

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'A', NEW DELHI**

**Before Sh. C. M. Garg, Judicial Member**

**Dr. B. R. R. Kumar, Accountant Member**

**ITA No. 2663/Del/2014 : Asstt. Year : 2006-07**

**ITA No. 2664/Del/2014 : Asstt. Year : 2007-08**

**ITA No. 2665/Del/2014 : Asstt. Year : 2008-09**

ACIT, Central Circle-23, New Delhi	Vs	M/s BPTP Ltd., M-11, Middle Circle, Connaught Place, New Delhi
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>
<b>PAN No. AACCB2442A</b>		

**Assessee by : Sh. Ajay Bhagwani, CA**

**Revenue by : Sh. P. Praveen Sidharth, CIT DR**

**Date of Hearing: 15.02.2023**

**Date of Pronouncement: 28.04.2023**

**ORDER**

**Per Dr. B. R. R. Kumar, Accountant Member:**

The present appeals have been filed by the Revenue against the orders of Id. CIT(A)-XXXIII, New Delhi dated 04.12.2013.

2. In ITA No. 2663/Del/2014, the Revenue has raised the following grounds of appeal:

*"1. On the facts and in the circumstances of the case, the Id. CIT(A) has erred in deleting the addition of Rs.52,57,49,113/- out of total addition of Rs.52,88,97,863/- made by the AO on account of special discount allowed to customers.*

*2. On the facts and in the circumstances of the case, the Id. CIT(A) has erred in deleting the addition of*

*Rs.12,18,142/- made by the AO on account of interest on PDCs paid outside the books of account."*

3. In ITA No. 2664/Del/2014, the Revenue has raised the following grounds of appeal:

*"1. On the facts and in the circumstances of the case, the Id. CIT(A) has erred in deleting the addition of Rs.34,81,29,414/- out of total addition of Rs.35,10,72,414/- made by the AO on account of special discount allowed to customers.*

*2. On the facts and in the circumstances of the case, the Id. CIT(A) has erred in deleting the addition of Rs.1,12,27,992/- made by the AO on account of interest on PDCs paid outside the books of account."*

4. In ITA No. 2665/Del/2014, the Revenue has raised the following grounds of appeal:

*"1. On the facts and in the circumstances of the case, the Id. CIT(A) has erred in deleting the addition of Rs.1,68,82,728/- made by the AO on account of special discount allowed to customers."*

5. The assessee filed return of income on 29.11.2006 declaring an income of Rs.8,34,26,050/-. The assessee company is engaged in the business of real estate development and construction of housing & commercial projects.

6. The facts have been taken from the order of the Id. CIT(A).

7. Since, the issues involved in all these appeals are similar, they were heard together and being adjudicated by a common order.

8. Return declaring an income of Rs. 8,34,26,050/- was filed u/s 139(1) of the IT. Act on 29.11.2006. The revised return of

income declaring an income of Rs. 5,46,48,870/- was filed u/s 139(5) on 01.08.2007. Later on, search was conducted u/s 132A of the IT. Act on 15.11.2007 at the various premises of the assessee and its associate concerns. Consequently, notice u/s 153A was issued on 03.09.2008. The Assessments have been completed making additions on account of Special Discount, interest payment on PDCs.

**Special Discount:**

**ITA No. 2663/Del/2014 : A. Y. 2006-07**

**ITA No. 2664/Del/2014 : A. Y. 2007-08**

**ITA No. 2665/Del/2014 : A. Y. 2008-09**

9. The AO made addition on account of special discount offered by the assessee for the Assessment Years u/s 153A and considering the same as cash receipt.

10. While concluding the assessment, the Assessing Officer held that the authorized officer found that the assessee has adopted the modus operandi where in cash received as part of sale consideration, not recorded in the books of accounts were disguised in the contemporary record as "Special Discount". Chairman of the group, during the course of search and seizure operation was confronted during the statement u/s 132(4) on the following seized document:-

- a) Page 40-46 of A-1/BO-2 relating to transactions with M/s. Brijwasi Impex (P) Ltd.
- b) Page 7, 14, 28 and 32 of A-1/BO-2 relating to Jitender Kwatra, Adarsh
- c) Kwatra, Ashish Kohli and Sanjay Thukral.
- d) Page 4 of Annexure A-I/BO-2

- e) Page 1 of Annexure A-8/BO-2
- f) Page 110 of Annexure A-6/BO-2
- g) Page 31 of Annexure A-4/BO-2
- h) Page 63,64 and 68 of Annexure A-5/BO-2
- i) Page 21 of Annexure A-3/BO-3
- j) Page 69 of Annexure A-5/Party BO-2 which prima facie established the aforesaid modus operandi of the assessee.
- k) Page 69 of Annexure A-5/BO-2

11. The AO held that Sh. Kabul Chawla, the Director of the company, was confronted with the seized material who in turn made a) disclosure of Rs. 100.01 crores for the purpose of tax in his statement.

12. The relevant portion of statement is as under:

*"Q.2 I am showing you certain documents which have been seized from the premises at 5th and 6' floor, DCM Building, Barakhamba Road, New Delhi and certain photocopies of documents which have been found during the course of the search at M-JJ, Connaught Place, New Delhi, and from B-1/A-5 Mohan Cooperative Indl. Area, New Delhi.*

*Ans. I have seen these documents and some of them may be explained by me at a late date. However, I hereby agree to offer a sum of Rs. 100.01 crores as additional income for F.Y. 2007-08. This offer is being made subject to the condition that no penalty or prosecution proceedings being initiated against Assessee Company, Group Companies, Promoters and all persons covered under the search. The additional income is hereby offered on account of increase in net profitability of M/s BPTP Ltd. and relating to various information and documents/valuables found and seized during the Course of the search from all the premises covered under the search.....*

*.....This estimate of our income for the current assessment year will obviously include income which is based on documents found and seized at*

*the time of search and had not yet been entered in the books of account, if any, for current year and of any other sum on account of proposed disallowances to be made out of expenses that may remain allegedly unverifiable or of any investment which remain allegedly unsubstantiated, if any.*

*.....We further understand that this statement is being recorded under section 132(4) on oath and that prosecution proceedings can be initiated for furnishing false information. This statement has been made in good faith to avoid any protracted litigation when the assessee has agreed to pay taxes on Rs. 400 Crores. It is a non-retractable offer and at no stage will any refund be claimed for the taxes paid on Rs. 400 Crores. "*

13. The AO held that this statement was a voluntary offer made before the Authorised Officer by the Director, Sh. Kabul Chawla who was confronted with the incriminating material and who had expressed his inability to give any explanation. The AO relied on the the statement of Shri Kabul Chawla which was again recorded on 12.01.2008 wherein he confirmed the disclosure made on 15/16.11.07.

14. The AO held that the assessee had to pay tax on Rs. 400 Crores which includes Rs. 100 Crores offered in the statement made under section 132(4) in the accounting year 2007-08. The AO relied on the statement wherein it was submitted that the actual profit can be known only on finalization of the full year's accounts.

15. The Assessing Officer held that the seizure of incriminating documents and statements made by Sh. Kabul Chawla are conclusive with regard to the under statement of income to the extent of Rs. 100.01 crores. The Assessing Officer held that

even vide reply dt.07.01.2009, the assessee did not deny the surrender of undisclosed income in the statement u/s 132(4).

16. On going through the seized material, the AO determined the discounts of three types viz.

- Special Discount,
- Inaugural discount and
- Broker's discount

which were claimed to have been allowed to its customers against the booking of plots/villas for various projects. These details are culled from Page 1-69 of Annexure A-5/Party BO-II from M-11, Connaught Circus, New Delhi. The summary is contents on page 69 of seized material is reproduced as under:-

SL. No.	PROJECT	NAME OF PROJECT	INAUGURAL	BROKER	SPECIAL	TOTAL DISCOUNT
1	A06	Allotted Plots	23,462,759	36,548,968	361,368,048	421,379,775
2	A08	Allotted Plots	7,937,769	15,311,026	147,735,163	170,983,958
3	A01	Park Life Gurgaon-Group Housing	1,806,813			1,806,813
4	A03	Allotted Princess Park Faridabad	4,534,773	3,711,145	4,199,200	12,445,118
5	A04	Park Land Villa Allotted Faridabad	1,741,000	3,081,187	25,389/700	30,211,887
6	A05	Allotted Park Grandeura Faridabad- group Housing	3,718,036	1,741,953	24,384/700	29,844,689
7	PF1	Unallotted Plots		437,855	73,148,625	73,586,480
8	PF4	Unallotted Plots		3,238,266	92,439,100	95,677,366
9	PF2	Unallotted Princess Park Faridabad- group housing			4,112,500	4,112,500
10	PF6	<b>Unallotted Commercial Plots</b>	<b>93,060,000</b>			<b>93,060,000</b>
11	PF7	Unallotted Plots	90,000	1,66,500	63,128,344	36,384,844
	Total		136,351,150	64,236,900	<b>795,905,380</b>	996,493,430

17. The Assessing Officer has treated inaugural discount of Rs.9,30,60,000/- on the project PF-6 above as special discount. Therefore, he arrived the figure of special discount as Rs.88,89,65,380/- (Rs. 79,59,05,380/- + Rs. 9,30,60,000).

18. During the assessment proceedings, the appellant has made submission on the nature of these three discounts. The assessing officer analyzed the submission on the nature of the discounts as under:

**a) Special Discount:** The assessee stated that this discount is allowed on account of bulk bookings made by certain buyers, adherence to timely payment of the scheduled installments, and commercial expediency. The 'Special Discount' has been allowed varying from 0.48% to 58.33% and the break-up of number of cases in each of the following slabs is as under:

0.48%-5%	5%-15%	15%-25%	25% - 40%	40%-58.33%
144	410	437	317	80

19. The Assessing Officer held that there is wide variation in percentage of the said discount and the assessee has not given any basis or criteria for allowing the said discount to only a few customers. The AO held that it is not possible to either verify or check the correctness of the claim made during the assessment proceedings.

**b) Inaugural Discount:** The assessee has claimed that this discount has been allowed on the launch of the project and to first customers making booking in such project.

**c) Broker Discount:** The assessee has contended that against the bookings made through the brokers, the brokers may pass on some portion of their commission payable by the assessee to them to the customers and to that extent the

assessee company reduces the commission payable of the brokers concerned.

**20. After examining all the records, discount given on account of 'Broker Discount' and Inaugural Discount have been accepted by the Assessing Officer as genuine.**

21. The Assessing Officer held that commission to the brokers was paid on 'Basic Sale Price' (BSP) of the unit booked inclusive of special discount. Therefore, the special discount is nothing but unaccounted cash component. The Assessing Officer has mentioned that to verify whether commission is paid on BSP, enquiry was made through assessing officer of other leading Real Estate Developers, M/s. Omaxe Ltd. confirmed in writing that brokerage commission is paid on 'BSP'.

