

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH: BANGALORE**

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER**

ITA No.1466/Bang/2012
Assessment Year: 2008-09

T.G. Ranganath “Om Sairam” No.523, 3 rd Main, 2 nd Phase, BSK III Stage Bangalore 560 085 PAN NO : AABPR9993R	Vs.	ACIT Circle-4(1) Bangalore
ASSESSEE		RESPONDENT

ITA No.1467/Bang/2012
Assessment Year: 2009-10

T.G. Ranganath Bangalore 560 085	Vs.	ACIT Circle-4(1) Bangalore
APPELLANT		RESPONDENT

ITA No.173/Bang/2015
Assessment Year: 2010-11

T.G. Ranganath Bangalore 560 085	Vs.	DCIT Circle-4(1) Bangalore
APPELLANT		RESPONDENT

ITA No.1457/Bang/2012
Assessment Year: 2009-10

ACIT Circle-4(1) Bangalore	Vs.	T.G. Ranganath Bangalore 560 085
APPELLANT		RESPONDENT

Appellant by	:	Shri Satyanarayana Rao, A.R. & Shri B. Chattaraj, A.R.
Respondent by	:	Shri Sathyasai Rath, D.R.

Date of Hearing	:	10.08.2023
Date of Pronouncement	:	30.10.2023

O R D E R**PER CHANDRA POOJARI, ACCOUNTANT MEMBER:**

The appeal in ITA No.1466/Bang/2012 for the assessment year 2008-09 is directed against order of CIT(A) dated 12.9.2012. The cross appeals in ITA No.1467/Bang/2012 and ITA No.1457/Bang/2012 are directed against order of CIT(A) dated 12.9.2012 for the assessment year 2009-10 and ITA No.173/Bang/2015 for the assessment year 2010-11 is directed against order of CIT(A) dated 13.11.2014. Since all these appeals are relating to one single assessee and certain issues are common in nature, these appeals are clubbed together, heard together and disposed of by this common order for the sake of convenience.

2. The ld. A.R. filed detailed written submissions and filed a letter dated 9.8.2023 requesting the bench to consider the written submissions and adjudicate the appeals on the basis of the same. In view of this, we proceed to decide these appeals on the basis of written submissions filed by the assessee and hearing the ld. D.R.

3.First, we will take up ITA No.1466/2012 for the AY 2008-09.

The assessee has raised following grounds of appeal:

- 1. "The order of the learned Commissioner of Income-tax [Appeals] in so far as it is against the appellant is opposed to law, weight of evidence, probabilities, facts and circumstances of the case.*
- 2. The order of reassessment is bad in law and void ab initio for want of requisite jurisdiction especially, the mandatory requirement to assume jurisdiction under section 147 of the act did not exist or the same having not been complied with and consequently, the reassessment requires to be cancelled.*

3. *Without prejudice, the appellant denies himself liable to be assessed on a total income determined by the authorities below as against the total income of 21,77,427/- returned by the appellant under the facts and circumstances of the case.*
4. *The authorities below were not justified in relying on the statement made by the C.-appellant at the time of survey which has no evidentiary value and were further not justified in not appreciating the retraction statement made by the appellant under/ the facts and circumstances of the case.*
5. *The learned CIT(A) was not justified in confirming the disallowance made by the learned assessing officer under Section 68 of the Act of Rs. 2,75,00,00/- under the facts and circumstances of the case.*
6. *The learned CIT(A) was not justified in confirming the addition of Rs. 20,00,000/-made by the learned assessing officer under Section 68 of the Act without properly appreciating the evidences filed by the appellant under the facts and circumstances of the case.*
7. *The learned CIT(A) was not justified in confirming the addition of Rs. 49,28,730/-made by the learned assessing officer on the basis of the Profit and Loss Account found at the time of survey which was only a provisional Profit and Loss Account . Without prejudice the authorities below ought to have telescoped the said amount with the other income added by them in the course of assessment.*
8. *The learned CIT(A) was not justified in confirming the addition of 50,00,000/- under Section 68 of the Act wherein the amounts received were out of the opening balances receivables and where such opening balances were proved genuine and that the appellant had produced the details of persons from whom such amounts were received back under the facts and circumstance of the case.*
9. *The learned CIT(A) was not justified in confirming the addition of 1,05,00,000/-which is shown as a liability towards M/s.Gopalan & Co., which was received for eviction of illegal occupants and the same was offered as income in 2010-11 after the work was completed under the facts and circumstances of the case.*

