

IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH: DB: INDORE

BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER
AND
SHRI BHAGIRATH MAL BIYANI, ACCOUNTANT MEMBER

ITA No.87/Ind/2021
Assessment Year: 2012-13

The ACIT (Central)-2, Bhopal, MP-462011	vs.	Shri Sanjeev Agrawal, H.No.E-2/134, Arera Colony, Bhopal, MP-452016 PAN ADHPA8387N
(Appellant)		(Respondent)

For Revenue :	Shri P.K. Mishra, CIT(DR)
For Assessee :	Shri S. S. Deshpande, CA Shri Satyajeet Chatterjee, CA

Date of Hearing :	22.02.2023
Date of Pronouncement :	09.05.2023

ORDER

PER CHANDRA MOHAN GARG, J.M.

This appeal filed by the Revenue is directed against the order dated 14.08.2020 of the Ld. CIT(A), Bhopal, relating to Assessment Year 2012-13.

2. The grounds of appeal raised by the revenue read as under:-

1. *On the facts and in the circumstances of the case, the Id. CIT(A) erred in deleting the addition of Rs. 6,50,00,000/- made*

by the Assessing officer on account of voluntary surrender u/s 132(4) of the Income Tax Act, 1961.

2. On the facts and in the circumstances of the case, the Id. CIT(A) erred in deleting the addition of Rs. 75,61,000/- and Rs. 6,25,000/- made by the Assessing officer on account of unexplained transactions.

3. On the facts and in the circumstances of the case, the Id. CIT(A) erred in deleting the addition of Rs. 82,35,639/- made by the Assessing officer on account of overdraft interest.

4. On the facts and in the circumstances of the case, the Id. CIT(A) erred in deleting the addition of Rs. 3,53,80,000/-, Rs. 49,00,000/-, Rs. 18,50,000/-, Rs. 22,70,000/- made by the Assessing officer on account of on money payment against the land purchase.

3. Apropos ground no. 1 the learned CIT(DR) submitted that the AO was right in making addition in this regard because during the course of statement recorded u/s. 132(4) of the I.T Act 1961 on 22.10.2011 and 15.11.2011, the assessee Sanjeev Agrawal has offered total undisclosed to the tune of Rs. 17,25,00,000/- in the hands of himself, his family members and his business concerns. The learned CIT(DR) further submitted that subsequently again vide letter dated 23.04.2012 before the DDIT-(Inv.)-1, Bhopal the assessee again confirmed the said surrender of Rs. 17.25 crores. The learned CIT(DR) further submitted that in the case of **ACIT vs. Hukum Chand Jain reported as (2010) 191 Taxmann.com 319 (Chhatisgarh)**, the Hon'ble Chhatisgarh High Court has held that the admission is one important piece of evidence but it cannot be said it is conclusive. The learned CIT(DR) submitted that in this case Hon'ble High Court considered the judgement of Hon'ble Rajasthan High Court in the case of **Ramjas Naval vs. CIT 183 CTR (Raj) 144** wherein it was held that assessee admits that he is

disclosing undisclosed income at his free will without any threat and express his inability of submit any documentary evidence during the search proceedings then subsequent contention of the assessee that the income found during the search proceedings in genuine has to be held that afterthought. Therefore the AO was right in making addition in this regard and the Ld. CIT(A) had deleted the same without any cogent reason. Therefore the first appellate order may kindly be set aside by restoring that of the AO.

4. Replying to the above the learned counsel of the assessee strongly supported the first appellate order submitted that the AO has made addition which was not sustainable on the basis of surmises of conjectures which was rightly deleted by the Ld. CIT(A). The learned counsel drawing our attention towards relevant part of the first appellate order submitted that during the course of search proceedings the assessee submitted brief details and declared Rs. 4 crores has work in progress in Sagar Premium Towers, Rs. 1 crore advance given to the parties and Rs. 90 lakh was cash kept at side Sagar Premium Towers and Rs. 85 lakh kept at side at Sagar Landmark. The learned counsel further explained that besides that above Rs. 6.75 crore declaration the assessee made miscellaneous surrender of Rs. 10.50 crore and it was submitted that the same shall be confirmed after study of all loose papers.

5. The learned counsel further submitted that subsequently after filing of return u/s. 153A of the Act, assessee did not find any investment linking with said remaining of amount of Rs. 10.50 crores but however just to by piece of mind and reduced the litigation the assessee shown Rs. 4 crores in his tax return and return of his wife under income from other sources. The learned counsel submitted that the voluntary surrender amount of Rs. 17.25 crores was reduced to Rs. 10.75 crores and balance amount of Rs. 6.50 crores was deducted as there was no corroborative

evidence on record to corroborate the conclusion of the AO. The AO, that the assessee has earned income undisclosed sources at Rs. 6.50 crores over and above of Rs. 3 crores disclosed in the return of income.

6. The learned counsel, supporting the first appellate order, vehemently pointed out that the AO has failed to bring on record any positive or adverse evidence having nexus with the assessee or business transaction carried out by the assessee or by pointing out assessee connection with the seized documents in name or otherwise. Therefore, it was rightly concluded by the Ld. CIT(A) that the addition made by the AO was not on the basis of any incriminating material found during the course of search but only on the basis of statement of assessee Shri Sanjeev Agrawal only. The learned counsel also pointed out that during the post search enquiries no irregularity or adverse material have been brought on record and only addition made was towards income declared in the statement recorded u/s. 132(4). The learned counsel also place reliance on the various decisions including as listed below:-

1. *ACIT (1) vs. Sudeep Maheshwari ITA No. 524/Ind/2013*
2. *Kailasben Mangarlal Chokshi Vs. Commissioner of Income Tax-(2008) 14 DTR 257 (Guj.)*
3. *Shree Ganesh Trading Co. Vs. Commissioner of Income Tax, Tax Case No.8 of 1999*
4. *Ms/ Ultimate Builders vs. ACIT Central-II, Bhopal ITA No. 134/Ind/2019*
5. *Kailashben Manharlal Choksi 328 ITR 411 (200)*
6. *CIT vs. Jaya Lakshmi Ammal (2017) 390 ITR 189 (Mad.)*
7. *ACIT vs. Shri Yogesh Kumar Hotwani 30 ITJ 353/380 (Ind-trib)*

7. The learned counsel submitted that without making any reference to any incriminating material found during the course of search suggesting of earning of unaccounted income the Ld. CIT(A) was right in deleting the addition by following the order of ITAT Indore Bench in the case of Ms/ Ultimate Builders (supra) and other judgments including judgment of Hon'ble Gujarat High Court in the case of Kailashben Manharlal Choksi (supra).

8. The learned counsel lastly submitted that during the course search and seizure operation the assessee was under stress and was not able to peruse his books of accounts and financial statements nor was able to consult his tax advisor therefore the assessee in all fairness kept open the heads of declared amount and after considering the entire facts and circumstances surrendered amount of Rs. 10.75 crores and also paid tax thereon. Therefore, remaining amount of Rs. 6.50 crore was rightly deleted by the Ld. CIT(A) having no substance and without support of any adverse material.

9. On careful consideration of above submissions first of all we note that the AO made addition on the basis of statement recorded by the Investigation Wing during the course of search and seizure operation on 22.02.2011 and 15.11.2011 of assessee Shri Sanjeev Agrawal and subsequently, vide letter dated 23.04.2012 he again confirmed the said surrender. The said letter dated 23.04.2012 has also been reproduced by the AO in para 13.3 at page no.9 and 10 of the assessment order.

10. However, at the time of filing return of assessee, his wife and other related concern the assessee including amount of Rs. 05.75 crore in the name of M/s. Agrawal Constructions towards projects namely; Sagar Premium Towers (work in progress to parties) & Sagar Landmark of Rs. 3 crore in his own account and Rs. 2 crore on account of his wife Mrs. Kiran Agrawal, totalling of Rs. 10.75

crores and also paid due tax thereon. This created a difference of Rs. 6.50 crores which was impliedly retracted by way of showing less amount of surrender money. This was picked up by the AO for making addition in the hands of assessee.

11. From careful perusal of the relevant part of the first appellate order, we further note that the learned first appellate authority after considering the stand of the AO, replying and explanation of the assessee concluded that the assessee has made the deduction of Rs. 6.5 crores by submitting that no such undisclosed income was earned and therefore no such income was required to be offered to tax. For the sake of completeness, we find appropriate to reproduced the relevant cooperative part of the first appellate order which read as follows:-

4.5.1 During the course of search at various premises of appellant various incriminating material/ documents were found and seized. These documents were also confronted to appellant and the appellant in reply made voluntary surrender of Rs. 17.25 crores on various accounts. The brief details of additional income offered during the course of search are as under:-

<i>Particulars</i>	<i>Amount Rs. in Crores</i>
<i>Work in Progress at site "Sagar Premium Towers"</i>	<i>4.00</i>
<i>Advances given to parties</i>	<i>1.00</i>
<i>Cash kept at site "Sagar Premium Towers"</i>	<i>0.90</i>
<i>Cash kept at site "Sagar Landmark"</i>	<i>0.85</i>
<i>Miscellaneous Surrender (Shall be confirmed after study of all loose papers)</i>	<i>10.50</i>
<i>Total Amount</i>	<i>17.25</i>

The appellant after filing return of income us 153A did not find any investment linking with Rs. 10.50 Crores but however in the return just to purchase of peace of mind reduced the figure of Rs. 10.50 crore to Rs. 4.00 crore and shown the same in his tax return and return of his wife as under the head "Income from Other Sources" as other income. The details of additional income offered by appellant in return of income are under:-

<i>Name of Assessee (PAN)</i>	<i>Amount Rs.</i>	<i>Remarks</i>
<i>M/s Agrawal Constructions (AARFA9981D)</i>	<i>5,75,00,000</i>	<i>Disclosed in the return of income & accepted in the assessment</i>
<i>Mr. Sanieev Agrawal (ADHPA8387N)</i>	<i>3,00,00,000</i>	<i>Disclosed in the return of income but in assessment enhanced by Rs. 6.50 cores.</i>
<i>Mrs. Kiran Agrawal (AASPA9452C)</i>	<i>2,00,00,000</i>	<i>Disclosed in the return of income & accepted in the assessment</i>
<i>Total Amount Rs.</i>	<i>10,75,00,000</i>	

The appellant on ad-hoc made voluntary surrender of Rs. 17.25 crores which was reduced to Rs. 10.75 crores and the balance amount of Rs. 6.50 crores was retracted. The appellant has strongly contended that no corroborative evidence on record to corroborate the conclusion of the AO, the assessee had earned income from undisclosed sources at Rs. 6.50 crores over and above Rs. 3.00 crores disclosed in the return.

