

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE

BEFORE SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER
AND
SHRI S. S. VISWANETHRA RAVI, JUDICIAL MEMBER

आयकर अपील सं. / IT(SS)A Nos.91 to 96/PUN/2022
निर्धारण वर्ष / Assessment Years : 2012-13 to 2017-18

Shri Manoj Madanlal Chhajed, 601, A-8 Building, Karishma Housing Society, Near Sangam Press, Kothrud, Pune- 411029. PAN : AALPC4991M	Vs.	ACIT, Central Circle-1(1), Pune.
Appellant		Respondent

आयकर अपील सं. / IT(SS)A Nos.97 & 98/PUN/2022
निर्धारण वर्ष / Assessment Years : 2012-13 & 2015-16

ACIT, Circle-1(1), Pune.	Vs.	Shri Manoj Madanlal Chhajed, 601, A-8 Building, Karishma Housing Society, Near Sangam Press, Kothrud, Pune-411029. PAN : AALPC4991M
Appellant		Respondent

आयकर अपील सं. / ITA No.725/PUN/2022
निर्धारण वर्ष / Assessment Year: 2018-19

Shri Manoj Madanlal Chhajed, 601, A-8 Building, Karishma Housing Society, Near Sangam Press, Kothrud, Pune- 411029. PAN : AALPC4991M	Vs.	ACIT, Circle-1(1), Pune.
Appellant		Respondent

IT(SS)A Nos.91 to 96/PUN/2022
IT(SS)A Nos.97 & 98/PUN/2022
ITA No.725/PUN/2022

Assessee by : Shri Ratan Samal,
Mrs. Ruchi M. Rathod &
Shri H. G. Sharma
Revenue by : Shri Keyur Patel
Date of hearing : 06.06.2023
Date of pronouncement : 28.06.2023

आदेश / ORDER

PER BENCH :

These are the cross appeals filed by the assessee as well as by the Revenue. The appeals in IT(SS)A Nos.91 to 96/PUN/2022 filed by the assessee are directed against the order of ld. Commissioner of Income Tax (Appeals)-11, Pune dated 29.07.2022 for the assessment years 2012-13 to 2017-18. The cross appeals in in IT(SS)A Nos.97 & 98/PUN/2022 filed by the Revenue are directed against the order of ld. Commissioner of Income Tax (Appeals)-11, Pune dated 29.07.2022 for the assessment years 2012-13 & 2015-16. The appeal of the assessee in ITA No.725/PUN/2022 is directed against the order of ld. Commissioner of Income Tax (Appeals)-11, Pune [‘the CIT(A)’] dated 29.07.2022 for the assessment year 2018-19.

2. Since the identical facts and common issues are involved in all the above captioned nine cross appeals, we proceed to dispose of the same by this common order.

3. Briefly, the facts of the case are that the assessee is an individual engaged in the business of dealing in the real estate/property and carrying on business under the name and style of “M/s. Siddhi Properties” (a proprietary concern). The particulars of Returns of Income filed by the assessee u/s 139(1) of the Income Tax Act, 1961 (‘the Act’) are detailed below :-

<i>A.Y.</i>	<i>Date of filing of return u/s 139(1)</i>	<i>Returned Income</i>
<i>2012-13</i>	<i>30/09/2012</i>	<i>56,72,948</i>
<i>2013-14</i>	<i>30/09/2013</i>	<i>33,93,088</i>
<i>2014-15</i>	<i>30/11/2014</i>	<i>78,36,709</i>
<i>2015-16</i>	<i>29/10/2015</i>	<i>22,27,420</i>
<i>2016-17</i>	<i>15/10/2016</i>	<i>46,95,030</i>
<i>2017-18</i>	<i>02/11/2017</i>	<i>75,91,350</i>
<i>2018-19</i>	<i>09/02/2019</i>	<i>23,53,680</i>

4. The search and seizure operations were conducted in the residential and business premises of the assessee on 04.11.2017. During the course of such search and seizure operations, the Department had found and seized a Diary of 2009 containing of 183

written pages, which according to the Department contained a notings indicating the payments and receipts of on-money consideration at the time of purchase and sale of properties and also indicated the receipt of accommodation entries in the form of unsecured loans from shell companies based at Kolkata. According to the Department, the assessee had received accommodation entries from various shell companies based at Kolkata in the bank account maintained with Axis Bank Account No.350010100056665, the details of which are set out by the Assessing Officer in the assessment order. It is alleged that during the previous year relevant to the assessment year 2012-13, the assessee had received accommodation entries in the form of unsecured loan to the extent of Rs.13,27,54,925/-. It is also alleged that the assessee had accepted the unsecured loans from shell companies by giving equal amount in cash through middlemen known as Shri Sushil Agarwal. During the course of such search and seizure operations, the Investigation Wing of the Department had recorded a statement from the assessee u/s 132(4) of the Act on 05.11.2017, copy of the statement was extracted by the Assessing Officer at page no.8 of the assessment order. It is stated by the Assessing Officer that the

assessee during the course of recording of statement u/s 132(4) had confessed that all the unsecured loans were in the nature of accommodation entries and these loans were received after giving equivalent amount of cash to Shri Sushil Agarwal, who acted as mediator for providing the accommodation entries. When the Investigation Wing of the Department confronted the Diary of 2009 which is found and seized during the course of search and seizure operations to the assessee, the assessee had confessed that on-money consideration was paid at the time of purchase of property and they also received on-money consideration at the time of sale of the property. Based on this information, the Assessing Officer issued notices u/s 153A of the Act on 19.01.2018 calling upon the assessee to file the return of income. In response to said notices u/s 153A of the Act, the assessee had filed the returns of income as detailed below :-

<i>A.Y.</i>	<i>Date of filing of return u/s 153A</i>	<i>Income declared in return u/s 153A</i>	<i>Additional Income offered, if any</i>
<i>2012-13</i>	<i>24/01/2019</i>	<i>56,72,950</i>	<i>NIL</i>
<i>2013-14</i>	<i>24/01/2019</i>	<i>1,33,93,090</i>	<i>1,00,00,000</i>
<i>2014-15</i>	<i>24/01/2019</i>	<i>1,78,36,710</i>	<i>1,00,00,000</i>
<i>2015-16</i>	<i>24/01/2019</i>	<i>22,27,420</i>	<i>NIL</i>
<i>2016-17</i>	<i>24/01/2019</i>	<i>1,46,95,030</i>	<i>1,00,00,000</i>
<i>2017-18</i>	<i>24/01/2019</i>	<i>1,75,91,360</i>	<i>1,00,00,000</i>

2018-19	-	-	NIL
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5. Subsequently, the Assessing Officer had proceeded to frame the assessment u/s 143(3) r.w.s. 153A vide order dated 31.12.2019.

6. Now, we shall take up the appeal of the assessee in IT(SS)A No.91/PUN/2022 for the assessment year 2012-13 as a lead case for adjudication.

IT(SS)A No.91/PUN/2022, A.Y. 2012-13 – By Assessee :

7. The assessee raised the following grounds of appeal :-

- “a) *The Appellant states that the Assessing Officer erred in treating genuine loans as non- genuine and creating unjust additions on loans u/s 68 of the Income Tax Act, 1961 of Rs. 13,27,54,925/- and the Appellate Authority erred in partially confirming such unjust additions on loans u/s 68 of Rs. 10,11,00,000/-, ignoring the detailed documentary evidence brought on record which clearly shows that loans were received from genuine parties and these amounts were returned with interest from banking channels.*
- b) *The Appellant states that the Assessing Officer erred in creating additions on loans of Rs. 13,27,54,925/- and the Appellate Authority erred in partially confirming the unjust additions on loans of Rs. 10,11,00,000/- u/s 68 of the Income Tax Act, 1961 solely relying upon a statement which was subsequently retracted by the Appellant and without bringing forth any incriminating corroborative evidence in support of the unjust additions.*
- c) *The Appellant states that the Assessing Officer erred in creating additions on loans of Rs. 13,27,54,925/- and the Appellate Authority erred in partially confirming the unjust additions on loans of Rs. 10,11,00,000/- u/s 68 of the Income Tax Act, 1961 based completely on borrowed satisfaction on the basis of investigation conducted by a third-party investigating authority.*

- d) *The Appellant states that the Assessing Officer erred in creating additions of Rs. 6,27,20,500/- and the Appellate Authority erred in partially confirming the unjust additions of Rs. 4,94,20,500/- u/s 69C of the Income Tax Act, 1961 without bringing any incriminating or corroborative evidence on record solely based on loose papers and loose diaries contrary to the settled judicial precedents on the issue.*
- e) *The Appellant states that the Assessing Officer erred in creating additions of Rs. 6,27,20,500/- and the Appellate Authority erred in partially confirming the unjust additions of Rs. 4,94,20,500/- u/s 69C of the Income Tax Act, 1961 ignoring the fact that the transactions in the diary notings had only partially materialized, out of which the materialized portions were already declared in the balance sheets and tax was paid. Therefore, the authorities erred in upholding addition on transactions which have not even materialized.*
- f) *The Appellant craves leave to add, alter, amend, vary, or delete any of the aforesaid grounds.”*

8. During the course of assessment proceedings, the assessee was called upon vide show-cause notice dated 20.11.2019 to explain the creditworthiness, identity and genuineness of the creditors of unsecured loans received from shell companies based at Kolkata of Rs.13,27,54,925/-. The details of loans were set out by the Assessing Officer vide para 6 of the assessment order. In response to the show-cause notice, the assessee had filed a detailed explanation in an attempt to establish the genuineness, creditworthiness and identity of the sundry creditors of loans stating that :-

(i) The unsecured loans were received through account payee cheques and also repaid in the same year through RTGS or cheque and also interest was paid on these loans after deducting TDS. The assessee further submitted that the statement recorded during the course of search and seizure proceedings should not to be considered, as it was retracted vide letter dated 06.03.2018 submitted on 07.03.2018 before the DDIT (Investigation), Pune. The assessee also filed confirmation letters received from unsecured loans creditors. Further, it is contended that there is no incriminating material found as a result of search and seizure operations to show that the said loans were bogus, are merely accommodation entries. In the absence of any such incriminating material, no addition u/s 153A can be made, placing reliance on the following judicial precedents :-

- (i) PCIT vs. Meeta Gutgutia, 257 Taxman 441 (SC).
- (ii) CIT vs. Gurinder Singh Bawa, 386 ITR 483 (Bom.).
- (iii) CIT vs. Kabul Chawala, 380 ITR 573 (Delhi).
- (iv) PCIT vs. Dipak Jashvantlal Panchal, 397 ITR 153 (Guj.).
- (v) PCIT vs. Best Infrastructure (India) (P.) Ltd., 94 taxman.com 115 (SC).

9. However, the Assessing Officer rejected the above explanation by citing that the Investigation Wing of Income Tax Department, Kolkata had conducted a massive investigation on Kolkata based shell companies, during the course of search and seizure operations recorded the statements of directors, who had controlled the shell companies, wherein, they accepted that the companies are merely shell companies and they were used to provide bogus accommodation entries in the form of unsecured loans by accepting the cash from the beneficiaries and providing accommodation entries in the form of loans by way of cheques through middlemen. He further observed that during the course of statement recorded u/s 132(4), the assessee confessed the same and stated that loans were arranged through middlemen known as Shri Sushil Agarwal. The statement given by the assessee during the course of statement recorded u/s 132(4) is extracted by the Assessing Officer at page nos.8 and 9 of the assessment order. The Assessing Officer also rejected the argument of the assessee that no incriminating material was found as result of search and seizure operations indicating that these loans were fictitious by referring to the page nos.20 to 22 and 83 of bundle no.11, which according to the Assessing Officer are

entries indicating that the assessee had taken accommodation entries by paying cash to Shri Sushil Agarwal. Citing the above circumstances, the Assessing Officer invoking the doctrine of human probabilities applied in the case of CIT vs. Durga Prasad More, 82 ITR 540 (SC) and in the case of Sumati Dayal vs. CIT, 214 ITR 801 (SC) had proceeded to hold that the unsecured loans of Rs.13,27,54,925/- received during the previous year relevant to the assessment year under consideration are fictitious, bogus and brought to tax as unexplained income of the assessee.

