course of search operation at 703,1B, Dheeraj Enclave, Siddarth Nagar, Mumbai, which contains details of cash transactions routed through Angadias, relating to the entry operation

business. Such handwritten "Estimate Sheets", found during the course of search were seized as Annexure A-1 to A-4. These handwritten "Estimate Sheets were computerized with the help of a customized software and stored in a pen drive. These are reproduced in the assessment order in that case Thus retraction by entry operators subsequently do not have much evidentiary value and at best are hostile witness serving their own interest. The retraction by Shri Pratik Kothari also is not genuine and is an afterthought to escape the payment of taxes Hence it is held that the impugned loan transactions are not genuine and have been obtained against cash which is not recorded in books of accounts.

7.30 While the assessing officer has not accepted the retraction, he has also not accepted the peak working on the basis that the appellant is not admitting that loans are bogus accommodation entry obtained against cash.

7.31. It is also noted that Parag Kothari and Pratik Kothari have virtually no other significant source of income other than their share of income from the partnership firm R Kantilal & Co The loans taken by them is given to R Kantilal& Co and is returned by the firm to it. Thus, though most of the loans are received in the hands of Parag Kothari and Pratik Kothari, the actual beneficiary is R. Kantilal& Co. During the search action too, Shri Pratik Kothari had offered the income in the hands of R. Kantilal& Co. Hence, in these facts, the income should be assessed in the hands of M/s R. Kantilal Co.

7.32. Since the loan transactions of Parag Kothari, Pratik Kothari and R. Kantilal& Co. are similar, they are considered here in one place. Based on the assessment proceedings, the appellant was asked to furnish details of loan taken and loan repaid in the various entities in a chronological fashion. It is noted that the loans were taken and repaid mostly in a short span of time. It is also noted that no interest has been paid on these loans taken. The fact that no interest was paid on the loans taken clearly indicates that these were accommodation entries obtained in lieu of cash. Otherwise, no unrelated third party would provide unsecured loan of such huge amounts without any security. It is also noted that both Pratik Kothari and Parag Kothari have no significant sources of income other than the share of profit from the firm R Kantilal& Co. Thus, the cash generated would have been from the firm, R. Kantilal& Co. It is also noted from the details called that the loans obtained by the individuals Shri Pratik Kothari and Shri Parag Kothari were advanced to the firm, M/s. R.Kantilal and Co Thus, the funds obtained by way of cheque was provided to the firm, M/s.R.Kantilal& Co. for its use. All these facts clearly suggest that the loan entries are related to the requirements of the business of M/s.R. Kantilal& Co.

7.33. The appellant made a common submission for the appeals in the case of Parag Kothari, Pratik Kothari and R. Kantilal& Co. as follows:

The Commissioner of Income Tax (A)-53,
AaykarBhavan, M.K.Road,
Mumbai- 400 020
Respected Sir,

Re: Further submission in the matter of our appeal for AYS 2008-09, 2009 10 & 2012-13 and appeal in the case of Parag Kothari for AYS 2009-10 to 2013-14 and Pratik Kothari for AYS 2009-10 to 2013-14 PAN NO BAGER5384C

This has reference to the discussion which has taken place in your Chamber in connection with our appeals for above mentioned AYS and also the appeals of Shri Parag Kothan & Pratik Kothan for assessment years, as mentioned above.

a) With reference to the addition made on account of profit for purchases from disputed parties partly treated as non-genuine, by way of plethora of evidence and arguments as evident from earlier submission, we have explained that the purchases are genuine. While, we are contesting before you that the purchases are absolutely genuine and the addition made in the assessment order should be deleted, without prejudice, it was discussed that we give you working by taking profit at 4% on such disputed purchases and from such profit we reduce the actual net profit already offered in the Return of Income. on such disputed purchases. Accordingly, we have prepared a chart showing total sales, total purchases, net profit earned in percentage on disputed purchases and amount and he have reduced the profit earned on disputed purchases as per audited accounts from 4% profit, thus giving balance profit on disputed purchase which is to be sustained. A Detailed chart is enclosed herewith from which Particulars the net profit worked out year wise is as under:

Particulars	A.Y. 2008-09	A.Y. 2009-10	A.Y 2012-13
Addition made as per Assesssment order	14,25,375/-	62,95,785/-	93,69,432/-
Addition (as per discussion) to be sustained	1,53,876/-	26,55,444/-	18,99,297/-

b) Inter alia in connection with the loans taken by M/s R Kantilal& Co, Parag Kothari & Pratik Kothari for various years, the AO has made separate addition for all the loans in various years in the individual hands. Normally, the AO, after taking the view that the loans represents unaccounted income of the appellant group should have worked out the peak of the group, Hence without prejudice, we had emphasized in the appellant proceeding that if your honour takes a view that the loans by all the above entities are unexplained cash credits then especially in the context of the declaration of income given u/s 132(4) of Rs 4.07 Cr during the course of search on our group on 25.05.2014, what can be brought to tax as unaccounted income in the hands of the group can only be the peak of the movement of the funds for the loans taken and loans repaid by all the entities together A Detailed chart on above fine is enclosed herewith.

Further, this amount of peak worked out in this way has to be further reduced by cash available to the appellant from addition sustained on account of profit on disputed purchase, because cash available from profit on disputed purchase is applied for obtaining loan, the chart enclosed depict this working also.

c) To reiterate this submission we are making as above is without prejudice because by plethora of evidence and arguments, we have conclusively proved that the purchases of diamonds from disputed parties and the loans taken by M/s R Kantilal& Co. and his group members namely Parag Kothari & Pratik Kothari are not accommodation entries and are all genuine transactions.

Kindly take this on record and do the needful."

7.34. There is merit in the contention of the appellant, which is the contention made on without prejudice basis, that the addition, if any, should be made on the basis of peak working. The loan taken is repaid in a short period of time and subsequent loan is taken much later. Thus it is reasonable to believe that unaccounted funds are recycled in obtaining loans by cheques when required. The peak working based on the details of transactions as seen from the ledger accounts supported by the bank statements of the lender of the appellant concerned is tabulated below:

R. KANTILAL & CO. GROUP (R KANTILAL& CO., PRATIK KOTHARI, PARAG KOTHARI)
Peak working of loans for the period 1-4-2007 to 31-3-2014

Date of borrowing	Date of repayment of loan	Name of borrower	Borrowed from	Cash paid for amount borrowed in books	Cash received on amount of loan returned in books	Peak addition	Cash balance available	
29.03.2008		Parag Kothari	Sparsh Exports	120,00,000		120,00,000		A.Y. 2008-09