4.5.2 I have considered the facts of the case, plea of the appellant, case laws relied upon by the appellant and AO and findings of the AO. During the assessment proceedings w/s 143(3)/153A of the Act, assessee made the retraction by

submitting that no such undisclosed income was earned and therefore no such income was required to be offered to tax. However, the A.O giving reference to the statement of appellant and also giving reference to the seized documents found during the search, made addition for undisclosed income. However, no specific reference was made to any incriminating material having its bearing on the surrendered income. During the course of appellate proceedings, appellant has contended that during the course of search no cash or unrecorded assets was found, no incriminating material was found and no income was offered to tax in the statement recorded us 132(4) of the Act of the person found to be in the possession and control of the books of premises. Relevant questions asked about the loose paper found were duly replied in the statement. Further, Id AR of the appellant has also contended that search in the case of appellant was started on 21.10.2011 and concluded on 22.10.2011. The statement of appellant was recorded on 24.10.2011 and cannot be utilized against assessee without having any corroborative evidence on record.

4.5.3 The AO on page 7 of the assessment order has given specific reference of loose paper mentioning details of payment of Rs. 6.75 crores which has been considered as incriminating documents by him based on which the addition has been made. I have gone through the said loose papers/observations and it has been observed that the said loose paper does not mention any amount more than Rs. 6.75 crores, however, appellant has already made voluntary disclosure of Rs. 10.75 crores in return filed by various concerns. All these facts have been accepted by the AO during the assessment proceedings and none of these facts have been disputed by the AO. Thus, the assessee has successfully explained that the seized paper and declared amount mentioned therein in return filed w/s 153A/139(1) of the Act. Accordingly, the papers (except one) referred to in the assessment order, no other incriminating document was found suggesting unaccounted income. The A.O has also failed to bring on record any positive evidence having nexus with the

assessee or business transaction carried out by the assessee or by pointing out assessee's connection with the seized document in name or otherwise. Thus, it can be safely concluded that the addition made by the A.O was not on the basis of the incriminating material found during the course of search but only on the basis of statement of appellant only. Even in post search enquiries no irregularity has been brought on record and the only addition made is towards income declared in the statement recorded us 132(4). Hon'ble ITAT Indore in the case of ACIT(1) vS. Sudeep Maheshwari ITA No 524/Ind/2013 dated 13.02.2019 has held as under:-

"6. It is the case of the assessee that during the course of search & seizure, no incriminating material or undisclosed income or investments were found. It is stated that the assessee was under mental pressure and tired. Therefore, to buy peace of mind, he accepted and declared Rs.3 crores in personal name. It is also stated that the case laws as relied by the A.O. are not applicable on the facts of the present case. The assessee has relied on the decision of the Hon'ble Supreme Court rendered in the case of Pullangode Rubber Produce Co. Ltd. 91 ITR 18 (SC), wherein the Hon'ble Court has held that admission cannot be said that it is conclusive. Retraction from admission was permissible in law and it was open to the person who made the admission to show that it was incorrect. However, reliance is placed on the judgement of the Hon'ble Gujarat High Court rendered in the case of CIT Vs. Chandrakumar Jethmal Kochar (2015) 55 Taxmann.com 292 (Gujarat), wherein it has been held that merely on the basis of admission that few benami concerns were being run by assessee, assessee could not be basis for making the assessee liable for tax and the assessee retracted from such admission and revenue could not furnish any corroborative evidence in support of such evidence. It was further urged by the assessee that admission should be based upon certain corroborative evidences. In the absence

of corroborative evidences, the admission is merely a hollow statement. We have given our thoughtful consideration to the rival contentions of the parties. It is undisputed fact that the statement recorded us 132(4) of the Act has a better evidentiary value but it is also a settled position of law that the addition cannot be sustained merely on the basis of the statement. There has to be some material corroborating the contents of the statement. In the case in hand, revenue could not point out as what was the material before the A.O., which supported the contents of the statement. In the absence of such material, coupled with the fact that it is recorded by the Ld. CIT(A) that the assessee himself had surrendered a sum of Rs.69,59,000/- and Rs. 75,00,000/- in A. Y. 2008-09 and 2009-10 respectively. The A.O. failed to co-relate the disclosures made in the statement with the incriminating material gathered during the search. Therefore, no inference is called for in the finding of the Ld. CIT(A) and is hereby affirmed. Ground raised by the revenue is dismissed.

4.5.4 *Hon'ble Gujarat High Court in the case of Kailashben Mangarlal Chokshi vs. CIT - (2008) 14 DTR 257 (Guj.) has held that merely on the basis of admission, the assessee could not have been subject to additions, unless and until some corroborative evidence is found in support of such admission.*

4.5.5 *Hon'ble Jharkhand High Court Shree Ganesh Trading Co. Vs Commissioner of Income-tax, Tax Case No.8 of 1999 order dated 03.01.2013 held as under;*

"4. We considered the submissions of the learned counsel for the parties and perused the reasons given in the impugned orders as well as reasons given in the case of Kailashben Manharlal Chokshi (supra).

5. It appears from the statement of facts that there was a search in the business premises of the petitioner's firm as well as in the residential premises of its partner, Shri Sheo Kumar Kejriwal, on 24th September, 1987. During the

course of search, the statement of Shri Sheo Kumar Kejriwal had been recorded under section 132(4) of the Income Tax Act and in the statement, he stated that he was partner in the Ganesh Trading Company, ie. the present assessee-firm in his individual status and that he surrendered Rs. 20 lacs for the assessment year 1988-89 as income, on which tax would be paid. He further stated that other partners would agree to the same; otherwise it would be his personal liability. However, in the returns filed after search, the income of Rs. 20 lacs surrendered by Shri Sheo Kumar Kejriwal was not declared by the assessee-firm. On being asked to explain the reason for not showing the surrendered amount in the returns, it was submitted by the assessee that declaration made by the partner was misconceived and divorced from real facts. It was contended that the declaration was made after persuasion, which, according to the learned counsel for the assessee, Shri Binod Poddar, in fact, was because of coercion exerted by the search officers. In explanation, it was submitted that the firm or the individual had no undisclosed income. The assessee's said retraction was not accepted by any of the authorities below on the ground that the statement given by the assessee appears to be voluntarily given statement disclosing undisclosed income of Rs. 20 lacs. According to the learned counsel for the assessee, Shri Binod Poddar, the Assessing Officer had full jurisdiction to proceed for further enquiry and could have collected evidence in support of alleged admission of undisclosed income of the assessee.

6. We are of the considered opinion that statement recorded under section 132(4) of the Income Tax Act, 1961 is evidence but its reliability depends upon the facts of the case and particularly surrounding circumstances. Drawing inference from the facts is a question of law. Here in this case, all the authorities below have merely reached to the conclusion of one conclusion merely on the basis of assumption resulting into fastening of the liability upon the

assessee. The statement on oath of the assessee is a piece of evidence as per section 132(4) of the Income Tax Act and when there is incriminating admission against himself, then it is required to be examined with due care and caution. In the judgment of Kailashben Manharlal Chokshi (supra), the Division Bench of Gujarat High Court has considered the issue in the facts of that case and found the explanation given by the assessee to be more convincing and that was not considered by the authorities below. Here in this case also, no specific reason has been given for rejection of the assessee's contention by which the assessee has retracted from his admission. None of the authorities gave any reason as to why Assessing Officer did not proceed further to enquire into the undisclosed income as admitted by the assessee in his statement under section 134(2) in fact situation where during the course of search, there was no recovery of assets or cash by the Department. This fact also has not been taken care of and considered by any of the authorities that in a case where there was search operation, no assets or cash was recovered from the assessee, in that situation what had prompted the assessee to make declaration of undisclosed income of Rs. 20 lacs.

Mere reading of statement of assessee is not the assessment of evidentiary value of the evidence when such statement is self-incriminating. Therefore, we are of the considered opinion that in the present case, a wrong inference had been drawn by the authorities below in holding that there was undisclosed income to the tune of Rs. 20 lacs.