10. Further, the Assessing Officer based on the notings found in bundle no.1 of Diary of 2009 and the statement given by assessee u/s 132(4) had concluded that the assessee was paid on-money consideration of Rs.24,00,000/- in cash in connection with the sale of property at Paud Road. The Assessing Officer referred to the statement given by assessee during the course of search and seizure proceedings u/s 132(4) of the Act, then proceeded to make addition of the said amount, rejecting the explanation of the assessee that the notings reflects only the proposed transaction of sale of property, which had actually not materialized.

11. Then the Assessing Officer based on the notings found in page no.2, 13, 22, 168 of bundle no.1, images of which are reproduced vide page nos.18, 19, 20 and 21 of the assessment order had concluded that the assessee had paid on-money consideration at the time of purchase of property at Paud Road rejecting the contention of the assessee that the notings made are nothing but a proposal of sale of property and probable schedule of payment etc. However, the Assessing Officer placing reliance on the statement given by the assessee during the course of search and seizure proceedings u/s 132(4), which is reproduced at page no.21 of the assessment order, held that the assessee had received on-money consideration of Rs.24,00,000/- and brought to tax as unexplained consideration u/s 69 of the Act.

12. Similarly, the Assessing Officer based on the notings found in page no.2, 3, 13, and 168 of bundle no.1 had concluded that the assessee had paid on-money consideration in cash in connection with the purchase of land at Paud Road amounting to Rs.6,27,20,500/- and brought to tax as unexplained expenditure u/s 69C of the Act. The scanned images of notings were reproduced at page nos.18, 19, 20 and 21 of the assessment order, copy of the

statement recorded during the course of search and seizure operations u/s 132 is also reproduced at page no.22 and 23 of the assessment order.

13. Being aggrieved by the above disallowances, the assessee had filed an appeal before the Id. CIT(A) contenting *inter alia* that the Assessing Officer ought not to have treated the unsecured loans of Rs.13,27,54,925/- as bogus loans, are merely accommodation entries since the interest was paid on such loans after deducting the TDS and the loans were accepted through the mode of banking channels and loans were also repaid through banking mode immediately. Copy of the ledger account of sundry creditors appearing in the books of accounts is placed at page no.39, 49 of Paper Book. It is also contended that no addition can be made merely based on the statement given by the third party as well as without giving opportunity of cross-verification by placing reliance on the decision of the Hon'ble Delhi High Court in the case of PCIT vs. Anand Kumar Jain.

B. Without prejudice to the above, it is further contended that in the absence of any incriminating material found as result of search and seizure action, no addition can be made u/s 143(3) r.w.s. 153A

placing reliance on the decision of the Hon'ble Bombay High Court in the case of CIT vs. Gurinder Singh Bawa, 386 ITR 483 (Bom.) and on the decision of Hon'ble Supreme Court in the case of PCIT vs. Meeta Gutgutia, 257 Taxman 441 (SC).

C. It was contended that in the absence of any conclusive evidence, no addition can be made merely based on the statement, which was retracted later. It is contended that the assessee had discharged the onus of proving the genuineness, creditworthiness and identity of the creditors by filing the confirmation letters, copies of ledger account, name and address, PAN details etc. The assessee also filed the statement of banks account of the lenders, wherein, the entries showing the lending of money by account payee cheques/RTGS to the assessee. He also pointed out that no cash was deposited in the bank accounts of lenders before money is lent to the assessee. He also filed the profit & loss account and balance sheet of the lender companies.

D. Finally, it is contended that since the loans were repaid through the banking channels after deducting the TDS on the interest, it can be concluded that the loans received are genuine.

14. On due consideration of the above submissions, the ld. CIT(A) held that the retraction of the statement given u/s 132(4) is not valid in law and the retraction is not supported by any cogent material and the statement given by an assessee u/s 132(4) constitutes a prima-facie evidence placing reliance on the decision of the Hon'ble Delhi High Court in the case of Bhagirath Aggarwal vs. CIT, 351 ITR 143 (Delhi), in the case of CIT vs. M. S. Aggarwal, 93 taxmann.com 247 (Delhi) and the decision of the Hon'ble Supreme Court in the case of Bannalal Jat Constructions (P.) Ltd. vs. ACIT, 413 ITR 322 (SC). Then the ld. CIT(A) had proceeded to hold that the assessee had failed to prove the genuineness of the creditors placing reliance on the decision of the Hon'ble Supreme Court in the case of Sreelekha Banerjee vs. CIT, 49 ITR 112 (SC) and Sumati Dayal vs. CIT, 214 ITR 801 (SC), decision of the Hon'ble Kerala High Court in the case of M.A. Unneeri Kutty vs. CIT, 198 ITR 147 (Ker.), decision of the Hon'ble Delhi High Court in the case of CIT vs. Nova Promoters and Finlease (P.) Ltd. 342 ITR 169 (Delhi) confirmed the findings of the Assessing Officer that the sundry creditors were bogus, accordingly, confirmed the addition. While doing so, the ld. CIT(A) observed that the assessee had not filed

audited financial statements or balance sheet for the relevant year in the case of M/s. Divyadrishti Traders Pvt. Ltd. and M/s. Divyadristhi Merchants Pvt. Ltd.. However, the ld. CIT(A) held that out of the total credits received from M/s. Divyadristhi Merchants Pvt. Ltd. an amount of Rs.2,50,00,000/- requires to be deleted as it represents the opening balance as on 01.04.2011.

B. As regards, the addition on account of alleged receipt of on-money consideration on sale of plot at Paud Road. Based on the notings contained in page no.2 of bundle no.1, the ld. CIT(A) had proceeded to hold that the notings on the left side of the loose sheets clearly indicates the cost of purchase, entries on right side indicates the sale consideration, thus he proceeded to hold that the document is not a mere dumb document accordingly confirmed the addition on account receipt of on-money consideration of Rs.24,00,000/-.

C. Similarly, the ld. CIT(A) upheld the addition of Rs.6,27,20,500/- on account of alleged on-money consideration paid at the time of purchase of property. The details of which are set out by the ld. CIT(A) at page no.41 of his order, which reads as under :-

<i>Bundle no.1, page no.1</i>	<i>Property Details</i>	<i>Cheque payment</i>	<i>Cash payment</i>
<i>2</i>	<i>Plot at Paud Road</i>	<i>19,05,000</i>	<i>27,20,500</i>
<i>3</i>	<i>Property at Vadgaon</i>	<i>20,00,000</i>	<i>1,68,00,000</i>

	<i>Maval</i>		
<i>13</i>	<i>Plot at Male</i>	<i>68,00,000</i>	<i>85,00,000</i>
<i>22</i>	<i>Land with Santosh Jain</i>	<i>90,00,000</i>	<i>1,10,00,000</i>
<i>168</i>	<i>Miscellaneous</i>	<i>1,00,00,000</i>	<i>2,37,00,000</i>
<i>Total</i>			<i>6,27,20,500</i>

D. The ld. CIT(A) on analysis of the notings at page no.2, 3, 13, 22 and 168 of bundle no.1 held that there is evidence of payment of consideration in cash over and above the apparent consideration at the time of purchase of property at Paud Road, Vadgaon Maval, Male, Santosh Jain and Miscellaneous. The ld. CIT(A) confirmed the addition of Rs.6,27,20,500/- since the assessee had failed to discharge the onus of rebuttal of presumption u/s 132(4A) r.w.s. 292C of the Act. However, the ld. CIT(A) shifted an amount of Rs.1,25,00,000/- for the assessment year 2013-14, as so much of on-money was paid in the previous year relevant to the assessment year 2013-14 based on the evidence available on record.

15. Being aggrieved by the order of the ld. CIT(A), the assessee is in appeal before us in the present appeal.

16. The ld. Counsel for the assessee submits that as a result of search and seizure actions, no incriminating material was found suggesting the existence of undisclosed income, therefore, in the

absence of such incriminating material, no addition can be made in the assessment framed u/s 143(3) r.w.s. 153A of the Act. In this connection, he placed reliance on the following decisions :-

- (i) PCIT vs. Meeta Gutgutia, 257 Taxman 441 (SC).
- (ii) CIT vs. Gurinder Singh Bawa, 386 ITR 483 (Bom.).
- (iii) CIT vs. Kabul Chawala, 380 ITR 573 (Delhi).
- (iv) PCIT vs. Dipak Jashvantlal Panchal, 397 ITR 153 (Guj.).
- (v) PCIT vs. Best Infrastructure (India) (P.) Ltd., 94 taxman.com 115 (SC).

B. He further submits that the statement given by the assessee during the course of search and seizure proceedings u/s 132(4) has to be considered in its entirety. Drawing our attention to the statement recorded u/s 132(4), which is placed before us at page nos.1 to 26 of the Paper Book, he submits that the statement given by the assessee does not have any evidentiary value in view of reply given by the assessee to question no.39. Drawing our attention to the reply given by the assessee to question no.39, he submits that the initial statement given by the assessee is not binding as such statement is subject to verification of books of accounts and reconciliation, thus, he submits that the statement cannot be construed as a categorical and conclusive statement.

C. Without prejudice to the above argument, he submits that even assuming that the statement given by the assessee is valid, no addition can be made merely based on the statement u/s 132(4) of the Act without bringing on record any corroborative material placing reliance on the following decisions :-

(i) PCIT vs. Best Infrastructure (India) (P.) Ltd., 397 ITR 82 (Delhi).

D. On merits, he submits that the assessee had discharged the onus of proving the genuineness, creditworthiness and identity of the loan creditors. He also drawn our attention to the financial statements of the lender companies, the balance sheet and profit & loss account for the assessment year 2015-16 and also the loan confirmation letters from lenders etc. He also filed the copy of the ledger account of the lenders appearing in his books of account. He further submits that the most of the loans were repaid within the same accounting year through account payee cheques or other banking modes. The interest on these loans was paid after deducting applicable TDS. Thus, he submits that the appellant had discharged the onus lying upon it in terms of provisions of section

68 of the Act. In the circumstances, the AO was not justified in making the addition of unsecured loans.

E. As regards, the addition made on account of alleged receipt of on-money consideration in cash, as well as, the payment of alleged on-money purchase consideration in cash, he submits that the plot at Paud Road was not purchased by him but by a partnership firm, namely, Gold Field Resorts, of which he is a partner and the transactions had no bearing in the assessment of appellant.

F. Regarding the purchase of plot at Vadgaon Maval, he submits that no on-money consideration was paid and no addition can be made merely based on the notings found in the loose sheets without any corroborative evidence placing reliance on the following decisions :-

- (i) Central Bureau Investigation vs. V. C. Shukla, (1998) 3 SCC 410.
- (ii) Common Cause vs. Union of India, 394 ITR 220 (SC).
- (iii) CIT vs. Girish Chaudhary, 296 ITR 619 (Delhi).

17. On the other hand, ld. CIT-DR submits that the statement given by the assessee during the course of search and seizure operations u/s 132(4) together with the notings in the Diary

constitutes an incriminating material and can form the basis for making the addition since the assessee failed to rebut the presumption u/s 132(4A) r.w.s. 292C of the Act.

B. As regards, the addition made on account on-money purchase consideration and receipt of on-money consideration, he submits that the notings found in the Diary of 2009 clearly indicates the transaction of unaccounted receipts as well as payments at the time of purchase of property. Therefore, he submits that the orders of the lower authorities are very reasoned and speaking based on the proper appreciation of material on record requires no interference.