10. *Without prejudice, the learned CIT(A) was not justified in confirming the addition of 1,05,00,000/- being the amount received from M/s.Gopalan & Co.,(M/s.Gopalan Enterprises) since these amounts were not credited in the year under review but were credited in the books of the appellant in earlier years under the facts and circumstances of the case.*
11. *Without prejudice, the learned CIT(A) erred in not directing the assessing officer to give a suitable deduction in the year 2010-11 where the appellant had offered the amount of 1,05,00,000/- received from M/s.Gopalan & Co., to avoid double taxation.*
12. *The learned CIT(A) was not justified in confirming the addition of 10,00,000/- being the amount received from ICFAI where such sum has been considered in the profit and loss account for AY: 2010-11.*
13. *Without prejudice, if 10,00,000/- were to be treated as income for AY 2008-09, then the authorities below were not justified in not giving deduction of expenses incurred on that behalf.*
14. *Without prejudice, the learned CIT(A) erred in not directing the assessing officer to give a suitable deduction in the AY: 2010-11 where the appellant had offered the amount of 7,46,606/- [net of expenses] received from ICFAI to avoid double taxation.*
15. *The learned CIT(A) was not justified in confirming an addition of 4,90,000/- amount received from MD. Pavithra on behalf Appellant's wife Smt. Annapoorna towards sale of her agricultural land under the facts and circumstances of the case.*
16. *Without prejudice, if 4,90,000/- were to be treated as income of the appellant, the same would be exempt from tax as the asset transferred is an agricultural land falling within the exceptions laid down unde'r Section 2(14) r.w.s.10 (37) of the Act.*
17. *The learned CIT (A) was not justified in confirming the addition of 22,52,700/- which represents withdrawals from the capital account in a partnership firm m/s. Karkesia Estates shows distinctively In the financial statements and the same has been allowed by the same CIT(A) for A Y 2009-10 on cumulative basis under the facts and circumstances of the case.*

18. *The learned CIT(A) was not justified in confirming the addition to the extent of 10% of the travelling and vehicle maintenance charges where the appellant is in possession of the relevant bills / supporting vouchers which were produced before the authorities below under the facts and circumstances of the case.*

19. *The appellant craves leave to add, alter, delete or substitute any or all of the grounds mentioned above.”*

3.1 The assessee has also raised following additional grounds along with a petition for admission of additional grounds:

1. *“The order of reassessment is bad in law and void ab initio for want of requisite jurisdiction especially, the mandatory requirement to assume jurisdiction under section 147 of the act did not exist or the same having not been complied with and consequently, the reassessment requires to be cancelled.*
2. *The Appellant crave leave to add, alter, amend, substitute, change and delete any of the grounds of appeal.*
3. *For the above and other grounds that may be urged at the time of hearing of the appeal, the Appellant prays that the appeal may be allowed and justice rendered.”*

3.2 We have heard the both the parties on admission of additional grounds. In our opinion, all the facts are already on record and there is no necessity of investigation of any fresh facts for the purpose of adjudication of above ground. Accordingly, by placing reliance on the judgement of Hon’ble Supreme Court in the case of NTPC Vs. CIT 229 ITR 383 (SC) we inclined to admit the additional grounds for the purpose of adjudication as there was no investigation of any fresh facts otherwise on record and the action of the assessee is bonafide.

4. Facts of the case are that the assessee, who is in the real estate business, filed his return of income for the assessment years

2008-09 on 24/3/2009, declaring the total income at Rs.21,77,427/-. According to the ld. AO, following a survey u/s 133A of the Income-tax Act, 1961 [the Act' for short] conducted on 17/9/2010 in the assessee's case, the assessment for the assessment year 2008-09 was reopened as the assessee had agreed to 'voluntarily' declare additional income of Rs.5,03,80,530/- (as is evident from pages 14 and 15 of the survey report) spread over the assessment years 2008-09, 2009-10 and 2010-11 as under :

No.	Details	Date	Asst.Year	Amount (Rs.)	Total (Rs.)
1.	Unexplained cash credits in cash book	2/10/2007 9/3/2008	2008-09 -do-	2,75,00,000 20,00,000	
2.	Commission on real estate found to be not included in P & L A/c		-do-	49,28,730	3,44,28,730
	Profit on sale of Malagar Estate - difference betn. actual & accounted sale (Rs.77,00,000 - 58,47,200)	3/6/2008	2009-10	18,52,800	
4.	Investment in cold storage at Mysore where the appellant was proprietor - not reflected in the books		-do-	18,00,000	
5.	Unexplained cash credits in cash book	28/4/2008	-do-	25,00,000	61,52,800
6.	Net income from real estate - sale of timber - May/June 2009 not accounted in books		2010-11	70,00,000 27,99,000	97,99,000
	Grand total			5,03,80,530	5,03,80,530

4.1 However, in response to the AO's notice u/s 148 of the Act dated 14/10/2010, requiring the assessee to file a revised return of income for the assessment year 2008-09 (as also the assessment year 2009-10) and to file a return of income for the assessment year 2010-11 in accordance with the commitment made during the survey operations, the assessee retracted from his 'commitment' alleging that the confession about declaration of additional income was forcibly obtained from him. The ld. AO proceeded with the issue of notices u/s 143(2) and 142(1) of the Act and completed the assessment u/s 143(3) r.w.s. 147 of the Act by determining the assessee's total income at Rs.6,05,63,650/-.