7. In view of the above reasons, without answering the question about retrospective operation of the proviso to section 134(4), we are holding that the authorities below have committed error of law in drawing inference from the materials placed on record, ie. admission of the assessee coupled with its retraction by the assessee. The Revenue may now proceed accordingly"

4.5.6 Further, Hon'ble ITAT in the case of Ms Ultimate Builders vs ACIT Central-II, Bhopal ITA No 134/Ind/2019 dated 09.08.2019, wherein it has been held that the statement given by the assessee was without any specific reference to any incriminating material therefore, addition on account of undisclosed income offered in statement was deleted. Besides this, decision of Hon'ble Gujarat High Court in the case off Kailashben Manharlal Choksi 328 ITA 411 (2008) also supports the contention that merely on the basis of admission, the assessee could not be subjected to addition unless & until some corroborative evidences is found in support of such addition.

4.5.7 In the case of CIT vs Jaya Lakshmi Ammal (2017) 390 IT 189 (Mad.) Hon'ble Madras High Court ha held as under:

"we are of the considered view that, for deciding any issue, against the assessee, the authorities under the IT Act, 1961 have to consider, as to whether there is any corroborative material evidence. If there is no corroborating documentary evidence, then statement recorded under s. 132(4) of the IT Act, 1961, alone should not be the basis, for arriving at any adverse decision against the assessee. If the authorities under the IT Act, 1961, have to be conferred with the power, to be exercised, solely on the basis of a statement, then it may lead to an arbitrary exercise of such power. An order of assessment entails civil consequences. Therefore, under Judicial review, courts have to exercise due care and caution that no man is condemned, due to erroneous or arbitrary exercise of authority conferred. "

The court further held that "if the assessee makes a statement under s. 132(4) of the Act, and if there are any incriminating documents found in his possession, then the case is different. On the contra, if mere statement made under s. 132(4) of the Act, without any corroborative material, has to be given credence, than it would lead to disastrous results. Considering the nature of the order of

assessment, in the instant case characterised as undisclosed and on the facts and circumstances of the case, we are of the view that mere statement without there being any corroborative evidence, should not be treated as conclusive evidence against the maker of the statement. "

4.5.8 Hon'ble Jurisdictional Tribunal Indore in the case of ACIT Vs. Shri Yogesh Kumar Hotwani 30 ITJ 353/380 (Ind-Trib) has held that no addition can be made merely based on statement w/s. 132(4) without linking to the seized books of accounts, other documents, money, bullion, jewellery or other valuable articles or things. In para 18 of the order, at page 380, the Tribunal held as under :-

We also find that disclosure was not made by the assessee hence it is not binding on him. We also rely on the decision in the case of CIT v. Chandra Kumar Jethmal Kochar, (2015) 230 Taxman 78 (Guj), Asstt. CIT v. Kunwarjeet Finance Pvt. Limited, (2015) 61 Taxmann.com 52 (Ahm.-Trib.), CIT v. Jagdish Narayan Ratan Kumar, (2015) 61 taxmann.com 173 (Raj, wherein it was held that when addition of disclosure made by the assessee in statement recorded w/s 132(4), it cannot be sustained despite retraction, when Revenue could not furnish any positive evidence in support of such addition. Therefore, we are unable to uphold the findings of the AO and inclined to agree with Ld. CIT(A). Further, the Hon'ble Rajasthan High Court in the case of Jagdish Narayan Ratan Kumar (supra) has held that statement made during search must be correlated with records, which are found and if there is no ambiguity, explanation given by the assessee should be taken into consideration before making assessment. Thus, based on these decisions, we are of the opinion that the addition made by merely based on statement ws 132(4) without linking to the seized books of accounts. other documents, money, bullion, jewellery, other valuable articles or things is not sustainable in law

4.5.9 *In view of the above discussion & facts stated above, I come to unescapable/conclusion that the AO was not justified in making addition of Rs.6,50,00,000/- as unaccounted income based on disclosure made during the search because no specific reference has been made by the AO to any incriminating material found during the course of search suggesting earning of such unaccounted income. Therefore, judiciously following the decision of hon'ble ITAT, Indore in the case of M/s Ultimate Builders (supra), the addition made by the AO amounting to Rs.6,50,00,000/- is Deleted. Therefore, appeal on this ground is Allowed.*

12. On being asked by the Bench, the learned CIT(DR), except taking basis of the statements of assessee recorded during the course of search and seizure operation on 22.10.2011 & 15.11.2011 and the letter dated 23.04.2012, could not show us any positive, adverse or cogent documentary evidence or incriminating material to show that the remaining amount of surrender of Rs. 6.5 crores, which was not included in the return of income, was in fact, earned by the assessee from undisclosed sources. The Assessing Officer proceeded to make impugned addition on the basis of statement of the assessee only along with his on whims, wrong assumptions and presumption by arising suspicion and doubt over the statements and explanations of the assessee. At this juncture, we take respectful cognizance of the judgment of Hon'ble Supreme Court in the case of Umacharan Shaw & Bros. Company vs CIT (supra) wherein it was held that the suspicion, however, strong cannot take a place of proof. In the subsequent judgment in the case of K.P Verghese vs. ITO (supra), the Hon'ble Supreme Court again held that the assessee must be shown to have received more than what is disclosed by him.

13. On careful consideration of stand of the AO and basis taken by the Ld. CIT(A) for deleting the addition first of all we may point out

that the Hon'ble High Court of Gujarat in the case of Kailasben Mangarlal Choksh vs. CIT(supra) it was held that merely on the basis of admission of assessee, the assessee could have been subjected to addition, unless and until some collaborative evidence is found in support of such admission. Meaning thereby addition on the standalone basis of statement of assessee u/s. 132(4) of the Act cannot be held as sustainable in absence collaborative evidence found in supports such addition. Further the Hon'ble Jharkhand High Court in the case of Shri Ganesh Trading Company vs. CIT(supra) held that mere reading of statement of assessee is not the assessment of evidentiary value of the evidence well such statement is self incriminating. In this case the Hon'ble High Court noted that the authorities below have not considered a fact that in a case where there was a search operation, no assets or cash was recovered from the assessee, in such a situation what had prompted the assessee to make declaration of undisclosed income of Rs. 20 lakhs.

14. In the present case also the assessee during the course of search operation in the statement and subsequently by way of letter dated 23.04.2012, as has been reproduced by the AO in the assessment order, was sure about the surrender of Rs. 6.75 crores under various heads, however regarding remaining of Rs. 10.50 crore the assessee in the said letter clarified that the said amount pertaining to miscellaneous surrender shall be confirmed after study of all papers. Subsequently at the time of filing return the assessee also included part of amount of Rs. 4 crore on his account and his wife account totalling to Rs. 10.75 crore surrender and remaining amount of Rs. 6.50 crore was not declared as surrendered and after paying tax on amount of Rs. 10.75 core the assessee impliedly retracted the remaining amount of Rs. 6.50 crore.

15. On careful consideration of stand of AO and basis taken by the learned first appellate authority for granting relief to the assessee on this issue, we also note that the ITAT Indore Bench in the case of M/s. Ultimate Builders vs. ACIT(supra) categorically held that the statement given by the assessee without any specific reference to any incriminating material, the addition on account undisclosed income offered in the statement during the course of search and seizure operation. Further in the case of Kailasben Mangaral Choksh vs. CIT(supra) the Hon'ble Gujarat High Court also rendered a proposition that merely on the basis of admission, the assessee could not be subjected to addition unless and until some collaborative evidence is found in support of such addition.

16. On in view of foregoing discussion we reached to a logical conclusion that the assessee during statement and subsequent surrender letter dated 23.04.2012 made head wise surrender of Rs. 6.75 crore but remaining amount of Rs. 10.50 crore was kept open to be declared as miscellaneous surrender which was to be confirmed after study all the papers. The assessee filed return of income u/s. 153A of the Act, subsequently and also included Rs. 4 crore on his account and his wife account leaving the amount of Rs. 6.50 crore.

17. Therefore, we are in agreement with the contention of the learned counsel of the assessee, which has been accepted by the Ld. CIT(A), that the assessee right from search and seizure operation till filing of return could not find any substantive material or investment which could be considered for supporting the surrender of reaming amount Rs. 6.5 crore and the AO has made addition in hands of assessee only on the basis of statement of assessee recorded during search and post search period and letter dated 23.04.2012 of the assessee without any supporting and collaborative adverse or positive material against the assessee

showing earning of undisclosed income during the relevant financial year. Therefore the Ld. CIT(A) was right in deleting the unsustainable addition made by the AO by relying various judgements of Hon'ble Gujarat High Court, High Court of Jharkhand and co-ordinate bench of Tribunal including order of ITAT Indore Bench in the case of Ultimate Builders (supra). We are unable to see any ambiguity, perversity or any other valid reason to interfere with the findings arrived by the Ld. CIT(A) in this regard. Therefore we uphold the same. Accordingly ground no. 1 of Revenue is dismissed.

18. Apropos second part of ground no. 2 of Revenue the learned CIT(DR) supporting the assessment order submitted that it was established by the AO that the hand written loose papers record the cash payment of Rs. 6,25,000/- for present A.Y. 2012-13 by the assessee to various person which was not recorded in the books of accounts of the assessee. Therefore the AO was right in making addition u/s. 69C of the Act, as unexplained expenditure by the assessee. The learned CIT(DR) submitted that the Ld. CIT(A) granted relief to the assessee without any basis therefore impugned first appellate order may kindly be set aside by restoring that of the AO.