18. We heard the rival submissions and perused the material on record. Ground of appeal no.(a), (b) and (c) challenges the addition of unsecured loans of Rs.13,27,54,925/-. The assessee had raised the preliminary issue that in the absence of any incriminating material, no addition can be made in the assessment u/s 143(3) r.w.s. 153A of the Act. Now, it is settled position of law that the existence of incriminating material is a *sine qua non* for the purpose of addition in the assessment u/s 143(3) r.w.s. 153A of the Act. Recently, the Hon'ble Supreme Court in the case of PCIT vs. Abhisar Buildwell (P.) Ltd., 149 taxmann.com 399 (SC) held that

no addition can be made in respect of unabated assessment in the absence of any incriminating material found as result of search and seizure action, confirming decisions of the following High Courts :

- (i) PCIT vs. Saumya Construction, 387 ITR 529 (Gujarat).
- (ii) PCIT vs. Dipak Jashvantlal Panchal, (2) TMI 862 (Gujarat).
- (iii) CIT vs. Continental Warehousing Corporation (Nhava Sheva) Ltd., 374 ITR 645 (Bombay).
- (iv) PCIT vs. M/s. Delhi International Airport Pvt. Ltd. and Ors., 443 ITR 382 (Karnataka).
- (v) CIT vs. Kabul Chawala, 380 ITR 573 (Delhi).
- (vi) PCIT vs. Meeta Gutgutia, 395 ITR 526 (Delhi).
- (vii) Chintels India Ltd. vs. DCIT, 397 ITR 416 (Delhi).
- (viii) Sri S.M. Kamal Pasha vs. DCIT, (8) TMI 966 (Karnataka).
- (ix) PCIT vs. Jay Infrastructure and Properties Pvt. Ltd., (10) TMI 1022 (Gujarat).
- (x) Smt. Jami Nirmala vs. PCIT, 437 ITR 573 (Orissa).
- (xi) Smt. Smritisudha Nayak vs. Union of India, 439 ITR 193 (Orissa).
- (xii) CIT vs. Veerprabhu Marketing Limited, 388 ITR 574 (Calcutta).
- (xiii) PCIT vs. M/s. Salasar Stock Broking Ltd., (8) TMI 1131 (Calcutta).
- (xiv) PCIT vs. Smt. Daksha Jain, (8) TMI 474 (Rajasthan).
- (xv) Dr. A. V. Sreekumar vs. CIT, 404 ITR 642 (Kerala).

While expressing the disagreement with contrary view taken by the Hon'ble Allahabad High Court in the case of PCIT vs. Mehndipur Balaji, 447 ITR 517 (All.). Thus, it is a settled position

of law that in the absence of any incriminating material found as a result of search and seizure action, no addition can be made de-horse incriminating material in respect of unabated assessment.

19. In the present case, it is undisputed position that no regular assessment proceedings were pending as on date of search for the assessment year 2012-13. Therefore, it is a case of unabated assessment. Therefore, in the light of the settled position of law discussed supra that in the case of unabated assessment, in the absence of any incriminating material the concluded assessment cannot be disturbed. Then, we proceed to examine whether or not any incriminating material was found by the Department as result of search and seizure operations.

B. On perusal of the assessment order, it would reveal that the entire case of the Assessing Officer is hinged upon the following :

- (i) Entries found in the Diary in page no.9, 20 to 22 and 83 of bundle no.11 which is found and seized during the course of search and seizure proceedings in the case of assessee.
- (ii) Statement of the assessee recorded u/s 132(4) of the Act.
- (iii) Statement recorded by the Directorate of Investigation, Income Tax Department, Kolkata from the Directors

control of shell companies based at Kolkata, namely, Shri Praveen Agarwal, Shri Anuj Agarwal and Shri Jeevendra Mishra.

C. Now, we shall deal with the notings in the Diary, it is clear that an amount of Rs.1,09,00,000/- is recorded against “Kolkata”. Similarly, at page no.22, entries of Rs.11,000/- is found against “Kolkata” and page no.83 entries of Rs.3,60,000/- was found against the “Sushil, Kolkata” on 25.03.2015.

D. We have carefully gone through the notings found in the seized material i.e. Diary of 2009. These notings are found in the Diary, 2009, which is found and seized during the course of search and seizure operations, wherein certain payments as well as receipts were recorded without recording the dates and full details. It is not even a record of daily transactions. Certainly it does not form part of books of account regularly maintained by it in the course of business. It is not clearly decipherable from the said entries on standalone basis that a transaction had taken place, which gives rise to any taxable event for the reason that there is no indication from the entries found therein that a transaction was undertaken during the previous year relevant to the assessment year under

consideration giving rise to the taxable event. More particularly, these entries do not indicate that the loans received from the sundry creditors are fictitious or mere accommodation entries. Thus, the entries are non-speaking, it cannot be concluded that it represents the undisclosed income of the assessee for the reason that the entries does not disclose four components required to be satisfied to constitute a taxable event. The first is the taxable event which attracts the levy, the second is the person on whom the levy is imposed and who is obliged to pay the tax. The third is the assessment year in which charge of income-tax is levied. The fourth is the total income of the previous year and the fifth is the rate or rates at which tax is to be imposed. The rates are prescribed in the annual Finance Act. Therefore, these entries have no value in determining total income on the basis of seized diary. Our view in this regard is supported by the decision of Hon'ble Supreme Court in *Govind Saran Ganga Saran v. CST*, 155 ITR 144 (SC), wherein, it was held that for the purpose of charging to tax, there should be four components to be satisfied. For the sake of convenience, we refer to the relevant head notes from that decision:

“The component which enter into the concept of a tax are well known. The first is the character of the imposition known by its nature which prescribes the taxable event attracting the levy, the second is a clear indication of the person on whom the levy is imposed and who is obliged to pay the tax, the third is the rate at which the tax is imposed and the fourth is the measure or value to which the rate will be applied for computing the tax liability. If those components are not clearly and definitely ascertainable, it is difficult to say that the levy exists in point of law. Any uncertainty or vagueness in the legislation scheme defining any of those components of the levy will be fatal to its validity.”

E. Reliance can be placed on the decision of the Hon’ble Delhi High Court in the case of CIT vs. S.M. Aggarwal, 293 ITR 43 (Delhi), in the case of CIT vs. Girish Chaudhary, 296 ITR 619 (Delhi), decision of the Hon’ble Calcutta High Court in the case of PCIT vs. Ajanta Footcare (India) (P.) Ltd. 84 taxmann.com 109 (Cal.) and the decision of the Hon’ble Bombay High Court in the case of Harish Textile Engineers Ltd. Vs. DCIT, 379 ITR 160 (Bom.) in support of the proposition that a document will be a dumb document, where any of the above four ingredients is missing and AO fails fill-up the gap with the help of other documents or from post search investigation enquiries. And no addition can be made based on such dumb documents. In other words, a dumb document does not constitute incriminating material for the purpose of assessment u/s 143(3) r.w.s. 153A of the Act.

F. Since the entries do not contain any details to indicate the nature of transaction, period of transaction and persons involved, the inference drawn by the Assessing Officer that the entries represent the accommodation entries received from so called Kolkata based shell companies is merely based on the presumptions, surmises and conjectures, therefore, cannot form the basis for the addition.

G. Thus, it is clear that these entries found in page no.20, 22 and 83 of bundle no.11 cannot lead to the conclusion that the loans received by the assessee company are bogus or merely accommodation entries provided by so called Kolkata based shell companies.

20. Next, we proceed to examine the evidentiary value of the statement given by the assessee u/s 132(4) of the Act. It is true that in reply to question no.24 when the statements of Shri Praveen Agarwal, Shri Anuj Agarwal and Shri Jeevendra Mishra, who were stated to be controller of so called shell companies based at Kolkata recorded by Investigation Wing of the Department, Kolkata, was confronted to the assessee, he stated that the loans from the above parties are in the nature of accommodation entries and also the loans

were obtained after giving cash to the middle person, namely, Shri Sushil Agarwal. He also agreed to write off the unsecured loans and the year-wise breakup of the same is as under :-

<i>Year</i>	<i>Amount of accommodation entry</i>
<i>2010-11</i>	<i>3</i>
<i>2011-12</i>	<i>2</i>
<i>2014-15</i>	<i>3</i>

In reply to question no.25, he stated the modus operandi adopted for obtaining the loans by stating that accommodation entries were received through Shri Sushil Agarwal, who is a mediator by giving cash, loans were received for equivalent amount of cash given through RTGS. In reply to question no.26, he stated that the interest amounts paid by cheque was received back in cash after deducting the commission.

However, at the end of the statement, in reply to question no.39, he clearly stated that the statement given by him is merely based on the memory alone and subject to reconciliation and verification of entries in the books of accounts. The relevant statement is extracted below :-

*“Q.39 Do you wish to state anything further?
 Ans. Sir, At outset I wish to state that the Diaries/papers found are of years going back upto 10 years. And so the statement that I have*

given are on my memory. While recording my statement, I have analysed the transactions to the best of my knowledge and belief. I have at some places pointed out that there is confusion in the recordings. I further like to mention that there could be inconsistencies in the figures that have been recorded as such as hundreds, thousands and lakhs. There are some recording for sale of plots which are at exaggerated prices. This has been kept as it is because while selling the plots these figures are used to fetch higher price from the prospective buyers. There are also some transactions which have not been completed or have got cancelled. But the recordings exist in the diary. There are some figures which have been recorded in full but the customer has negotiated the same at a later point and so those may not be the actual realised prices. At many places only figures have been mentioned without noting whether these are amounts received or paid. I have recorded my statement for such amounts purely on my memory and so they could be vise-versa also. The dates recorded in the Diaries may differ with the dates recorded in the regular books of accounts or the dates as per Bank. This is because I am not sure whether the dates in the Diaries are the date on which amounts have been received or paid or dates on which the transactions have been negotiated etc. I will try and reconcile all these discrepancies in the fund flow statement that I propose to make. I request to kindly consider this. However, considering my assets, liabilities, entries in the diaries and the over all financials and the accommodation entries, as found in the search I wish to declare on my own an additional income of Rs.13 crores for various years as under :-

Year	Accommodation entry (in crores)	Expenses from undisclosed sources (in crores)	Total disclosure (in crores)
2010-11	3	1	4
2011-12	2	-	2
2012-13	-	1	1
2013-14	-	1	1
2014-15	3	-	3
2015-16	-	1	1
2016-17	-	1	1
TOTAL DISCLOSURE			13

I will reconcile all the various facts and figures as found in the Diaries and other incriminating documents. You will appreciate that this figure worked out without getting into specific details and so this is subject to revision upwards or downwards which I will explain in details. This

declaration of Rs.13 crores should be considered as my disclosure of additional income u/s. 132(4) of the Income Tax Act. I also request that my case may be considered compassionately and in view of the declaration of undisclosed income, no penalty provisions may be initiated.”

It is well settled position in law that admission has to be construed as a whole, for the purpose of its evaluation. The Department cannot adopt “pick and choose” approach, by ignoring that part of the statement which is against the Departmental interests and adopting other part of the statement which suits the Departmental interests. In the present case, the reply given by the assessee in question no.24, 25 and 26 has to be read with reply to question no.39. On conjoint reading of the replies given to question nos.24, 25 and 26 read with reply given to question no.39, what emerges from the statement is that it is not a clear, categorical and unambiguous conclusive statement, but a qualified statement. He, nowhere stated that the entire unsecured loans of Rs.13,27,54,925/- received by him during the previous year relevant to the assessment year under consideration are merely accommodation entries provided by Kolkata based shell companies. He nowhere stated that the details of such bogus loans. This is further corroborated by the fact that the appellant had not offered any income on account of

unsecured loans for the year under consideration during the course of recording statement u/s 132(4) of the Act. Further, the Assessing Officer had not examined the assessee on the entries found in page no.20, 25 and 26 of the bundle no.11. As held by us supra, these entries do not lead to the conclusion that the loans received are bogus.

In the given above circumstances, we are of the considered opinion that the statement given by the assessee u/s 132(4) has no effect, evidentiary value, cannot be construed as a confessional statement, no cognizance can be taken of the statement made by the assessee. Therefore, it cannot constitute the incriminating material.

21. Even assuming for a moment that the statement given by the assessee can be construed as confessional statement and has evidentiary value, such statement does not form part of evidence found as a result of search and seizure, as the word “evidence found as a result of search” would not take within its sweep, statements recorded during the course of search and seizure operations, which is not relatable to the evidence and material found during the course of search. In this connection, reliance can be placed on the decision of the Hon’ble Delhi High Court in the case of CIT vs. Harjeev

Aggarwal, 70 taxmann.com 95 (Delhi). The relevant paragraphs of the decision of the Hon'ble Delhi High Court in the case of Harjeev Aggarwal (supra) are extracted as under :-

“19. In view of the settled legal position, the first and foremost issue to be addressed is whether a statement recorded under Section 132 (4) of the Act would by itself be sufficient to assess the income, as disclosed by the Assessee in its statement, under the Provisions of Chapter XIV-B of the Act.

20. In our view, a plain reading of Section 158BB(1) of the Act does not contemplate computing of undisclosed income solely on the basis of a statement recorded during the search. The words "evidence found as a result of search" would not take within its sweep statements recorded during search and seizure operations. However, the statements recorded would certainly constitute information and if such information is relatable to the evidence or material found during search, the same could certainly be used in evidence in any proceedings under the Act as expressly mandated by virtue of the explanation to Section 132(4) of the Act. However, such statements on a standalone basis without reference to any other material discovered during search and seizure operations would not empower the AO to make a block assessment merely because any admission was made by the Assessee during search operation.