4.2 The Id. CIT(A) has given partial relief in respect of addition made on account of profit on sale of Malagar Estate by deleting an amount of Rs.3,10,000/- and addition towards income from agriculture treating it as income from "other sources" at Rs.4,25,000/- is deleted and in respect of disallowance of travel & vehicle expenses, sustained only Rs.89,000/- out of disallowance of Rs.4,45,900/-. Against this assessee is in appeal before us.

5. Regarding the additional ground, the Id. A.R. submitted that the assessment order is void-ab-initio for want of requisite jurisdiction as per 147 of the Act.

5.1 The Id. A.R. submitted that the Survey was conducted u/s 133A of the Act on 17-09-2010 at residential premises at No.523, "SUMUKHA", 3rd Main, BSK 3rd stage, Bangalore -560085 of the assessee besides business premises. The power of entry into the residential and business premises prescribed under section 132 of the Act can be exercised by the income-tax authority only, in consequence of information in his possession and also with an additional condition that such authority should have reason to believe, on the basis of such information, that there is willful omission, non-compliance or concealment on the part of the assessee. Under section 132, an income-tax authority can enter and search any building, break open the lock of any door, search any person, seize any books, money, bullion, jewellery or other valuable article, make a note of inventory of any such money, bullion, etc. He may also examine on oath any person and any statement obtained during such examination may thereafter be used in evidence in any proceeding under the Act. Whereas for exercising power of survey under section 133A of the Act, no such prior information or reason is necessary and it also overrides other provisions of the Act with non obstante clause. In the survey operation, the income-tax authority can enter only the business

premises and also only during the hours at which such place is open for the conduct of business or profession. Therefore, conducting survey at the residential premises of the assessee is illegal and hence, the entire proceedings is liable to be quashed.

5.2 The Id. A.R. further submitted that the authorities below ought not to have relied on the mere statement made by the assessee during the course of survey conducted under section 133A of the Act. The statement made at the time of survey has no evidentiary value and therefore, admission made by the assessee without any corroborative evidence is devoid of merits. The authorities below have solely relied on the statement of the assessee obtained through coercion and such statement is opposed to the law and judicial decisions. The authorities below have failed to appreciate the fact that mere confession statement without any credible evidence would not automatically bind on the assessee. Section 133A(3)(iii) enables the authority to record the statement of any person which may be useful for, or relevant to, any proceeding under the Act. Section 133A, however, enables the Income-Tax authority only to record any statement of any person which may be useful, but does not authorize taking any sworn statement. On the other hand, such a power to examine a person on oath is specifically conferred on the authorized officer only under Section 132(4) of the tax Act in the course of any search or seizure. Thus, the Income-tax Act, whenever it thought fit and necessary to confer such power to examine a person on oath, the same has been expressly provided. Whereas section 133A does not empower any Income-tax Officer to examine any person on oath. Thus, in contradiction to the power under Section 133A, Section 132(4) of the Income-tax Act enables the authorized officer to examine a person on oath and any statement made by such person during

such examination can also be used in evidence under the Income-tax Act. On the other hand, whatever statement is recorded under Section 133A of the Income-tax Act it is not given any evidentiary value obviously for the reason that the officer is not authorized to administer oath and to take any sworn statement which alone has evidentiary value as contemplated under law. Therefore, the statement elicited during the survey operation has not evidentiary value.

5.3 In this regard the Id. A.R. for the assessee placed reliance on the decision of the Hon'ble Kerala High Court in case of Paul Mathews & Sons v Commissioner Of Income Tax reported in [2003] 263 ITR 101 (Ker) and the Hon'ble Supreme Court in case of the Commissioner Of Income Tax vs M/S. S. Khader Khan Son reported in (2013) 352 ITR 480 (Supreme Court), in which, it was highlighted that the statement under section 133A of the Act has no evidentiary value for the reason that the authorities are not empowered to administer oath and to take sworn statement u/s 133A of the Act.