19. Replying to the above, the learned counsel of the assessee drew our attention towards relevant part of the first appellate order and submitted that in absence of any collaborative evidence to prove that there was exchange money by cash or cheque or kind the AO is not entitled to invoke provisions of section 69C of the Act merely on basis of loose papers. The learned counsel also submitted that the said loose papers does not have any clear cut indication or narration whether the same represents receipt of payment or balance amount. The learned counsel also submitted that the incomplete numbers cannot be treated amounting in lakhs for

making addition in the hands of the assessee. The learned counsel vehemently pointed out that the loose papers were dumped documents non-speaking and the A.O. ought to have explained by adopting which formula or basis of which the amounts were increased to lakhs. Therefore, the Ld. CIT(A) rightly deleted the addition.

20. On careful consideration of rival submissions, at the outset we note that the Ld. CIT(A) has granted the relief to the assessee with following observations and findings:-

The AO has made allegation against the assessee that cash payment has been received by appellant. In absence of any admission, by any of person or either by appellant, addition cannot be made on basis of sheer imagination and guess work. It is settled legal position that onus of proof is on the person who makes any allegation and not on the person who has to defend. As per legal maxim "affairmanti non neganti incumbit probation" means burden of proof lies upon him who affirms and not upon him who denies. Similarly as per doctrine of common law "incumbit probation qui digit non qui negat" i.e. burden lies upon one who alleges and not upon one who deny the existence of the fact. Further, it is most important to mention that nowhere in the said impugned diary name of the appellant is mentioned and suggesting any such unaccounted payment/receipt. The AO has failed to discharge his onus of proof especially when addition has been made under "deeming fiction". In view of this lacune on the part of A, impugned addition is legally not sustainable. As held in the case of CIT vs KP Varghese 131 IT 574 (SC) by Hon'ble Apex Court in absence of evidence that actually assessee paid more amount than declared in registered deed, no addition can be made. In the case of Bansal Strips (P) Ltd & Ors Vs. ACIT (2006) 99 ITD 177 (Del) it has been held that :-

"If an income not admitted by assessee is to be assessed in the hands of the assessee, the burden to establish the

such income is chargeable to tax is on the AO. In the absence of adequate material as to nature and ownership of the transactions, undisclosed income cannot be assessed in the hands of the assessee merely by arithmetically totalling various figures jotted down on loose document".

4.7.4 This is an undisputed fact that neither any incriminating material was found or seized during search proceedings nor any person has ever admitted about receipt/payment of the said amount, as per loose paper, from/by the appellant. In absence of any corroborative evidence to prove that there was any exchange of money by CASH/Cheque/Kind, AO has no locus to assume that appellant has paid cash amounting to Rs. 6,25,000/- in AY 2012-13. The AO has nothing on record which could establish that the said amount was actually received by the appellant, if the sum was received through cheque the entry of the same should have been reflected in any of the bank account of appellant. Also, the amount does not have any clear cut indication or narration whether the same represents receipt/payment or balance amount. Also, the amount or numbers written are incomplete and cannot be treated as amount in lakhs as treated by the AO. It is settled law that AO cannot make any addition merely on basis of suspicion, however strong it may be. The AO is not justified in presuming certain facts without having anything to corroborate. Hon'ble Supreme Court in the case of Dhakeshwari Cotton Mills Ltd. v/s CIT (1954) 26 ITR 775 (SC) has held that although strict rules of evidence Act do not apply to income tax proceedings, still assessment cannot be made on the basis of imagination and guess work. It has been held in the case of Umacharan Saha & Bros co. v/s CIT 37 ITR 21 (SC) that suspicion, however strong cannot take place of evidence. Similar views have been expressed by Apex court in the case of Dhira Lal Girdharilal v/s CIT (1954) 26 ITR 736 (SC).

4.7.5 In view of the above discussion, material evidences on record and case laws cited, firstly, the loose papers or rather

say it as dumb document should be a speaking one having direct nexus with the assessee, which was not in the case of appellant. Secondly, the AO ought to have explained by which formula or methodology the amounts were treated as amounts in lakhs. Thirdly, the impugned transactions does not have even basis details of transactions such as whether the amount represents receipt/payment/balance amount, date of payment, mode of payment, details of payer/beneficiary, purpose of transaction etc. My findings on the issue under consideration are based on the various conclusions drawn by me which have been discussed in the above paras. Therefore, the A was not justified in making additions simply of guess work and solely on the basis of some dumb loose paper. Thus, the addition made by the AO amounting to Rs. 6,25,000/- is Deleted. Therefore, appeal on this ground is Allowed.

21. On careful consideration of basis taken by the AO and reason for deletion of addition recorded by the Ld. CIT(A), first of all we further note that the basis taken by the AO i.e. loose papers records the cash payment of Rs. 6,25,000/- for A.Y. 2012-13 to various persons which were not recorded in the books of accounts of assessee thus the same is unexplained expenditure and covered u/s. 69C of the Act. Further for calculating amount of undisclosed expenditure the A.O converted the figures into lakhs. We are unable to see any methodology or formula applied by the A.O. for such conversion of small figures, stated in the loose papers, into lakhs. We are also in agreement with the conclusion drawn by the Ld. CIT(A) that the so called transactions does not have even any basic details of transactions to which the impugned amount represents receipts of payments for balance amount. Even date of payment mode of payment, details of payers/beneficiary purpose of transaction etc. was also not clear from the loose papers and there

was no further enquiry or investigation by the AO in this regard. Therefore the Ld. CIT(A) was right in deleting the addition.

22. In first part of ground no. 2 of Revenue the Department has also challenged the deletion of addition of Rs. 75,61,000/- made by the AO, on account of undisclosed cash payment to Shri Sudheer Sharma of S.R Group u/s. 69C of the Act, which was deleted by Ld. CIT(A) without any basis therefore the impugned first appellate order may kindly be set aside by restoring that of the AO. The CIT(DR) vehemently supporting the assessment order submitted that the AO in para 25.1 to 25.5 rightly concluded that the seized documents are cash payment of Shri Sudheer Sharma appears in code 'S. Agarwal & SA'. The name of assessee was also renders in the diary of Sh. Sudheer Sharma inventorized as A1/6 during search and seizure operating in the premises of Vidya Niketan Society on 20.06.2012. The Ld. CIT(DR) also contended that the Ld. CIT(A) has deleted the addition without any basis and justified reason. Therefore, the impugned first appellate order may kindly be set aside by restoring that of the AO.

23. Replying to the above the learned counsel of the assessee placed strong reliance on the order of Ld. CIT(A) pertaining to ground no. 7 and submitted that during the course of assessment proceedings the assessee successfully explained the transactions mentioned on the said loose papers and submitted a detailed reply in this regard. The learned counsel further submitted that the AO dismiss the explanation of the assessee that the name of the assessee also appeared at the page 38 of phone diary of the Sudheer Sharma inventories as A1/6 seized during the course of search at the same premises. The learned counsel further explained that merely because the name of a person has been recorded in the phone diary along with mobile number does not create any relation

with the assessee for making addition in the hands of assessee u/s. 69C of the Act.

24. Furthermore, supporting the first appellate order the learned counsel submitted that the search operation on the assessee and group was conducted on 21.10.2011 and there was no material or document was found and seized from assessee pertaining to this transaction. He further explained that subsequently another search and seizure operation was conducted on third party Shri Sudheer Sharma Group on 20.06.2012 wherein alleged diary was seized which cannot be used against the assessee. The learned counsel lastly submitted that in such factual position the presumption available for the AO u/s. 292C of the Act cannot be validly drawn against the assessee for making baseless addition.

25. The learned counsel of the assessee submitted that under identical facts and circumstances ITAT Delhi Bench in the case of ***Trilok Chand Chaudhary reported as (2019) 33 NYPTTJ 610 (Delhi Trib.)*** held that the material found in the course of another party cannot be used in the case of present assessee in a case whom there was separate search under separate search warrant. The learned counsel further placing reliance of the judgment ITAT Kolkata Bench in the case of ***Krishna Kumar Sighania (2018) 168 ITD 271 (Kol-Trib)*** submitted that no addition could be made on the basis of evidence gathered from the extraneous source and on the basis of statement or document received during search operation on third party, subsequent to search and said material cannot be used u/s. 153A of the Act against the assessee.

26. On careful consideration of above rival submission from the stand of the AO and conclusion drawn by Ld. CIT(A) in paras 4.6 to 4.6.3 we clearly note that the AO proceeded to make addition in the hands of the assessee merely because the name assessee was appeared in the diary seized during separate search conducted on

20.06.2012 in the case of Shri Sudheer Sharma Group. In this situation, the Ld. CIT(A) was right in noticing that during the course of subsequent search at the premises of Vidya Niketan Society premise located at Plot no. 3, Khusiram tower, Bhopal on 20/06/2012 some papers were seized and date wise account of receipt and its head-wise utilisation by Shri Sudheer Sharma was found. On being asked by the bench the Ld. CIT(DR), did not controvert this factual position that the search operation on assessee group was conducted on 21.10.2011 the said paper was seized during the course of another search subsequently undertaken on 20.06.2012 in the office premises of Vidya Niketan Society. In this situation, we are in agreement with the conclusion drawn by the Ld. CIT(A) that the impugned loose papers and documents were found & seized from the premises of third party i.e. Vidya Niketan Society. Therefore, presumption u/s. 292C of the Act will apply to said searched entity i.e. M/s. Vidya Niketan Samiti and Shri Sudheer Sharma group only and not to the assessee enabling the AO to make addition in the hands of assessee in the assessment order passed u/s. 153A/143(3) of the Act. Our conclusion also gets support from the order of ITAT Delhi Bench in the case of Trilok Chand Chaudhary(supra). Therefore, we are inclined to hold that there is no ambiguity and perversity or any valid reason to interfere with the findings arrived and recorded by the Ld. CIT(A) and thus we uphold the same. Accordingly both the limbs of ground no 2 of Revenue are dismissed.