21. A plain reading of Section 132 (4) of the Act indicates that the authorized officer is empowered to examine on oath any person who is found in possession or control of any books of accounts, documents, money, bullion, jewellery or any other valuable article or thing. The explanation to Section 132 (4), which was inserted by the Direct Tax Laws (Amendment) Act, 1987 w.e.f. 1st April, 1989, further clarifies that a person may be examined not only in respect of the books of accounts or other documents found as a result of search but also in respect of all matters relevant for the purposes of any investigation connected with any proceeding under the Act. However, as stated earlier, a statement on oath can only be recorded of a person who is found in possession of books of accounts, documents, assets, etc. Plainly, the intention of the Parliament is to permit such examination only where the books of accounts, documents and assets possessed by a person are relevant for the purposes of the investigation being undertaken. Now, if the provisions of Section 132(4) of the Act are read in the context of Section 158BB(1) read with Section 158B(b) of the Act, it is at once clear that a statement recorded under Section 132(4)

of the Act can be used in evidence for making a block assessment only if the said statement is made in the context of other evidence or material discovered during the search. A statement of a person, which is not relatable to any incriminating document or material found during search and seizure operation cannot, by itself, trigger a block assessment. The undisclosed income of an Assessee has to be computed on the basis of evidence and material found during search. The statement recorded under Section 132(4) of the Act may also be used for making the assessment, but only to the extent it is relatable to the incriminating evidence/material unearthed or found during search. In other words, there must be a nexus between the statement recorded and the evidence/material found during search in order to for an assessment to be based on the statement recorded.

22. *In CIT v. Shri Ramdas Motor Transport [1999] 238 ITR 177/102 Taxman 300, a Division Bench of Andhra Pradesh High Court, reading the provision of Section 132(4) of the Act in the context of discovering undisclosed income, explained that in cases where no unaccounted documents or incriminating material is found, the powers under Section 132(4) of the Act cannot be invoked. The relevant passage from the aforesaid judgment is quoted below:—*

"A plain reading of sub-section (4) shows that the authorised officer during the course of raid is empowered to examine any person if he is found to be in possession or control of any undisclosed books of account, documents, money or other valuable articles or things, elicit information from such person with regard to such account books or money which are in his possession and can record a statement to that effect. Under this provision, such statements can be used in evidence in any subsequent proceeding initiated against such per son under the Act. Thus, the question of examining any person by the authorised officer arises only when he found such person to be in possession of any undisclosed money or books of account. But, in this case, it is admitted by the Revenue that on the dates of search, the Department was not able to find any unaccounted money, unaccounted bullion nor any other valuable articles or things, nor any unaccounted documents nor any such incriminating material either from the premises of the company or from the residential houses of the managing director and other directors. In such a case, when the managing director or any other persons were found to be not in possession of any incriminating material, the question of examining them by the authorised officer during the course of search and recording any statement from them by invoking the powers under section 132(4) of the Act, does not arise. Therefore, the statement of the

managing director of the assessee, recorded patently under section 132(4) of the Act, does not have any evidentiary value. This provision embedded in sub-section (4) is obviously based on the well established rule of evidence that mere confessional statement without there being any documentary proof shall not be used in evidence against the person who made such statement. The finding of the Tribunal was based on the above well settled principle."

23. *It is also necessary to mention that the aforesaid interpretation of Section 132(4) of the Act must be read with the explanation to Section 132(4) of the Act which expressly provides that the scope of examination under Section 132(4) of the Act is not limited only to the books of accounts or other assets or material found during the search. However, in the context of Section 158BB(1) of the Act which expressly restricts the computation of undisclosed income to the evidence found during search, the statement recorded under Section 132(4) of the Act can form a basis for a block assessment only if such statement relates to any incriminating evidence of undisclosed income unearthed during search and cannot be the sole basis for making a block assessment.*

24. *If the Revenue's contention that the block assessment can be framed only on the basis of a statement recorded under Section 132(4) is accepted, it would result in ignoring an important check on the power of the AO and would expose assesseees to arbitrary assessments based only on the statements, which we are conscious are sometimes extracted by exerting undue influence or by coercion. Sometimes statements are recorded by officers in circumstances which can most charitably be described as oppressive and in most such cases, are subsequently retracted. Therefore, it is necessary to ensure that such statements, which are retracted subsequently, do not form the sole basis for computing undisclosed income of an assessee.*

25. *In CIT v. Naresh Kumar Agarwal [2014] 369 ITR 171/[2015] 53 taxmann.com 306, a Division Bench of Telangana and Andhra Pradesh High Court held that a statement recorded under Section 132(4) of the Act which is retracted cannot constitute a basis for an order under Section 158BC of the Act. The relevant extract from the said judgement is quoted below:—*

"17. The circumstances under which a statement is recorded from an assessee, in the course of search and seizure, are not difficult to imagine. He is virtually put under pressure and is denied of access to external advice or opportunity to think independently. A battalion of officers, who hardly feel any limits on their power, pounce upon the assessee, as though he is a hardcore criminal. The nature of steps, taken during the course

of search are sometimes frightening. Locks are broken, seats of sofas are mercilessly cut and opened. Every possible item is forcibly dissected. Even the pillows are not spared and their acts are backed by the powers of an investigating officer under section 94 of the Code of Criminal Procedure by operation of sub-section (13) of section 132 of the Act. The objective may be genuine, and the exercise may be legal. However, the freedom of a citizen that transcends, even the Constitution cannot be treated as non-existent."

"18. It is not without reason that Parliament insisted that the recording of statement must be in relation to the seized and recovered material, which is in the form of documents, cash, gold, etc. It is, obviously to know the source thereof, on the spot. Beyond that, it is not a limited licence, to an authority, to script the financial obituary of an assessee."

"19. At the cost of repetition, we observe that if the statement made during the course of search remains the same, it can constitute the basis for proceeding further under the Act even if there is no other material. If, on the other hand, the statement is retracted, the Assessing Officer has to establish his own case. The statement that too, which is retracted from the assessee cannot constitute the basis for an order under section 158BC of the Act.""

In the present case, on mere perusal of the statement recorded of the assessee u/s 132(4) it would be evident that the assessee was examined and confronted on the statements given by Shri Praveen Agarwal, Shri Anuj Agarwal and Shri Jeevendra Mishra recorded during the course of search and seizure proceedings in their case. The assessee was never examined on the notings found in the Diary, 9, 20 to 22 and 83 of bundle no.11. Therefore, in view of the legal position discussed supra the statement recorded from the assessee

u/s 132(4) cannot be considered as incriminating material to be used for the purpose of assessment to be made pursuant to notice u/s 153A of the Act.

22. Even otherwise, it is a settled position of law that mere statement u/s 132(4) on a standalone basis without referring to any other material discovered during the search and seizure operations empowers the Assessing Officer to make the addition in the assessment framed pursuant to notice issued u/s 153A of the Act. Reference can be made on the decision of the Hon'ble Delhi High Court in the case of PCIT vs. Pilot Industries Ltd., 146 taxmann.com 233 (Delhi), PCIT vs. Best Infrastructure (India) (P.) Ltd. 397 ITR 82 (Delhi), CIT vs Harjeev Aggarwal 70 taxmann.com 95 (Delhi) and PCIT vs. Agson Global (P.) Ltd, 441 ITR 550 (Delhi).

In the present case, as held by us supra, there is no material found as a result of search and seizure action indicating that the unsecured loans received by the assessee are fictitious or bogus representing the undisclosed income of the assessee brought into books in the form of unsecured loans. Therefore, mere statement of

the assessee cannot form the basis to make addition in the assessment under 153A r.w.s. 143(3) of the Act.

23. Now, next question that is required to be considered by us is whether or not the statements given by Shri Praveen Agarwal, Shri Anuj Agarwal and Shri Jeevendra Mishra during the course of search and seizure proceedings in their hands, constitutes a incriminating material for the purpose of assessment u/s 153A of the Act. In the present case, undisputedly the foundation for the assessment is the statement given by the above mentioned persons, who are third parties to the assessee. It is settled position of law that the statement of third party recorded in the course of search conducted in the case of third party, it cannot form the basis for the assessment u/s 153A as held by the Hon'ble Delhi High Court in the case of PCIT vs. Anand Kumar Jain, in the case of PCIT vs. Manoj Hora, 402 ITR 175 (Delhi) and the decision of the Hon'ble Gujarat High Court in the case of PCIT vs. Kunvarji Commodities Brokers Pvt. Ltd., 432 ITR 150 (Guj.)

In this context, it is significant to note that during the course of hearing before us the ld. CIT-DR had placed before us copy of the statement given by above three named persons, confronted to the

assessee during the course of recording the statement u/s 132(4) of the Act. We had carefully gone through the said statements, we find that the statements were given explaining the *modus operandi* adopted by the companies controlled by them for the purpose of providing entries in the form of bogus LTCG and not the accommodation entries in the form of bogus loans. Moreover, name of the assessee, nowhere figures in the statements.

From the above discussions, what emerges is that the Department had failed to bring on record evidence of existence of incriminating material found as result of search and seizure operations to prove that the loans accepted by the assessee were bogus or mere accommodation entries received from shell companies based at Kolkata. Thus, the conditions precedent for purpose of making addition u/s 143(3) r.w.s. 153A does not stand satisfied in the present case. Therefore, the Assessing Officer was not justified in making the addition of Rs.13,27,54,925/- being the unsecured loans as unexplained income in the assessment u/s 143(3) r.w.s. 153A of the Act.

24. The order of the Id. CIT(A) cannot be sustained in the eyes of law for the reasons that the Id. CIT(A) had failed to consider that (i)

statement of the assessee u/s 132(4) in its entirety, merely swayed away by the answers given by the assessee in reply to question nos.24, 25 and 26 ignoring the answers given by the assessee to the question no.39, (ii) examine the evidentiary value of the statement recorded u/s 132(4) from the assessee (iii) that the statement recorded u/s 132(4) on standalone basis cannot form the basis to make the addition u/s 153A of the Act (iv) appreciate that the statement recorded u/s 132(4) is not related to the material found as result of search and seizure operations, cannot be called as “incriminating material”.

The Id. CIT(A) also had seriously fell in error in applying the proposition of law that the onus lies upon the assessee to prove the genuineness, creditworthiness and identity of the lenders companies placing reliance on the certain judicial precedent. In the assessment made u/s 153A, onus of proving the genuineness, creditworthiness and identity of the lenders shifts to the assessee only upon the fulfilment jurisdiction fact i.e. existence of incriminating material found as a result of search and seizure actions by the Assessing Officer to make the addition in the assessment framed pursuant to the notice issued u/s 153A of the Act. And also when the Revenue

discharged the burden of proving that the apparent is not real. The reliance placed by the ld. CIT(A) on the decision of the Hon'ble Delhi High Court in the case of Bhagirath Agarwal vs. CIT, 351 ITR 143 (Delhi) and CIT vs. M. S. Agarwal, 93 taxmann.com 247 is misplaced, inasmuch as, these decisions are not an authority purpose for the proposition that the statement recorded u/s 132(4) of the Act by itself without anything more can be basis for the addition. The Hon'ble Rajasthan High Court in the case of PCIT vs. Sanjay Chhabra, 453 ITR 516 referring to the two decisions of the Hon'ble High Court of Delhi in the case of Suman Poddar vs. ITO, 423 ITR 480 and Bhagirath Agarwal vs. CIT, 351 ITR 143 by held as under vide para 6 of the judgement :-

“In both the aforesaid decisions, the High Court considered the material on record on its own facts. It was not propounded as the principle of law that without there being any other material, only on the basis of statement recorded under section 132(4) of the Income-tax Act even though retracted, the addition could be justified. The judgements are distinguishable on facts.”

25. In the light of above findings, we are of the considered opinion that the orders of the Assessing Officer as well as the ld. CIT(A) suffers from illegality and cannot be sustained in the eyes of law and, therefore, we hereby set-aside both the orders of the lower

authorities and direct the AO to delete the addition of Rs.13,27,54,975/- on account of unsecured loans.

Since the addition is being quashed on the jurisdictional ground, the submissions made by the assessee on the merits of the issue are left open. Thus, the ground of appeal nos.(a), (b) and (c) filed by the assessee stands allowed.