5.4 Further, the Id. A.R. submitted that the ITAT, Cochin Bench, in ITA No.442/Coch/2018 dated 07-02-2019 in the case of CIT vs Toms Enterprises has held that in contradistinction to the power under section 133A, section 132(4) of the Income-tax Act enables the authorized officer to examine a person on oath and any statement made by such person during such examination can also be used in evidence under the Income-tax Act. On the other hand, whatever statement is recorded under section 133A of the Income Tax Act it is not given any evidentiary value obviously for the reason that the officer is not authorized to administer oath and to take any sworn statement which alone has evidentiary value as contemplated under law. Therefore, the additions made merely on the basis of statement recorded during the course of survey is not

adequate document/evidence to bring a particular transaction into the tax net.

5.5 He submitted that an admission is an extremely important piece of evidence but it cannot be said that it is conclusive and it is open to the person who made the admission to show that it is incorrect and that the assessee should be given a proper opportunity to show that the books of accounts do not correctly disclose the correct state of facts. Be that as it may, the assessee has filed a retraction statement dated 03.01.2011 and the authorities below without verifying the veracity of the retraction statement has impulsively made additions merely based on the statement which is non-est eye of law. The statement recorded during the course of survey has been retracted by the assessee and therefore, there is no other material or evidence to support the disclosure made and no additions could be made on the basis of such retracted statement.

5.6 He further submitted that the Hon'ble High Court of Karnataka in the case of Commissioner of Income Tax and Another Vs. Dr. N. Thippa Setty 322 ITR 525 held that where an order of re-assessment is based entirely on statements recorded under Section 132(4) of the Act and subsequently such statement is retracted, then the same was liable to be set aside. In the case of the assessee though the statement recorded u/s 133A doesn't have any evidentiary value, subsequently, such statement was retracted by the assessee for the valid reasons and therefore, the reassessment order made on such invalid foundation is bad in law and the aforesaid decision is squarely applicable to assessee's case.

5.7 The Id. A.R. further placed reliance on the circular issued by CBDT in F.No.286/2/2003 dated 10.03.2003 to the following effect:

*F. No. 286/2/2003-IT(Inv) Govt. of India,
Ministry of Finance & Company Affairs,
Department of Revenue, Central Board of Direct Taxes,
No.254/North Block, New Delhi 10th March 2003*

*To All Chief Commissioner of Income Tax (Cadre Contra)
& All Directors General of Income Tax Investigation.*

*Sir, Subject: Confession of Additional income during the
course of search & seizure and survey operation Regarding.*

Instances have come to the notice of the Board where assessee have claimed that they have been forced to confess the undisclosed income during the course of the search & seizure and survey operations. Such confessions, if not based upon credible evidence, are later retracted by the concerned assessee while filing returns of income. In these circumstances, on confessions during the course of search & seizure and survey operations do not serve any useful purpose. It is, therefore, advised that there should be focus and concentration on collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed before the Income Tax Departments. Similarly, while recording statement during the course of search & Seizures and survey operations no attempt should be made to obtain confession as to the undisclosed income. Any action on the contrary shall be viewed seriously. Further, in respect of pending assessment proceedings also, assessing officers should rely upon the evidences/materials gathered during the course of search/survey operations or thereafter while framing the relevant assessment orders. Your faithfully

Sd/-

(S.R.Mahapatra)

Under Secretary (Inv.II)'

5.8 He submitted that the reassessment proceedings were initiated on the basis of mere statement of the assessee without any corroborative evidence. The authorities below relied upon a draft ledger extracts of cash book and came to a conclusion that there are certain discrepancies and prematurely initiated the reassessment proceedings on the basis of draft ledger extract of cash books and confession statement of the assessee, which was at a later stage retracted by the assessee. It is pertinent to note that in the alleged original cash book which is heavily relied by the department, the cash withdrawals from Indian Overseas Bank Account No.6633 on 23-10-2007, 25-10-2007, 28-10-2007, 30-10-2007 and 31-10-2007 is not accounted. This establishes the fact that the alleged original cash book, as contended by the department, is a draft cash books and it doesn't reflect the correct transactions. The assessee submitted that the draft ledger extract of the cash book as no evidentiary value and a detailed submissions in this regard would be made at a later of part of the written submissions. Therefore, in view of the aforesaid circular, mere reliance of confession statement without any corroborative evidences would invalidate the entire proceedings and hence, the assessment proceedings initiated solely of such grounds is liable to be quashed.

5.9 He further placed reliance on the decision of the Hon'ble Income Tax Appellate Tribunal, Bangalore vide ITA No.499,500,501508 and 509 of 2021 dated 18-07-2022 in the case of DCIT vs M/s Gokula Education Foundation, wherein it was held as under:

"12.3 Ld. CIT(A) further observed that the AO has relied upon the sworn statements of Mr. D. V. Guruprasad which are ambivalent in nature which certainly necessitates further inquiry M/s. Gokula Education Foundation (Medical) Bengaluru and gathering of clinching/formidable evidence to justify the addition.