27. Apropos ground no. 3 of Revenue the learned CIT(DR) strenuously contended that in para 27.4 the AO rightly made addition in the hands of the assessee by observing that the assessee has claimed expenditure of Rs. 1,22,86,668/- including an amount of Rs. 82,35,639/-pertaining to present A.Y. 2012-13 and the said over draft interest claimed by the assessee was not allowable as business expenditure. Therefore the impugned amount debited by

the assessee as over draft interest for A.Y. 2012-13 was rightly disallowed u/s. 14A of the Act by the AO.

28. Replying to the above the learned counsel of the assessee, drawing our attention towards relevant part of the assessment order while adjudicating ground no. 12 of assessee, submitted that in para 4.8 the Ld. CIT(A) has considered entire facts and circumstances of the issue and thereafter deleted the addition by following the orders of the ITAT Mumbai in the case Sudhir Dattaram Patil vs. DCIT 2 SOT 678 (ITAT Mum) and AH Baldota vs.ACIT (2016) 103 TTJ 517. Therefore, first appellate order is quite correct and sustainable, hence, the same may kindly be upheld.

29. On careful consideration of rival submission first of all we note that the Ld. CIT(A) has granted relief to the assessee with following observations and findings:-

4.8.2 I have considered the facts of the case, plea raised by the appellant and findings of the AO. The appellant during AYs 2009-10 to 2012-13 has taken loan from following banks:-

Sn	Name of Bank	Account No.	Period of Limit	Amount	Account Type
1	State Bank of India	30300355336	29-12-2007 to 18-06-2011	1,00,00,000/-	OD
2	HDFC Limited	533329421	26-06-2007 to 11-03-2013	1,00,00,000/-	Mortgage Loan
3	hOfc Limited	538732208	11-03-2010 to 11-03-2013	50,00,000/-	Mortgage Loan
4	HDFC Limited	538732239	26-03-2010 to 11-03-2013	50,00,000/-	Mortgage Loan

5	Bank of Baroda	18600400000344	29-09-2010 to Till Date	5,00,00,000/-	OD
6	Bank of Baroda	18600400000368	15-06-2011 to Till Date	2,00,00,000/-	OD

The loan taken by the appellant has been utilized in business activities through partnership firms which have been accepted by the AO. The interest expenses claimed by the appellant are as under:-

Sn	Name of Bank	Account No.	2009-2010	2010-2011	2011-2012	2012-2013
1	State Bank of India	30300355336	161397.00	313320.00	182452.00	0.00
2	Bank of Baroda	18600400000 34 4	0.00	0.00	2374880.0 0	4841471.0 0
3	Bank of Baroda	18600400000 36 8	0.00	0.00	0.00	1463079.0 0
4	HDFC Bank Limited Loan	533329421	0.00	0.00	0.00	955368.00
5	HDFC Bank Limited Loan	538732208	0.00	0.00	399986.00	371198.00
6	HDFC Bank	538732239	0.00	0.00	618991.00	604523.00

	Limited Loan					
Total Amount Rs.		161397.00	313320.00	3576309.0 0	8235639.0 0	

The appellant from the partnership firm to whom loans were provided has earned remuneration/salary income which has been duly shown in return filed by the appellant and the same has been fully accepted by the AO. Hon'ble ITAT Mumbai in the case of Sudhit Dattaram Patil vs DCIT 2 SOT 678 (ITAT Mum) has held as under:-

Under the new scheme of taxation of the firm and its partners effective from the assessment year 1993-94, the Legislature has provided two different segments, one for the purpose of share of profit from a firm, as mentioned in section 10(A), and the other segment in respect of salary, remuneration, etc., as provided in section 28(v). Both these claims, thus, function in two different directions. The firm itself is taxed at the rates prescribed and the partners are taxed only in respect of remuneration, commission, etc., but not in respect of their share of profit from the firm which is exempt under section 10(2A). A combined reading of sections 14A and 10(A) leads to the conclusion that the share of profit from a firm being exempt under section 10(A), the expenditure incurred in relation to this income is not subject to any deduction. Moreover, the profits of a firm are nothing but the profits of the partners who work for and on behalf of the firm. The profits, so earned, are firstly taxed in the hands of the firm and thereafter divided

among the partners according to their profit sharing ratio. Due to this reason, the same profit is not again subject to tax in the hands of the partners. Thus, an assessee is not entitled to claim expenditure of any nature against the income earned from a firm as share of profit in the capacity of a partner of the firm. So far as the assessability of salary, remuneration, etc., is concerned, these heads of income are provided to be taxed by the Legislature under section 28(v) as profits and gains of business or profession, with the result that, though the terms 'salary' or 'remuneration' are used, the character of the income is nothing but profits and gains of business. Otherwise also when section 67 was in operation which stood omitted with effect from 1-4-1993, the salary, remuneration, etc., were used to be treated as profits from the firm while computing the income of a partner from the firm. The Legislature has recognized this principle and only then enacted a fiction in section 28(V). As per these amendments, a remuneration is to be treated as a return of business profits by the firm to a partner and, if it is so, a result follows that the partner is entitled to all the deductions which he hitherto was entitled to while computing the profits and gains from business including the deduction in respect of interest paid on moneys borrowed for investment in the firm. When the statute has by fiction provided that the remuneration received by the partner from the firm is to be assessed under the head Profits and gains of business or profession under section 28, then automatically any interest paid by the partner for the purpose of earning the remuneration must also be deducted as per section 36(1) (li). Under this section, in computing the income referred to in section 28, the deduction is provided of the amount of the interest paid in respect of capital borrowed for the purposes of the business or profession. In the instant case, the objection, as raised by the revenue authorities, was that the interest was not paid for the purposes of earning the remuneration

and in any case share of profit was not taxable in the hands of the partner. Strictly speaking share of profit is subject to exemption but not the remuneration or salary. Otherwise also, any payment of salary to a partner is only a mode of sharing business profits and the character of receipt of salary/remuneration remains the same as of the income enjoyed by the firm. [Paras 6 to 87]

In view of the foregoing legal interpretation, a conclusion could be drawn that an assessee is entitled to the deduction of the interest paid on moneys borrowed for investment in the firm in which he has become a partner against the amount received by him from the firm as remuneration/salary and assessed under the head Profits and gains of business or profession'. With the result, in view of the clear provisions of section 28(v), the salary income has to be considered as profit and gains from business or profession and, hence, interest paid on the money borrowed for the purpose of making capital contribution to the partnership firm has to be fully allowed in the hands of assessee/partner. Resultantly, the ground raised by the assessee was to be allowed

Similar view was taken by Hon'ble ITAT Mumbai in the case of AH Baldota vs ACIT (2016) 103 TTJ 517 wherein it has been held that:-

Interest on borrowed capital - Assessment years 1994-95 to 1997-98 - Whether if a partner gets any bonus, commission, remuneration and interest from firm which is allowed as a deduction in hands of firm, then partner has a source of income under head 'Profits and gains from business and profession' against which expenditure incurred by partner, e.g., interest paid on borrowed capital invested in firm, can be claimed as deduction - Held, yes - Whether by virtue of section 10(2A) share income from firm does not form part of total income of partner and, therefore, expenditure incurred by partner in earning that

income would not be allowable - Held, yes - Assessee was a partner in a firm - He borrowed money from a bank and invested same in partnership firm - Assessee paid interest on borrowed money and claimed deduction of same against his other assessable business income - Whether assessee would be entitled to deduction as claimed only if he had income from firm like salary, bonus, commission and interest - Held, yes

4.8.3 In view of the above discussion and judiciously following the decisions cited above, additions made by the A amounting to Rs.82,35,639/- is Deleted. Therefore, appeal on this ground is Allowed.

30. The learned CIT(DR) has not controverted the factual position taken into consideration by the Ld. CIT(A) has noted in the relevant part of first appellate order as has been reproduced above. Further undisputedly the appellant from the partnership firm to whom loans were provided has earned remuneration/salary income which has been duly shown in the return filed by the appellant which was accepted by the AO along with tax thereon. Under identical facts and circumstances ITAT Mumbai Bench in the case of Sudhir Dattaram Patil vs DCIT (supra) held that the assessee entitled deduction of interest paid on money/amounts borrowed for investment in the partnership firm in which he has become a partner against the amount received by him from the firm as remuneration/salary and assessed under the head profit and gains of business or profession. This factual position of the present case has not been negated or diluted by the AO nor by the Ld. CIT(DR), during argument before this Bench. Therefore, the conclusion drawn by the Ld. CIT(A) gets strong support from the order of ITAT Mumbai in the case Sudhir Dattaram Patil vs. DCIT (supra) and another order of in the case of AH Baldota vs.ACIT (supra). Therefore, we declined to interfere with the findings arrived by the Ld. CIT(A) and thus ground no. 3 of Revenue also dismissed.