26. Ground of appeal nos.(d) and (e) challenges the addition of Rs.6,27,20,500/- on account of unexplained expenditure. On perusal of the assessment order, it would show that the Assessing Officer made addition on account of alleged on-money consideration paid in cash at the time of purchase of property based on the notings found in the Diary of 2009 as well as statement of the assessee u/s 132(4) of the Act. The Assessing Officer had reproduced scanned images of the notings found in the Diary at page no.2, 3, 13, 22 and 168 of bundle no.1 and also reproduced the statement given by the assessee at page no.18, 19, 20, 21 and 22 of the assessment order. These notings were explained by the assessee in the statement given u/s 132(4), which is extracted in page no.22 of the assessment order.

On perusal of assessment order, it would show that the Assessing Officer had inferred that the assessee had paid on-money consideration at the time of purchase of properties, details of which are given at page no.17 of the assessment order and, accordingly, brought to tax as unexplained expenditure u/s 69C of the Act. The Assessing Officer also observed that the appellant had failed to discharge the onus of rebuttal of presumption raised u/s 292C of the Act.

On appeal before the Id. CIT(A), the findings of the Assessing Officer were confirmed, rejecting the argument of the assessee that they were dumb documents and by holding that the assessee had failed to discharge the onus of disproving the contents of the seized documents. However, he restricted the addition for the assessment year under consideration to the extent of Rs.4,94,20,500/- and the balance of addition was shifted for the assessment year 2013-14, as it was found that so much of on-money was paid during the previous relevant to the assessment year 2013-14.

27. Being aggrieved, the assessee is in appeal before us in the present appeal.

28. The whole basis of addition made by the Assessing Officer is the statement given by the assessee u/s 132(4) of the Act and the notings found in the Diary of 2009 which is seized and found as a result of search and seizure operations. The findings given by us in relation to the grounds nos.(a), (b) and (c) that the statement given by the assessee does not amount to confession, has no evidentiary value and cannot form the basis for the addition equally holds good in relation to the present grounds of appeal also. Therefore, it may be concluded that the statement cannot form the basis for the addition in the assessment u/s 153A of the Act.

From the observation made by the Assessing Officer at para 28 of the assessment order, it would be clear that the assessment is solely based on the notings found in the Diary as well as the statements recorded u/s 132(4) of the Act. In the foregoing paragraph, we held that the statement of the assessee u/s 132(4) cannot form the basis for the addition, then what remains as the basis for the addition is notings found in the Diary. The Assessing Officer had not caused any further enquiry, with the seller of the plots, the entries in the Diary were not corroborated with any other independent evidence. The Assessing Officer also not attempted to

verify whether these transactions were entered in books of account or not in view of the reply given to question no.39.

We find that notings in diary cannot be treated as ledger books of accounts for the reason that these notings do not contain any closing balance, opening balance and it was not recorded as date-wise transactions. It appears to us that some notings were made in the diary transactions-wise. Therefore, the diary cannot be considered as books of accounts maintained by the assessee regularly for the business.

Similarly, these documents also cannot be termed as “speaking documents” for the reason that it does not reveal any taxable event and person on whom tax can be levied as well as year of taxability etc. Therefore, these documents can be termed as “dumb documents” which cannot form the basis for making the addition in the assessment. It is settled position of law that onus lies upon the Department to collect cogent evidence to corroborate the notings on the loose sheets. The additions cannot be made merely on the basis of notings on the loose sheet papers which are in the nature of “dumb document” having no evidentiary value. The onus lies on the Department to collect the evidence to corroborate the notings on

the loose sheets. The Hon'ble Supreme Court in the case of CIT vs. Kalyansundaram (P.V.), 294 ITR 49 (SC) endorsed the decision of the Hon'ble Madras High Court confirming the findings of the Tribunal that no on-money payment was made though the other party to the transaction accepted the receipts of on-money consideration in the absence of any prima-facie a case made by the Department. The Hon'ble Bombay High Court in the case of PCIT vs. Umesh Ishrani, 108 taxmann.com 437 (Bom.) confirmed the findings of the Tribunal, wherein the Tribunal had deleted the addition made on the basis of loose papers and nowhere shows that any payments made by the same person and no enquiry or verification was made with the seller of the properties. Further reliance in this regard, can be placed on the following decisions :-

- i) CIT vs. Atam Valves (P.) Ltd. (2009) 184 Taxman 6 (P&H)
- ii) CIT vs. Maulikkumar K. Shah (2008) 307 ITR 137 (Guj)
- iii) CIT vs. C.L. Khatri (2006) 282 ITR 97 (MP)
- iv) Pr.CIT vs. Kamlesh Prahladbhai Modi (2018) 94 taxmann.com 356 (Guj)
- v) CIT vs. Shri Girish Chaudhary (2008) 296 ITR 619 (Del)
- vi) CIT vs. Vivek Aggarwal (2015) 56 taxmann.com 7 (Del)
- vii) CIT vs. Salek Chand Agarwal (2008) 300 ITR 426 (All)
- viii) CIT vs. Dinesh Jain (HUF) 352 ITR 629 (Del)

29. We find that the conclusions reached by the Assessing Officer are merely based on presumptions and assumptions without bringing any corroborative material on record in support of such conclusion. It is settled position of law that no addition in the assessment can be made merely based on assumptions, suspicion, guess work and conjecture or on irrelevant inadmissible material.

Reliance can be placed in this regard on the following decisions:

- i) Dhirajlal Girdharilal vs. CIT (1954) 26 ITR 736 (SC)
- ii) Dhakeswari Cotton Mills Ltd. vs. CIT (1954) 26 ITR 775 (SC)
- iii) CIT vs. Maharajadhiraja Kameshwar Singh of Darbhanga (1933) 1 ITR 94 (PC)
- iv) Lalchand Bhagat Ambica Ram vs. CIT (1959) 37 ITR 288 (SC)
- v) Umacharan Shaw & Bros vs. CIT (1959) 37 ITR 271 (SC)
- vi) Omar Salay Mohamed Sait vs. CIT (1959) 37 ITR 151 (SC)

30. The Hon'ble Delhi High Court in the case of CIT vs. Dinesh Jain (HUF), 352 ITR 629 after referring to the decision of the Hon'ble Supreme Court in the case of Lalchand Bhagat Ambica Ram vs. CIT (1959) 37 ITR 288 (SC) held that no addition can be made taking into account notorious practice prevalent in the similar trade. The relevant findings vide para 14 and 15 are as under:

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14. In Lalchand Bhagat Ambica Ram Vs. Commissioner of Income Tax, Bihar and Orissa (1959) 37 ITR 288, the

Supreme Court disapproved the practice of making additions in the assessments on mere suspicion and surmise or by taking note of the notorious practices prevailing in trade circles. At page 299 of the report, it was observed as follows :

"Adverting to the various probabilities which weighed with the Income-tax Officer we may observe that the notoriety for smuggling food grains and other commodities to Bengal by country boats acquired by Sahibgunj and the notoriety achieved by Dhulian as a great receiving centre for such commodities were merely a background of suspicion and the appellant could not be tarred with the same brush as every arhatdar and grain merchant who might have been indulging in smuggling operations, without an iota of evidence in that behalf. "

15. This takes care of the argument of Mr. Sabharwal that judicial notice can be taken of the practice prevailing in the property market of not disclosing the full consideration for transfer of properties."

31. The Hon'ble Supreme Court in the case of K.P. Varghese vs. ITO (1981) 131 ITR 597 (SC) held that the capital gains is intended to tax the gains of assessee not what an assessee might have gained and what is not gained cannot be computed as gain and the assessee cannot fastened with the liability on a fictional income. Similarly, the Hon'ble Supreme Court in the case of CIT Vs. Shivakami Co. (P.) Ltd. (1986) 159 ITR 71 (SC) held that unless there is evidence that more than what was stated was received, no higher price can be taken to be the basis for making addition. In the present case, the

Assessing Officer had failed to make a prima-facie case against the assessee that the assessee had paid on-money payment at the time of purchase of land by the assessee.

32. As regards to the discharge of onus of rebuttal of presumption raised u/s 292C of the Act, such presumption is raised against the assessee, only in case when the documents are speaking one, reflects the complete transaction or the gaps in the components that are required must be filled up by the Assessing Officer through investigation and other material found during the course of search or investigation. In the present case, in the paragraphs supra, we categorically held that neither the documents are speaking one nor the Assessing Officer through investigation filled the gaps in the documents to constitute a speaking one. Therefore, the onus had not shifted to the assessee to discharge the rebuttal presumption raised u/s 292C of the Act.

33. Therefore, it can be said that the Assessing Officer had failed to bring on record any conclusive evidence to prove that the assessee had made investment in purchase of lands over and above the stated consideration and received on-money consideration on sale of property. Therefore, in our considered opinion, the findings

of the Assessing Officer as well as the ld. CIT(A) are based on surmises and conjectures not based on any material/evidence, accordingly, the orders of the Assessing Officer and ld. CIT(A) are hereby reversed direct the Assessing Officer to delete the addition of Rs.6,27,20,500/- on account of on-money payment and Rs.24,00,000/- on account of on-money receipt. Thus, the ground of appeal nos.(d) and (e) filed by the assessee stands allowed.

34. In the result, the appeal filed by the assessee in IT(SS)A No.91/PUN/2022 for A.Y. 2012-13 stands allowed.

35. Now, we shall take up the cross appeals of the Revenue in IT(SS)A No.97/PUN/2022 for A.Y. 2012-13 for adjudication.

IT(SS)A No.97/PUN/2022, A.Y. 2012-13 – By Revenue :

36. The Revenue raised the following grounds of appeal :-

- “1. *On the facts and in the circumstances of the case and in law, the Ld.CIT(A) has erred in applying peak theory and determining peak credit in respect of accommodation entries of unsecured loan from M/s Divyadrishi Merchants Private Limited which is proven shell/paper company and doing no real business.*
2. *On the facts and in the circumstances of the case and in law, the Ld.CIT(A) has erred in not appreciating the fact that peak credit theory is not applicable where deposits remain unexplained under section 68 of the Income-tax Act, 1961 and particular withdrawal/repayment is not available on the date of subsequent credit.*
3. *On the facts and in the circumstances of the case and in law, the Ld.CIT(A) has erred in not appreciating the fact that the*

assessee in his statement recorded u/s 132(4) has admitted that he had taken accommodation entries in the form of unsecured loan by giving equal amount of cash to controller of shell company M/s Divyadrishti Merchants Private Limited.

4. *On the facts and in the circumstances of the case and in law, the Ld.CIT(A) has erred in allowing adjustment of Rs.2,50,00,000/- in quantifying undisclosed income in the form of accommodation entries of unsecured loan without appreciating the fact that during the year under consideration the assessee had taken accommodation entries of Rs.4,94,50,000/- in the form of unsecured loan from M/s Divyadrishti Merchants Private Limited.*
5. *The appellant craves leave to add, amend, modify or alter any of the grounds.”*

B. The Revenue filed the above grounds of appeal being aggrieved by that part of the order of the ld. CIT(A), wherein, the ld. CIT(A) had directed the AO to delete the addition of Rs.2,50,00,000/- stated to be opening balance of M/s Divyadrishti Merchants Private Limited as on 01.04.2011. However, from the material on record, it is clear that there was no opening balance as on 01.04.2011, the findings of the ld. CIT(A) to this extent are reversed. However, in view of our findings in the assessee's appeal in IT(SS)A No.91/PUN/2022 for A.Y. 2012-13 that in the absence of any incriminating material, disclosing the bogus nature of the loans received by the assessee, no addition on account of unsecured loans can be made, the grounds of appeal filed by the Revenue has become academic in nature and accordingly, dismissed.