12.4. Ld. CIT(A) observed that inquiry from persons, students who allegedly paid the money was essential to corroborate loose sheets as required by the decision of Hon'ble Supreme Court in the case of CBI vs VC Shukla (1998) 3 SCC and Common Cause (A Registered Society) and Others vs Union of India in Writ Petition Civil Appeal No 505 of 2015 reported in 394 ITR 220(SC). And since such corroborative evidence is not found, one is constrained from sustaining an addition so made in view of the decisions of the Hon'ble Supreme Court cited supra. Hence the addition is found to be unsustainable.

12.5. As discussed earlier, there is no corroborated evidence other than the statement of Shri D. V. Guru Prasad to support the entries in the loose sheets. Accordingly, as discussed in earlier para, we delete the addition"

5.10 The aforesaid decision of the Hon'ble Jurisdictional ITAT is squarely applicable to the assessee's case as additions is made solely on the statement recorded, which was subsequently retracted, and the draft ledger copies. There is no iota of evidence either through a person or through an asset to confirm the alleged cash transactions. Therefore, the assessment proceedings completed on such incongruities is liable to be quashed.

6. The ld. D.R. submitted that there was a survey u/s 133A of the Act in the assessee's case on 17.9.2010. During the course of survey, certain discrepancies were found like introduction of unexplained cash credits to the extent of Rs.3.2 crores in the cash book, omission of real estate business to the extent of Rs.49.25 lakhs and on money payment for purchase of properties, etc. The assessee has voluntarily declared additional income to the extent of Rs.5,03,80,530/- spreading over 3 assessment years i.e. 2008-09 to 2010-11 and agreed to revise the return of income for the assessment years 2008-09 & 2009-10 and to file return of income for the assessment year 2010-11 within a month time and to pay the tax thereon. Based on the above the assessment for assessment year 2008-09 is reopened by issuing notice u/s 148 of

the Act on 14.10.2010 and he supported the order of the lower authorities on this issue.

Findings on Reopening:

7. We have heard the rival submissions and perused the materials available on record. In this case, there was survey u/s 133A of the Act on 17.9.2010. During the course of survey, various discrepancies with regard to introduction of cash credit to the extent of Rs.3.2 crores, omission of real estate business to the extent of Rs.49.25 lakhs and on money payments for purchase of properties, etc. was found and the assessee's statement was recorded, wherein assessee agreed to file revised return for the assessment year 2008-09 to 2010-11. Secondly, the notice u/s 148 of the Act has been issued on 14.10.2010. Now the contention of ld. A.R. is that reopening is bad in law. In our opinion, at the time of issuing of notice, there is no necessity of conclusive proof to suggest the escapement of income. On the other hand, the ld. AO shall have prima facie material to hold that that his income has escaped from the assessment. In the instant case, there is a prima facie material available in the hands of the assessee in the form of statement recorded u/s 133A of the Act coupled with certain other documents to suggest the income escaped from assessment. With a view to examine these materials, the reassessment proceedings were initiated and which are came to the knowledge of the ld. AO subsequent to the original assessment, the doctrine of "change of opinion" cannot act as an embargo for exercise of power vested u/s 147 of the Act. The section 147 of the Act authorizes and permits the AO to assess or re-assess income chargeable to tax, if he has reason to believe that income from any assessment year has escaped assessment.

7.1 The scope and effect of section 147 as substituted with effect from April 1, 1989, and also sections 148 to 152 are substantially different from the provisions as they stood prior to such substitution. Under the old provisions of section 147, separate clauses (a) and (b) laid down the circumstances under which income escaping assessment for the past assessment years could be assessed or reassessed. To confer jurisdiction under section 147(a) two conditions were required to be satisfied: firstly the Assessing Officer must have reason to believe that income, profits or gains chargeable to income tax have escaped assessment, and secondly he must also have reason to believe that such escapement has occurred by reason of either material facts necessary for his assessment of that year. Both these conditions were condition precedent to be satisfied before the Assessing Officer could have jurisdiction to issue notice under section 148 read with section 147(a). But under the substituted section 147 existence of only the first conditions suffices. In other words if the Assessing Officer for whatever reason has reason to believe that income has escaped assessment it confers jurisdiction to reopen the assessment. It is, however, to be noted that both the conditions must be fulfilled if the case falls within the ambit of the proviso to section 147. The case at hand is covered by the main provision and not the proviso.

7.2 So long as the ingredients of section 147 are fulfilled, the Assessing Officer is free to initiate proceeding under section 147 and failure to take steps under section 143(3) will not render the Assessing Officer powerless to initiate reassessment proceedings even when intimation under section 143(1) had been issued.