			Pvt. Ltd.					
	02.04.2008	Parag Kothari	Sparsh Exports Pvt. Ltd.		120,00,000		120,00,000	
							120,00,000	
31.03.2009		Parag Kothari	Kriya Impex Pvt. Ltd.	100,00,000			20,00,000	
30.03.2009		R. Kantilal & Co.	Kriya Impex Pvt. Ltd.	100,00,000			(80,00,000)	
31.03.2009		Pratik Kothari	Kriya Impex Pvt. Ltd.	75,00,000			(155,00,000)	
31.03.2009		Pratik Kothari	Karnavat Impex Pvt. Ltd.	100,00,000			(255,00,000)	
	Addition					255,00,000		A.Y.2009-10
	02.04.2009	Parag Kothari	Kriya Impex Pvt. Ltd.		100,00,000		100,00,000	
	02.04.2009	R. Kantilal & Co.	Kriya Impex Pvt. Ltd.		100,00,000		200,00,000	
	06.04.2009	Pratik Kothari	Kriya Impex Pvt. Ltd.		75,00,000		275,00,000	
	02.04.2009	Pratik Kothari	Karnavat Impex Pvt. Ltd.		100,00,000		375,00,000	
08.03.2010		Pratik Kothari	Kangan Jewels Pvt. Ltd.	50,00,000			325,00,000	
31.03.2010		Parag Kothari	Vaishali Gems	50,00,000			275,00,000	
	25.06.2010	Pratik Kothari	Kangan Jewels Pvt. Ltd.		50,00,000		325,00,000	
	06.04.2010	Parag Kothari	Vaishali Gems		50,00,000		357,00,000	
							375,00,000	
							375,00,000	
29.03.2011		Pratik Kothari	Kriya Impex Pvt. Ltd.	50,00,000			325,00,000	
30.03.2011		Pratik Kothari	Kriya Impex Pvt. Ltd.	75,00,000			250,00,000	
31.03.2011		Pratik Kothari	Kriya Impex Pvt. Ltd.	100,00,000			150,00,000	
30.03.2011		Parag Kothari	Kriya Impex Pvt. Ltd	75,00,000			75,00,000	
31.03.2011		Parag Kothari	Kush Gems Pvt.Ltd.	30,00,000			45,00,000	
29.03.2011		Parag Kothari	Mahak Dimonds	100,00,000			(55,00,000)	
30.03.2011		Parag Kothari	Mahak Diamonds	100,00,000			(155,00,000)	
31.03.2011		Parag Kothari	Mahak Diamonds	20,00,000			(175,00,000)	
	Addition					175,00,000		A.Y. 2011-12
	05.04.2011	Parag Kothari	Kriya Impex Pvt. Ltd.		75,00,000		75,00,000	
	05.04.2011	Pratik Kothari	Kriya Impex Pvt. Ltd.		50,00,000		125,00,000	
	05.04.2011	Pratik Kothari	Kriya Impex Pvt.		75,00,000		200,00,000	

			Ltd.					
	05.04.2011	Pratik Kothari	Kriya Impex Pvt. Ltd.		100,00,000		300,00,000	
	07.06.2011	Parag Kothari	Mahak Dimonds		50,00,000		350,00,000	
	09.06.2011	Parag Kothari	Mahak Diamonds		25,00,000		375,00,000	
	10.06.2011	Parag Kothari	Mahak Diamonds		35,00,000		410,00,000	
	04.07.2011	Parag Kothari	Mahak Diamonds		60,00,000		470,00,000	
	17.08.2011	Parag Kothari	Mahak Diamonds		50,00,000		520,00,000	
							520,00,000	
16.03.2012		Parag Kothari	Kanak Gems pvt. Ltd.	100,00,000			420,00,000	
29.03.2012		Parag Kothari	Mahak Diamonds	175,00,000			245,00,000	
30.03.2012		Pratik Kothari	Mahak Diamonds	175,00,000			70,00,000	
	03.04.2012	Parag Kothari	Mahak Diamonds		125,00,000		195,00,000	
	04.04.2012	Parag Kothari	Mahak Diamonds		50,00,000		245,00,000	
	03.04.2012	Pratik Kothari	Mahak Diamonds		175,00,000		420,00,000	
	26.07.2013	Parag Kothari	Kanak Gems Pvt. Ltd.		50,00,000		470,00,000	
	07.08.2013	Parag Kothari	Kanak Gems Pvt. Ltd.		50,00,000		520,00,000	
04.03.2013		Pratik Kothari	Kanak Gems Pvt. Ltd.	150,00,000			370,00,000	
	11.07.2013	Pratik Kothari	Kanak Gems Pvt. Ltd.		75,00,000		445,00,000	
	15.07.2013	Pratik Kothari	Kanak Gems Pvt. Ltd.		50,00,000		495,00,000	
	06.08.2013	Pratik Kothari	Kanak Gems Pvt. Ltd.		20,00,000		515,00,000	
	07.08.2013	Pratik Kothari	Kanak Gems Pvt. Ltd.		5,00,000		520,00,000	
	08.08.2014	Pratik Kothari	Kanak Gems Pvt. Ltd.		30,00,000		550,00,000	
				1745,00,000	1745,00,000	550,00,000		

7.35. Based on the working tabulated in the Table above, the peak credit comes to Rs. 1,20,00,000/- in AY 2008-09, Rs 2,55,00,000/- in AY 2009-10 and Rs. 1,75,00,000/- in AY 2011-12. Since the entity generating the business is M/s R. Kantilal & Co. the addition in respect of peak credit is made in the hands of M/s. R.Kantilal & Co. This is also what was stated in the statement recorded of Shri Pratik Kothari at the time of search. It is also noted that additions have been made in respect of purchases in the case of M/s. R. Kantilal & Co. Alternatively, the contention of the appellant that such disallowances in respect of purchases should be considered as the part source for the investment for obtaining the unsecured loans against cash is also merited. Since the addition sustained on the basis of peak credit is more than the disallowance made in respect of the

purchases, the total addition for AY 2009-10 is sustained at Rs.2,55,00,000/- which covers both the loan and bogus purchases. To this extent, the assessed income is enhanced.
The grounds of appeal are partly allowed as above.

8. in the result, appeal is partly allowed."

9. At the outset the ld. Counsel has vehemently contended that during the course of search action no incriminating material that was found on the basis of which addition was made therefore, the addition made by the A.O was not valid. The ld. Counsel further stated that the assessment made during year under consideration were unabated assessment therefore no addition can be made without any incriminating material found during the course of search. The ld. Counsel also stated and statement recorded u/s 132(4) during the course of search could not be sole basis for making an addition without corroborating the same with evidences of material found during the course of search. The ld. Counsel further submitted that during the course of appellate proceedings before the ld. CIT(A) a number of judicial pronouncements as referred page no. 5 of the paper book were submitted that no addition should be made without any incriminating material found during the course of search. However, the ld. CIT(A) has not considered the judicial pronouncements relied upon by the assessee. The ld. Counsel has also stated that during the course of appellate proceedings before the ld. CIT(A) the assessee has also referred the CBDT Instruction No. 286/2/2003 dated 10.03.2003 and Instruction dated 18.12.2014 regarding direction that focus be should on collection of evidences of income and no attempt should be made to obtain confession as to undisclosed income while recording the statement. The ld. Counsel has also referred page no. 74 to 76 of the paper book pertaining to the letter dated 09.09.2015 written by the assessee to the A.O regarding the fact that no incriminating material of

any nature found from the assessee and all the purchases were dully explained with full supporting evidences and also it was brought to the knowledge of the A.O that Shri Rajendra Jain had informed the assessee that his statement was extracted forcibly by the Income Tax Department vide affidavit dated. 21.10.2013 and assessee submitted that its declaration was obtained due to misrepresentation of facts and same was also retracted. The assesseee also referred letter dated 05.05.2016 addressed to A.O placed at page 83 to 88 of the paper book vide which different documents were enclosed to demonstrate that purchases made were genuine. The ld. Counsel also referred that ld. CIT(A) has also not given any notice before making enhancement of the income. He also submitted that no evidence of cash payment was found and also referred page no. 26 of the paper book pertaining to supporting document furnished in respect of purchases made by the assessee. Regarding unsecured loan the ld. Counsel submitted that assessee has repaid all the loan and also submitted that assessee has filed ledger confirmation/PAN copy/ITR filed lender bank statement and affidavit confirming the transaction etc. which were not controverted by the lower authorities.