22. The Assessing Officer has not accepted the appellant's reply on special discount for the following reasons:

"i) *Firstly, the assessee has not given the basis and justification for the said discount in each case and generalized reply is not verifiable with reference to the explanation.*

*ii) Secondly, there is vast variation in the percentage of special discount. It is not the case of the assessee that the beneficiaries of the said discount had some special relationship or merits or were its regular customers in various projects. In most of the cases, there is a broker to whom commission is also paid. In the absence of any case-wise justification or basis for special discount at given percentage, no verification of the reply is possible.*

*iii) Thirdly, there is no basis or justification for variation in percentage of discount for the sales made at the same time and in the same project. For instance Mr. Pankaj Garg has booked five plots of 300 sq. yards at basic*

*sale price (BSP) of Rs.32,40,000/- each but is allowed discount at 22.84% for two plots, 45.68% for one plot, and 58.33% for balance two plots. All the five plots are in seriatum and booked at the same time through the same broker, namely, Himalaya Associates. Similarly, Mr. Jagbir Singh Siddhu has booked 4 plots at basic sale rate of Rs. 9500 per sq. yd. and has been given varying discount @ 14.48%, 15.94%, 20.73% and 24.91% in respect of the said four plots. All these plots are booked through the same broker, namely Suraj Realtors at the same time and in the same project. There are a number of similar instances which are not repeated for the sake or brevity. The assessee has not given any explanation and justification for the variation in the rate of discount.*

*iv) Fourthly, one of the justifications given by the assessee for special discount is timely payment. It has not given list of cases in which special discount is given for reason of timely payment. It is, however, noticed that special discount has been allowed in cases where payments were not paid in time and, on the contrary, there are cases in which all payments were made in time but no discount has been allowed. This is clearly evident from the details given in the customer ledger accounts as furnished by the assessee vide its letter dated 7.12.2009. It may be stated here that the discount is allowed at the time of booking when the assessee cannot be certain of the timely payment as per the schedule or otherwise from any customer. Had the assessee really allowed the special discount for timely payment, it would have been reflected after the payments were received and not at the time of booking.*

*v) Fifthly, a perusal of Annexure A-5, Page 69/ Party BO-II reveals summary of total discounts upto 15.11.2007 for 153 customers at Rs. 1,24,45,118/- in respect of Project A-03. However, in the details filed during the course of assessment proceedings, the total discount upto 15.11.2007 for 179 customers comes to Rs. 1,67,04,750/- giving difference of Rs.42,59,632/-. The increase in the amount of discount and number of customers upto 15.11.2007 as per two different details shows that it is not a case of discount but of receipt of basic sale price (BSP) in cash from any customer at any time without reflecting it in the regular accounts. The fact is that basic sale price received in cash and not*

*shown in the books of account is disguised as special discount. If the contention of the assessee is correct, the actual price settled could itself be called as basic sale price (BSP) and there was no need for keeping separate record for amount of special discount. The fact is that the record was required to be maintained to settle the amount paid for a particular plot in the eventuality of cancellation of the booking etc. when the assessee may have to refund the amount to a customer. Some of the seized letters etc., as a matter of fact, prove this and the customers have raised the issue of the amount paid in cash which finds place in the list of special discount only. These instances are separately discussed in this order. In this para, I have analyzed the position with reference to project A-03 only and the position in respect of other projects is identical and is not being repeated for the sake of brevity.*

*vi) Sixthly, another reason given for allowing special discount is commercial expediency. While I do not dispute that it is for the assessee to take a view on grounds of commercial expediency in a particular case and the authorities should normally not sit upon businessman's judgment but this principle does not debar the assessing authority to enquire and investigate whether the claim is really for business consideration or it is only a farce or a fraud with the revenue. This is a search case and truth would not have seen the light of the day but for the material found and seized in search action. The seized material and the discussion in this order proves beyond doubt that the ground of commercial expediency is being cited as a lame excuse to cover the fraud committed for avoiding correct payment of taxes and not for promoting the business. The point of view of businessman has to be a prudent and reasonable point of view which is free from an apparent taint of excessiveness, collusiveness or colorable discretion. This is what Hon'ble Delhi High Court has held in the case of Siddho Mal & Sons vs. CIT 122 ITR 839 (Del). There are a number of other decisions of the Apex Court and the jurisdictional and other High Courts which support the view being taken by me on the facts and circumstances of the case."*

23. The AO relied on the seized documents which revealed payment of Rs. 27 lacs in cash as part of basic sale price (BSP)

and shown as special discount. The AO held that, "the assessee has admitted that the seized letter dt.03.07.2007 was received by it from M/s. Brijwasi Impex Pvt. Ltd. It has, however, controverted that reference to Rs.27 lacs paid by them in cash was a term loosely employed for discount allocated for timely payment and booking at the stated price. However, in the same breath, the assessee has stated that it was taken aback and it checked from its record to verify as to whether any cash was received. The stated story of loose term employed for cash discount is totally false keeping in view the contradictory averments made by the assessee. Moreover, the assessee has claimed that the 'Special Discount' to the tune of Rs.27 lacs @ Rs.4,50,000/- each was allowed against 6 bookings made and against which Rs.3 lacs each aggregating to Rs.18 lacs was admittedly received by the assessee and accounted for in its books of accounts. However, no such condition of timely payment against which the 'Special Discount' claimed to have been allowed is mentioned on the application form and further what treatment will be given to the 'Special Discount' in case the alleged agreed timely payments are not made. There is simple noting on each of the six application forms as 'Special Discount' approved for Rs.4.50,000/- (Four lacs fifty thousand only)' - Sd/- Rajat/ Ok (Sd/- Sudhanshu Tripathi). The assessee has, during the course of assessment proceedings, made an attempt to create evidence by way of writing a letter dt. 07.07.2007 to M/s Brijwasi Impex Pvt. Ltd. to show that it has not received the cash of Rs.27 lacs. This letter dt.07.07.2007 had not been found during the course of search and is an afterthought. It is a self-serving document created by the assessee to explain the unaccounted amount. Further, it is claimed that the amount of Rs.18 lacs received by cheques has been returned to M/s. Brijwasi Impex Pvt. Ltd. by 6 cheques all dated 08-02-2008 of Rs.3 lacs each. All the cheques are much after the date of search and have no relevance. The assessee has also furnished xerox copies of all the said 6 cheques. In the intervening period from date of writing letter dt. 07.07.2007 upto the date of issuing of the above cheques on 08.02.2008, it seems both the assessee and M/s. Brijwasi Impex Pvt. Ltd. kept quiet since no correspondence for the said period has been furnished or found in search. It is further noticed that in its letter dated 10.07.2007, Brijwasi Impex Pvt. Ltd. has not foregone its claim of Rs. 27 lacs and again asked for refund of "the booking amount

together with Rs. 27 lakhs as compensation". No justification or basis for claim of the compensation amount is given and it exactly tallies with the cash payment of Rs. 27 lacs disguised as discount by the assessee. No weightage can be attached to the explanation and cheques stated to have been issued as the entire evidence pertains to the date subsequent to the date of search and have been created to cover the default. It does prove the point at issue, namely cash payment at the time of booking.

In its reply dt.23.11.2009, the assessee company has also requested the undersigned to invoke power conferred u/s 131 of the I.T. Act, 1961 to summon M/s. Brijwasi Impex Pvt. Ltd. for verifying the facts. The assessee is using this ploy for making the matter technical and instead of discharging its onus, is passing on the same to the Department. It is for the assessee to discharge its primary onus with regard to the transactions with M/s. Brijwasi Impex Pvt. Ltd. It has even failed to obtain an affidavit as filed in some other cases of alleged allowing of 'Special Discount. Moreover, in view of the candid and categorical mention in the said letter about the amount of Rs. 27 lacs paid in cash, it is established beyond an iota of doubt that the assessee did receive Rs. 27 lacs in cash."

24. The AO relied on the documents seized pertaining to Sh. Gulshan Kwatra, Sh. A. K Shood and Sh. Hemender Gupta. Further, during the assessment proceedings, the Assessing Officer asked to the assessee to produce the particulars to whom special discount was allowed. In response to the query, the appellant has filed affidavit of some of the allottees. Subsequently, summons were issued by the Assessing Officer in some cases. None of the parties attended.

25. The assessee has filed 140 affidavits of different parties confirming that the bookings were without any payment of cash. The AO held that the assessee submitted these affidavits in last moment to delay the proceeding and did not accept the contents of these affidavits as true. The Assessing Officer has come to

the conclusion that special discount is nothing but unaccounted cash received from the customers and hence made addition for various assessment years as under:

	A.Y. 2006-07	A.Y. 2007-08	A.Y. 2008-09	Grand Total
Residential Plots (A)	431550588	297927214	13364428	742842230
PF-6	64922500	23050000	--	87972500
Villas	29830575	4322500	---	34153075
Princess Park	2594200	3660000	1242500	7496700
Park Granduera	----	22112700	2275800	24388500
Total	528897863	351072414	16882728	896853005

26. Aggrieved, the assessee filed appeal before the Id. CIT(A). The various arguments taken up before the Id. CIT(A) are as under:

- The observation of the AO, that the search resulted in detection of a large number of incriminating document which were all confronted to the Managing Director, Shri Kabul Chawla suffer from the vice of untruth besides being vague. What are those alleged incriminating document which were detected and what was their number is not even stated. To allege that they were all confronted is a remark not substantiated by any material whatsoever.
- The Assessing Officer has wrongly held that Shri Kabul Chawla was confronted in the course of search with the seized documents, which are annexed at pages SD-1 to SD-20 of the assessment order containing details of special discount, that Shri Kabul Chawla could not offer any explanation and that after examining the said documents made a disclosure of additional income of Rs. 100.01 Crore

for purposes of tax. This is a perverse analysis and one that goes beyond the pale of factual truth.

- To sum up, the assessee submitted that the statement of Sh. Kabul Chawla was not in particular reference to the seized material mentioned in the Assessment Order.
- That there has been no admission on the part of Shri Kabul Chawla that any cash was received as part of sale consideration which was disguised as a special discount given to the purchasers and that no unaccounted income was admitted in the course of recording of the statement of Shri Kabul Chawla
- The search carried out on 15.11.2007 was completed by April, 2008 and it is presumed that as per law the documents were accordingly handed over by the Investigation Wing. The return of income was filed on 29.9.2008. It was however, only on 29.06.2009, after 15 months from the conclusion of the search, and after 9 months from the filing of the return, that the assessment process was put in motion when notices u/s 143(2) and 142(1) were first issued for compliance on 08.07.2009. The delay attributable to the issue of the notice on the part of Assessing Officer was vital in as much as valuable time for compliance was unduly curtailed.
- That there was no delay on the part of the assessee to comply to the notices and that delay in compliance cannot be attributed to the assessee and it will be wrong and incorrect to say that any dilatory tactics were adopted and

details and explanations were furnished in piecemeal to avoid verification. It will be appreciated that a timely compliance was in assessee's own interest. The time taken for compliance was because the questionnaires itself were issued late and assessee was given less than adequate time for compliance.

- The addition of Rs. 89.685 crore is based on generalization and not on any specific material found in the course of search which, too lack corroboration.
- The AO himself states that he could find alleged incriminating material in the course of search only in respect of a few parties. This shows that AO himself admits that there was no incriminating material in respect of the remaining parties i.e. most of the parties. Even if material found in the course of search in respect of few parties is alleged to be incriminating, there is neither any precedent nor authority to presume that other transactions, where no material whatsoever was found, were to be dealt with in the same manner.
- The AO could only find the seized record of 12 parties as under in respect of which certain documents were seized namely,
  - a) Brijwasi Impex Pvt. Ltd
  - b) Sanjay Thukral
  - c) Ashish Kohli
  - d) Adarsh Kwatra
  - e) Jitender Kwatra

- f) Heminder Gupta
- g) A.K. Sood
- h) Shree Ganesh Fin. Cab. P. Ltd.
- i) Rahul Gagrena
- j) Ranjcin P. Budhiraja
- k) Sandeep Jain
- l) Ram Avtar

27. The reply in respect of each of the seized material is as under:

"a) **Brijwasi Impex Pvt. Ltd.**

*The questionnaire and the assessee's reply and the documents are already annexed / reproduced and are not referred to for the sake of brevity. The AO has given following reasons to reject the explanation filed by the assessee:*

- a) No condition of timely payment against which the special discount claimed to have been allowed is mentioned on the application form. There is simple noting on each of the six application forms as "special discount approved for Rs. 4.50 lacs SD/- Rajat ok/SD/- Sudhanshu Tripathi).*
- b) The letter dated 7.7.2007 written to M/s Brijwasi Impex Pvt. Ltd had not been found during the course of search. It is afterthought and a self serving document.*
- c) The six cheques of Rs. 3lacs each dated 8.8.2008 were made much after the date of search and have no relevance. In the intervening period from 7.7.2007 up to 8.8.2008, it seems both the assessee and M/s Brijwasi Impex Pvt. Ltd kept quiet since no correspondence for the said period was furnished or found in search.*

- d) *In his letter dated 10.7.2007, M/s Brijwasi Impex Pvt. Ltd had not foregone its claim of Rs. 27 lacs and again asked for refund of "the booking amount together of Rs.27 lacs as compensation".*
- e) *In reply dated 23.11.209, assessee requested AO to invoke powers u/s 131 to summon M/s Brijwasi Impex Pvt. Ltd. This was a ploy for making the matter technical and instead of discharging the onus, passing the same to the Department. Assessee even failed to file affidavits from M/s Brijwasi Impex Pvt. Ltd. as was filed in some other cases.*

*The short question is whether AO has been able to lead an unimpeachable evidence for the finding that the sum of Rs.27 lacs (4.5 lacs X 6) was actually cash paid by M/s Brijwasi Impex Pvt. Ltd and that the same was disguised as discount by the assessee. As we shall submit hereinafter none of the reasons given justify the action of the AO in making the addition.*