C. In the result, the appeal filed by the Revenue in ITA No.97/PUN/2022 for A.Y. 2012-13 stands dismissed.

IT(SS)A No.92/PUN/2022, A.Y. 2013-14 – By Assessee :

37. The assessee raised the following grounds of appeal :-

- “a) *The Appellant states that the Assessing Officer and the Appellate Authority erred in confirming alleged unaccounted expenditure additions u/s 153A of the Income Tax Act, 1961 without bringing any incriminating material and without corroborating evidence and by relying on a statement which was later retracted leading to the contradiction to settled judicial precedents.*
- b) *The Appellant states that the Assessing Officer erred in creating additions of Rs. 59,00,000/- and the Appellate Authority erred in unjustly enhancing the additions to Rs. 1,84,00,000/- u/s 69C of the Income Tax Act, 1961 solely based on loose papers, loose documents and loose diaries despite the fact that such transactions have not at all materialized.*
- c) *The Appellant states that the Assessing Officer erred in creating additions of Rs. 59,00,000/- and the Appellate Authority erred in unjustly enhancing the additions to Rs. 1,84,00,000/- u/s 69C of the Income Tax Act, 1961 ignoring the fact that the transactions have only partially materialized and the portion which has materialized has been recorded in the balance sheet and books of accounts on which tax has already been paid. Therefore, the authorities erred in upholding additions on transactions which have not at all materialized.*
- d) *The Appellant states that the Assessing Officer erred in creating and the Appellate Authority erred in partially confirming the unjust additions u/s 69C of the Income Tax Act, 1961 solely relying upon a statement which was subsequently retracted by the Appellant without bringing forth any incriminating corroborative evidence in support of the unjust additions.*
- e) *The Appellant states that the Assessing Officer erred in creating and the Appellate Authority erred in confirming the unjust additions on surmises ignoring the detailed documentary evidence and legal propositions including judicial precedents advanced before such authorities.*
- f) *The Appellant craves leave to add, alter, amend, vary, or delete any of the aforesaid grounds.”*

38. The appellant had filed the originally Return of Income under the provisions of section 139(1) of the Act in pursuant to notice u/s 153A disclosing an additional income of Rs.1 crore. Against the said return of income, the assessment was completed by the Assessing Officer vide order dated 13.12.2019 passed u/s 143(3) r.w.s. 153A of the Act at a total income of Rs.1,92,93,090/-. While doing so, the Assessing Officer made an addition of Rs.59,00,000/- alleging that the appellant assessee had paid on-money consideration of Rs.1,59,00,000/- on purchase of property based on the notings found in page nos.62, 63 and 68 of bundle no.1. The scanned images of page nos.62, 63 and 68 were reproduced by the Assessing Officer at page nos.5, 6 and 7 of the assessment order. On analysis of these notings found in the above-said pages and based on the statement given by the assessee u/s 132(4) of the Act, the Assessing Officer concluded that the assessee had paid on-money consideration of Rs.1,59,00,000/- at the time of purchase of land and after reducing the amount of additional income declared in the return of income filed pursuant to notice u/s 153A of the Act,

the balance amount of Rs.59,00,000/- was an addition u/s 69C of the Act.

39. Being aggrieved, an appeal was filed before the Id. CIT(A), who vide impugned order had confirmed the action of the Assessing Officer by holding that the assessee had failed to discharge the onus of rebuttal of the presumptions raised u/s 292C of the Act. The Id. CIT(A) also made an enhancement of addition of Rs.1,25,00,000/- based on his findings for the assessment year 2012-13, wherein, he shifted part of addition made on account on-money consideration paid on purchase of property in the assessment year 2012-13 to the assessment year under consideration.

40. Being aggrieved, the assessee is in appeal before us in the present appeal.

41. Before us, the assessee submits that without any post-search enquiry, no addition can be made based on the notings found in the loose sheets placing reliance on the certain judicial precedents.

42. On the other hand, Id. CIT-DR submits that the appellant had not cooperated with the Assessing Officer by filing the required details. Thus, he submits that the order of the Id. CIT(A) is very

speaking and reasonable based on the proper appreciation of material on record and, therefore, no addition can be made.

43. We heard the rival submission and perused the material on record. The issue in the present ground of appeal revolves around the interpretation of the notings found in the diary at page nos.62, 63 and 68 of bundle no.1. The scanned images of the said notings were reproduced by the Assessing Officer in the assessment order. The entire assessment order is hinged upon two things : (i) the statement recorded from the assessee u/s 132(4) of the Act and (ii) the notings found in the diary at page nos.62, 63 and 68 of bundle no.1. We dealt with in great detail on the evidentiary value of the statement recorded from the assessee u/s 132(4) in assessee's own appeal for the assessment year 2012-13, we held that the statement recorded u/s 132(4) cannot be construed as confessional statement for the reasons stated therein. Therefore, the statements recorded u/s 132(4) have no evidentiary value. Then, what remains to be dealt with the notings found in diary at page nos.62, 63 and 68 of bundle no.1.

We have carefully examined the said notings and we find that the notings does not contain any date, name of the persons, as well

as four components required to be satisfied to constitute a taxable event, cannot be discerned from such notings. The first is the taxable event which attracts the levy, the second is the person on whom the levy is imposed and who is obliged to pay the tax. The third is the assessment year in which charge of income-tax is levied. The fourth is the total income of the previous year and the fifth is the rate or rates at which tax is to be imposed. The rates are prescribed in the annual Finance Act. Therefore, “this component” has no value in determining total income on the basis of seized document. Therefore, we are of the considered opinion that these entries/notings found in diary at page nos.62, 63 and 68 of bundle no.1 can be safely terms as “dumb documents” in view of the legal position discussed by us in the assessee’s own appeal for the assessment year 2012-13 that a dumb document cannot form a basis for the addition. Accordingly, we direct the Assessing Officer to delete the addition of Rs.59,00,000/- made for the year under consideration.

44. As regards, the enhancement made by the ld. CIT(A), since we held in the assessee’s own appeal for the assessment year 2012-13 that there is no evidence of payment of any on-money

consideration. Therefore, the question of shifting the part of addition for the assessment year under consideration does not arise.

45. In the result, the appeal filed by the assessee in IT(SS)A No.92/PUN/2022 for A.Y. 2013-14 stands allowed.

IT(SS)A No.93/PUN/2022, A.Y. 2014-15 – By Assessee :

46. The assessee raised the following grounds of appeal :-

- “a) The Appellant states that the Assessing Officer and the Appellate Authority erred in confirming alleged unaccounted expenditure additions u/s 153A of the Income Tax Act, 1961 without bringing any incriminating material and without corroborating evidence and by relying on a statement which was later retracted leading to die contradiction to settled judicial precedents.*
- b) The Appellant states that the Assessing Officer erred in creating and die Appellate Authority erred in unjustly upholding the additions to Rs. 1,35,00,000/- u/s 69A of the Income Tax Act, 1961 solely based on loose papers, loose documents and loose diaries despite the fact that such transactions have not at all materialized.*
- c) The Appellant states that the Assessing Officer erred in creating and the Appellate Authority erred in unjustly upholding the additions to Rs. 70,97.500/- u/s 69C of the Income Tax Act, 1961 solely based on loose papers, loose documents and loose diaries despite the fact that such transactions have not at all materialized.*
- d) The Appellant states that die Assessing Officer and the Appellate Authority erred in upholding additions of Rs. 1,35,00.000/- u/s 69A and upholding additions of Rs. 70,97,500/- u/s 69C of the Income Tax Act, 1961 ignoring the fact that the transactions have only partially materialized and the portion which has materialized has been recorded in the balance sheet and books of accounts on which tax has already been paid. Therefore, the authorities erred in upholding additions on transactions which have not at all materialized.*
- e) The Appellant states that the Assessing Officer erred in creating and the Appellate Authority erred in partially confirming the*

unjust additions u/s 69A and u/s 69C of the Income Tax Act, 1961 solely relying upon a statement which was subsequently retracted by the Appellant without bringing forth any incriminating corroborative evidence in support of the unjust additions.

- f) *The Appellant states that the Assessing Officer erred in creating and the Appellate Authority erred in confirming the unjust additions on surmises ignoring the detailed documentary evidence and legal propositions including judicial precedents advanced before such authorities.*
- g) *The Appellant craves leave to add, alter amend, vary, or delete any of the aforesaid grounds.”*

47. The assessee had filed the return of income pursuant to notice u/s 153A disclosing additional income of Rs.1 crore. Against the said return of income, the assessment was completed by the Assessing Officer vide order dated 31.12.2019 passed u/s 153A r.w.s. 143(3) of the Act at a total income of Rs.3,84,34,210/-. While doing so, the Assessing Officer made addition of Rs.70,97,500/- by alleging that the assessee had paid on-money consideration in cash at the time of purchase of property situated at Village- Male based on the notings found at page nos.13, 70 and 71 of bundle no.1 and the statement given by the assessee u/s 132(4) of the Act. The scanned images of the said page nos.13, 70 and 71 of bundle no.1 were reproduced by the Assessing Officer vide page nos.5 and 6 of the assessment order. Similarly, the Assessing Officer also made

addition of Rs.2,35,00,000/- by alleging that the assessee had received on-money consideration at the time of sale of property based on the notings found at page nos.18 and 94 of bundle no.1. The Assessing Officer also reproduced the scanned images of the said page nos.18 and 94 at page nos.10 and 11 of the assessment order. After reducing the additional income declared in the return of income pursuant to the notice u/s 153A of Rs.1 crore, the Assessing Officer made the addition on balance amount of Rs.2,35,00,000/-.

48. On appeal before the ld. CIT(A), the ld. CIT(A) while confirming the action of the Assessing Officer had given benefit of telescoping the addition made on account of receipt of on-money consideration on sale of property and directed the Assessing Officer to delete the addition. Against this ground of appeal, the Revenue is not in appeal before us. However, the ld. CIT(A) confirmed the addition of Rs.2,35,00,000/- as according to the ld. CIT(A) the assessee failed to discharge the onus of rebuttal of presumption raised 292C of the Act. The ld. CIT(A) also made enhancement of income of Rs.4,74,500/- based on the findings given by him for the assessment year 2012-13.

49. Being aggrieved, the assessee is in appeal before us in the present appeal.

50. The ld. Counsel reiterated the same argument as advanced for the earlier assessment years.

51. On the other hand, ld. CIT-DR submits that the order of the ld. CIT(A) is reasonable one and based on the proper appreciation of material on record.

52. We heard the rival submission and perused the material on record. The issue in the present ground of appeal revolves around the interpretation of the notings found in the diary at page nos.18 and 94 of bundle no.1. The scanned images of the said notings were reproduced by the Assessing Officer in the assessment order. The entire assessment order is hinged upon two things : (i) the statement recorded from the assessee u/s 132(4) of the Act and (ii) the notings found in the diary at page nos.62, 63 and 68 of bundle no.1. We dealt with in great detail on the evidentiary value of the statement recorded from the assessee u/s 132(4) in assessee's own appeal for the assessment year 2012-13, we held that the statement recoded u/s 132(4) cannot be construed as confessional statement for the reasons stated therein. Therefore, the statements recorded u/s

132(4) have no evidentiary value. Then, what remains to be dealt with the notings found in diary at page nos.18 and 94 of bundle no.1.

We have carefully examined the said notings and we find that the notings does not contain any date, name of the assessee as well as four components required to be satisfied to constitute a taxable event. The first is the taxable event which attracts the levy, the second is the person on whom the levy is imposed and who is obliged to pay the tax. The third is the assessment year in which charge of income-tax is levied. The fourth is the total income of the previous year and the fifth is the rate or rates at which tax is to be imposed. The rates are prescribed in the annual Finance Act. Therefore, “this component” has no value in determining total income on the basis of seized document. Therefore, we are of the considered opinion that these entries/notings found in diary at page nos.18 add 94 of bundle no.1 can be safely terms as “dumb documents” in view of the legal position discussed by us in the assessee’s own appeal for the assessment year 2012-13 that a dumb document cannot form basis for the addition. Accordingly, we

direct the Assessing Officer to delete the addition of Rs.2,35,00,000/- made for the year under consideration.

53. As regards, the enhancement made by the Id. CIT(A), we held in the assessee's own appeal for the assessment year 2012-13 that there is no evidence of payment of any on-money consideration. Therefore, the question of shifting the part of addition for the assessment year under consideration does not arise.