Ground no. 4 of Revenue (first part)

31. Pressing into service first part of said ground no. 4 of Revenue, the Ld. CIT(DR) submitted that the AO made addition on protective basis in the hands of assessee. The Ld. CIT(DR) also submitted that During the course of the search a registered purchase deed (page 55 of PB) was found for land of 1.459 Hectares located at Gram Katra Tec. Huzur purchased by M/s Agrawal Buildcon from Pankaj Makhija, Pradeep Sharma and Pradeep Hirani being the power of attorney holder of Smt. Rekha Bai, Shri Lalaram and Shri Devi Singh for a consideration of Rs. 1,76,50,000/-. During the course of post search enquiry, summons under 131 were issued to the sellers Rekha Bai and others and their statements were recorded jointly. During the statement these persons produced an agreement dated 27/11/2010 for the sale of 3.69 Acres of land between Shri Lakhmichand Hirani and Shri Pradeep Sharma on one side and Shri Lalaram, Shri Devi Singh and Smt. Rekha Bai on other side for a consideration of Rs. 5,03,68,500/-. The sale agreement is reproduced at page 33 of the assessment order. The joint statement of the sellers were recorded by the DDI (In.) who stated that they have received 5,03,68,500/- from Pradeep Sharma and Lakhmichand Hirani. The statement of Shri Pradeep Sharma and Pradeep Hirani were also recorded by ADIT. On the basis of these statements, the Ld. AO has made the addition of Rs. 3,53,80,000/- u/s 69 as unaccounted unexplained investment on the protective basis in the hands of the assessee and has made addition in the case of M/s Agrawal buildcon on substantive basis. The Ld. CIT(DR) submitted that the Ld. CIT(A) has deleted the addition without any basis therefore impugned order may kindly be set aside by restoring that of AO.

32. Replying to the above the learned counsel submitted that that the agreement between the third parties produced are not binding

on the assessee, since the assessee is no way connected with the same. The said agreement is not found during the course of the search nor it contains the signature of the assessee. There is no proof of any cash payment made by the assessee. The deposits of cash if any, in the account of the seller cannot be connected with the assessee. The assessee was under no obligation to explain such cash deposit. There is no material on record to suggest that the cash was paid by the assessee. The Department has failed to obtain support towards such allegation from the owners of the land. The sellers have not taken the name of the assessee for receiving any cash payment. After considering the arguments, the Ld. CIT(A) has deleted the addition. It is brought to the notice of the Bench that in the case of Agrawal Buildcon where the substantive addition has been made, the Tribunal was pleased to dismiss the Departmental appeal on the ground that firstly the Department has failed to controvert the fact that the additions have been made on the basis of statement of power of attorney holders, secondly the addition was made without providing any opportunity of cross examination of the third party on whose statement the addition had been made and thirdly, the addition had been made merely on the basis of oral evidences and there is no other positive evidence on record which could prove that the sellers have received on money and offered the same and lastly the addition seems to be made on assumption and presumption as except the copy of registered sale deed, no other incriminating material was found during search proceedings which could indicate that alleged "on money" has been paid by the assessee. In view of the decision of the Tribunal it is submitted by learned counsel of assessee that the order of the Ld. CIT(A) was correct and accordingly be upheld.

33. At the outset, from the first appellate order, we note that the Ld. CIT(A) has granted relief to the assessee with following observations and findings:-

Ground No 6:-Through this ground of appeal, the appellant has challenged addition of Rs. 3,53,80,000/- on account of on-money payment for purchase of land on protective basis. On perusal of assessment order it is seen that the additions have been made on protective basis in the hands of appellant and substantive basis in the hands of M/s Agrawal Buildcon. The substantive additions have been discussed and decided in depth vide appellate order passed in the case of M/s Agrawal Buildcon vide appeal No CIT(A)-3/BPL/IT-11392/2015-16 for AY 2012-13 dated 17.07.2020. In view of the facts that substantive addition has already been adjudicated in depth in the case of M/s Agrawal Buildcon, the addition made by the AO of the equal amount on protective basis in the case of appellant is directed to be Deleted.In case the demand in the hands of Ms Agrawal Buildcon are directed by the higher judicial authorities to make addition in the case of appellant then the demand in the case of the appellant would revive automatically to that extent. Thus, addition made by the AO amounting to Rs. 3,53,80,000/- is Deleted. Accordingly, appeal on this ground is Allowed.

34. On careful consideration of relevant part of assessment order, first appellate order and conclusion drawn by the Ld. CIT(A), we note that the addition has been made by the AO on protective basis in the hands of assessee and on substantive basis in the hands of M/s. Agarwal Buildcon, we find it appropriate to consider the findings in the order of the Tribunal order dated 28.01.2022 in the case of ACIT vs M/s Agrawal Buildcon in ITA No. 39/IND/2021 for A.Y. 2012-13, wherein upholding order of Ld. CIT(A), which deleted the substantive addition, the Tribunal held as follows:-

8. From perusal of the above finding wherein Ld. CIT(A) has referred to various settled judicial precedents, we find that Ld. DR failed to controvert the facts that firstly the additions were made simply on the basis of statement of power of attorney

holders, secondly the addition was made without providing any opportunity of cross examination to the assessee with the 3rd party on whose statement addition has been made, thirdly, the additions are made merely on the basis of oral evidences and there is no evidence on record which could prove that the seller has received 'on money' and offered the same before the revenue authorities and lastly the addition seems to be made on assumption and presumption as except the registered sale deed no other incriminating material was found during search proceedings which could indicate that the alleged 'on money' has been paid by the assessee.

9. We, therefore, respectfully following the decision/judgments referred hereinabove in the finding of ld. CIT(A) are inclined to hold that no addition u/s 69 of the Act was called for in the hands of assessee. Thus, find no infirmity in the finding of ld. CIT(A) and the same is confirmed. Sole ground raised by the revenue is dismissed.

35. In view of the fact that the substantive addition has been deleted by Ld. CIT(A) and same has been uphold by the Tribunal order dated 28.01.2022 in the case of ACIT vs. M/s Agrawal Buildcon (supra). No interference is called for in the first appellate order on this issue. Accordingly, first part of ground no. 4 of Revenue is dismissed.

Ground No. 4 of Revenue (Second Part)

36. Apropos this limb of ground no. 4 of Revenue, the Ld. CIT(DR) submitted that the assessee is a partner in the firm M/s Shiva Reality and the said firm purchased property from Shri Dayaram Chokse. During assessment proceedings the AO recorded statement of Shri Chokse by calling him u/s. 131 of the Act, wherein the stated to have received Rs. 1,03,00,000/- cash against sale of land.

37. The Ld. CIT(DR) further submitted that the assessee was provided due opportunity to cross examination Shri Bhagwan Ram

Chokse son of Dayaram Chokse (seller of the land) on 10.12.2013 wherein he reiterated that he has received cash amount of Rs. 54 lakh on 24.12.2010 and Rs. 49 lakhs on 03.05.2011 which was deposited to the banks account of his family members immediately after receipt of cash from assessee Shri Sanjeev Agrawal. During statement recorded on 29.11.2013 the seller of land submitted copies of bank passbook of all family members wherein deposits have been made on 24.12.2010 and 04.05.2011 simultaneously to bank accounts of six family members of seller of land to the assessee. However this appeal is pertain to A.Y. 2012-13, therefore we are concerned with the issue of payment of cash “on money” of Rs. 49 lakh during FY 2011-12 pertaining to A.Y. 2012-13. The Ld. CIT(DR) submitted that the Ld. CIT(A) has granted relief to the assessee without any reasonable basis and justification therefore impugned first appellate order may kindly be set aside by restoring that of the AO. The Ld. CIT(DR) vehemently submitted that the Ld. CIT(A) in para (b), (c) and (d) at pages 37 to 40 of first appellate order has made irrelevant observations which are perverse while dismissing the action of the AO, therefore, the first appellate order may kindly be set aside while restoring that of the AO.

38. Replying to the above the learned counsel of the assessee supporting the first appellate order submitted that the AO has made addition on the basis of statement of third party/seller Shri Bhagwan Das Chokse and cross examination part recorded on 10.12.2013 was signed only by Shri Dayaram Chokse which were fabricated and taken after lapse of time. The learned counsel also submitted that the AO has made on the basis of oral evidence of seller which has no evidently value in the tax proceedings and the oral evidence can only be accepted when there was no written evidence. The learned counsel also submitted that it is a undisputed fact the AO has made addition only on the basis of difference in consideration shown in purchase deed and the market

value of the land determined by Stamp Valuation Authority or on the basis of statement of third party. The learned counsel submitted that it is not a case of the AO and there is no evidence in his hand to invoke provision of section 69A of the Act, that the investment in land was not fully recorded in the books of accounts and onus of proof was on the AO, to establish that the assessee has made some unaccounted investment by way of payment of Rs. 49 lakh cash as on money in purchase of land. The learned counsel submitted that the AO has failed to discharge onus and simply applied the deeming fiction of section 69A of the Act, merely on the basis of guess work, presumption and suspicion to make impugned addition, which is not sustainable in view of judgment of Hon'ble Supreme Court in the case of **Umacharan Saha & Brothers vs CIT 37 ITR 21 (SC)**. The learned counsel also submitted that the Hon'ble Supreme Court on **Dhakeshwari Cotton Mills Ltd vs. CIT (1954) 26 ITR 775 (SC)** has held that although strict rules of evidence Act do not apply to income tax proceedings, assessment cannot be made on the basis of imagination and guess work.