7.3 Same view is fortified by the judgement of Hon'ble Supreme Court in the case of ACIT Vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd. reported in 291 ITR 500 (SC).

7.4 The Id. A.R. relied on the judgement of Hon'ble Karnataka High Court in the case of Dr. Thippa Setty (322 ITR 525) (Karn.) In that case the Hon'ble High Court held that statement recorded u/s 132(4) of the Act which was retracted cannot be relied upon to reopen the assessment u/s 148 of the Act when the department has accepted the retraction. However, in the present case, the department never accepted the retraction statement filed by the assessee on 03.01.2011. Being so, at the stage of reopening of assessment by the AO, it is not necessary to have conclusive opinion of escapement of income. On the other hand, he must have prima facie of the opinion that income has escaped from the assessment in these assessment years. To that extent, in our opinion, at the time of reopening of assessment, the AO has reason to believe that income has escaped from assessment on the basis of the sworn statement recorded from the assessee shows that there was escapement of income in the assessment year under consideration. Hence, the reopening is justified. Accordingly, additional ground raised by the assessee on reopening of assessment is dismissed.

Main Grounds in ITA No.1466/Bang/2012 (AY 2008-09):

8. Ground no.2 of the assessee's appeal is with regard to reopening of assessment. In view of our adjudication of the additional ground herein above, this ground does not require any adjudication and this ground no.2 challenging the reopening of assessment is dismissed as discussed while adjudicating the additional ground as above.

9. Ground Nos.1, 3 & 4 are too general in nature. Hence, it is not considered for adjudication.

10. Ground No.5 is with regard to addition of Rs.2.75 crores u/s 68 of the Act.

10.1 The ld. A.R. submitted that the learned assessing officer has issued notice u/s 148 of the Act on the basis of the statement recorded u/s 133A of the Act. The learned assessing officer relying upon the draft ledger extract of the cash book has come to a premature conclusion that there are certain discrepancies in the books of account of the assessee and to make roving enquiries issued notice u/s 148 of the Act dated 14.10.2010.

10.2 He further submitted that the authorities below held that the assessee had not explained the source of cash deposits amounting to Rs.2.75 crore found recorded in the draft cash book. In this regard the assessee submitted that the learned CIT(A) — 11 has depicted two cash books in the appellate order. One is original cash book and the other is the alleged re-casted cash book. The authorities below held that the assessee had fabricated and re-casted the cash book to delete the cash entry amounting to Rs.2.75 crore and the learned CIT(A)-11 confirmed the additions on the ground that the assessee had not discharged the onus on him to explain the credit in his books of account.

10.3 The ld. A.R. for the assessee further submitted that the assessee had filed the return of income for the assessment year 2008-2009 declaring total income of Rs.21,77,427/-. The assessee has maintained books of account and in the income tax return filed for the assessment year 2008-09, the assessee had disclosed correct balances in the balance sheet. The learned authorities below have not made any inquiries from the person who has alleged to have made the payment of Rs.2,75,00,000/-. It is the presumption of the authorities below upon which the additions of Rs.2.75 crore is made.

10.4 He submitted that the learned CIT(A) has confirmed the disallowance made by the learned assessing officer under 68 of the Act amounting to Rs.2,75,00,000/-. The ld. A.R. submitted that the

learned CIT(A) held that during the course of survey, the cash book with credits found was removed by the assessee at the time of furnishing the information to the department and the assessee has not discharged the onus to explain the credits in the books of account amounting to Rs.2.75 crore. In this regard the assessee submitted that for the AY 2008-09, he has filed the Return of Income on 24-03-2009 i.e., earlier to the date of survey. The assessee had prepared the books of accounts prior to the date of filing the return of income and subsequently, the assessee has filed ITR — 4 considering the ledger balances/transactions. Assuming without admitting, even if the cash book is prepared by the assessee considering the alleged advances of Rs.2.75 crore, there should have been a corresponding asset reflecting in the balance sheet or the assessee ought to have shown the cash balance in the books of account. The assessee on an anticipation of an advance would have passed an entry in the books of account but at the finalizing the accounts, the assessee retaining the draft copy would have finalized the accounts. The authorities below merely based on the such draft ledgers and trial balances have come to the conclusion that it represents the income of the assessee. The assessee has neither fabricated the accounts nor he has removed any entry.

10.5 He submitted that it is pertinent to note that the learned assessing officer in page 17 of the assessment order has admitted that the assessee had introduced fictitious credits in the cash book. The term fictitious means invented by somebody rather than true. Therefore, the learned assessing officer has admitted that the cash credits in the books of account are not real or true. On such fictitious entries which doesn't depict the income of the assessee, the authorities below have held that it is an unexplained credit u/s

68 of the Act. The authorities below have not brought on record how the assessee has used the cash of Rs.2.75 crore found in the draft cash book. Rather than establishing the end use of the cash balance and without drawing logical conclusion about the cash balance, the authorities below without any cogent evidence has added a sum of Rs.2.75 crore as unexplained cash credits u/s 68 of the Act.