54. In the result, the appeal filed by the assessee in ITA No.93/PUN/2022 for A.Y. 2014-15 stands allowed.

IT(SS)A No.94/PUN/2022, A.Y. 2015-16 – By Assessee :

55. The assessee raised the following grounds of appeal :-

- “a) The Appellant states that the Assessing Officer erred in treating genuine loans as non- genuine and creating unjust additions on loans u/s 68 of the Income Tax Act, 1961 of Rs. 11,56,99,693/- and the Appellate Authority erred in partially confirming such unjust additions on loans u/s 68 of Rs. 7,79,62,568/-, ignoring the detailed documentary evidence brought on record which clearly shows that loans were received from genuine parties and these amounts were returned with interest from banking channels.*
- b) The Appellant states that the Assessing Officer erred in creating additions on loans of Rs. 11,56,99,693/- and the Appellate Authority erred in partially confirming the unjust additions on loans of Rs. 7,79,62,568/- u/s 68 of the Income Tax Act, 1961 solely relying upon a statement which was subsequently retracted by the Appellant and without bringing forth any incriminating corroborative evidence in support of the unjust additions.*

- c) *The Appellant states that the Assessing Officer erred in creating additions on loans of Rs. 11,56,99,693/- and the Appellate Authority erred in partially confirming the unjust additions on loans of Rs. 7,79,62,568/- u/s 68 of the Income Tax Act, 1961 based completely on borrowed satisfaction on the basis of investigation conducted by a third-party investigating authority.*
- d) *The Appellant states that the Assessing Officer erred in creating and the Appellate Authority erred in confirming the unjust additions of Rs. 3,82.50,000/- u/s 69A of the Income Tax Act, 1961 without bringing any incriminating or corroborative evidence on record solely based on loose papers and loose diaries contrary to the settled judicial precedents on the issue.*
- e) *The Appellant states that the Assessing Officer erred in creating and the Appellate Authority erred in confirming the unjust additions of Rs. 3,82,50,000/- u/s 69A of the Income Tax Act, 1961 ignoring the fact that the transactions in the diary notings had only partially materialized, out of which die materialized portions were already declared in the balance sheets and tax was paid. Therefore, the authorities erred in upholding addition on transactions which have not even materialized.*
- f) *The Appellant craves leave to add, alter amend, vary, or delete any of the aforesaid grounds.”*

56. The assessee had filed original return of income for the assessment year 2015-16 on 29.10.2015 declaring total income of Rs.22,27,420/-. The said return of income was processed u/s 143(1) on 05.05.2016 and there was no scrutiny assessment. Subsequently, based on the search and seizure operations conducted on the assessee, a notice u/s 153A was issued on 19.01.2018. In response to the said notice, the assessee filed the return of income declared same income as declared in the original return of income. Against the said return of income, the assessment was completed by the

Assessing Officer vide order dated 31.12.2019 at a total income of Rs.15,65,89,681/-. While doing so, the Assessing Officer made addition on account of loans received as unexplained income of the assessee of Rs.11,56,99,693/-, addition on account of alleged on-money sale consideration received in cash of Rs.3,82,50,000/- and addition of Rs.4,12,568/- on account of Dabba Trade.

57. Being aggrieved, an appeal was filed before the Id. CIT(A), who vide impugned order confirmed the addition on account of unsecured loans of Rs.11,56,99,693/- received from M/s. Grammy Agencies based at Kolkata by holding it to be accommodation entries received in the form of unsecured loans from Kolkata based shell companies. The Id. CIT(A) also on analysis of page nos.60, 93 and 94 of bundle no.1 and considering the statement given by the assessee u/s 132(4) had confirmed the addition of Rs.3,82,50,000/-. Similarly, the Id. CIT(A) also confirmed the addition of Rs.4,12,568/- being the unexplained cash expenditure on account of Dabba Trading. However, the Id. CIT(A) granted the benefit of telescoping the addition of Rs.3,82,50,000/- on account of on-money consideration. Even in respect of unsecured loans, the Id. CIT(A) also granted the benefit of telescoping the addition on

account of repayment of unsecured loans restricting the addition to Rs.7,79,62,568/-.

58. Being aggrieved, the assessee is in appeal before us in the present appeal.

59. Grounds of appeal nos.(a), (b) and (c) challenges the addition of unsecured loans of Rs.11,56,99,693/-. It is an admitted position that it is an unabated assessment since no proceedings u/s 143(2) were pending as on date of search. Therefore, identical issue involving common facts had arisen in assessee's own case filed by the assessee for the assessment year 2012-13, wherein, considering the whole gamut of the case, we held that the Assessing Officer had failed to satisfy the jurisdictional conditions precedent i.e. existence of incriminating material found as result of search and seizure operations to make the additions in the assessment made pursuant to the notice u/s 153A of the Act. Since the identical facts and issues are involved in the present appeal as in the assessment year 2012-13, therefore, our decision in IT(SS)A No.91/PUN/2022 for A.Y. 2012-13 shall apply *mutatis mutandis* to the present appeal of the assessee in ITA No.94/PUN/2022 for A.Y. 2015-16. Thus, the

ground of appeal nos.(a), (b) and (c) filed by the assessee stands allowed.

60. Ground of appeal nos.(d) and (e) raised seeking relief from the addition of Rs.3,82,50,000/- made on account of receipt of alleged on-money consideration on sale of property. The Assessing Officer based on the notings found at page nos.60, 93, 94 and 101 of bundle no.1, the scanned images of the said pages were reproduced at page nos.17 and 18 of the assessment order, had concluded that the assessee had received on-money consideration of Rs.3,82,50,000/- and made addition based on the statement given by the assessee u/s 132(4) of the Act.

61. On appeal before the ld. CIT(A), the ld. CIT(A) confirmed the action of the Assessing Officer.

62. Being aggrieved, the assessee is in appeal before us in the present appeal.

63. Before us, the assessee submits that without any post-search enquiry, no addition can be made based on the notings found in the loose sheets placing reliance on the certain judicial precedents.

64. On the other hand, ld. CIT-DR submits that the appellant had not cooperated with the Assessing Officer by filing the required

details. Thus, he submits that the order of the Id. CIT(A) is very speaking and reasonable based on the proper appreciation of material on record and, therefore, no addition can be made.

65. We heard the rival submission and perused the material on record. The issue in the present ground of appeal revolves around the interpretation of the notings found in the diary at page nos.60, 93, 94 and 101 of bundle no.1. The scanned images of the said notings were reproduced by the Assessing Officer in the assessment order. The entire assessment order is hinged upon two things : (i) the statement recorded from the assessee u/s 132(4) of the Act and (ii) the notings found in the diary at page nos.60, 93, 94 and 101 of bundle no.1. We dealt with in great detail on the evidentiary value of the statement recorded from the assessee u/s 132(4) in assessee's own appeal for the assessment year 2012-13, we held that the statement recorded u/s 132(4) cannot be construed as confessional statement for the reasons stated therein. Therefore, the statements recorded u/s 132(4) have no evidentiary value. Then, what remains to be dealt with by us is interpretation of notings found in diary at page nos.60, 93, 94 and 101 of bundle no.1.

We have carefully examined the said notings and we find that the notings does not contain any date, name of the assessee as well as four components required to be satisfied to constitute a taxable event. The first is the taxable event which attracts the levy, the second is the person on whom the levy is imposed and who is obliged to pay the tax. The third is the assessment year in which charge of income-tax is levied. The fourth is the total income of the previous year and the fifth is the rate or rates at which tax is to be imposed. The rates are prescribed in the annual Finance Act. Therefore, “this component” has no value in determining total income on the basis of seized document. Therefore, we are of the considered opinion that these entries/notings found in diary at page nos.60, 93, 94 and 101 of bundle no.1 can be safely terms as “dumb documents” in view of the legal position discussed by us in the assessee’s own appeal for the assessment year 2012-13 that a dumb document cannot form basis for the addition. Accordingly, we direct the Assessing Officer to delete the addition of Rs.3,82,50,000/- made for the year under consideration.

66. In the result, the appeal filed by the assessee in IT(SS)A No.94/PUN/2022 for A.Y. 2015-16 stands allowed.

IT(SS)A No.98/PUN/2022, A.Y. 2015-16 – By Revenue :

67. The Revenue raised the following grounds of appeal :-

- “1. *On the facts and in the circumstances of the case and in law, the Ld.CIT(A) has erred in applying peak theory and determining peak credit in respect of accommodation entries of unsecured loan from M/s Grammy Agencies which is proven shell/paper proprietary concern and doing no real business,*
2. *On the facts and in the circumstances of the case and in law, the Ld.CIT(A) has erred in not appreciating the fact that peak credit theory is not applicable where deposits remain unexplained under section 68 of the Income-tax Act, 1961 and particular withdrawal/repayment is not available on the date of subsequent credit.*
3. *On the facts and in the circumstances of the case and in law, the Ld.CIT(A) has erred in not appreciating the fact that the assessee in his statement recorded u/s 132(4) has admitted that he had taken accommodation entries in the form of unsecured loan by giving equal amount of cash to controller of shell concern M/s Grammy Agencies*
4. *On the facts and in the circumstances of the case and in law, the Ld.CIT(A) has erred in allowing telescoping benefit regarding unexplained cash expenditure of Rs.4,12,568/- for Dabba Trade against the unaccounted cash receipt without appreciating the fact that the assessee failed to submit corroborative, cogent and reliable evidences to establish that said expenditure has been made out of the said unaccounted cash receipt.*
5. *On the facts and in the circumstances of the case and in law, the Ld.CIT(A) has erred in allowing telescoping benefit regarding unexplained cash receipt of Rs.3,17,37,432/- against the accommodation entries of unsecured loan without appreciating the fact that the assessee failed to submit corroborative, cogent and reliable evidences to establish that said cash receipts were utilized in obtaining such accommodation entries of unsecured loan.*
6. *The appellant craves leave to add, amend, modify or alter any of the grounds.”*

68. The Revenue is in appeal aggrieved by the decision of the Id. CIT(A) granting the benefit of telescoping the addition made on account of receipt of on-money consideration against the addition on account of unsecured loans as well as Dabba Trading.

69. In the appeal filed by the assessee for the assessment year 2015-16, we held that the Assessing Officer was not justified in making the addition on account of unsecured loans as he failed to bring on record the existence of incriminating material. Thus, the grounds of appeal filed by the Revenue become infructuous, accordingly, dismissed as such.

70. In the result, the appeal filed by the Revenue in IT(SS)A No.98/PUN/2022 for A.Y. 2015-16 stands dismissed.

IT(SS)A No.95/PUN/2022, A.Y. 2016-17 – By Assessee :

71. The assessee raised the following grounds of appeal :-

- “a) The Appellant states that the Assessing Officer and the Appellate Authority erred in confirming alleged unaccounted expenditure additions u/s 153A of the Income Tax Act, 1961 without bringing any incriminating material and without corroborating evidence and by relying on a statement which was later retracted leading to the contradiction to settled judicial precedents.*
- b) The Appellant states that the Assessing Officer erred in creating and the Appellate Authority erred in unjustly upholding the additions of Rs. 14,00,000/- u/s 69A of the Income Tax Act, 1961 solely based on loose papers, loose documents and loose diaries*

despite the fact that such transactions have not at all materialized.

- c) *The Appellant states that the Assessing Officer erred in creating and the Appellate Authority erred in unjustly upholding the additions of Rs. 14,00,000/- u/s 69A of the Income Tax Act, 1961 ignoring the fact that the transactions have only partially materialized and the portion which has materialized has been recorded in the balance sheet and books of accounts on which tax has already been paid. Therefore, the authorities erred in upholding additions on transactions which have not at all materialized.*
- d) *The Appellant states that the Assessing Officer erred in creating and the Appellate Authority erred in partially confirming the unjust additions u/s 69A of the Income Tax Act, 1961 solely relying upon a statement which was subsequently retracted by the Appellant without bringing forth any incriminating corroborative evidence in support of the unjust additions.*
- e) *The Appellant states that die Assessing Officer erred in creating and the Appellate Authority erred in confirming the unjust additions on surmises ignoring the detailed documentary evidence and legal propositions including judicial precedents advanced before such authorities.*
- f) *The Appellant craves leave to add, alter, amend, vary, or delete any of the aforesaid grounds.”*

72. The assessee had filed the original Return of Income for the assessment year 2016-17 declaring total income of Rs.46,95,030/-. Subsequently, based on the information found as result of search and seizure operations, a notice u/s 153A was issued on 19.01.2018. Pursuant to notice u/s 153A, the assessee filed return of income on 24.01.2019 disclosing income of Rs.1,46,95,030/-. Against the said return of income, the assessment was considered by the Assessing Officer vide order dated 31.12.2019 passed u/s 153A r.w.s. 143(3)

at a total income of Rs.1,83,99,174/-. While doing so, the Assessing Officer made addition on account of alleged receipt of on-money consideration incurred in connection with the Dabba Trading of Rs.3,04,144/- and cash loan of Rs.20,00,000/- based on the notings found in the note books of bundle nos.11 and 12 and statement given by the assessee u/s 132(4) of the Act. The Assessing Officer based on the statement given u/s 132(4) and the notings found in page no.20, 102 and 105 of bundle no.1 concluded that the assessee had received on-money consideration on sale of property of Rs.1,14,00,000/- after deducting the income declared in the return of income filed pursuant to the notice u/s 153A made addition of Rs.14,00,000/-. Similarly, the Assessing Officer based on the notings found in the note books, which was found and seized at bundle nos.11 and 12 concluded that the assessee is engaged in the Dabba Trading and incurred a loss in the Dabba Trading of Rs.3,04,144/- and the same was brought to tax as unexplained expenditure. Similarly, the Assessing Officer based on the statement given by one Mr. Devendra Shingavi given u/s 132(4) recorded during the course of search and seizure operations in his case that the loan of Rs.20,00,000/- was received from the assessee

on 31.12.2015, the Assessing Officer had brought to tax of Rs.20,00,000/- by holding that the assessee had paid cash loan of Rs.20,00,000/- to the said person.