39. The learned counsel submitted that no incriminating material was found during the course of search suggesting exchange or payment of "on money" by the assessee to the sellers and the land. He further submitted that the land was not purchased by the assessee and in fact, the same was purchased by M/s. Shiva Reality partnership firm which is an independent assessee and filing return of income. The learned counsel also pointed out that the sellers failed to explain where the said cash received was utilised and date of receipt of cash. Therefore the Ld. CIT(A) was right in granting relief to the assessee. The learned counsel submitted that the AO was not justified in making addition on account of owned money paid to sellers u/s. 69A of the Act in absence of any collaborative evidence and simply relying on the basis of statement of third party. Therefore addition made by the AO amounting to Rs. 49 lakh may

kindly be deleted. The learned counsel submitted that the facts and circumstances of other issues wherein the Ld. CIT(A) has deleted the addition of rs. 22,70,000/- and 18,50,000/- are also identical and similar therefore the contention of assessee is equally applicable to other second and third limbs of grounds of revenue. Therefore first appellate order may kindly be upheld by dismissing the ground of revenue.

40. The learned counsel on the addition of Rs. 18,50,000/- made by AO submitted that the addition has been made merely on the basis of statement of third party/seller without any other incriminating material in the hands of assessee or any material found and seized during the course of search and survey operation and the Ld. CIT(A) has rightly granted relief to the assessee after considering the entire facts and circumstances of the case and propositions rendered by Hon'ble Supreme Court as noted above.

41. The learned counsel regarding addition of Rs. 22,70,000/- submitted that the AO had made addition u/s. 69B of the Act substantive basis in the hands of assessee and protective basis in the hands of partnership firm by alleging that the document seized during the course of search it is revealed that the registration of land deed was made showing consideration of Rs. 35 lakh, whereas the Stamp Valuation Authority has valued the land at Rs. 57,70,000/- and the AO to proceeded to allege that the assessee is a key person of the firm and he has made undisclosed investment from the income earned from undisclosed sources. The learned counsel submitted that the AO himself was not sure which deeming provision he wants to apply as even if it is considered that the consideration was shown at Rs. 35 lakh which was lesser than the valuation taken by the Stamp Valuation Authority of Rs. 57,70,000/- then also the allegation on unexplained investment cannot be made against the assessee particularly when the land

has been purchased in the name of partnership firm of Ms/ Shiva Reality.

42. The learned counsel submitted that if any action has to be taken under the provision of Act, then the purchaser of land may be subjected to any addition u/s. 56(vii)(b)(ii) of the Act and for that the Assessing Officer is required to take proper recourse and procedure laid down as per provision of the Act and no addition can be made in the hands of assessee in this regard. The learned counsel drawing our attention towards para 4.3.5 of first appellate order submitted that the Ld. CIT(A) has granted relief to the assessee on the basis of correct appreciation of facts by rightly observing that the fiction created u/s. 50C of the Act, regarding full value of consideration received or accrue to seller, cannot be extended to the provision of section 69 or 69B of the Act in the case of purchaser i.e., present assessee. The learned counsel submitted that such statutory legal fiction cannot be extended to make addition in the case of purchasers, therefore the AO was not justified in making additions on account of owned money paid to seller's u/s. 69 of the Act, in absence of any collaborative evidence merely on the basis of difference between consideration shown in the registered sale deed and valuation taken by the Stamp Valuation Authority. The learned counsel submitted that even otherwise provision of section u/s. 56(2)(vii)(b) of the Act is applicable with effect from A.Y. 2014-15 and not the present A.Y. 2012-13 therefore in view of order of ITAT Chandigarh Bench in the case ITO vs. Ms. Inderjeet Kaur (2012) 50 SOT 377 (Chd.) the addition could not have been made in the hands of assessee under any provision of the Act, applicable at that point of time for the transactions undertaken during FY 2011-12 pertaining to A.Y. 2012-13.

43. Placing rejoinder above the Ld. CIT(DR) submitted that in para 4.3.4 the Ld. CIT(A) noted that the sellers failed to explain where the said cash received were utilised and date of receipt of cash which is incorrect perverse and wrong conclusion as Shri Bhagwan Ram Chokse in his statement as well as cross examination dated 10.12.2013 replying to question no. 3 stated the date of received of cash of Rs. 49 lakh as 03.05.2011 and also submitted that the cash received from the assessee along with cheque amount was deposited to the bank accounts of family members of assessee. The AO has reproduced the details of bank statement in para 21.3 at page 66 of the assessment order wherein an amount of Rs. 49 lakh was deposited in the six bank accounts of family members of the assessee totalling to Rs. 49 lakh. Therefore the facts picked up by the Ld. CIT(A) for deleting the addition are incorrect perverse and baseless.

44. The Ld. CIT(DR) also submitted that the Assessing Officer has noted statement of Shri Kanhiya Lal son of Bhakchand Pal on 26.11.2013 in para 22.1 of assessment order wherein he clearly stated to receive Rs. 5 lakh advance in cash and Rs.13,50,000/- cash and Rs. 70 lakh cheque from the assessee and land was sold against total consideration of Rs. 88,50,000/- and registration was done showing consideration of Rs. 75 lakhs. The Ld. CIT(DR) submitted that the assessee was provided cross examination on 10.12.2013 on this witness (seller) wherein he reiterated the same facts and replying to question no. 5 stated that he received of Rs. 13,50,000/- cash from assessee on the date of registration of sale deed and this amount has been deposited to his bank account and bank account of his son Shri Mahesh Pal operated in the Bhopal Cooperative Central Bank and State Bank of India, Misrod branch and his statement has not been diluted in any manner during cross examination. The Ld. CIT(DR) submitted that the Ld. CIT(A) has granted the relief to the assessee without calling

comments/remand report from the AO. On the basis of incorrect perverse findings therefore impugned first appellate order may kindly be set aside by restoring that of the AO.

45. The Ld. CIT(DR) further submitted that regarding issue of addition of Rs. 22,70,000/- the Assessing Officer noted that during the search proceedings found that the assessee has purchased land in the name of firm M/s. Shiva Reality from Shri Amit Kumar Patani on 07.09.2011 where the consideration in the registered sale deed has been shown at Rs. 35 lakh whereas the fair market value was Rs 57,70,000/- and thus the AO rightly concluded that the whole deal was supervise and managed by Shri Sanjeev Agrawal being a key person of the firm therefore he made substantive addition in the hands of assessee and protective addition in the hands of M/s. Shiva Reality treating the same as unexplained investment u/s. 69B of the Act. Therefore the order of the AO is quite correct which requires no interference. The Ld. CIT(DR) vehemently pointed out that the Ld. CIT(A) has granted relief to the assessee without any reasonable and justified basis. Therefore first appellate order may kindly be set aside by restoring that of the AO.

46. On careful consideration of above submission first of all, we take up the issue of payment of own money of Rs. 49 lakh to Shri Dayaram Chokse and Rs. 18,50,000/- to Shri Kanhiyalal Pal on account of purchase of land i.e. second & third part of ground no. 4 of revenue. From the para 21 to 21.13 of assessment order it is clear that the Assessing Officer recorded statement of Shri Bhagwan Das Chokse son of Shri Daya Ram Chokse on behalf and presence of his father Shri Daya Ram Chokse, who appeared before the AO along with his father Shri Daya Ram Chokse and the statements recorded before the AO were duly signed by seller Shri Daya Ram Chokse as well as his son Shri Bhagwan Das Chokse. Replying to question no. 1 Shri Bhagwandas Chokse categorically stated that

since his father is very old therefore he is giving statement on his behalf in his presence. Statement of Shri Bhagwan Das Chokse was recorded on 26.11.2013, 29.11.2013 and assessee was also provided opportunity to cross examination the said witness on 10.12.2013. The statement of Shri Bhagwan Das Chokse and cross examination has been reproduced by the AO in the assessment order. From the careful reading of statement as well as cross examination it is discernable that Shri Bhagwan Das Chokse categorically stated that he received of Rs 49 lakh cash from Shri Sanjeev Agrawal on 03.05.2011 which was deposited to the different bank accounts of his six family members as per details given during statement recorded on 29.11.2013. The AO in para 21.11 and 21.12 concluded that the assessee acting as partner of the firm M/s. Shiva Reality, has paid "on money" to the seller which represent undisclosed investment of the assessee and covered by u/s. 69 of the Act because the explanation of the assessee about "on money" is not satisfactory. The AO also noted that the broker of the land has also approved the payment of "on money" before him during assessment proceedings on 26.11.2013 and 29.11.2013. The AO, thus, made substantive addition in the hands of assessee and protective addition in the hands of firm M/s. Shiva Reality.

47. From the relevant part of the first appellate order, we note that the Ld. CIT(A) has deleted the addition by firstly observing that on perusal of the cross examination statement it is seen the same has been signed by Shri Daya Ram and appellant has raised a concern that the same has been fabricated and signature of Daya Ram was taken later on. In our humble understanding, before making such kind of observations the Ld. CIT(A) is required to take comments/remand report of the AO before recording such kind of finding. Regarding observations of the Ld. CIT(A) in para 4.3.4 it is also noted that the Ld. CIT(A) observed that the impugned sellers failed to explain where the said cash received was utilised and date

of receipt of cash which is quite contrary to the factual findings recorded by the AO in the relevant paras of assessment order wherein date of payment and its used has been mentioned. The Ld. CIT(A) was mislead the facts and thus its findings arrive on the issue of own money of Rs. 49 lakh does not survive and requires re-adjudication by the Ld. CIT(A) after taking comments of the AO regarding explanation and allegation of the assessee.