On the other hand, in respect of no incriminating material found the ld. D.R submitted that nowhere in Sec. 153 it is mentioned that assessment should be made only on the basis of incriminating material. He referred judgment of Bombay High Courts' in the case of CIT Vs. Murli Agro (2014) 49 taxmann.com 172 (Bombay) and in the case of Continental Warehousing Corporation Vs. CIT Tax Appeal No. 523 of 2013. The ld. D.R again stated that there is no need of incriminating material u/s 153A of the Act. The ld. D.R placed reliance on the decision of Hon'ble Kerala High Court i.e 72 taxman.com 234 (Kerala). Similarly

the other case laws referred by the ld. D.R are distinguishable on facts from the case of the assessee as discussed here.

The case of Hukum Chand Jain (2010) taxman 319 (Chhatisgharh) is pertained to issue under section 158BC of the Act. The A.O completed the assessment by including the amount of undisclosed income offered by the assessee business specific additions were based on material, which could not be explained by him.

The case of Nova Aroma Ters & Finance Limited (2012) 18 taxman.com 217 (Delhi) is pertained to involving section 68 for accommodation entries of share application money. The A.O issued summons to two persons who did not make compliance and inspector reported no such person was available. In this case the A.O carried out independent inquiries that the assessee was unable to prove the genuineness of the transaction.

The case of Independent Media (P) Ltd. (2012) 25 txman.com 276 (Delhi) is pertained to addition on account of unexplained share application money where the assessee has not filed any confirmation or evidence to establish the genuineness of the transactions or creditworthiness of the share application filed.

The case of Youth Construction (P) Ltd (2014) 44 taxman.com 364 (Delhi) is also pertained to addition on account of share capital u/s 68 of the Act. The AO had examined the bank account and had deducted a pattern by which the bank account were used only as conduit to receive the monies and pay them out on the same day. There was enough material with the AO which warrants the explanation from the assessee regarding the nature and the source of the share application money.

The case of Mihir kanti Hazra (2015) 61 taxmann.com 315 (Calcutta) is also pertained to addition made u/s 68 of the Act of unsecured loan wherein the creditworthiness and genuineness of transactions were not proved by persons who responded to summons u/s 131 of the Act.

The case of Continental Warehousing Corporation of Jurisdictional High Court in this case at para 5.1 it is held that assessment or reassessment u/s 153A arises only when a search has been initiated or conducted. But in para 53: it is discussed about what is the scope of assessment or reassessment as total income u/s 153A(1) and categorically held that in respect of non-abated assessment the assessment will be made on the basis of books of account or other documents not produced in the original assessment but found during the course of search and undisclosed income or undisclosed property disclosed in the course of search.

The case of Bannalal Jat (2019) 106 taxmann.com 128 (SC) where Shri Bannalal Jat in reply to questions no. 8 in the statement recorded u/s 132(4) admitted that in his business of civil transaction he inflated various expenditure and income so generated by his expenditure was in form of cash which was found at his residence and same was not recorded in his books of account. It was not a case of simple retraction but backed by books of accounts of M/s Bannalal Jats.

10. Heard both the sides and perused the material on record. A search action u/s 132(1) of the Act was conducted on the assessee on 05.05.2014. A notice u/s 153A of the Act was issued and served upon

the assessee. In response to the notice u/s 153A the assessee had not offered any additional income for the year under consideration. The assessee submitted that the original return of income filed for assessment year 2009-10 declaring total income of Rs.42,78,950/- on 05.08.2010 be treated as return filed in compliance to notice issued u/s 153A of the Act. The assessee has brought to the notice of the A.O and ld. CIT(A) during the course of assessment and appellate proceedings that additions in the assessment order were not made on the basis of any incriminating material since no incriminating material was unearthed during the course of search action carried out u/s 132(4) of the Act in the case of the assessee. The AO had made addition in respect of purchase and unsecured loan only on the basis of pre search inquiries. A statement taken u/s 132(4) of the Act during the course of search cannot be the sole basis for making an addition unless there was same material or evidences unearthed during the search but corroborate the same. It is also noticed that in the assessment order the A.O has nowhere stated and referred to any incriminating material unearthed during the search in the case of the assessee while making the impugned addition. It is also noticed that A.O has not mentioned a single document which has been termed as incriminating. Further there was no assessment pending for the year under consideration in the case of the assessee and the same was unabated assessment. Since no assessment was pending during the course of search and therefore, the A.O was required to make the addition only on the basis of incriminating material found during the course of search. However, the impugned addition have been made entirely on the basis of statement of shri Pratik Kothari partner of the assessee firm. The assessee has submitted that it had retracted his statement recorded u/s 132(4) as the statement was recorded by

misrepresentation on fact because Shri Rajendra Jain had retracted his statement on the basis of which the declaration from the assessee was obtained. Shri Rajendra Jain and others have clarified the assessee that their transactions entered into with them were absolutely genuine and their statement was recorded by force due to misrepresentation of facts. By affidavit dated 21.10.2013, Shri Rajendra Jain and others have retracted the declaration obtained from them and they given copies of affidavit of retraction along with copy of letter filed before the Income Tax Authorities. The assessee was searched on the basis of finding of search conducted in the case of Shri Rajendra Jain Group. During the course of appellate proceedings before the ld. CIT(A) the assessee had also explained that on the basis of statement of Shri Rajendra Jain, he had given his statement under extreme mental pressure. It was also submitted during the course of assessment that no incriminating material was found which could even cast doubt on the genuineness of the transactions and the statement was purely based on the acceptance of Shri Rajendra Jain and to put an end to the search action. The payments have been made through proper banking channels and subsequently unsecured loan taken have been repaid to the lenders. There was no other evidence except the retraction statement of Shri Rajendra Jain. The assessee explained that during the course of search no incriminating material of any nature was from them and there was no seizure/impounding of any asset or incriminating documents paper etc. The fact that Shri Rajendra Jain had already retracted his statement was not brought to the notice of the assessee while recording his statement and further stated that no incriminating material has been found from the assessee during the course of search at his premises and the A.O has made addition in the hands of the assessee only on the basis of

statement of Shri Rajendra Jain and Dharmachand Jain which they have themselves retracted.