- a. *So far as this reason at (a) is concerned, it is submitted that it does not emerge from any document/record/books of account that special discount of Rs.27 lacs was given for timely payment. In fact in our written replies, reproduced supra, we have made detailed submissions regarding the reasons for granting discount such as needs of business, requirement of customers, the value at time of negotiations, bulk bookings and several other factors within the realm of commercial expediency. The noting in the application forms of booking approves the discount but it nowhere says that it was not a discount but cash received and disguised as discount.*
- b. *The allegation at (b) is totally unfounded. We maintain individual file of each customer. The said letter was lying in*

*the individual file of the customer and since there was only selective seizure the individual files were not looked into and seized. The letter shows on the face of it acknowledgement by the Director of M/s Brijwasi Impex Pvt. Ltd. The objection that it was a self serving document is only based on mere imagination and without any corroboration. This reason has to be rejected for its inherent demerit.*

- c. The reason at (c) again is subjective and is merely based on assumption. The time gap between 7.7.2007 and 8.8.2008 has been adversely viewed by the AO for which no reason is forthcoming. The AO has not appreciated that it is the decision of the company to decide the time of refund. It is not understood what the AO means when he states that the cheques being dated after the date of search, to quote, 'have no relevance'. The cheques were duly issued on the said date and encashed. These cheques form part of the record of the assessee and how can it have no relevance? The fact that there was no correspondence found in this regard is not relevant because none existed. Such matters are negotiated orally.*
- d. As for (d) the letter dated 10.7.2007 of M/s Brijwasi Impex Pvt. Ltd has not been construed properly. For the sake of ready reference this letter is reproduced below:*

*"This is with reference to you letter dated 07.07.2007 and our letter dated 03.07.2007. Please note we have made 6 bookings in April 06 for which we had paid Rs.18 lakhs. Based on the multiple bookings we negotiated a cumulative discount of Rs. 27 lakhs (Rs.4.50 lakhs for each booking) which was allowed to us. Subsequently because of financial constraints we decided to cancel the booking and it is in that context we had written letter dated 3.7.2007. Since our*

*funds have remained with the company for almost 15 months and in the meanwhile, the prices of plots had increased substantially, we desired that the cash discount of Rs. 27 Lakhs also must legitimately fall to our share.*

*Please note that in our letter dated 3.7.2007 we had described discount of Rs. 27 lakhs given to us, as cash paid which we confirm was erroneously so mentioned. We confirm that no cash was paid. We once again request you to take up our cases for surrender at the earliest and refund the booking amount together with Rs. 27lakh as compensation."*

*What the customer (M/s Brijwasi Impex Pvt. Ltd) was demanding was not the cash of Rs.27 lacs paid but compensation as its funds remained in the company for almost 15 months and in the meanwhile the prices of plots increased substantially. It is for this reason that M/'s Brijwasi Impex Pvt. Ltd desired that the cash discount of Rs.27 lacs must legitimately fall to their share. It is however, a different matter that no such claim of compensation was accepted and the deal was cancelled after refund of Rs.18 lac, cheques for which amount were accepted by M/s Brijwasi Impex Pvt. Ltd as full and final settlement. It is relevant to note that in the same letter M/s Brijwasi Impex Pvt. Ltd confirmed that no cash was paid. The observation of the AO that the cheques were issued subsequent to the date of search cannot be viewed adversely because both the parties agreed to the cancellation of the booking only after the date of search. The mention of the date of search is not relevant one way or the other.*

*(e) With regard to (e) it is submitted that the request for invoking the power u/s 131 the assessee had made the prayer only in the interest of justice so that the party could be summoned and examined. This request cannot be treated as ploy or indulging in technicality and avoiding the discharging of onus. Necessary*

*evidence discharging the onus was furnished and it was assessee's request that the said evidence be tested on the terra firma of examination by calling the party concerned. Incidentally, the AO has referred that assessee failed to obtain the affidavit and file the same. This affidavit was indeed filed vide letter 24.12.2009. In the said affidavit, it has been stated by the deponent that a total discount of Rs.27 lacs was given, and that no cash was paid in lieu of the discount allowed. The said company is assessed in Central Circle 12, New Delhi, PAN No. AADCB7530L.*

*As stated the affidavit has duly been furnished. At the cost of repetition, it is submitted that it is settled that if an affidavit is filed by an assessee and he is neither cross-examined on that point nor is he called upon by the Department to produce any documentary evidence, the assessee may assume that the Income-Tax authorities are satisfied with the affidavit as sufficient proof on the point in question (L. Sohan Lal Gupta v. CIT (1958) 33 ITR 786, 791 (All)). This is so because the rejection of an affidavit filed by an assessee is not justified unless the deponent has either been discredited in cross-examination or has failed to produce other supporting evidence when called upon to do so (Ref. Mehta Parikh & Co. v. CIT (1956) 30 ITR 181, 187 (SC), Dilip Kumar Roy v. CIT (1974) 94 ITR 1 (Bom); Malwa Knitting Works v. CIT (1977) 107 ITR 379, 381 (MP); Vasanji Ghela & Co. v. CST (197) 40 STC 544, 561 (Bom); Sri Krishna v. CIT (1983) 142 ITR 618 (All); CIT v. Birbal Khanna & Co. (1983) 33 CTR (MP) 240; Netram Mool Chand v. CST (1984) Tax LR (NOC) 113 (All)).*

*In view of above it is submitted that no addition was called for in regard to the discount recorded in the account of M/s Brijwasi Impex Pvt. Ltd.*

**(i) Pages 7, 14, 28 and 32 of Annexure A-1/BO-III**

*The queries, the seized documents, assessee's replies are already reproduced/ annexed to the paper book and are not repeated for the sake of brevity. On the basis of seized documents the AO has made addition as under:*

*Mr. Sanjay Thukral - Rs. 5,00,000/- (Brother-in-law' of Mr. Jitender Kwatra)*

*Mr. Ashish Kohli - Rs. 4,86,250/- (Son-in-law of Mr. Gulshan Kwatra)*

*Mr. Adarsh Kwatra - Rs. 3,81,250/- (Brother-in-law of Mr. Gulshan Kwatra)*

*Mr. Jitender Kwatra - Rs. 3,81,250/- (Son of Mr. Gulshan Kwatra)*

*The reasons for not accepting the assessee's explanation are as under:-*

*(a) The jottings made in pencil on the back side of the four registration receipts in the handwriting of the customers are covered by the presumption u/s 292C of the Act.*

*(b) Affidavits of legal heirs of Mr. Gulshan Kawtra (who died on 12.7.2006) as furnished have no evidentiary value as deponents were not the parties to the payment whether by cheque or cash. Original transactions are entered into by Late Shri Gulshan Kwatra and not by the legal heirs.*

*(c) The legal heirs were issued summons u/s 131 but the same were not complied with; only written replies of identical nature were sent.*

*(d) The Assessee failed to produce the deponents of the affidavits in spite of specific direction to produce them.*

*(e) The affidavits are identical, signed and attested on the same dates and apparently prepared at the instants of the assessee.*

*None of the reasons given by the AO justified the addition for the reasons stated hereinafter:*

*(a) As for (a), there is no quarrel on the proposition that in the respect of the seized document relied upon by the AO presumption as per section 292C of the Income Tax Act applies. However, the presumption referred to in section 292C is rebuttable and the evidence furnished by the assessee shows that no adverse inference is called for in respect of these documents.*

*(b) As for (b) the fact is that five plots were booked on 3.9.2005. On ascertaining, it has been found that the booking amount in respect of only one plot which was subsequently transferred to Mr. Jitender Kwatra S/o Shri Gulshan Kwatra came from Shri Gulshan Kwatra. The booking amounts of remaining four plots of Rs Ilacs each came by cheques dated 31.8.2005 from Jitender Kwatra, Adarsh Kwatra, Ashish Kohli and Sanjay Thukral. The subsequent payments by cheques also came from the respective persons. In fact what happened was that all the booking applications were signed by Shri Gulshan Kwatra and that is why the bookings were recorded in the books of assessee in the name of Shri Gulshan Kwatra. After his death on 12.7.2006, the bookings were transferred in the names of respective four persons.*

*We are furnishing by way of additional evidence that the cheques in four names were received not from Shri Gulshan Kwatra but from four respective persons. After the death of Shri Gulshan Kwatra the plot for which he paid the initial amount was transferred to his son Jitender Kwatra, who was his legal heirs. The remaining plots were also transferred in the names of respective persons who had paid the initial and subsequent payments. It is therefore wrong on the part of the AO to allege that the affidavits of the legal heirs had no evidentiary value because they were not parties to the payment. The fact of the matter is otherwise as stated above. The objection of the AO on the admissibility of the affidavits by these four persons does not survive.*

(c) As for (c) it is submitted that the AO had all the powers to enforce attendance of the deponents and the assessee has no role to play in the matter.

(d) As for (d) it is denied that assessee was called upon to produce the four deponents.

(e) As for (e) the objection is of no consequence so long as affidavits duly signed and verified have been made by the deponents. It is relevant to point out that all the four affidavits, duly filed vide letter dated 24.12.2009, were taken on record. The AO having not summoned the deponents for cross examination, these affidavits in fact clinch the issue in favour of the assessee.

For the aforesaid reasons, it is submitted that addition is not justified.

(ii) **Mr. Hemender Gupta - A-1/Pase 4**

The query, the seized documents and assessee's reply have been annexed / reproduced and not stated for the sake of brevity. The AO has rejected the explanation for the following reasons:

(a) No communication dated 11.10.2007 by the assessee to Shri Gupta regarding that no receipts in respect of post date cheques are issued, was found in the course of search.

(b) No post dated cheque bearing No. 345243 dated 12.1.2008 issued the by Shri Gupta was found.

(c) No particulars of the post dated cheques is mentioned in the letter dated 5.10.2007. The two cheques claimed to have been given are having different series.

(d) There is no mention of the amount of Rs.5 lacs due from Shri Gupta in the schedule of payments.

(e) *The remarks on the bottom of the left hand corner of the seized document namely "discount slip not given at the time of booking" negate the story put forth by the assessee.*

*None of above reasons justify drawing adverse inference for the reasons given below:*

(a) *As for (a) the communication did exist in the personal file of the customer which was not seized. We have already submitted earlier that there was selective seizure. This however, does not mean that no such letter existed.*

(b) *As for (b) for the same reasons as above, the post dated cheque also formed part of the personal file of the customer and was not seized. It is relevant to point out that the said cheque was actually encashed on 15.1.2008. The AO's remarks that the cheque did not exist is based only on assumption.*

(c) *As for (c), the reasons that the two cheques have different series by itself does not constitute an adverse factor. It is the decision of the customer to issue a particular cheque from a particular account, and nothing more can be inferred from that.*

(d) *As for (d), the amount did not find mention in the schedule of payment as it was not due at the relevant time.*

(e) *As for (e), the remark only shows that a discount was given of Rs.5 lacs and this fact required to be intimated to the customer and there is nothing more to be understood from this noting.*

*It is relevant to point out that an affidavit of Shri Gupta was duly filed vide letter dated 24.12.2009, which was taken on record. In this affidavit of Shri Gupta specifically mentioned that he was given a discount of Rs. 5lacs and no cash payment was made in lieu of the said discount. The AO having not summoned the deponent for cross*

*examination, the affidavit in fact clinches the issue in favour of the assessee.*

*For the aforesaid reasons it is submitted that no addition can be made in respect of the discount given to Shri. Hemender Gupta.*

***(iii) A.K. Sood Page -1 of Annexure A-8/ Party BO-2***

*The query, the seized documents and assessee's reply have been annexed / reproduced and not stated for the sake of brevity. The AO has rejected the explanation for the following reasons:*

*(a) The contention of the assessee that the jottings on the copy of the ledger account enclosed by Mr. A.K. Sood in his letter dated 25.10.2007 has nothing to do with the company as the communication being between the broker and customer has no relevance with the assessee company, on the face of it is not acceptable because this document was found in search at assessee's premises.*

*(b) The assessee cannot simply get away with explanation that the communication with the broker and Mr. A.K. Sood and has no relevance with the assessee.*

*(c) It is clearly established that assessee has received cash of Rs. 2,43,000/- in the guise of special discount.*

*None of the reasons given by the AO justify drawing adverse inference for the reasons stated below:*