48. The similar position is also discernable on the issue of own money of Rs. 18,50,000/- from Shri Kanhiya Lal Pal and this third limb of ground no. 4 of revenue also require to be re-adjudicated by the Ld. CIT(A) after calling comment/remand report from the AO on the explanation, submissions and documentary evidences, if any, filed by the assessee. Therefore, in view of foregoing the second and third limb of ground no. 4 of revenue are restored to the file of Ld. CIT(A) for a fresh denovo adjudication, without being influenced from the earlier first appellate order and after allowing due opportunity of hearing to the assessee.

49. So far as regarding fourth limb of ground no. 4 of revenue, pertaining to the challenging deletion of addition of Rs. 22,70,000/- is concerned the A.O. made addition only on the strength of copy of registered sale deed executed by Shri Amit Kumar Patni in favour of partnership firm M/s. Shiva Reality wherein the assessee was also a partner. The AO noted that the assessee purchase land of 0.67 hectare situated at gram Samardha Kaliyasot on 07.09.2011, showing consideration of Rs. 35 lakh therein as against fair market value based on registrar stamp duty of Rs. 57,70,000/- . The AO show cause the assessee that why an amount of Rs. 22,70,000/- should not be treated as undisclosed investment in the purchase of land. From para 23 to 23.6 we note that the AO after observing the facts discernable from the register sale deed went upon to held that the firm has infused huge cash towards purchase of above land and

the quantum undisclosed cash investment would not be less than the prevailing market rate or market value whichever is higher therefore he finally held that the assessee firm has made investment in land of Rs. 57,70,000/- and at the time of registry out of disclosed income and the registry was made of Rs. 35 lakhs only. The AO made addition of Rs. 22,70,000/- in hands of assessee on substantive basis and in the hands of firm M/s Shiva Reality on protective basis treating the same as unexplained investment u/s. 69B of the Act.

50. The Ld. CIT(A) has granted relief the assessee with following observations and findings:-

4.3.5 The appellant purchased land admeasuring 0.67 hectare from Shri Amit Kumar Patni at village Samardha Kaliyasot, Patwari Halka No. 44/26, RI-03, Huzur, Bhopal for a total sale consideration of Rs. 35,00,000/- on 07.09.2011. The market value of the said land was Rs. 57,70,000/-. The AO required assessee to show cause as to why the difference in market value and registered value should not be added to the total income. The assessee in reply submitted that the said land has been purchased for Rs. 35,00,000/-only. Hon'ble Supreme Court in the case of CIT v/s KP Varghese 131 ITR 574 (SC) has held that in absence of evidence that actually assessee paid more amount than declared in registered deed, no addition can be made. In the case of Bansal Strips (P) Ltd & Ors Vs. ACIT (2006) 99 ITD 177(Del) it has been held that :-

"If an income not admitted by assessee is to be assessed in the hands of the assessee, the burden to establish the such income is chargeable to tax is on the AO. In the absence of adequate material as to nature and ownership of the transactions, undisclosed income cannot be assessed in the hands of the assessee merely by arithmetically totally various figures jotted down on loosed document"

Hon'ble MP High Court in the case of Krishna Kumar Rawat vs UOI & others (1994) 214 ITR 610 has held that the market rates for the purpose of registration of an immovable property as notified by the sub registrar can also have no application for determining the market value under Chapter XXC of the Act. It is limited only for payment of the stamp duty. The AO has simply presumed that village samardha kaliysot is a prime area of tehsil Huzur, Bhopal and the rates of land are very high. It is settled legal pronouncement that presumption how strong may cannot take place of evidence. Hon'ble ITAT Ahmedabad in the case of Vallabhbai Purshottambhai Surani 54 SOT 556 (ITAT Ahmedabad) has held as under:-

"Section 69B is deeming fiction which provides that addition can be made by AO when conditions mentioned therein are satisfied. A failed to bring on record any material to support his estimated price. Section 50C is deeming provision where under stamp duty rate is treated as full value of consideration for purpose of computing capital gain us 48. It is applicable in case of seller of property and therefore cannot be invoked in case of purchaser of property for purpose of Section 69B. AO has not made any independent enquiry or collected corroborative evidence to justify addition.

AO failed to bring on record any material to support his estimated rates. Therefore, relying on decisions of High Courts and of co-ordinate Bench, no addition can be made. Order of CIT(A) is upheld. Appeal dismissed.

Without prejudice to the above, the differential amount between value as per registered purchase deed vis-a-vis guideline value determined by Stamp Valuation Authority is not taxable under any provision of the Act as applicable under "deeming fiction" enshrined w/s 50C of the Act as applicable in the case of sellers. Thus, differential amount per se cannot be brought to tax under provision of IT Act in the hands of purchasers in absence of charging deeming provision in the Act. Hon' ble Supreme Court in the case of CIT v/s Mother India Refrigeration

Industries Pt Ltd(1985) 4 SCC 1 has held that statutory fiction must be limited strictly to the purpose for which it is introduced. So, the "deeming fiction" enshrined in sec 50C cannot be extended to the case of buyers. This is an undisputed fact that the property have been purchased in F.Y 2011-12 (A.Y 2012-13) and at the relevant time, there was no deeming provision in the statute to make the buyers liable to pay tax as per guideline value of property as applicable in the case of sellers w/s 50C of the Act. This is pertinent to mention that purchasers [Individual & HUF] have been made liable to pay tax on differential amount i.e. as per stamp valuation vis-à-vis shown in purchase deed w.e.f. 01.04.2014 i.e. A.Y. 2014-15 by making necessary amendments in section 43CA and 56(2)(vii)(b) of the Act. Obviously, because the said transaction had taken place before 01.04.2014, assessee's case is not hit by the said provisions. Section 43CA and 50C are applicable in the case of the seller of an immovable property whereas section 56(2)(vii)(b) is applicable to purchasers of immovable property viz. individual/HUF and not to other assessees. In order to plug this loophole, scope of said provision was expanded by inserting a new section 56(2)(x) by Finance Act 2017 w.e.f 01.04.2017 thereby including all categories of assessees so that the assets received without or inadequate consideration may be brought to tax. The said provision is not even applicable in instant case and even otherwise provision of section 56(2)(vii)(b) is applicable w.e.f. A.Y. 2014-15 only. Hon'ble ITAT, Chandigarh Bench in the case of ITO v/s Mrs. Inderjit Kour (2012) 50 SOT 377 (Chd) has held that deeming fiction created u/s 50C regarding full value of consideration received or accrued to seller, cannot be extended to the provisions of section 69, in the case of purchasers. Such statutory legal fiction cannot be extended, to make in the purchasers liable to tax, in the context of undisclosed investment us 69 of the Act. It has been held that legal fictions created for a definite purpose should be limited for that purpose and cannot be extended beyond their legislative needs. It is well-settled that deeming provision creating legal fictions, specially in taxing statute have to be strictly construed.

51. In view of above from the assessment order, we clearly note that, except copy of registered sale deed executed in favour of firm of M/s. Shiva Reality, there was nothing else in the hands of AO in support of addition made by him u/s. 69B of the Act. The Ld. CIT(A) rightly observed that the deeming fixation of section 50C of the Act can be applied in the case of seller only and not in the case of purchaser and the provision of section 56(2)(vii)(b) is applicable with effect from A.Y. 2014-15 onward and not for A.Y. 2012-13. The Ld. CIT(A) rightly relied on the order of ITAT Chandigarh Bench in the case of ITO vs. Inderjeet Kaur (supra), wherein it was held that the deeming fiction created in section 50C cannot be extended to the provision of section 69 or 69B or any other of the Act in the case of purchaser to make the purchaser liable for tax. In the present case, the AO has made addition u/s. 69B of the Act which is applicable only when the Assessing Officer successfully discharge onus, lay on his shoulder, establishing that the assessee has made investments which is not recorded in the books of accounts of the assessee or the amount recorded in the books pertaining to the transaction exceeds the actual consideration paid by the assessee and in such a situation when the assessee offers no explanation about such excess amount or the explanation offered by him is, in the opinion of the A.O., not satisfactory. In the present case the assessee requested to call upon the seller to explain the situation but the summon issued u/s. 131 of the Act to the seller was served and the replied in writing to dak of the AO. Merely because the seller was not present in person before the AO, the assessee cannot be alleged to have made any unexplained investment which could entitle the AO to make addition u/s. 69B of the Act. Therefore the Ld. CIT(A) was right in deleting the addition on this issue. Therefore issue raised by the revenue in the forth limb of ground no. 4 is dismissed being devoid on merits.

52. In the result, first and fourth limb of ground no. 4 of revenue are dismissed and second and third limb of ground no. 4 of revenue are restored to the file of Ld. CIT(A) for a fresh adjudication by following the procedure as has been directed hereinabove.

53. In the result, appeal of revenue is partly allowed, in the manner as stated above.

Order pronounced in open court on 09.05.2023.

sd/-

(BHAGIRATH MAL BIYANI)
ACCOUNTANT MEMBER

sd/-

(CHANDRA MOHAN GARG)
JUDICIAL MEMBER

Dated: 9th May, 2023.

NV/-

Copy forwarded to :

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

// By Order //

Asstt. Registrar, ITAT, Indore

		Date
1.	Draft dictated on	24.01.2023
2.	Draft placed before the author	25.01.2023

3.	Draft placed before the other Member	.01.2023
4.	Approved Draft comes to the Sr.PS/PS	.01.2023
5.	Order uploaded on	.01.2023
6.	File sent to the Bench Clerk	.01.2023
7.	Date on which file goes to the Head Clerk.	
8.	Date on which file goes to the AR	
9.	Date of dispatch of Order.	