During the course of appellate proceedings before us the ld. Counsel has contended that the assessee has made specific submission vide letter dated 05.12.2017 along with specific references of the judicial pronouncements of jurisdictional High Court's and other judicial authorities as per the copy of submission placed in the paper book from page no. 1 to 50. The ld. Counsel vehemently contended that it is established from the material on record and finding of the A.O and CIT(A) that there was no incriminating material found during the course of search on the assessee on which the impugned addition were made, therefore, he contended that the addition made only on the basis of statement was not valid and same are required to be deleted.

After perusal of the detailed submission filed by the assessee vide letter dated 05.12.2017 placed at page 1 to 50 of the paper book we observe that the ld. CIT(A) had failed to controvert the relevant detail and judicial pronouncements referred by the assessee relating to no incriminating material found during the course of search action carried out in the case of the assessee. The assessee has categorically pointed out before the ld. CIT(A) that not a single document had been seized from the assessee which can be termed as incriminating material leading to any undisclosed income earned by the assessee. It is also undisputed fact that during the year under consideration no assessment was pending in the case of the assessee. On the issue that assessment u/s 153A can only be made on the basis of some incriminating material the assessee has submitted conclusion of following judicial pronouncements for consideration before the ld. CIT(A), however the same were not

considered in the finding of the ld. CIT(A). The details of such judicial pronouncement relied upon by the assessee are as under:

i. CIT Vs. Murli Agro Product Ltd.

ii. CIT Vs. Harjeev Agrawal (ITA 8/2004 Delhi HC)

iii. Shri Bhagat Bansal Vs. ACIT (ITA No. 534/Jp/2012)

iv. ACIT Vs. Dharmpal Gulati (ITA No. 671/Del/2012)

v. CIT Vs. Continental Warehousing Corporation (Nhavasheva) (2015) 374 ITR 645 (Bom)

vi. All Cargo Global Logistics Pvt. Ltd. Vs. ACIT (2011) 137 ITD 287 (Mum)

vii. CIT Vs. Gurinder Singh (2016) 386 ITR 483 (Bom)

viii. CIT Vs. Kabul Chawla (2015) 61 taxmann.com 412 (Delhi)

ix. ACIT Vs. M/s Thakkar Popatlal Velji Sales Ltd. (ITA No.5743/Mum/2010 dated 08.05.2013)

x. Tarannum Zafar Khan Vs. ACIT (ITA No. 5888 to 5890/Mum/2009 dated 12.07.2013.

xi. CIT Vs. Dr. Ratan Kumar Singh (2013) 35 taxman.com 441 (Allahabad)

xii. CIT Vs. Ashim Krishan Mondal (2005) 270 ITR 160 (Cal).

The assessee had also referred to the instruction dated 10.03.2013 and 18.12.2014 issued by the CBDT on the point that assessment should be based upon evidence/material gathered during the course of search/survey operations. The Ld. CIT(A) has not controverted these submissions specifically filed by the assessee and the ld. CIT(A) also has neither controverted these judicial pronouncements nor made any reference in his findings.

The Hon'ble Madras High Court in the case of M. Narayan N. Boos. Vs. ACIT, Circle (339 ITR 192) held that addition made by the A.O merely on the basis of retracted statement u/s 132(4) could not be sustained in the absence of any evidence material or recovery of any movable or immovable assets at the time of search to corroborate the disclosure made by the assessee.

The Hon'ble Supreme Court in Vinod Solanki Vs. Union of India (92 SCL 157 held that evidence brought as record by way of confession which stand retracted must be substantially corroborated by other independent and cogent evidences which would lead adequate assurance to the court that it may seek to rely thereupon.

The CBDT vide circular No.F.No.286/2/2003-IT(Inv.), dated 10.03.2003 has categorically directed that authorities should focus on collection of evidence of undisclosed income in search cases and abstain from laying undue emphasis on plan statements which are later on retracted. The relevant part of the circular is reproduced as under:-

> *"Instances have come to the notice of the Board where assessees 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 assessees 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. Further, in respect of pending assessment proceedings also, Assessing Officers should rely upon the evidences materials gathered during the course of search survey operations or thereafter while framing the relevant assessment orders."

We observe that merely retracted statements of the employees without corroborating with any other evidences/materials cannot form a sole basis of additions. To sustain the disallowance it is necessary to have supporting evidences and documents, in the case of the assessee, basis of additions were only retracted statement of the employees which had no strong evidential value. There was no positive material on record brought by the A.O to substantiate that in fact assessee had inflated its expenses by overbilling. The assessing officer has only relied on the retracted statement and there was no independent material /evidences to substantiate the same.

The Hon'ble Delhi High Court in the case of CIT Vs. RRJ Securities (2016) 380 ITR 612) wherein it is held that in the absence of any incriminating material the concluded assessment could not be interfered u/s 153A of the Act.

The Hon'ble Delhi Court in the case Pr.CIT Vs. Lata Jain (ITA 274 & 276 of 2016) considering the ratio laid down in the case of CIT Vs. Kabul Chawla (2016) 380 ITR 573 held that Section 153A assessment cannot be made for the assessment year in which incriminating material is not recovered even though incriminating material may be recovered for other years in the block of this years.

In the decision of Gurinder Singh Bawa Vs. DCIT (2012) 28 taxman.com 328 of the ITAT, Mumbai, held that wherein search assessment u/s 153A of assessment pertaining to six immediately preceding assessment year were completed the A.O cannot make addition therein unless there is incriminating material recovered from the search.

The assessee also referred a number of decision similar to the ratio laid down in the above mentioned cases.

After perusal of the aforesaid fact and judicial findings it is clear that the assessment in the case of the assessee u/s 153A was not based on any incriminating material found during the course of search. The ld. CIT(A) has not considered the entire evidences and material placed before him by the assessee. In the light of the above facts and finding we consider that ld. CIT(A) is not justified in dismissing the appeal of the assessee since no incriminating material was found during the course of search on the basis of which the addition was made. Therefore, we direct the A.O to delete the impugned addition.

11. The appeal of the assessee is partly allowed and appeal of revenue is dismissed.

Ground No. C to G:

12. Since we have considered that addition made in the course of the assessee u/s 153A r.w.s 143(3) of the Act were not based on any incriminating material found/unearthed during the course of search and addition made were not valid, therefore, it is not require to adjudicate the other ground of appeal filed by the assessee which become infructuous.

Accordingly, the appeal of the assessee is partly allowed and appeal of the revenue is dismissed.

ITA No.7090/Mum/2018 (Assessee's Appeal)

13. As the facts and the issue involved in this appeal are the same as mentioned supra in ITA No. 7089/Mum/2018, therefore, applying the same mutatis mutandis, the grounds of appeal (a) and (b) are allowed. Since, no incriminating material as found during the course of search action. Applying the findings of ground no. C to G of ITA No. 7089/Mum/2018, the grounds of appeal no. C and D became infractions which is not required any adjudication. Therefore, appeal of the assessee is partly allowed.

ITA Nos. 6778 /Mum/2018 (Revenue Appeal)

"1. Whether on the facts and circumstance of the case and in law, the Ld. CIT(A) has erred in reducing the net profit on non genuine purchases from 6% determined by the AO to 3.48%, without the assessee having brought on record any additional evidence or submission that had not been considered already by the AO while determining the net profit?,"

2. Whether on the facts and circumstance of the case and in law, the Ld. CIT(A) erred in determining the net profit of the assessee on non genuine purchases at 6% by relying on instruction of 2008 dated 22/06/2008 even though the facts of the case do not fall within the provisions of these instructions in so far the assessment was made u/s 143(3) rws 147 pursuant to search and seizure operation.?."