73. On appeal before the Id. CIT(A), the addition on account of on-money consideration of Rs.14,00,000/- was confirmed. However, the Id. CIT(A) deleted the addition made on account of loss of Dabba Trading of Rs.3,04,144/- and the addition of Rs.20,00,000/- made on account of cash loan given to Mr. Devendra Shingavi by granting the benefit of telescoping against the addition on account of receipt of on-money consideration.

74. Being aggrieved, the assessee in appeal before us in the present appeal challenging the upholding of addition of Rs.14,00,000/- made on account of receipt of on-money consideration. The addition was made by the Assessing Officer based on the notings found in page nos.20, 102 and 109 of bundle no.1 and the statement given by the assessee u/s 132(4) of the Act. The scanned images of the said notings were reproduced by the Assessing Officer in the assessment order. The entire assessment order is hinged upon two things : (i) the statement recorded from the assessee u/s 132(4) of the Act and (ii) the notings found in the diary

at page nos.20, 102 and 105 of bundle no.1. We dealt with in great detail on the evidentiary value of the statement recorded from the assessee u/s 132(4) in assessee's own appeal for the assessment year 2012-13, we held that the statement recorded u/s 132(4) cannot be construed as confessional statement for the reasons stated therein. Therefore, the statements recorded u/s 132(4) have no evidentiary value. Then, what remains to be dealt by us is interpretation of notings found in diary at page nos.20, 102 and 105 of bundle no.1.

We have carefully examined the said notings and we find that the notings does not contain any date, name of the assessee as well as four components required to be satisfied to constitute a taxable event. The first is the taxable event which attracts the levy, the second is the person on whom the levy is imposed and who is obliged to pay the tax. The third is the assessment year in which charge of income-tax is levied. The fourth is the total income of the previous year and the fifth is the rate or rates at which tax is to be imposed. The rates are prescribed in the annual Finance Act. Therefore, "this component" has no value in determining total income on the basis of seized document. Therefore, we are of the considered opinion that these entries/notings found in diary at page

nos.20, 102 and 105 of bundle no.1 can be safely terms as “dumb documents” in view of the legal position discussed by us in the assessee’s own appeal for the assessment year 2012-13 that a dumb document cannot form basis for the addition. Accordingly, we direct the Assessing Officer to delete the addition of Rs.14,00,000/- made for the year under consideration.

75. In the result, the appeal filed by the assessee in IT(SS)A No.95/PUN/2022 for A.Y. 2016-17 stands allowed.

IT(SS)A No.96/PUN/2022, A.Y. 2017-18 – By Assessee :

76. The assessee raised the following grounds of appeal :-

- “a) *The Appellant states that the Assessing Officer and the Appellate Authority erred in confirming alleged unaccounted expenditure additions u/s 153A of the Income Tax Act, 1961 without bringing any incriminating material and without corroborating evidence and by relying on a statement which was later retracted leading to the contradiction to settled judicial precedents.*
- b) *The Appellant states that the Assessing Officer erred in creating and the Appellate Authority erred in unjustly upholding the additions of Rs. 45,34,000/- u/s 69A of the Income Tax Act, 1961 solely based on loose papers, loose documents and loose diaries despite the fact that such transactions have not at all materialized.*
- c) *The Appellant states that the Assessing Officer erred in creating and the Appellate Authority erred in unjustly upholding the additions of Rs. 45,34,000/- u/s 69A of the Income Tax Act, 1961 ignoring the fact that the transactions have only partially materialized and the portion which has materialized has been recorded in the balance sheet and books of accounts on which tax has already been paid. Therefore, the authorities erred in*

upholding additions on transactions which have not at all materialized.

- d) The Appellant states that the Assessing Officer erred in creating and the Appellate Authority erred in partially confirming the unjust additions u/s 69A of the Income Tax Act, 1961 solely relying upon a statement which was subsequently retracted by the Appellant without bringing forth any incriminating corroborative evidence in support of the unjust additions.*
- e) The Appellant states that the Assessing Officer erred in creating and the Appellate Authority erred in confirming the unjust additions on surmises ignoring the detailed documentary evidence and legal propositions including judicial precedents advanced before such authorities.*
- f) The Appellant craves leave to add, alter, amend, vary, or delete any of the aforesaid grounds.”*

77. The appellant had filed the original return of income for the assessment year 2017-18 on 02.11.2017 declaring total income of Rs.75,91,350/-. Subsequently, the search and seizure operations were conducted in the premises of the assessee on 04.11.2017. As a result of which a notice u/s 153A was issued on 19.01.2018. In response to notice u/s 153A, the assessee had filed the return of income on 24.01.2019 declaring additional income of Rs.1 crore. Against the said return of income, the assessment was completed by the Assessing Officer vide order dated 31.12.2019 passed u/s 153A r.w.s. 143(3) at a total income of Rs.3,30,75,360/-.

While doing so, the Assessing Officer based on the notings found in page nos.111, 116 and 118 of bundle no.1 and the statement given by the assessee u/s 132(4) concluded that the assessee had received on-money consideration of Rs.1,45,34,000/- on sale of property. The Assessing Officer after reducing the amount of Rs.1 crore declared in the return of income filed in response to notice u/s 153A made addition of Rs.45,34,000/-. Similarly, the Assessing Officer on analysis of the entries found in the note books found and seized in bundle nos.11 and 12 concluded that the assessee incurred loss of Rs.1,09,50,000/- in Dabba Trading. Since the assessee could not explain the source for the loss of Rs.1,09,50,000/-, the Assessing Officer brought to tax the said amount as unexplained expenditure.

78. On appeal before the ld. CIT(A), the ld. CIT(A) confirmed the addition of Rs.45,34,000/- by holding that the assessee had failed to prove the onus lying upon him in terms of section 292C. However, the ld. CIT(A) deleted the addition of Rs.1,09,50,000/- made on account of loss incurred in the Dabba Trading by granting the benefit of telescoping against the addition made on account of receipt of on-money consideration of Rs.43,34,000/-.

79. Being aggrieved, the assessee is in appeal before us challenging the decision of the ld. CIT(A) confirming the addition of Rs.45,34,000/-.

80. We heard the rival submissions and perused the material on record. The addition is made by the Assessing Officer based on the page nos.111, 116 and 118 of bundle no.1, the scanned images of the said pages were reproduced by the Assessing Officer in page no.4 and 5 of the assessment order. We dealt with in great detail on the evidentiary value of the statement recorded from the assessee u/s 132(4) in assessee's own appeal for the assessment year 2012-13, we held that the statement recoded u/s 132(4) cannot be construed as confessional statement for the reasons stated therein. Therefore, the statements recorded u/s 132(4) have no evidentiary value. Then, what remains to be dealt with by us is interpretation of the notings found in diary at page nos.111, 116 and 118 of bundle no.1.

We have carefully examined the said notings and we find that the notings does not contain any date, name of the assessee as well as four components required to be satisfied to constitute a taxable event. The first is the taxable event which attracts the levy, the second is the person on whom the levy is imposed and who is

obliged to pay the tax. The third is the assessment year in which charge of income-tax is levied. The fourth is the total income of the previous year and the fifth is the rate or rates at which tax is to be imposed. The rates are prescribed in the annual Finance Act. Therefore, “this component” has no value in determining total income on the basis of seized document. Therefore, we are of the considered opinion that these entries/notings found in diary at page nos.111, 116 and 118 of bundle no.1 can be safely terms as “dumb documents” in view of the legal position discussed by us in the assessee’s own appeal for the assessment year 2012-13 that a dumb document cannot be form for the addition. Accordingly, we direct the Assessing Officer to delete the addition of Rs.45,34,000/- made for the year under consideration.

81. In the result, the appeal filed by the assessee in IT(SS)A No.96/PUN/2022 for A.Y. 2017-18 stands allowed.

ITA No.725/PUN/2022, A.Y. 2018-19 – By Assessee :

82. The assessee raised the following grounds of appeal :-

- “a) *The Appellant states that the Assessing Officer erred in creating and the Appellate Authority erred in unjustly upholding the additions of Rs. 10,00,000/- u/s 69C of the Income Tax Act. 1961 solely based on loose papers, loose documents and loose diaries*

despite the fact that such transactions have not at all materialized.

- b) The Appellant states that the Assessing Officer erred in creating and the Appellate Authority erred in unjustly upholding the additions of Rs. 10,00,000/- u/s 69C of the Income Tax Act, 1961 ignoring the fact that the transactions have only partially materialized and the portion which has materialized has been recorded in the balance sheet and books of accounts on which tax has already been paid. Therefore, the authorities erred in upholding additions on transactions which have not at all materialized.*
- c) The Appellant states that the Assessing Officer erred in creating and the Appellate Authority erred in partially confirming the unjust additions u/s 69C of the Income Tax Act, 1961 solely relying upon a statement which was subsequently retracted by the Appellant without bringing forth any incriminating corroborative evidence in support of die unjust additions.*
- d) The Appellant states that the Assessing Officer erred in creating and the Appellate Authority erred in confirming the unjust additions on surmises ignoring the detailed documentary evidence and legal propositions including judicial precedents advanced before such authorities.*
- e) The Appellant craves leave to add, alter, amend, vary, or delete any of the aforesaid grounds.”*

83. The assessee was filed the return of income for the assessment year 2018-19 on 09.02.2019 declaring total income of Rs.23,53,680/-. Against the said return of income, the assessment was completed by the Assessing Officer vide order dated 31.12.2019 at a total income of Rs.33,53,680/-. While doing so, the Assessing Officer made addition of Rs.10,00,000/- by holding that during the course of search and seizure proceedings, the assessee had incurred loss of Rs.10,00,000/- in Dabba Trading. The source

of said loss was not explained. The Assessing Officer had come to this conclusion based on the entries found in the note books of bundle nos.11 and 12 and the statement given by the assessee during the course of search proceedings u/s 132(4) of the Act.

84. Being aggrieved by the above addition, an appeal was filed before the Id. CIT(A), who vide impugned order confirmed the action of the Assessing Officer.

85. Being aggrieved, the assessee is in appeal before us in the present appeal.

86. We have carefully gone through the assessment order and even without going into the merits of the addition made by the Assessing Officer, suffice to hold that the addition is not warranted as the assessee himself declared income of Rs.23,53,680/- in the return of income, as the same explains the source for loss incurred in Dabba Trading and no separate addition is required to be made.

87. In the result, the appeal filed by the assessee in ITA No.725/PUN/2022 for A.Y. 2018-19 stands allowed.

88. To sum up, the appeals filed by the assessee in IT(SS)A Nos.91 to 96/PUN/2022 for A.Ys. 2012-13 to 2017-18 and ITA No.725/PUN/2022 for A.Y. 2018-19 stand allowed and the cross

IT(SS)A Nos.91 to 96/PUN/2022
 IT(SS)A Nos.97 & 98/PUN/2022
 ITA No.725/PUN/2022

appeals filed by the Revenue in IT(SS)A Nos.97 & 98/PUN/2022
 for A.Ys. 2012-13 & 2015-16 stand dismissed, as indicated above.

Order pronounced on this 28th day of June, 2023.

Sd/-
 (S. S. VISWANETHRA RAVI)
 JUDICIAL MEMBER

Sd/-
 (INTURI RAMA RAO)
 ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 28th June, 2023.

Sujeet

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-11, Pune.
4. The Pr. CIT (Central), Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "A" बेंच,
पुणे / DR, ITAT, "A" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

Senior Private Secretary
 आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.