*(a) As for (a) and (b), it is emphasized that the letter dated 25.10.2007, addressed by Mr. A.K. Sood to the assessee clearly mentions the fact that discount amount is Rs. 2,43,000/- and not Rs. 2,23,000/- as mentioned in the ledger. It is for this reason that the customer had written the letter to the company to reconcile the difference. It is relevant to point out at the cost of repetition that*

*the communication between the customer and the assessee does not say anything to the effect that any cash was paid which was disguised as special discount. On the contrary, the customer confirmed having received this discount but it is only the difference of Rs. 20,000/- which was being required to be reconciled. Ultimately, as it happened we confirmed that the discount was actually Rs.2,23,000/- and not Rs.2,43,000/- and we did not make any amendment in our book of account. Thereafter there was no further query from the customer and as we shall subsequently show the customer in his affidavit also confirmed having received discount of Rs.2,23,000/- only and not Rs. 2,43,000/-.*

*It is evident that the enclosed ledger account was the one which was faxed to the customer by the broker and the note made thereon by Mr. A.K. Sood was also addressed to the broker namely, Shitiz. The assessee's averment was that the communication between the customer and broker can have nothing to do with it. This explanation has been summarily rejected without getting any clarification from the customer and the broker. If the AO was not accepting the assessee's explanation that the note to the broker had no relevance with the assessee, it was incumbent on the AO to have called and examined both the customer and the broker. This was not done by the AO. We would like to reiterate that even in the note to the broker there is no mention that cash equivalent to Rs.2,43,000/- (or Rs. 2,23,000/-) was paid and therefore the AO's assumption that cash was received is prima facie not even emerging from the concerned document. His conclusion that cash was received which was disguised as special discount is clearly untenable.*

*The fact that the letter was found in the course of search cannot be adversely construed. It was a normal correspondence from a customer to the company for obtaining clarification. In fact, the letter which was written in the normal course and prior to the search*

*on 15.11.2007, states in no uncertain terms, as already pointed out above, only the factum of the discount amount (and not any cash paid) although the discount amount is mentioned as Rs. 2,43,000/-.*

*(b) As for (c), the matter however, need not be detained because an affidavit was filed from Mr. A.K Sood on 23.11.2009 which was taken on record. In this affidavit Mr. A.K. Sood has specifically confirmed that he was given a discount of Rs.2,23,000/- and no cash was paid to assessee in lieu of discount allowed. The AO while taking this on record still disbelieved the explanation. As already pointed out earlier if an affidavit is filed by assessee and he is neither cross examined on that point nor is he called upon by the Department to produce any documentary evidence, the assumption is that the Department is satisfied with the affidavit as sufficient proof on the point a question.*

*For the aforesaid reasons it is submitted that no addition can be made in respect of the discount given to Mr. A.K. Sood.*

*E. Material collected behind the back of the assessee used without confronting the same to the assessee and without giving opportunity (Reference Para 2.8 of the assessment order)*

*i) The material allegedly gathered from M/s Omaxe Ltd. also a real estate developer, has been used to the detriment of the assessee without even communicating the material gathered.*

*ii) Even no query was raised in the course of assessment relating to the said matter.*

*iii) The payment of brokerage is a policy decision and the understanding between the company and broker and cannot be questioned by the revenue. [Reference CIT vs. Dhanrajgiri 91 ITR 445 (SC) and CIT Vs Dalmia Vs 254 ITR 377 (SC)].*

*F. Observations in para 2.9, suffer from subjectivity, are of general nature, made without pointing out any specific material, and suffer from factually erroneous assumptions on facts and in law.*

**PARA 2.9 (I), (II), (III) & (IV) OF AO'S ORDER**

*The observations in aforesaid clauses are being dealt with cumulatively.*

*These observations of the AO are not more than subjective remarks and are of general nature without pointing out any specific material whatsoever. Whatever incriminating material relating to discounts was found and seized was already confronted and has been dealt with para 2.10 of the order of the AO. Our replies to that material are given in para D of the written submissions at page 12 to 22. There is not a single instance in these cases where the AO has established by clinching evidence that assessee was receiving cash and disguising it as discount. The observations of the AO are in the nature of mere suspicion. It has been held in Dhakeshwari Cotton Mills Ltd. Vs CIT (1954) 26 ITR 775 (SC), Omar Salay Mohamed Sait vs. CIT (1959) 37 ITR 151 (SC) and Lalchand Bhagat Ambica Ram vs. CIT (1959) 37 ITR 288 (SC), by the Apex Court that there must be something more than mere suspicion in support of an assessment and mere suspicion cannot take the place for the purpose of passing an order of assessment.*

*The AO writes that basis and justification for discount of each of the 1600 cases having not been given, the reply is not verifiable with reference to the explanation. The AO has not appreciated that we have already explained the modality of granting discount. In our letter dated 23.11.2009, we-have stated that allowing of discount is well thought-out procedure after taking cognizance of timing of a deal, the nature of a deal and business exigencies. Normally, the collegiums of Marketing Head and GM (Marketing) act in tandem for*

*determining what discount should be given with reference to a particular specific deal. The discount is thus decided on case to case basis and is recorded in the file. This itself is a proof and justification of discount granted.*

*We have explained the reasons for variation in the percentage of special discount in our letter dated 7.12.2009 (copy enclosed and placed at pages 177 to 181) and we rely thereon. No specific explanation was called relating to the variation in the percentage of discount paid to Mr. Pankaj Garg and Mr. Jagbir Singh Sidhu. However, in respect of Mr. Pankaj Garg, we invite kind attention to the three affidavits of Shri Pankaj Garg filed on 15.12.2009 in which Shri Pankaj Garg confirmed that no cash was paid to M/s BPTP Ltd. In these affidavits, it is confirmed that he received discount @ 45.68% for plot Q 8/12 and 58.33% for plot number T-705 and also 58.33% for an un-allotted plot. There was no further communication from the AO, after taking the aforesaid affidavits on record. The customer having confirmed the discount nothing adverse survives.*

*We deny what has been stated by the AO in para 2.9(iv) viz. that one of the justification for allowing payment of special discount was timely payment.*

**PARA 2.9 (V) OF AO'S ORDER**

*In this clause the AO has drawn adverse inference without appreciating correct facts. Unfortunately, correct facts have not been taken on record and that is the reason why the conclusions drawn are also incorrect. We are furnishing the facts as under:*

*The following facts require to be noted:-*

- a. The assessee company first receives the application from customers which are classified as Un-allotted in the*

*respective project till the time unit is allotted to the respective customer.*

- b. The moment unit is allotted to the customers against the application made by them which is classified as un-allotted, it is transferred from Un-allotted to allotted unit in the respective project.*
- c. The project codes are different for each of the project and further for allotted as well as for un-allotted units under each of the project.*

*The details of discount summary at page 4 of the Assessment order as per page No. 69 of Annexure AS Party BO-III are admitted. Item No. 4 gives inter alia, details of project of A-03 i.e. Princess Park, Faridabad in respect of units which were allotted. Item No. 9 namely, project PF2 gives details of un-allotted Princess Park Project. The total discount in respect of Sr. No 4 & 9 works out as under as on 15.11.2007:*

<i>(i) Discount in respect of allotted units as on 15.11.2007.</i>	<i>1,24,45,118/-</i>
<i>(ii) Discount in respect of un-allotted units as on 15.11.2007</i>	<i>41,12,500/-</i>
<i>Total</i>	<i>1,65,57,618/-.</i>

*Customer-wise details in respect of above project were furnished vide letter dated 5.11.2009 and it matches with the aforesaid details as shown in page No. 69 of the seized record.*

*At the instance of the AO details in respect of discount for the year ending 31.3.2008 were prepared and filed. The summary of these details as under:*

<i>(i) Discount in respect of allotted units as on 31.3.2008</i>	<i>Rs. 1,67,54,750/-</i>
<i>(ii) Discount in respect of un-allotted units as on 31.3.2008</i>	<i>Rs. 2,00,000/-</i>
<i>Total</i>	<i>Rs. 1,69,54,750/-</i>

*These details are on record of the AO and are verifiable.*

*The AO erred in stating in his order that the total discount up to 15.11.2007 as furnished by the assessee comes to 16704750/-. This statement of the AO is incorrect in two respects. Firstly, the figure of 16754750/- is the total of discount for the allotted units as on 31.3.2008 and not as on 15.11.2007. Secondly, the AO ignored to take the total discount allowed as on 31.3.2008 of Rs. 200000/- for un-allotted unit. The correct facts are that the total discount allowed up to 31.3.2008 works out to 16954750/-. We give the reconciliation in respect of discount as under:*

<i>Total discount in respect of allotted units as on 15.11.2007</i>	<i>Rs.1,24,45,118/-</i>
<i>Total Discounts in respect of Un-allotted units as on 15.11.2007</i>	<i>Rs.41,12,500/-</i>
<i>Total Discount as on 15.11.2007</i>	<i>Rs.1,65,57,618/-</i>
<i>Total Discount as on 31.3.2008</i>	<i>Rs.1,69,54,750/-</i>
<i>Net Difference</i>	<i>Rs.3,97,132/-</i>

*A reconciliation of difference is enclosed herewith for your reference and is placed at pages 185 to 199. The difference in discount as on 15.11.2007 and as on 31.3.2008 is explained in the reconciliation. We would also like to submit that the reconciliation in respect of special discount as on 15.11.2007 (Rs. 83,11,700/-) and as on 31.3.2008 (Rs. 74,96,700/-) was duly explained in our letter dated 11.12.2009, copy of which is enclosed and placed at pages 182 to 199. It is submitted that there is no discrepancy and hence nothing adverse survives.*

*5.3 The written submission of Ld. AR alongwith the application for fresh evidence was sent to the assessing officer vide this office F.No. CIT(Appeals)-111/10-11/264 dt. 29.03.2011. The relevant portion of the letter is reproduced as under:-*

*"During the course of hearing of appellate proceedings in case of M/s. BPTP Ltd. for the Asstt. Years 2006-07, 2007-08 and 2008-09*

*the appellant has filed two applications under Rule 46A of the I.T. Rules, 1962 on 29.03.2001.*

*1. This point being made in application at Annexure A-1 is that the affidavits filed by Sh. Jitendra Kwatra, Adarsh Kumar Kwatra, Sanjay Thukral, and Ashish Kohli during the assessment proceedings do have evidentiary value as the above deponents were party to the payments made through cheques as evident from the copies of their bank A/c, which are now enclosed. You are requested to examine the same and offer your comments on the issue.*

*You are also requested to verify whether copy of ledger A/c for booking in cases of Late Shri Gulshan Kwatra or Jitendra Kwatra, Adarsh Kumar Kwatra, Sanjay Thukral and Ashish Kohli are also the part of the sized records. In case it is so the certify copy of their off may be provided.*

*2. Another application for admission of additional evidence at Annexure A-2 is for Assessment Year 2006-07 and is on the issue of printing and stationary. The appellant has inter-alia enclosed copy of invoice raised by M/s. Thomson Press which is dated 06.09.2005. The appellant has claimed that the date recorded in the journal has been inadvertently mentioned as 06.09.2006. You may offer you comments on the issue.*

*3. On page No. 9 of the Assessment order it has been mentioned that the assessee has failed to obtain an affidavit from M/s. Brijwasi Impex (P) Ltd. on the issue of special discount. During the course of appellate proceedings the appellant has filed the copy of affidavit of M/s. Brijwasi Impex (P) Ltd. dated 21.12.2009 and has claimed that the same were also filed during the assessment proceeding vide letter dated 24.12.2009. The same may be factually verified from the assessment records and commented upon for Assessment Years 2006-07, 2007-08 and 2008-09.*

4. *In the Assessment order for Assessment Years 2006-07, 2007-08 and 2008-09 in the case of appellant there is the reference that the letter from M/s. Omaxe Ltd. on the issue of broker's commission was confronted to the appellant. The same has been denied by the appellant. You are requested to offer your comment on the issue upon examination of the records.*

5. *The appellant proceedings in the case are going on in this office for the assessment years 2006-07, 2007-08 and 2008-09. The requisite report may be sent to this officer by 15.04.2011 positively as the next dated of hearing is fixed for 20.04.2011. You may also attend the appellant proceedings at 10.30 A.M. on 20.04.2011 of so desired."*

5.4 *The assessing officer vide letter F.No/DCIT/CC-23/2011-12/101 Dt. 25.04.2011. Submitted report as under:*

*The requisite report/comments as desired by your goodself vide your above referred letter are as under:*

1. *Evidentiary value of affidavits filed by legal heirs of Sh. Gulshan Kawatra:*

*The assessee has submitted that the affidavits filed by S/Sh. Jitender Kawatra, Adarsh Kumar Kwatra, Sanjay Thakral and Ashish Kohli during the assessment proceedings do have evidentiary value as the above deponents were party to the payments made through cheques.*

1.1 *In this regard it is submitted that during the course of assessment proceedings, the above issue was examined by the AO while examining the main issue of 'Special Discount' involved in the case of the assessee. It has been very well discussed by the AO in the body of assessment order and proved that 'Special Discount' is nothing but amount of sale consideration received in cash without reflecting the same in regular books of account.*

1.2 However, in order to substantiate the genuineness of 'special Discount', the assessee furnished affidavits from the legal heirs of Late Sh. Gulshan Kawatra. On perusal of these affidavits, it was noticed that these were identical, signed on 21.11.2009 and attested on the same date 23.11.2009 by the same Notary Public. Further, summons u/s 131 of the I.T. Act, 1961 were issued to the legal heirs making affidavits, for personal deposition. It may be noted that none attended in response to the summons issued u/s 131 and only written replies of identical nature were sent. Therefore, the deposition of legal heirs in their respective affidavits that they have received the 'Special Discount' and no cash was paid to the assessee company in lieu of the said special discount, was not accepted.