10.6 He further submitted that the learned CIT(A) has reproduced the cash books in the order dated 12-09-2012, wherein as per the CIT(A)-11 there was a original cash books which was found impounded in the course of survey and the alleged re-casted cash book. As per the learned CIT(A)-11, the assessee had re-casted/fabricated the cash book concealing/deleting the transactions which were reflecting in the original cash impounded by the department. To reiterate, it is pertinent to note that in the alleged original cash book which is heavily relied by the department, the cash withdrawals from Indian Overseas Bank Account No.6633 on 23-10-2007, 25-10-2007, 28-10-2007, 30-10-2007 and 31-10-2007 is not accounted. This established the fact that the alleged original cash book is a draft cash books and it doesn't reflect the correct transactions. He submitted that the authorities below without verifying the veracity of transactions and without conducting any inquiries have in a haste made an addition of Rs.2.75 crore as unexplained cash credits u/s 68 of the Act.

10.7 The Id. A.R. for the assessee placed reliance on the decision of the Pullangode Rubber Produce Co. Ltd. v. State of Kerala [1973] 191 ITR 18(SC) wherein it was held as under:

"Entries made by the assessee in the account books treating a portion of the general expenditure as expenses

towards immature plants and capitalising such portion amount to an admission that the amount in question was laid out or expended for the cultivation, upkeep or maintenance of immature plants from which no agricultural income was derived during the previous year for the purpose of Explanation (2) to section 5 of the Kerala Agricultural Income-tax Act, 1950. Such admission is an extremely important piece of evidence but it cannot be said that it is conclusive. It is open to the assessee who made the admission to show that it is incorrect and the assessee should be given a proper opportunity to show that the books of account do not disclose the correct state of facts"

10.8 He submitted that the authorities below have relied on the incorrect cash book and though the assessee has furnished the correct cash book, the authorities below have brushed aside the submission of the assessee and have chosen to adopt fictitious/erroneous figures as income of the assessee which according to the decision of the Hon'ble Supreme Court is arbitrary and untenable in law.

10.9 He further placed reliance on the decision of the Hon'ble Jurisdictional High Court of Karnataka in the case of CIT vs Karnataka Power Transmission Corporation Ltd reported in the [2021] 276 Taxman 439 (Kar), wherein drawing support from the decisions of the Hon'ble Supreme Court of India in the cases of J.K. Industries Ltd. v. Union of India [2007] 165 Taxman 323 / [2008] 297 ITR 176 and CIT v. Bokaro Steel Ltd. [1999] 102 Taxman 94 / 236 ITR 315, held as under:

"On the other hand, learned counsel for the assessee has submitted that the mercantile system and accrual system of accounting are synonymous. In this connection, reference has been made to guidance note on accrual system of accounting and our attention has been invited to clause 2.1 and clause 3 of the aforesaid note. It is also pointed out that notification dated 299-2016 issued by Central Board of Direct Taxes (CBDT) applies to the assessee's who follow the mercantile system of accounting

and as per the Annexure annexed to the aforesaid notification, accrual refers to assumption that revenues and costs are accrued that is recognized that they are earned or incurred and recorded in the Previous Year to which they relate. Our attention has also been invited to the annexure to the aforesaid notification and it has been contended that the revenue shall be recognized when there is a reasonable certainty of its ultimate collection. It is also urged that object sought to be achieved by accounting standards, which is mandatory is to see that accounting income is adopted as taxable income and not merely as basis from which taxable income is to be computed. In this connection, reliance has been placed on the decision of the Supreme Court in J.K. Industries Ltd. v. Union of India [2007] 165 Taxman 323 / [2008] 297 ITR 176. It is also urged that hypothetical income cannot be brought to tax as income and only real income can be taxed. In this connection, reference has been made on decision of the Supreme Court in CIT v. Bokaro Steel Ltd. [1999] 102 Taxman 94 / 236 ITR 315. It is also argued that decision relied upon by learned counsel for the revenue do not apply to the fact situation of the case as Accounting Standard-9 was not in existence at the time when the decisions were rendered.