3. Whether on the facts and circumstance of the case and in law, the Ld. CIT(A) erred in giving relief to the assessee by determining the net profit out of 6% on non genuine purchases by relying on instruction of 2008 dated 22/06/2008 which required/specifies 6% of net profit on total dturnover under the Benign Assessment scheme, while the assessee declaring only 2.52% net profit on total turnover?"

4. Whether on the facts and circumstance of the case and in law, the Ld. CIT(A) erred on facts and in law by not upholding the addition of Rs.1,20,00,000/- u/s 68 even though the assessee was not able to prove the genuineness of the transaction as per provision of section 68 of the IT act?"

The appellant prays that the order of Commissioner of Income-tax (Appeal) on the above ground be set aside and that of the Assessing Officer be restored. The appellant craves leave to amend or alter any grounds or add a new ground which may be necessary."

ITA No. 7088/Mum/2018 (Assessee's Appeal)

"The Learned CIT(A) erred on facts, in law and under the circumstances in:-

(a) confirming the order passed u/s 143(3) rws 147 when no reasons exist to invoke provision of Sec 147 of Income Tax Act, 1961.

(b) confirming disallowance of Rs.1,20,00,000/- on account of loan taken from M/s Sparsh Exports Pvt.Ltd.

(c) directing that addition of Rs. 1.75 Cr. is to be made in the AY 2011-12.

(d) holding that the declaration made of Rs.4.07 Cr. in the statement recorded u/s 132(4) was binding on the appellant and the retraction of the same by the appellant is an afterthought.

(e) without prejudice to the above, the Learned CIT(A) erred in holding that in respect of purchases from impugned parties of Rs.1,14,03,000/- a sum of Rs.3,96,900/- is required to be disallowed.

The appellant respectfully submits that it has not taken loan of Rs.1,20,00,000/- from the above party and Shri Parag S.Kothari has taken loan from the above party. Hence no addition can be made in the hands of the appellant for the loan by Shri Parag S.Kothari. It is also submitted that the loan taken is genuine. Hence in final analysis, no addition can be made of Rs.1,20,00,000/- in the hands of the appellant.

The appellant further submits that the declaration of additional income was taken in the statement recorded of the appellant u/s 132(4) without any evidence found during search, hence the appellant had rightly retracted such statement.

The appellant further submits without prejudice that the purchase of Rs.1,14,03,000/- is genuine, hence no disallowance of Rs.3,96,900/- should have been sustained by the Learned CIT(A).

The appellant craves leave to add, amend, withdraw any grounds of appeal before the appellate order is passed."

14. Both the appeal of the revenue in ITA No.6778/Mum/2018 and assessee in ITA No.7088/Mum/2018 are based on similar facts on identical issues therefore these appeal are adjudicated together.

15. Heard both the sides and perused the material on record.
During the course of appellant proceedings before us the learned consul has not particularly discussed the issue of reopening the case under section 147 of the act therefore grownds of appeal of the assessee pertaining to the issue of reopening stand dismissed.

Without reiterating the fact as elaborated in ITA No. 6779/Mum/2018 the A.O treated the unsecured loan of Rs.1.20 crores as bogus taken by the assessee from M/s Sparsh Export Pvt. Ltd. holding that assessee had not been able to prove genuineness and creditworthiness of the transaction. During the course of assessment the A.O also found that assessee had made purchases from Kushal Export, Vaishali Gems and Mouli Gems, on the basis of information received from the DIT(Inv.) the AO observed that assessee was a beneficiary of the accommodation bills issued by these parties as per the modus operandi and fact mentioned in ITA No. 6779/Mum/2018 Therefore, the A.O has treated 12.50% of bogus purchases of Rs.1,14,03,000/- i.e Rs.14,25,375/- as bogus purchases and added to the total income of the assessee. In the appellate proceedings, the ld. CIT(A) observed that A.O assumed profit element @ 12.5% on the impugned purchases and made disallowance accordingly, however, he noticed that in subsequent assessment year 2009-10 and 2012-13 on similar fact the A.O. had made disallowance based on 8% of the impugned purchases. The ld. CIT(A) has taken into consideration the case of Nayak Gems filed by the assessee showing

that on the issue of purchases from entities belonging to Rajendra Jain and the purchases made from Sparsh Exports Pvt. Ltd. the A.O made disallowance of 6% of such purchases. However, in those cases the ld. CIT(A) reduced the disallowance to 3% of the purchases based on the recommendation of the Task Force Group for diamond industry set up by the Govt. of India, Ministry of Commerce and Industry. The ld. CIT(A) further referred the case of Renisha Impex P. Ltd. vide ITA No. 4464/Mum/2016 and ITA No. 4453/Mum/2016 dated 12.09.2017 wherein as agasint 100% disallowance made by the A.O, the ITAT held disallowance of 4% of impugned purchases. This was the case of purchases from Praveen Jain entity. The ld. CIT(A) also referred the case of Suresh H. Satyani vide ITA No. 3452/Mum/2016 dated 08.03.2017 wherein the ITAT considered the disallowance @ 9% but granting credit for no profit offered and these were the cases where purchases were made from Bhanwarlal Jain entities. The relevant part of the decision of the ld. CIT(A) is as under:

"6.3. I have considered the submissions carefully. When it was pointed out that the assessing officer has noted that notices u/s 133(6) were not complied with while it was contended before me that it was complied with, the appellant submitted even if such notices were not complied with, no additions can be made. The modus operandi involved in diamond trade has been elaborated earlier. The purchases could not be substantiated at the time of search action. These purchases were admitted to be unsubstantiated. The appellant did not have any evidence for the movement or dispatch of goods purchased and sold. It is also noted that the capacity of the parties from whom the appellant had made purchases and the parties to whom the appellant made sales was not established. Discrepancies have been highlighted by the assessing officer. Despite strenuous efforts of the appellant, the doubts are not dispelled. The party Kushal Exports has shown a loss on trading and the meagre profit is on account of interest income claimed. The entity belongs to the group of Rajendra Jain and others. In the search action in those cases, no actual stock of diamonds were found even though the same was reflected in books. The bogus nature transactions as per books was admitted. The statements recorded were not bland statements. There was admission of modus operandi, listing of key persons, evidence of communication with beneficiaries, listing of entities indulging in bogus transactions. These statements were given in the presence of independent Panchas. This cannot be summarily disowned by merely filing a self-serving retraction later. It is in the

light of these: evidences that Shri Pratik Kothari admitted to bogus purchases. The disallowance of purchases is certainly warranted. The assessing officer has not disallowed the entire purchases. He has assumed that purchases have been made in cash and bills obtained from the impugned party. The assessing officer has assumed profit element @ 8% on the impugned purchases and as made the disallowance based on this.