1.3 The assessee has now raised almost the same issue with additional evidences during appellate proceedings. The assessee has not submitted anything in respect of genuineness of affidavit which was not accepted by the AO for the reasons noted in the assessment order. It has submitted copies of cheques for the payment of Rs. 1 lac which was initial booking amount. It may be noted that these cheques were not furnished during the assessment proceedings. Furnishing of copies of these cheques does not in any way prove that these affidavits have any evidentiary value. The above reasons which were noted during the assessment proceedings, remains unsatisfied as the furnishing a copy of cheques and contending that the legal heirs were party to the payments made at the time of bookings, does not prove that the issue of 'special discount' was genuine.

1.4 It may be noted that search in the case of the assessee was conducted on 15.11.2007 and the affidavits were signed on 21.11.2009. It is crystal clear that the affidavits along with the copies of cheques submitted by the assessee during the appellate proceedings are nothing but after thoughts to divert the main issue of 'Special Discount' from the eyes of the appellate authorities.

1.5 Further, on perusal of Annexure A-1/Party BO-II, it is noticed that the assessee has issued registration receipts PF1/G0041; PF1/G0040 and PF1/G0043, all dated 09.09.2005 to Mr. Gulshan Kumar Kawatra, r/o 17/61, West Punjabi Bagh, New Delhi-110026, acknowledging payment in respect of provisional registration for a unit in Future Projects -01. Sh. Gulshan Kawatra expired on 12.07.2006. Later on, vide letter dated 31.10.2007, Sh. Jitender Kawatra S/o Mr. Gulshan Kumar Kwatra, r/o 17/61, West Punjabi Bagh, New Delhi-110026, informed the assessee that the above mentioned bookings, were to be made on each in the names of Sh. Sanjay Thukral S/o Sh. S.K. Thukral r/o 12B/12 East Punjabi Bagh, New Delhi-110026; Sh. Ashish Kohli s/o Sri Chand Kohli r/o H-3/2 Model Town-III, New Delhi-11000-; Sh. Adarsh Kumar Kwatra S/o Shanker Dass Kawatra r/o C-33A, Mehendru Enclave, New Delhi-110033 and himself.

1.6 From the above facts it is clear that the deponents, namely, S/Sh. Jitender Kawatra, Adarsh Kumar Kawatra, Sanjay Thakral and Ashish Kohli whose affidavits were filed during the course of assessment proceedings, were not party to the bookings made vide registration receipts PF1/G0044, PF1/G0040 and PF1/G0043, acknowledging payment in respect of provisional registration for a unit in Future projects-01, all dated 09.09.2005 and all of which were issued by the assessee in the name of Mr. Gulshan Kawatra, r/o 17/61, West Punjabi Bagh, New Delhi-110026. Further, the assessee has not submitted any supporting documentary evidence in support of its contention that Sh. Sanjay Thukral S/o Sh. S.K. Thukral r/o 12B/12 East Punjabi Bagh, New Delhi-110009 and Sh. Adarsh Kumar Kwatra S/o Shanker Dass Kwatra r/o C-33A, Mahendru Enclave, New Delhi-110033 were legal heirs of Mr. Gulshan Kumar Kwatra, r/o 17/61, West Punjabi Bagh, New Delhi-110026.

1.7 Further, the assessee has not submitted the copies of initial application forms for provisional bookings made by these four persons namely S/Sh. Jitender Kwatra, Adarsh Kumar Kwatra, Sanjay Thakral and Ashish Kohli, which can prove that these persons have made the initial bookings/payments. The assessee has not even explained/justified its act of issuing registration receipts PFI/G0044; PFI/G0041; PFI/G0040 and PFI/G0043, acknowledging payment in respect of provisional registration for a unit in Future Projects-01, all dated 09.09.2005, only in the name of Mr. Gulshan Kumar Kwatra and not in the names of S/Sh. Jitender Kwatra, Adarsh Kumar Kwatra, Sanjay Thakral and Ashish Kohli if the initial bookings were made by these four persons namely S/Sh. Jitender Kwatra, Adarsh Kumar Kwatra, Sanjay thabxil and Ashish Kohli, whose affidavits it has furnished now.

1.8 Further, the assessee has not explained if these four persons, namely, S/Sh. Jitender Kwatra, Adarsh Kumar Kwatra, Sanjay Thakral and Ashish Kohli, whose affidavits it has furnished now, have made initial bookings, then why did they not object to issuance of all registration receipts dated 09.09.2005 in the name of Mr. Gulshan Kumar Kwatra in September 2005 itself and why did they write a letter to assessee in this respect only on 31.10.2007.

1.9 The assessee has tried to just divert the attention from the unaccounted cash taken on account of special discount two years before with the help of affidavits and cheques. Accordingly, the evidentiary value of the affidavit is not acceptable. Therefore, in view of the above, the contention of the assessee that the affidavits filed by S/Sh. Jitender Kwatra, Adarsh Kumar Kwatra, Sanjay Thakral and Ashish Kohli during the assessment proceedings do have evidentiary value should not be accepted.

1.10 Further, in this case, the assessee does not fulfill any of the conditions laid down in Rule 46A of the I.T. Rule, 1962, to avail the

*opportunity to produce the additional evidence. The mere claim that the evidence produced during the appellate proceedings is vital and important does not provide a substantial cause to allow its admission at the appellant stage especially when the evidence was available with the assessee at the initial stage and during the assessment proceedings. However, the assessee did not furnish the same before the AO during the assessment proceedings despite adequate opportunities being given to it inter alia the assessee was not prevented by the sufficient cause to produce the same.*

*1.11 As regards, the copy of ledger A/c for bookings in cases of Late Sh. Gulshan Kawatra or Jitendra Kwatra, Adarsh Kumar Kwatra, Sanjay Thukral and Ashish Kohli, the same were not part of the seized documents.*

*2. Issue of printing and stationary in the A.Y 2006-07:- As per the submissions of the assessee in the appellate proceedings, date mentioned on bill raised by M/s. Thomson Press is 06.09.2005 whereas the date recorded in the journal is 06.09.2006.*

*2.1 In this regard, it may be noted that the above bill raised by M/s. Thomson Press was not furnished during the assessment proceedings and not only the narration of journal entry was furnished. It is also not out of place to mention that at first the onus lies on the assessee to prove the genuineness of any expenditure debited in its books of accounts. The assessee was asked to furnish the details/evidences for expenses debited in its books. However, the assessee furnished only journal entries in support of expenditure on account of printing and stationary. The details submitted by the assessee during the assessment proceedings were showing above date as 06.09.2006 which proved that the above expense was for AY 2007-08.*

5.5 *The appellant filed rejoinder vide letter dt. 25.11.2011. The same is reproduced as under:*

*"1. Evidentiary value of affidavits filed by legal heirs of Sh. Gulshan Kwatra:*

*The AO has raised objection to admission of affidavits furnished during the course of hearing by legal heir/relatives of Late Sh. Gulshan Kwatra on the ground that "these were identical, signed on 21.11.2009 and attested on the same date 23.11.2009 by the same Notary Public.*

*1.1 The above objections of the AO are not tenable in law and is of academic in nature only as Sh. Jitender Kwatra, Sh. Adarsh Kumar Kwatra, Sh. Sanjay Thukral and Sh. Ashish Kohli are closely related to each other. The objections raised do not raise any doubt about the contents, facts stated in such affidavits, and genuineness of transaction. It is not stated by AO that by being identical, signed on same day and attested by same Notary Public on same day how it affects the legal sanctity and genuineness of these affidavits.*

*1.2 Further, objections raised by AO do not matter much as these affidavits were filed by assessee on 23.11.2009 and assessment were completed on 31.12.2009 and in between the AO never raised these issues during the course of assessment proceedings.*

*1.3 As informed to the AO during the course of assessment proceedings that Sh. Gulshan Kwatra had expired much before the initiation of search on assessee. The bookings standing in his names were transferred to his legal heirs who made the initial payment for these booking To evidence this that payments for these booking initially were made by these legal heirs only in whose name these bookings were transferred later on, on death of late Sh. Gulshan Kwatra, the copies of Bank Statements of these legal heirs were filed*

*to admit these additional evidence to adjudicate the matter that the affidavit filed by the legal heirs are valid in view of the facts that these bookings belong to these legal heirs only and they can give affidavits more especially in view of fact that Sh. Gulshan Kwatra has expired on the date of giving of affidavit.*

*1.4 Your honour may appreciate that as facts were similar and the deponents were layman and not being any legal experts, they have used common language. So long as affirmations made by the said persons in their affidavits are not found to be wrong and incorrect by the AO, it does not make any difference as to whether these affidavits were having same language and these were signed on same date and attested by same Notary Public on same day. Further, these objections during the course of assessment proceedings.*

*1.5 Further, it is not the fault of the assessee if the persons did not appear before the AO in response to summons issued u/s131 of Income Tax Act, 1961. The AO was having ample powers to enforce attendance which were not used for which assessee cannot be blamed. Regarding the non appearance of deponents before AO, the default cannot be attributed to assessee as they are customers of assessee and assessee cannot enforce their attendance. It is the AO who is having vast powers to enforce their appearance. The burden cannot be shifted to assessee. Even otherwise, the AO has stated that these persons have filed requisite information asked by AO.*

*1.6 Regarding the objection of the AO that assessee has not furnished copies of cheques issued by Sh. Jitender Kwatra, Adarsh Kumar Kwatra, Sanjay Thukral and Ashish Kohli towards initial booking amount during the course of assessment proceedings, it is submitted that it was clearly stated by the above mentioned deponents in their affidavits that they have paid initial booking amount of Rs. 1,00,000/- each and also subsequent payments. However, the AO never raised any doubt and never asked us or these*

*persons to furnish copies of relevant cheques towards initial booking amount. Reliance in this regard is placed on the copy of 'Order-Sheet' which is enclosed herewith evidencing that AO never asked us to submit copies of cheques received from said persons towards initial booking amount.*

*1.7 It is further submitted that AO has issued summons u/s 131 of the Income Tax Act, 1961 to the above mentioned persons to appear and furnish certain information but did not asked them to produce evidence in respect of payment of initial booking amount of Rs. 1,00,000/-.*

.....

*2. Issue of filing of affidavit from M/s. Brijwasi Impex (P) Ltd.*

*2.1 It is wrongly stated by the AO that the assessee has not filed affidavit from M/s. Brijwasi Impex (P) Ltd. during the course of assessment proceedings. It is submitted that company has duly filed 23 affidavits including affidavit from Sh. Sanjeev Kumar in his capacity as a director of M/s. Brijwasi Impex (P) Ltd. along with letter 2.2009. A copy of this letter is placed at page no. 141-163 of paper book no.2. A list containing names of 23 affidavits was also filed with the said letter dated 24.12.2009.*

*2.2 It is surprising that even after sending copy of the affidavit by your honor, the AO did not took any steps to verify the fact stated by assessee company by calling the party vz MJs. Brijwasi Impex (P) Ltd.*

*2.3 We are not convinced with observation of AO that assessee did not file the affidavit or Mr. Sanjeev Kumar Aggarwal, Director of M/s. Brijwasi Impex (P) Ltd. during the assessment proceeding. We request your honour that we would like to inspect the assessment records to the actual facts. Alternative rely, your honour may call*

*the records alongwith replies filed in response to various queries raised with seized record to find the actual facts.*

*2.4 It may be mentioned here that assessee has also filed, inter alia, affidavit of Mr. Hemender Gupta along with said letter dated 24.12.2009. However, the AO did not raise similar objection regarding non filing of affidavit of Mr. Hemender Gupta in the assessment order which clearly raises doubt about the statement of AO that affidavit from director of M/s Brijwasi Impex (P) Ltd. was not filed by AO in any case we request your honour to kindly call for the assessment records to ascertain the correctness of our above contention or allow us an opportunity to make the inspection of assessment records.*

28. The Id. CIT(A) held that it is clear from the report of AO that the AO herself after going through records of assessee is not sure as to whether letter from M/s. Omaxe Ltd. was confronted to the assessee or not in the absence of anything on the record which clearly shows that false allegation are made and wrong facts are relied by AO to take adverse view on the issue. No adverse inference is to be drawn against the assessee on the basis of alleged letter of third party which was not even shown or confronted to the assessee. The Id. CIT(A) after giving due reasoning has admitted that additional evidences filed by the assessee under Rule 46A for which the Revenue is not in appeal.

29. The Id. CIT(A) confirmed the addition on account of cash receipts based on the seized material and the addition made on account of Special Discount has been deleted.

30. Aggrieved, the revenue filed appeal before the Tribunal.

31. During the hearing, the Id. DR relied on the orders of the Assessing Officer and the Id. AR reiterated the arguments taken before the Id. CIT(A) and on the order of the Id. CIT(A).

32. Heard the arguments of both the parties and perused the material available on record.

33. We have gone through the order of the Id. CIT(A) and the rationale given while confirming the cash receipts and deleting the Special Discount and examined the same against the backdrop of the seized material, arguments of the revenue and the submission of the assessee.

34. The snippets of the *ratio* in the order of the Id. CIT(A) is as under:

**i) Reliance on the contents of seized documents for addition on accounts of special discounts**

The Assessing Officer has relied on following seized documents:-

- i) Page 40-46 of Annexure A1/Party BO-II in the case of Booking by **M/s. Brijwasi Impex (P) Ltd.**
- ii) Page 4,7,14,28 & 32 of Annexure A1/Party BO-II & page 1 of Annexure A-8 of party BO-II in the case of Booking by **Sh. Gulshan Kwatra.**
- iii) Annexure A-1, page no. 4 in the case of booking by **Sh. Hemendra Gupta.**
- iv) Page 1 of Annexure A-8/Party BO-2 in the case of Booking by **Sh. A.K. Sood.**

### 35. M/s. Brijwasi Impex (P) Ltd.

Page 46 of the seized material is a letter addressed by M/s. Brijwasi Impex (P) Ltd. dt. 3.7.2007 stating that it has booked 6 plots of 350 sq. yards in upcoming projects and paid Rs. 18 lacs by cheque.

35.1 The detail contains receipt no. for all the payment of Rs. 3 lacs each. In the said letter it mentioned that apart from the above Rs. 27 lacs was paid in cash. The letter reads as under:

*"This is to inform you that we have booked 06 plots of 350 sq. yards in your upcoming projects. The details of payment is given below:*

<b>Sr. No.</b>	<b>Customer Code</b>	<b>Receipt No.</b>	<b>Payment made by us in Cheque</b>
01	PF7/B0024	18106	300000.00
02	PF7/B0025	18105	300000.00
03	PF7/B0026	18102	300000.00
04	PF7/B0027	18101	300000.00
05	PF7/B0028	18099	300000.00
06	PF7/B0029	18096	300000.00
		<b>Total</b>	<b>1800000.00</b>

*Apart from above we have also paid Rs. 2700000/- in cash to you. We want to surrender the above plots registration to you as inform by you surrender process is closed for some time."*

35.2 Further, the assessee has produced a letter dt. 07.07.2007, addressed to M/s. Brijwasi Impex (P) Ltd. stating that no cash was received. The Assessing Officer has not accepted the explanation of the appellant on the ground that in the seized document the wordings are cash received and correlated with other seized document which contains special discount allowed for Rs. 4.5 lacs for each plots and, therefore,

concluded that these cash receipts are nothing but the special discount which has not been brought in the books of accounts.

35.3 On perusal of the contents of the seized documents, correspondence contained in the seized documents, M/s. Brijwasi Impex (P) Ltd. has clearly mentioned that it has paid Rs. 27 lacs in cash and the same has been rightly brought to tax by the Id. CIT(A).

35.4 Now coming to the nexus of this cash received and special discount, in the letter of M/s. Brijwasi Impex (P) Ltd. no where the word 'special discount' is mentioned. The Assessing officer has correlated other seized document i.e. ledger of 6 plots which contains special discount of Rs. 4.5 lacs each and hence total special discount is coming to Rs. 27 lacs. This does not prove cash received is treated as special discount. In the letter, M/s. Brijwasi Impex (P) Ltd. has not mentioned any discount allowed in lieu of cash payment made. Therefore, this cash payment is over and above the net consideration after allowing all discount. These seized documents on its own do not prove the nexus that cash payment is nothing but special discount as held by the Assessing Officer.

### **36. Sh. Gulshan Kwatra:-**

36.1 Seized document at page 4, 7, 14, 28 & 32 of Annexure A-1/ Party BO-II for the bookings.

36.2 Late Sh. Gulshan Kwatra had booked 4 plots in September 2007. After his death, the booking was transferred to his four legal heirs, namely, Sh. Jitendra Kwatra, Sanjay Thukral, Ashish Kohli and Adarsh Kwatra. During the search proceedings copy of

booking receipts in respect of these four bookings were found and seized.

36.3 On the back of booking receipts there are notings of cash and cheque receipts as under:-

i) Jitendra Kwatra

7450 X 250	1,00,000/- Cheque
<u>      X 50%</u>	3,00,000/- Cash
<u>9,31,250/-</u>	1,86,250/- Cash
	<u>3,45,000/-</u> Cash
	<u>9,31,250/-</u>

ii) Sanjay Thukral

7450 X 250	1,00,000/- Cheque
<u>      X 50%</u>	3,00,000/- Cash
<u>9,31,250/-</u>	1,86,250/- Cash
	1,54,000/- Cheque
	<u>2,00,000/-</u> Cash
	<u>9,31,250/-</u>

iii) Ashish Kohli

7450 X 250	1,00,000/- Cheque
<u>      X 50%</u>	3,00,000/- Cash
<u>9,31,250/-</u>	1,86,250/- Cash
	<u>3,45,000/-</u> Cheque
	<u>9,31,250/-</u>

iv) Adarsh Kwatra

7450 X 250	1,00,000/- Cheque
<u>      X 50%</u>	3,00,000/- Cash
<u>9,31,250/-</u>	1,86,250/- Cash
	<u>3,45,000/-</u> Cash
	<u>9,31,250/-</u>

36.4 All these receipts are booking receipts issued in favour of Sh. Gulshan Kwatra. On the reverse side above notings in the name his four legal heirs are mentioned. All cheques entries are entered in the books of account of the appellant against booking of plots and cash receipts are not entered. Total cash mentioned in respect of these plots are as under:-

- i) Jitendra Kwatra- Rs. 8,31,250/-
- ii) Adarsh Kwatra- Rs. 8,31,250/-
- iii) Ashish Kohli- Rs. 4,86,250/-
- iv) Sanjay Thukral- Rs. 5,00,000/-

36.5 The Assessing Officer has correlated these cash receipts as special discount. During the proceedings, the assessee argued mainly that size of these plots finally allotted in different from mentioned in these seized papers. The cheque amount mentioned in the notings tallies in the books of a/c of the appellant and accepted by the appellant. On all seized material, the total has been done after considering such cheque and cash payment. Once cheque payment tallies with the books of account, it automatically supports the view that cash amount mentioned is also true. Further, the name of legal heir of Sh. Gulshan Kwatra is mentioned on each page. Size of the plot is mentioned as 250 sq. yds. Under these circumstances, the Ld. AR's argument that size of plot is different at the time of final allotment does not matter as provisional allotment of all plots was of size 250 sq. yds. As the notings on these seized materials are specific and correlated to actual entries in the books of accounts, as far as cheque payment is concerned, the affidavit filed by these four legal heirs does not change the

notings in the seized paper. Further, the booking was done by Sh. Gulshan Kwatra and not by these four individuals. Hence, there is undisputable receipt of the cash which needs to be taxed. At the same time, nowhere discount is mentioned in the seized documents. Nobody during the search or post search enquiry were confronted and accepted that these cash receipt represent special discount. Further, the amount of cash receipt does not tally with the special discount allowed. Under these circumstances these seized document does not prove that these cash payment are special discount. We affirm the ratio of the Id. CIT(A) on this issue.

### **37. Sh. Hemender Gupta:**

Page 4 of the Annexure A-1 for booking

37.1 The said seized document is the letter addressed by Sh. Hemender Gupta dated 5.10.2007 stating that he has paid Rs. 15 lacs for booking commercial plot. In support of Rs. 10 lacs he has mentioned cheque and date. In his letter he has informed that he has received receipt of Rs. 10 lacs only and for rest of Rs. 5 lacs, he has not received receipt. Therefore he requested to issue the receipt. It was argued before the Assessing Officer that the said payment of Rs. 5 lacs was paid by post dated cheque and as per the policy of the company, no receipt is issued for post dated cheques. The Assessing Officer has not accepted the explanation on the ground that Sh. Hemender Gupta while giving the details by cheque payment, has not mentioned these post dated cheques. Further, Assessing officer has found that the cheque no. provided for alleged post dated cheque is of different series compared to the series

mentioned in the letter for Rs. 10 lacs. Hence the Assessing Officer concluded that Rs. 5 lacs was paid by cash and represent special discount. Ld. Assessing officer has mentioned the remark on this letter 'Discount coupon not issued' at the time of booking. It is a fact on record that Sh. Hemender Gupta has clearly mentioned that he has paid Rs. 15 lacs and given cheque no. details for Rs.10 lacs for which receipt is issued. For the balance of Rs. 5 lacs, he has requested to issue the receipt. Therefore, it is evident from the seized material that Sh. Hemender Gupta has paid Rs. 15 lacs. If he could have paid by post dated cheques, then he should have mentioned the details of such post dated cheques also in his letter. Therefore, the arguments of the assessee to Sh. Hemender Gupta that for balance of Rs.5 lacs, receipt was not issued because of post dated cheques cannot be accepted. Hence, the Id. CIT(A) rightly treated the amount of Rs. 5 lacs as the unaccounted income of the assessee in the year of booking. As far as evidential value of this seized paper for cash receipt in place of special discount is concerned, in the said letter Sh. Hemender Gupta has not stated about special discount. During the search proceedings, no discount coupons are apparently found. The Ld. AR argued that if the practice was to issue such discount voucher for cash received, the same either issued or blank coupon could have been found and seized. Further, this seized document was not confronted either during search u/s 132(4) or post search and proceeding considering these facts, hence, the Id. CIT(A) rightly held that this seized document do not prove receipt of unaccounted cash in disguise of special discount.

**38. Sh. A.K. Sood:**

Page 1 of Annexure A-8/Party BO-2 for booking

38.1 This seized page is a ledger for allotment of plot to Sh. A.K. sood where the remark is written for the payment of Rs.2,43,000/- and not Rs. 2,23,000/-, The said payment of Rs.2,43,000/- is not accounted in the books of accounts of the appellant. During the assessment proceedings, the appellant explained that this is fax message and communication between broker and Sh. A.K. Sood and company has nothing to do it. The Assessing officer has treated Rs.2,43,000/- as cash payment in the guise of special discount as the figure '2,23,000' was appearing as special discount in the said ledger. The seized material is undisputedly a ledger of allotment of plot to Sh. A.K. Sood. On this ledger, the remark is the payment of Rs. 2,43,000/- and not Rs. 2,23,000/-. This figure of Rs.2,23,000/- is appearing in the ledger. Therefore, issue of payment of Rs. 2,43,000/- is corroborative of the facts mentioned in the said ledger. In view of specific notings in the seized material, Ld.CIT(A) held that cash payment of Rs. 2,43,000/- was made by Sh. A.K. Sood which is not accounted in the books of the appellant. However, there is no mention of any special discount.