6.4. In such a scenario, where on one hand the genuineness of the purchase from the party claimed is doubted, but the genuineness of purchase as a whole cannot be doubted, the Courts have taken a view that only the profit margin embedded in such a transaction could be taxed. This is a fairly accepted principle and the same would apply in this case also Further, a dealer operating in the market is always aware of the GP which he earns in any transaction. Taking into consideration all these aspects, the issue arrives, as to what would be the margin, one can expect while buying the material from grey market instead of normal course. Firstly, these diamonds in the grey market are always cheaper than the diamonds sources from the genuine dealer. Secondly, there is always an element of discount in the case of instant cash purchases.

6.5. A perusal of the copy of appellate orders in the case of Naitik Gems filed by the appellant shows that the issue involved purchases from entities belonging to Rajendra Jain entities and the purchases were from Sparsh Exports Pvt. Ltd. The assessing officer made a disallowance of 6% of such purchases. This was based on the Instruction no 2 of 2008 related to benign assessment in the cases of assesses in the diamond business. The Ld. CIT(A) reduced the disallowance to 3% of the purchases based on the recommendation of the Task Force group for diamond industry set up by the Government of India, Ministry of Commerce and Industry which after considering the Benign Assessment Procedure (BAP) scheme recommended a net profit of 2% for trading activity, 3% for manufacturing activity and 2.5% across the board for diamond industry. The appeal filed by the assesse in ITA No. 4760/Mum./2017 was dismissed vide order dated 2.11.2017. In the case of Renisha Impex P. Ltd. in ITA 4464/Mum/2016 and ITA 4453/M/16 in the order dated 12.9.2017, as against 100% disallowance made by the assessing officer, the Hon'ble ITAT upheld disallowance of 4% of impugned purchases. This was a case of purchases from Praveen Jain entity. In the case of Suresh L Satyani in ITA 3452/M/16 vide order dated 8.3.2017, the Hon'ble ITAT upheld the order of CIT(A) who had considered the disallowance @ 9% but considered granting credit for net profit offered. This was a case where purchases were from Bhanwarlal Jain entities.

6.6. In the case of the appellant, therefore the fair and reasonable margin is considered to be @ 6% of the impugned purchases. The appellant in the case before me has shown Income From Business at Rs 4,63,79,341/-in its computation of income in the current AY 2012-13, which is 1.87 % of the turnover. Thus after considering the net profit disclosed, disallowance is computed @ 4.13% of the impugned purchases.

6.7. Accordingly, the addition to the total income is restricted to 4.13% of the purchases of Rs.11,71,17,906/-which works out to Rs.48,36,970/-. The appellant gets a relief of Rs.45,32,462/- Accordingly, ground of appeal is partly allowed."

Therefore, in the case of the assessee the ld. CIT(A) held that it is fair and reasonable to restrict the disallowance @ 6% of the impugned purchases. After taking into consideration that assessee had already shown profit @ 2.52% of the turnover the ld. CIT(A) made further disallowance @ 3.45% of the impugned purchases. Accordingly, the appeal was partly allowed.

16. In view of the findings of the ld. CIT(A) based on the decisions of the coordinate benches we consider that ld. CIT(A) has restricted the disallowance at very reasonable level therefore, we don't find any merit in the ground of appeal of the revenue and the assessee issue accordingly both the appeal of the revenue & assessee in respect of restricting addition of purchases to the extent of Rs.3,96,900/- stands dismissed.

17. Without reiterating the facts as discussed supra in this order, during the course of assessment the A.O observed that assessee had taken loan of Rs.1.20 cr from Sparsh Exports Ltd. as accommodation entry and added to the total income of the assessee as unexplained cash credit.
In respect of unsecured loan the learned CIT(A) has not sustained any separate addition but the same was treated as part of addition sustained on the basis of peak credit in the hand of the assessee firm.
Mr. Pratik Kothari has admitted the same as undisclosed income on account of bogus unsecured loan of Rs.1.20 cr taken from Sparsh Export Ltd. in the hands of the assessee. However, the assessee retracted the statement stating that the declaration was taken by misrepresentation by not disclosing the full fact that Shri Rajendra Jain and Dharmichand Jain had already made retraction of their statement and they stated that the loan given were genuine.

Regarding genuineness of the loan taken the assessee referred loan confirmation of Sparsh Export Limited, PAN number of the lender, zerox copy of the affidavit obtained from Sparsh Export Ltd. narrating in detail loan of Rs. 1.20 cr given to Shri Pratik Kothari and the source of the income out of which the loan was given the assessee has also filed the zerox copy of the return of income filed by Sparsh Export Ltd. for A.Y. 2008-09, zerox copy of PAN card and also copy of bank of statement of Sparsh Export Pvt. Ld. highlighting the loan given to the assessee and return of income of Shri Pratik Kothari. The assessee has filed the copy of bank statement of Shri Pratik S. Kothari highlight loan received and repaid to Sparsh Export Limited. The assessee also submitted that during the course of appellant proceedings before the learned CIT appeal the assessee has made specific submission that the entire addition was made on estimation basis. The assessee wide letter dated 5 December 2017 has brought to the notice of lower authorities that all the parties to whom notices under section 133 (6) were issued had given replies and furnished all the details to the extent possible before the assessing officer. The assessee had also offered vide letter dated 29 August 2016 to produce all the parties before the assessing officer to whome notices were issued under section 133 subsection 6 of the act. The assessee also informed to the assessing officer that parties were agreed to appear before him and requested the assessing officer to let us know when they can come. The Ld. Council after the referring the page number 210 of the paper book pertaining to the letter of the assessee addressed to assessing officer dated 28th of October 2016 submitted that the assessing officer has not given any further direction in this regard.

On similar facts and identical issue we have also perused the decision of coordinate bench of the ITAT Mumbai in the case of ITO 18(2)4), Mumbai Vs. Shri Nemichand Lalchand Jain, in 'ITA. No.159/Mum/2017 and C.O. No. 100/Mum/2018, the Hon'ble ITAT, Mumbai had held, as under:

> *6. We have heard counsels for both the parties at length and we have also perused the material placed on record as well as the orders passed by revenue authorities. Before we decide the merits of the case, it is necessary to 'evaluate the orders passed by Ld. CIT(A). The Ld. CIT(A) has dealt with the above grounds raised by the revenue in para no. 5 of its order. The operative portion of the order of Ld. CIT(A) is contained in para no. 5.2 to 5.2.2 of its order and the same is reproduced below:*
>
> *5.2 The submissions of the appellant has been carefully considered. The appellant has provided information to substantiate the genuineness of the loan. The details provided by the appellant are the income tax return acknowledgement of M/s Daksh Diamonds, account confirmation of M/s Daksh Diamonds, bank statement of both the appellant and M/s Daksh Diamond, audited financial statement, details of repayment of loan to M/s Daksh Diamond. The AO has not said that these are bogus documents. In fact, he has not commented on the veracity of these documents. According 'to the appellant, he had proved the identity, creditworthiness and genuineness of the loan by submitting all the relevant documents. The transactions of both the loan received and the repayment of the loan have passed through banking channels which is evidenced from the bank account statements of both the parties. There is no evidence of any cash being paid by the appellant to the party which has given the loan. The appellant had asked for copy of the statement of Shri BhanwarLal Jain on which the AO has placed complete reliance but the same was denied to him. The AG had issued notice u /s133(6) to M s. Daksh Diamond calling for certain details. The proprietor of M/s Daksh Diamonds, Shri. Ritesh Siroya replied to the notice with all necessary documents. The appellant offered to produce the party before the AG for examination but the AO was silent on that. The AO has merely relied upon the statement given by Shri. Bhanwar Lal Jain and the modus operandi and the affairs of BhanwarLal Jain group to make the addition. In fact, the extract of the Statement reproduced by the AO in the assessment order of Shri. Bhanwar Lal Jain does not speak about providing accommodation entries for the loans. Therefore, there can be no inference drawn from the statement that Shri. Banwarlal Jain or the concerns operated by him, provide entries for loans. Neither Mr. Bhawar Lal Jain nor Mr. Ritesh Siroya has taken the name of the appellant at any point of time to state that they had given an accommodation entry for loan to him Whatever inferences the AO has drawn have no connection whatsoever with the loan taken by the appellant. The AO has not controverted the evidences produced by the assessee nor has he brought any evidence to support his view that the loan taken is a mere accommodation entry and is not genuine. 5.2.1. The*