38.2 The Assessing Officer has compiled the data during the assessment proceeding and arrived at the conclusion that special discount is not a real discount but the same is unaccounted cash received and not entered in the books of account on the following logic:-

- a) If special discount is genuine and the same is reduced from Basic Sale price, then there was no need to maintain the details of such special discount. The AO held that such details are required as the same may be needed at the time of refund in cash of cancellation of booking.
- b) One of the justification for providing special discount is for timely payment but details furnished does not prove the same. In some cases, where special discount is allowed, there is delay in payment.
- c) There is varied rate of percentage of special discount even for multiple booking by the same person. Percentage of special discount varied from 0.48% to 58.33%. There is no justification for such variation. The appellant has allowed special discount in only 1600 units as against 8000 units sold.
- d) The appellant has paid commission to the broker on 'Basic Sale Price' of unit booked including special discount. In its support, Ld. Assessing Officer has mentioned that he has verified the trend and got the information from the assessing officer of another Real Estate Developers M/s. Omaxe Ltd. where it was confirmed that brokerage commission is given on net sale consideration after deducting all discounts.

39. The assessee's main arguments against these reasons as summarized by Id. CIT(A) is as under:-

i) The appellant has many sites and marketing offices. The sales are carried out by the employees of the company. Therefore, these records are maintained by the appellant for the sake of knowledge of the promoter/Chairman of the group and for business analysis.

ii) Ld. AR has argued that before the assessing officer, it was explained that special discounts are allowed after considering the business exigencies such as timely payment etc. Nowhere the appellant has claimed that the sole objective for allowing special discount was timely payment. The Ld. Assessing Officer has only taken one reason for allowing special discount as timely payment and ignoring other business consideration.

iii) Ld. AR argued that the very fact the special discount was not allowed in all cases proves that the special discount is not unaccounted cash received at the time of booking/sale of units. If it could have been the practice to receive unaccounted money, then this practice should have been found in almost all cases of booking /sale.

iv) On the issue of brokerage commission on Basic Sale Price, Ld. AR has argued that business practice of M/s. Omaxe Ltd. was never confronted during the assessment proceeding before treating such business practice as evidence. No opportunity, was given to the appellant to put its argument against such practice. Such claim was sent to the assessing officer who has filed remand report dt. 25.04.2011. On rejoinder Ld. AR claimed that even the assessing officer is accepting the fact that no opportunity was granted to the assessee on the practice of M/s. Omaxe Ltd.

v) Ld. AR further argued that in case where special discount is given, the brokerage commission rate is lower. The practice of allowing brokerage commission on gross sale value is to maintain uniformity and not to disclose to others that discounts are given.

vi) AR argued that it is the privy of business decision of a particular business man how it allows brokerage commission and does not depend on the decision of other business man. On the issue of varying percentage of special discount, Ld. AR argued that it is the business consideration and privy of such business man to take a business decision.

37. After considering the entire facts, the Id. CIT(A) held that the addition made on account of treating entire special discount as unaccounted cash received cannot be approved.

38. In few cases, there are seized documents which established the cash receipt at the time of booking/sale of residential/Commercial Plots/ units which has been discussed in detail. These documents were never confronted either during search proceeding or post search proceeding. No statement has been recorded either under section 132(4) or 131 on the veracity of these document specifically whether such cash receipt represents special discount in the books of account in disguise.

40. Seized documents relied by the assessing officer proves cash received by the appellant which is unaccounted. In some cases, it tallies with special discount allowed. Just because the

unaccounted cash received in some cases tally with the figure of special discount, conclusion cannot be drawn that the entire special discount is the unaccounted cash received specially under the circumstances when no customer accepted that such special discount is unaccounted cash received. In fact during the assessment proceedings, the appellant has filed affidavit in more than 157 cases of booking of plots/residential/commercial units where they have stated that they have not paid any cash in lieu of special discount. Where contrary evidences inform of seized material is available inference can be drawn that these affidavits are for self serving purposes. In other cases, it was the duty of the Assessing Officer to examine those person before arriving at adverse conclusion. Onus lies on the assessing officer to disprove the contents of those affidavits. If summons issued by the assessing officer was not complied, the assessing officer should have enforced attendance of those witnesses as per law. Further, on variation in the rate of special discount is the decision of business prudence. The Ld. AR has relied upon various judicial pronouncements in this regard. These analysis could have helped the assessing officer if any evidences could have proved that cash receipts are special discounts in disguise.

41. Even seized documents having evidence of unaccounted cash receipt nowhere mentions the same is in lieu of special discount. Discount u/s 132(4) as discussed earlier does not support for the addition on account of special discount. Under section 132(4), Chairman Sh. Kabul Chawla has no where mentioned the disclosure on account of special discount. Further the disclosure was for one A.Y. 2008-09 (Search Year) and the

addition on account of special discount have been made for three assessment years, A.Y. 2006-07, 2007-08 and 2008-09. The quantum of addition on account of special discount does not tally with the disclosure made. Ld. AR has argued that the disclosure u/s 132(4) was on account of increased profitability. Earlier statement u/s 132(4) was revised by Sh. Kabul Chawla on 15/16.11.2007 which is reproduced in the order which says the company will pay tax on 400 Crores including Rs. 100 Crores for the accounting year 2007-08. Actual profit can be known only after finalization of account. He further stated that any disallowance out of expense which would remain unverifiable for the current year will be inclusive in this disclosure. Addition on account of special discount is not disallowance of expenses but unaccounted cash received. Therefore, addition cannot be supported by disclosure made u/s 132(4).

42. The Id. AR argued that Assessing Officer's reliance for addition on account of special discount on the decision of Hon'ble Delhi High Court in the case of Sidhomal and Sons Vs. CIT 122 ITR 839 and decision of Hon'ble Supreme Court in the case of Sumati Dayal Vs. CIT 214 ITR 801 are misplaced as in Sidhomal case, the issue was commission as per agreement with minor sons of some partners where as in the case of Sumati Dayal cited supra, human probability was examined on the applicability of discharging onus u/s 68 of I.T. Act.

43. Considering all these facts and circumstances of the case, the Id. CIT(A) confirmed the addition to the extent of unaccounted cash received as per the seized material in the

assessment year of booking the units as mentioned in earlier paragraphs on the basis of seized documents on the ground that unaccounted cash must have been received at the time of booking and balance addition on account of special discount were rightly deleted by the Id. CIT(A) for all the assessment years. Hence, we decline to interfere with the order of the Id. CIT(A) on this issue. The appeal of the revenue for the A.Ys. 2006-07, 2007-08 and 2008-09 on the issue of Special Discount is hereby dismissed.

**Interest on Post Dated Cheque:**

**ITA No. 2663/Del/2014 : A. Y. 2006-07**

**ITA No. 2664/Del/2014 : A. Y. 2007-08**

44. During the assessment the A.O. obtained details of such PDCs given at the time of registration to the seller and obtained Date of encashment and applied rate of 15% interest per annum paid for the period from sale deed to date of encashment, on the amount of PDCs on the basis of seized material. The A.O. held that such interest has been paid in cash out of Books of account with regard to the PDCs and brought such interest to tax as unaccounted expenses.

45. Facts relevant to the adjudication of this issue are that the assessee purchased huge tracts of land in different villages of Faridabad such as Kherikhurd, Kherikalan, Budena, Bhatola, etc. Only part payments of the sale considerations in respect of lands purchased were paid at the time of execution of sale deed and the payment of balance sale consideration was made through post dated cheques (PDCs) and it was alleged that for the intervening period i.e. period between the date of sale deed

and the date of encashment of PDC, interest was paid in cash to the vendors of the land by the vendee company on monthly basis @ 1.25% p.m. on the amount of PDC.

46. Copy of seized material on which A.O. has relied is part of Assessment order. The contents of seized material referred in Assessment Order are very relevant for deciding the issue. The details of contents and A.O. view and Ld. AR's argument are as under:- [As per the order of the Id. CIT(A)]

1. *Page 65 of Annexure A 12 party BO III*

*A.O. has stated that total amount of PDCs are Rs. 188 Crores and mentioned that interest @ 15% is paid on PDCs Ld. AR during appellate proceedings has stated that definitely this page contains details of PDCs which the company keeps record to manage funds availability for clearing the PDCs. Nowhere on this paper, there is a mention of interest paid on this thenThe Ld.CIT(A) held that no where the interest word or calculation is mentioned in this paper. Therefore, this paper does not correlate the payment of interest on PDCs.*

2. *Page no. 93 Annexure Al. party BOI.*

*This page is computer printout having different column. Various columns of this page contains Name of the seller, the name of purchaser company i.e. Associate Group Company of BPTP Group namely STP, (Shalimar Town Planning Ltd) and JB etc area of land, cost of land, etc. Last column mentions calculation of one month interest (15% on PDC). Total such interest is calculated for Rs.5,05,84,042/-. Ld. AR emphasized that there is no payment mentioned to a particular person. Further, he argued that total interest calculated for one month for all the land mentioned is Rs. 5,05,84,042/- and total sale consideration of entire land is*

mentioned in that amounts to Rs. 44,96,35,937/-. If one month interest is applied @ 15%, even on entire sale consideration, one month interest will not be even Rs. 20 lacs. Further, in this entire paper there is no mention of amount of PDCs, and rate of all land is written straight @ Rs. 1,45,00,000/- per acre having 18 such lands. Further, 15% and 75% of sale consideration is written two different columns. Therefore, these papers does not support payment on interest on PDC amount. The Ld.CIT(A) held that there is no mention on payment of interest on PDCs. A.O. concluded in Assessment Order on the basis of this paper that amount Rs. 33,72,26,953/- is due to farmers for land at Bardoli and interest on this sum is Rs.5,05,84,042/- @ 15% per annum. During appellate proceeding, Ld AR has argued that the column which contains the figure of Rs. 33,72,26,953/-, heading is "75%". Nowhere, dues of farmer on PDC is written. As this paper does not contain any details of PDCs issued to seller, Ld. CIT(A) did not rely on this document.

3. Page 68, 69 & 70 of Annexure A-1 of party BO-I

A.O. has mentioned that post dated cheques amounting to more than Rs. 109 Crores were pending as per these seized papers. A.O. has correlated sale of land to various seized document and different persons as under:-

S. No.	Name of the seller	Area of land	Amt. of sale consideration	Amt. of additional payment	Reference of seized material
1.	Smt. Rajwati	5.56 acres	Rs.2,25,75,000	Rs.13,43,750	Pg. 35 of Annexure 1, party BO-I
2.	Sh. Ramphal	0.93 acres	Rs.51,21,875	Rs.51,21,875	Pg. 30
3.	Sh. Ratan Singh & Azad Kumar	0.51 acres	Rs.35,43,750	Rs.4,46,425	Pg. 32
S. No	Interest received		Reference of seized material for int.		
1.	Rs. 55,000/-		Page 28 of Annexure A-2, BO-III		
2.			Page 26 of Annexure A-2, BO-III		
3.					

During post search enquiry, Bank statement of five persons above namely Smt. Rajwati, Sh. Rampal, Sh. Rattan Singh and Azad Singh,

*Sh. Vijay pratap and Sh. Kartar Singh were obtained and cash deposit were found. A.O. has tried to establish that source of these cash deposit are interest on PDCs learned AR has argued that source of cash deposit in Bank Account of these persons can only be explained by them. None of them were examined or asked to explain their source. Ld. AR further argued that Assessing Officer has not during assessment proceeding has given an opportunity or shown these Bank statement before being used against the appellant in Assessment Order. Therefore, linking of these cash deposit with assumption of interest on PDCs is only hypothesis of A.O. As far as interest receipt by seller, and mentioned in seized material, Ld. AR has denied the same as only claim of seller which was never paid. Those seized material which contains interest receipt by seller will be analyzed in subsequent paragraph.*

*5. Page No. 1, Annexure A-1, Party BO-III*

*This page is receipt of cash interest signed by seller of land namely, Ballu Alias Balram, Gyasi Ram and Chander singh and Chhotu Ram of Rs. 85,850/-, Rs. 3,43,500/-, Rs. 3,43,500/- and Rs. 3,43,500/- respectively duly signed by Balram, Chhotu Ram, Chander Singh and Gyasi Ram in lieu of extension of due date PDC for 3 months from 25.11.2006 to 25.02.2007. Earlier PDCs details are as under:*

	<i>Rs.</i>	<i>Dated</i>	<i>Cheque No.</i>
<i>Ballu Ram</i>	<i>2,89,375</i>	<i>25.11.2006</i>	<i>194267</i>
<i>Gyasi Ram</i>	<i>1,59,791</i>	<i>25.11.2006</i>	<i>883467</i>
<i>Chhotu Ram</i>	<i>1,59,791</i>	<i>25.11.2006</i>	<i>883468</i>
<i>Chander Singh</i>	<i>1,59,791</i>	<i>25.11.2006</i>	<i>883488</i>

*The interest paid is of Rs. 11,16,350/-. A.O. has held that interest is paid for extending the post dated cheques by 3 months.*

*6. Page 28, Annexure A-3 party BO-3*

*This page contains 5 columns in respect of two group company namely Countrywide Promoters Pvt. Ltd. and Shalimar Town Planners*

*Pvt. Ltd namely, date, party name, cheque no., amount and remark. In remark column words, 'interest amount' is written in the case of Countrywide Promoters Pvt. Ltd. Without any amount.*

*7. Page 88, Annexure A-1 Party 303*

*This page is debit voucher of cash payment of Rs. 13, 80,000/- duly signed by receiver. Ld AR explained it to be return of advance given by recipient Sh. Vijay Pratap. However, Since it is a signed voucher, it is apparently unaccounted cash payment.*

*8. Page no. 35, Annexure A-2, BO-3*

*It is debit, voucher of cash payment of Rs. 5 lacs dt.4.11.2007 with the signature of recipients. Ld AR explains that the paper was explained during assessment proceeding that it was debit not for Rs. 5 lacs for purchase of stamp and sent for approval. The same stand is reiterated during appellate proceeding. As this voucher contains receiver signature. Therefore, it is difficult to accept appellant's submission. Therefore, it is unaccounted payment. A.O has treated as interest. However interest is not written on this paper. Therefore it is not related to interest. However, this payment has to be treated as unaccounted payment in the hands of payer u/s 69B. A.O. has to identify the payer company and assess the same u/s 69.*

*9. Page no. 36, Annexure A-1, BO-3.*

*This page is also debit voucher for cash payment of Rs. 1,00,000 duly signed by the receiver with a remark 'interest paid to Ram Singh/ Nanak for Rs. 80,00,000/- for the month of November'. It is pertinent to note that if we apply 15% per annum on Rs. 80,00,000/- it comes to Rs. 1,00,000/-. During appellate proceeding, Ld. AR has reiterated that no payment of interest was made; it is only voucher for approval of senior management. Since on the voucher it is clearly mentioned as 'interest paid'. The receiver has signed it. A.O. has*

*correlated this interest payment to the purchase of land by M/s Super Belt (P) Ltd. Therefore, the explanation of appellant company is not acceptable as the receiver has signed, the voucher evidencing the payment of interest. Ld. AR has explained that land was purchased in Countrywide (P) Ltd.*

10. *Page 71, A-9, BO-3.*

*This paper is computer generated and having five column containing date, cheque no., party name, amount and date change It is interesting to note that the names are same as Page 36 discussed in just earlier paragraph i.e. Ram Singh and Nanak and the amount of cheque is Rs. 50 lacs and 30 lacs respectively (totaling to Rs. 80 lacs) and the remark is written as 'interest paid' below 'date change'. The Ld. AR again reiterated the stand taken before the A.O. that there is no Land transaction of the company M/s Super Belts (P) Ltd. with Mr. Ram Singh and Nauah. This explanation is contrary to the explanation given in just earlier paragraph. Therefore, the interest payment is made on Rs. 80 lacs with the remark 'date change'. It means for extension of date of PDC, interest is paid.*

11. *Page 31, Annexure A-2 party BO-3.*

*It is again a debit voucher dated 6.11.2007 for interest paid to Kishan Singh for 25,000 for November on account of Rs.20,00,000/-. Again the interest is paid @ 15% per annum for one month. The vouchers are duly signed by receiver. Ld. AR reiterated the stand taken before A.O. in the case of M/s Shalimar Town Planners (P) Ltd. the PDC was given to recipient no. interest was paid. The present voucher is in form of memorandum and no interest was paid. The explanation of the Ld. AR is not acceptable. As this voucher contains the signature of recipient in cash and matches with 15% of interest rate for a month. The inference is obvious that interest was paid.*

## 12. Page No. 36, annexure A-2, Party BO3

*This is again a debit voucher of cash payment of Rs. 1,90,000/- paid to one Sh. Sadanand. The Ld AR reiterated the stand taken before AO that Sadanand is consultant and the debit voucher is duly signed by receiver. Therefore, explanation of Id. AR cannot be accepted. However, there is no mention of 'interest paid' on this voucher.*

## 13. Page no. 37, Annexure A-2, Party BO-3

*This page is again a debit voucher at 09.10.2007 with narration 'interest paid to Jaipal' for Rs. 1,00,000/- in cash duly signed by receiver with remark 'For October' Ld. AR's argument that it is only memorandum or demand cannot be accepted.*

## 17. Page No. 70, Annexure A-1, Party BO-3

<i>Interest</i>	<i>= 4,00,00,000/- (Amt) Dhanvir, Ranvir</i>
<i>1-11-06 to 1-12-06</i>	<i>(1 month)</i>
<i>Interest</i>	<i>= 5,00,000/-</i>
<i>50 lacs cheque cleared on 5-12-2006</i>	
<i>Balance amount</i>	<i>3,50,00,000/- (2 months)</i>
<i>Interest</i>	<i>= 8,75,000/-</i>
<i>25 lacs cheque cleared on 6-2-2007</i>	
<i>Bal. Amt.</i>	<i>3,25,00,000/- (2months)</i>
<i>Interest</i>	<i>= 8,12,500/-</i>
<i>Total Interest</i>	<i>5,00,000</i>
	<i>8,75,000</i>
	<i><u>8,12,500</u></i>
	<i>21,87,500</i>

*A.O. has correlated these transactions with Shalimar Town Planners (P) Ltd. and has stated that these interest paid of Rs. 21,87,500/- was unaccounted in Book of a/c's. Ld AR has reiterated its stand that it is only memorandum and no interest was paid. A perusal of this*

*paper reveals that interest is paid on PDCs for few months, as the paper talks about clearing of cheque on extended time in this paper.*

*18. Page 69, A-9 BO-III*

*This page contains date 2/10/2006. Party name Karan Singh and Cheque No. 502749 and Amount Rs. 1,40,00,000/- and contains the remark 2 months PDC interest cheque. Ld. AR reiterated that the said cheque was replaced to Sh. Karan Singh by 3 cheques.*

<i>Cheque no.</i>	<i>Date</i>	<i>Amount</i>
<i>172169</i>	<i>3.10.2006</i>	<i>40,00,000/-</i>
<i>219195</i>	<i>8.11.2006</i>	<i>20,00,000/-</i>
<i>219202</i>	<i>2.12.2006</i>	<i>80,00,000/-</i>

*Employee informed ITO for informing that the person is insisting for interest. The reply of Ld. AR is not convincing. Ld. AR further argued that there is no sale deed & No. PDC's. AO may verify the same.*

*19. Page no.27, A-3, BO-3*

*This page contains party name as Rajveer and two amounts Rs. 2,00,00,000/- and Rs.1,20,00,000/-. Last column is remand interest. Ld. AR has reiterated his stand that party is insisting of interest.*

*20. Page 12, 13, 14 & 15, A-1, BO III*

*These pages contains copy of cheque issued by M/s Shalimar Town Planners (P) Ltd where date of issue of Cheque has been extended.*

*21. Page no. 29, Annexure A-2, BO-III*

*This page again is debit voucher of interest paid to one Sh. Karan Singh for Rs. 25,000/- for the month of November in cash, duly signed by receiver on the amount Rs. 20,00,000/-. This again shows payment of interest @ 15% on Rs. 20,00,000/- for one month Ld. AR explained this paper that interest was a demand by seller of land but no payment was made in cash. The reply of Ld. AR is not convincing.*

22. Page 53/ A-23/BO-III

*The page contains receipt with full narration in Hindi duly signed by one Sh. Gaje Singh which states that he has entered in agreement to sale for land in Mauja Sihi sale for dt. 7.6.2007 with M/s Green Valley Housing and Land Development (P) Ltd. He has received Rs. 1,22,47,482/- vide cheque no. 275435 and Rs. 5,75,000/- vide cheque no. 275440 both dated 31.10.2007. In lieu of extension of date of these two cheques by one month @ 15% on 29.10.2007. Further he writes that he has accepted the extension of date without any pressure. Ld AR reiterated the stand that the farmer has demanded the interest which was never paid. Ld. AR further reiterated that there is no such transaction in Green Valley Housing & Land Developers (P) Ltd. A.O. may verify the same. Further as per this receipt, it is for extension of period of some cheque & interest has been acknowledged by the receiver for extension of time.*

23. Page 55-56 of Annexure A-23, Party BO-III.

*It is an oath paper on Non Judicial stamp of Rs. 10 signed by Ramvati and Biro, daughters of late Harijivan stating that they have sold land at Khedikalan and Ramvati has received for Rs.1,52,94,500/- vide cheque no. 834868 and Rs. 4, 20,45,625 vide cheque no. 834872 both and dt. 12.10.2007. Biro has received Rs.1,52,94,500/- and Rs. 4,20,45,625/- vide cheque no. 834869 and 839873 respectively both dt.12.10.2007 from Shalimar Town Planners (P) Ltd. The date is extended and interest is receivable. However, no date of extension is mentioned and no interest amount is mentioned in this oath paper."*

47. Based on the documents found and seized, the Id. CIT(A) held that the assessee has been maintaining all along that interest is not paid as all the receipts are only memorandum only. However, analysis of these above seized document reveals

that these seized documents definitely proves that interest is paid on PDCs and brought those amounts to tax.

48. Various vouchers in seized documents conclusively proves that the recipient has signed on voucher for receipt of the interest. Ld. AR's contention that these are only working of interest claimed by seller for putting up before senior management cannot be accepted. The Id. CIT(A) has also held that in case of claim, the receiver will not sign the voucher as recipient. Amounts are specific and calculation is 15% per annum. Therefore, Ld. AR without conceding that the interest is paid on PDCs has taken the stand that in none of the seized material, i.e. even in receipt seized, the interest is from date of issue of PDCs.

49. Now issue arises whether interest on PDCs are paid from date of issue or for extension of PDCs. Documents discussed above where there is clear evidence of receipt of interest is for extension of period of PDCs. Ld. AR's arguments that calculation of interest on PDCs has been considered while entering into agreements holds some logic.

50. But when date of PDCs are extended, the recipient will definitely ask and settle for some additional compensation in form of interest. There is no evidence which proves that interest is paid from the date of sale to date of encashment of post dated cheques. However, there is concrete evidence in form of seized material to show that interest is paid and received by seller on the extension of PDCs as discussed above while analyzing the seized document.

51. Therefore, the Id. CIT(A) held that where ever the dates of PDCs are extended interest is paid @ 15% per annum in cash out of Books of accounts. Therefore, interest on PDCs to the extent of extension period appears to quite reasonable and logical. Accordingly, interest on PDCs either as sale consideration or additional payment may be recomputed to the extent of extended period of PDCs by the A.O. and to that extent addition is confirmed. Since, if it is not possible to work out the extension of PDCs in each case, the Id. CIT(A) directed the Assessing Officer to re-compute interest on PDCs after six months from date of issue of PDCs i.e. date of sale, as six months is taken as reasonable period for giving PDCs as per sale deed. The Id. CIT(A) held that it would be proper to compute interest after 6 months from date of Sale. Hence, we hold that the remission given by the Id. CIT(A) is logical, rational and reasonable and hence, we affirm the decision of the Id. CIT(A) on this issue.

52. In the result, the appeals of the Revenue are dismissed.  
Order Pronounced in the Open Court on 28/04/2023.

Sd/-

**(C. M. Garg)**  
**Judicial Member**

**Dated: 28/04/2023**

**\*Subodh Kumar, Sr. PS\***

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

**(Dr. B. R. R. Kumar)**  
**Accountant Member**

**ASSISTANT REGISTRAR**