loan given by M s. Daksh Diamond are reflected in the balance sheet. The loan was received on two dates: Rs. 25 laksh on 08 03 2007 and Rs. 50 lakhs on 23 03 2007. The appellant has repaid the loan as under: Transaction Date Amount Del sited (Rs.) 26.07.2007 15,00,000 - 31.07.2007 5,00,000 - 31,07,2007 3,00,000 - 01.08.2007 18,00,000 - 07.08.2007 10,00,000 - 22.08,2008 5,00,000 - 10.07.2009 14,00 000 - 15.07.2009 5,00,000 - 5.2.2. All these transactions are reflected in the bank statements of both the parties. The transactions have passed through, the banking channels, both the parties have confirmed the transactions, the genuineness of the transactions has been established and the creditworthiness of the lender is also established. In view of this, the loan taken by the appellant of Rs. 75 lakhs is held to be genuine. The addition made on this count is directed to be deleted. This ground of appeal is allowed. ;

After having gone through the facts of the present case as well as orders passed by the revenue authorities, we find that Ld. CIT(A) had appreciated the details provided by the assessee which leads to prove the genuineness of loans. The assessee had provided income tax return acknowledgement of Ms Daksh Diamonds, account confirmation, bank statement of the assessee as well as Ms Daksh Diamond, audited financial statement, details of repayment of loan. The Ld. CIT(A) while appreciating that the assessee had proved the identity, creditworthiness and genuineness of loans had taken into consideration that the transactions of both the loan received and the repayment of the loan had passed through banking channels. At the same time, the AO had not led any evidence that any cash was paid by the assessee to the parties who had given the loan. From the records, we also noticed that the statement of Bhanwar Lal Jain on which _ the AO has placed complete reliance was not given to the assessee. The ° proprietor of M s Daksh Diamonds, Shri. Ritesh Siroya replied to the notice issued by the AO u s 133(6) of the LT. Act and offered to produce the party before the AO for examination. On the contrary, the AO merely relied upon the statement given by Shri. Bhanwar Lal Jain and the modus operandi and the affairs of BhanwarLal Jain group to make the addition. Ld. CLI(A) correctly appreciated the fact: that: from the extract of the statement reproduced by the AQ in the assessment order of Shri Bhanwar Lai Jain, it does not speak about providing accommodation entries for the loans. Therefore, there can be no inference drawn from the statement that Shri. Barnnwarnla Jain or the concerns operated by him, provide entries for loans. Apart from the above, it was also noticed that neither Mr. BhawarlLal Jain nor Mr. Ritesh Siroya had taken the nate of the assessee at any point of time to state that they had given an accommodation entry for loan to him.

Even otherwise the loan were repaid by the assessee and the details of such repayment are recorded in para 5.2.1 of the order of La. CIT(A). Apart from that, all the transactions were reflected in the bank statements of both the parties. The transactions had passed through,the banking channels, both the parties had confirmed the transactions, the genuineness of the transactions has been established and the

creditworthiness of the lender was also established. Thus considering all those facts, Ld. CIT(A) had rightly deleted the additions. We have also considered the decision relied upon by the assessee, wherein also, the Coordinate Bench of the Tribunal in ITA No. 7079 Mum/16 in the case of ACIT Vrs. Dilip ; Chimanlal Gandhi and in case ITA No. 1069 to 1071 Mum 17 in the case of M s Reliance Corporation Vs. ITO had deleted the additions under the identical circumstances. Moreover, no new facts or contrary judgments have been brought on record before us in order to controvert or rebut the findings so recorded by Ld. CIT(A). Therefore, we see no reasons to interfere into or deviate from the findings recorded by the Ld.CIT(A). Hence, we are of the considered view that the findings so recorded by the Ld. CIT (A) are judicious and are well reasoned. Resultantly, these ground raised by the revenue stands dismissed."

It was also submitted during the course of assessment that no incriminating material was found which could even cast doubt on the genuineness of the unsecured loan. The payments have been made through proper banking channels and subsequently unsecured loan taken have been repaid to the lenders. There was no other evidence except the retracted statements. The A.O had not controverted these material facts with any relevant evidences. We have gone through the decision of coordinate bench of the ITAT in the case of Neminchand Jain Vs. DCIT as discussed wherein the addition on account of unsecured loan taken from companies controlled and operated by Shri Bhanwerlal Jain and his associate was made wherein also the assessee has filed various details in order to prove genuineness of transaction i.e confirmation letter, PAN, ITR acknowledgment , bank statement, affidavit etc. in the backdrop of admission of Shri Bhanwerlal Jain in his statement recorded u/s 132(4) of the Act. In the case of the assessee the facts are also similar and assessee has also filed the similar detail and copies of document as were filed in the case of Nemichand Jain. In the Nemichand Jain case as reproduced in the finding of ld. CIT(A) supra the coordinate bench of the ITAT held that the assessee had discharged initial burden by filing various documents to prove identity, genuineness

of transactions and creditworthiness of the parties and held that the A.O was erred in making addition towards unsecured loans u/s 68 of the Act. In the case of the assessee A.O has also failed to controvert the submission of the assessee supported with the relevant material. In the light of the facts and findings of coordinate bench in the Nemichand Jain case as supra, we find that the issue raised before the Tribunal in this year pertaining to the case of the assessee are similar to the case of Nemichand P. Jain.

After taking into consideration the facts and material on record it is clear that assessing officer has neither disproved the submission of the assessee nor made any independent investigation to bring on record any relevant materials in support of his findings. Therefore, the decision of learned CIT appeal in treating the said loan as part of peak credit is not justified. Accordingly this ground of appeal of the assessee is allowed . Since the aforesaid amount of loan is not treated as a part of peak credit therefore other grown of appeal filed by the assessee become infrutous and the same stands dismissed.

In the result appeal of the assessee is partly allowed.

ITA No. 6774/Mum/2018 (Revenue's Appeal)

18. All these 9 appeals of the revenue are pertained to the two partner Shri Pratik S. Kothari & Shri Parag S. Kothari partner of Shri R. Kantilal & Company are based on similar fact and issue, therefore, for the sake of convenience all these 9 appeal are adjudicated together by taking ITA No. 6774/Mum/2018 as lead case and its finding will be applied to all other appeals as mutatis mutandis.

19. Without reiterating the facts as elaborated above in this order the assessee was a partner in the firm R. Kantilal & Company along with Pratik S. Kothari he had shown income from profit/gains on business /profession and income from other sources during the year under consideration. During the course of a search action while recording statement detail of unsecured loan taken by Mr. Pratik Kothari/Shri Parag Kothari & M/s R. Kantilal & Company for assessment year 2007-08 onwards, on perusal of the ledger account it is noticed that following loan have been taken by assessee during the year under consideration:

Sr. No.	Amount of Loan	Name of the entity	AY
1.	75,00,000	Kriya Impex Pvt. Ltd.	2011-12
2.	30,00,000	Kush Gems Pvt. Ltd.	2011-12
3.	2,20,00,000	Mahak Diamonds	2011-12

The aforesaid entity who had given loan to the assessee were controlled by Shri Bhanwarlal Jain, Rajendra Jain, Shri Dharmachand Jain, Shri Yograj Singhvi. It was brought to the notice of the assessee that aforesaid persons during the course of search proceeding in their case had admitted that they were in the business of providing accommodation entries in the form of unsecured loan/bogus purchase etc. Therefore, assessee was asked to explain why unsecured loan taken from them should not be treated as mere accommodation entries. Mr. Pratik Kothari admitted that accommodation entry were taken by giving cash which was generated out of the business itself, therefore, requested that only the peak should be brought to tax as same was used to repay the loan and take new one and they have also computed the peak of Rs.4,07,40,000/-.

20. However, the A.O noticed that in response to notice u/s 153A neither peak value for the entire period as mentioned in the statement

u/s 132(4) of the Act was offered to tax nor any additional income offered in the respective assessment year. Therefore, assessee was asked to establish the identity of the lender creditworthiness and genuineness of the transaction made with Kriya Impex Pvt. Ltd. Kushal Gems Pvt. Ltd. & Mahak Diamonds. In response the assessee submitted i. loan confirmation; ii copy of PAN card; iii. ITR filed by the lender; iv bank statement of the lender showing loan given and returned; v. bank statement of the assessee showing loan taken and repaid to the parties; vi. Copies of affidavit from the lenders confirming the transaction. However, the A.O stated that parties have not made compliance to the notice issued u/s 133(6) of the Act. The A.O stated that the aforesaid concern were only providing accommodation entries. The

assessee explained that the books of account revealed that all the loan were dully accounted and was received by account payee cheques and subsequently repaid by account payee cheques. The A.O has also not accepted the retraction statement filed by the assessee stating that it was an afterthought however, the assessee contended that in search proceedings in the cases of Rajendera Jain and other party no incriminating material evidence of any nature was found and assessee's name was also not featured in their statement. The assessee also stated that no incriminating material has been found which can be suggest that he was a beneficiary of any accommodation entries. However the A.O has rejected the contention of the assessee stating that in his statement u/s 132(4) he had offered a sum of Rs.4.07 crores as peak value of the transaction. The assessee stated that it had retracted his statement recorded u/s 132(4) of the Act. The A.O stated that assessee failed to establish the identity and creditworthiness of the parties and

genuineness of the transaction he has not received reply to the notices issued u/s 133(6) of the Act, therefore, amount of loan of Rs.3.25 crores obtained from the aforesaid 3 parteis was treated as income for the year under consideration.

21. The ld. CIT(A) has given his finding at para 6.3 of the order. The ld. CIT(A) has concluded that PratikKothari and Parag Kothari had virtually no other significant source of income other than their source of income from the partnership firm R. Kantilal & Company. The loan taken by them were given to R. Kantilal & Company and was returned by firm to it. Though most of the loan were received in the hands of the Pratik Kothari & Parag Kothari but actual beneficiary was R. Kantilal & Company. During the search action too shri Prakash Kothari had offered the income in the hands of R. Kantilal & Company, therefore, the income should be assessed in the hands M/s R. Kantilal & Company. The ld. CIT(A) stated that the loan were related to the business of M/s R. Kantilal & Company. The ld. CIT(A) also stated that loan taken were repaid in short period of time and subsequent loan were taken much later. The ld. CIT(A) has sustained the addition in the hands of M/s R. Kantilal & Company and the additions made in the hands of Shri Pratik Kothari was deleted. In the light of the above facts and circumstances as discussed above by the ld. CIT(A) we don't find any infirmity in his decision ,therefore, the appeal of the revenue is dismissed.

ITA No. 6773/Mum/2018

22. As the facts and the issue involved in all these appeal are the same as mentioned supra in ITA No. 6774/Mum/2018, therefore, applying the same mutatis mutandis, all these appeals of the revenue are dismissed.

ITA No. 6772/Mum/2018

23. As the facts and the issue involved in all these appeal are the same as mentioned supra in ITA No. 6774/Mum/2018, therefore, applying the same mutatis mutandis, all these appeals of the revenue are dismissed.

ITA No. 6775/Mum/2018

24. As the facts and the issue involved in all these appeal are the same as mentioned supra in ITA No. 6774/Mum/2018, therefore, applying the same mutatis mutandis, all these appeals of the revenue are dismissed.

ITA No. 6776/Mum/2018

25. As the facts and the issue involved in all these appeal are the same as mentioned supra in ITA No. 6774/Mum/2018, therefore, applying the same mutatis mutandis, all these appeals of the revenue are dismissed.

ITA No.6757/Mum/2018

26. As the facts and the issue involved in all these appeal are the same as mentioned supra in ITA No. 6774/Mum/2018, therefore, applying the same mutatis mutandis, all these appeals of the revenue are dismissed.

ITA No.6759/Mum/2018

27. As the facts and the issue involved in all these appeal are the same as mentioned supra in ITA No. 6774/Mum/2018, therefore, applying the same mutatis mutandis, all these appeals of the revenue are dismissed.

ITA No.6760/Mum/2018

28. As the facts and the issue involved in all these appeal are the same as mentioned supra in ITA No. 6774/Mum/2018, therefore, applying the same mutatis mutandis, all these appeals of the revenue are dismissed.

ITA No.6761/Mum/2018

29. As the facts and the issue involved in all these appeal are the same as mentioned supra in ITA No. 6774/Mum/2018, therefore, applying the same mutatis mutandis, all these appeals of the revenue are dismissed.

30. In the result the appeal of the assessee are partly allowed and the appeals of the revenue are dismissed.

Order pronounced in the open court on 27.09.2022

Sd/-	Sd/-
(KAVITHA RAJAGOPAL) JUDICIAL MEMBER	(AMARJIT SINGH) ACCOUNTANT MEMBER

Mumbai, Dated 27.09.2022
PS: Rohit

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / The CIT(A)
4. आयकर आयुक्त(अपील) / Concerned CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,
सत्यापित प्रति //True Copy//

(Asst. Registrar)
ITAT, Mumbai