6. We have considered the submissions made by learned counsel for the parties and have perused the record. Admittedly, the assessee follows the mercantile system of accounting. It is pertinent to mention here that in exercise of powers under section 145(2) of the Act, the Central Government has issued Accounting Standards, which are to be followed by the assessee following mercantile system of accounting vide Notification dated 25-1-1996. Clause 6(b) of the aforesaid Notification defines the expression 'accrual' means that revenue and costs are accrued i.e., recognized as they are earned or incurred and recorded in the financial statements of the period to which they relate. The Notification dated 29-9-2016 issued by Central Board of Direct Taxes (CBDT), which applies to the assessee's following the mercantile system of accounting also provides that the expression 'accrual' refers to the assumption that revenue and costs are accrued that is recognized as they are earned or incurred and recorded in the Previous Year, to which they relate. The Supreme Court in Bokaro Steels Ltd. (supra) has held that entry in a book which was made about a hypothetical income which did not materialize cannot be subjected to tax as the entry reflects hypothetical income and only real income can be brought to tax.

7. Now we may advert to the facts of the case in hand. The Southern Regional grid in South India comprises Karnataka, Andhra Pradesh, Tamil Nadu, Kerala and Pondicherry. The aforesaid states form a network for smooth transmission of

exchange of electricity amongst the States, which includes drawl of their share of energy from central generating station owned by central public sector undertakings and the energy flow and grid operations in the southern region. The Karnataka Electricity Board which owned transmission lines in Karnataka decided to recover wheeling charges from State Electricity Board's of Tamil Nadu, Andhra Pradesh and Kerala to the tune of Rs. 52.89 Crores. The assessee therefore, did not raise any demand on account of wheeling charges and since, there was uncertainty with regard to recovery/collection of the outstanding amount, the assessee for the Assessment Year in question decided not to recognize revenue of Rs. 52.89 Crores for wheeling charges. In the meeting held on 4-11-2000 and the same was approved by the board of the assessee. Thus, the aforesaid income never accrued to the assessee and was in fact, an hypothetical income and not a real income. Subsequently, on 16-3-2004 in 134th meeting of Southern Regional Electricity Board, the arrangement of cost sharing of wheeling charges by the constituent States itself was scrapped and on the date when the Assessing Officer passed an order i.e., on 31-12-2008, the aforesaid decision was already in existence. Thus, from the aforesaid narration of facts, it is axiomatic that the income did not accrue to the assessee but was a hypothetical income, which could not have been subjected to tax and in view of Accounting Standard-9, the assessee rightly decided not to recognize the revenue of Rs. 52.89 Crores for wheeling charges for the relevant assessment year."

10.10 The ld. A.R. submitted that the addition is made solely on the hypothetical merely on the basis of the draft cash book and without bringing on record any corroborative evidence to substantiate the additions and therefore the impugned additions made amounting to Rs.2.75 crore is liable to deleted.

11. The ld. D.R. submitted that as per assessment order, being an extract of the relevant portion of the cash book found for the period from 1/10/2007 to 31/10/2007 during the course of survey, there is a credit of Rs.2.75 crores on 2/10/2007. As against this, there are cash withdrawals on the same date and on subsequent dates i.e. 3/10/2007, 7/10/2007 and 14/10/2007. When questioned during survey proceedings, the assessee was unable to explain the said credits and agreed to taxation of the same as his

income vide statement dated 24/9/2010 extracted in the assessment order at page No.9 of the assessment order and also the unequivocal admission at pages 14 and 15 of the statement recorded u/s 131 of the Act on 24/9/2011. The said entries in the cash book on the date of survey are further supported by a trial balance also found on the date of survey (17/9/2010) for the relevant financial year and also a ledger account both of which are annexed to the assessment order. The assessee has engaged himself in a number of land deals and cash transactions are known to be a common feature in land transactions. However, once a credit is found in his books, the onus is on him to explain the source. In such a case, the credit for Rs.2.75 crores is clearly not explained and is taxable u/s 68 of the Act.

11.1 He further submitted that the only explanation offered by the assessee before the Id. CIT(A) is that he was compelled to accept and, hence, the retracted. In this regard, it is observed that the retraction is made after substantial lapse of time subsequent to the initial surrender or acceptance as unexplained and the assessee cannot be said to have been under any duress as claimed. Courts have repeatedly held that retraction after substantial lapse of time cannot be accepted as a valid retraction. Moreover, the assessee has subsequently made up his accounts to delete most of those unexplained entries in his cash book. A copy of the cash book for the relevant period as relied upon by the assessee was called for and examined by lower authorities and it was observed by CIT(A) that when these two books were compared for the relevant period, the results are as shown in the following chart :

As per Original Cash Book					As per recast Cash Book				
Date	Particulars	Yr.No.	Debit (Rs.)	Credit (Rs.)	Date	Particulars	Yr.No.	Debit (Rs.)	Credit (Rs.)
01/10/07	Op. Bal.	-	55,32,262	-	01/10/07	Op. Bal.	-	55,32,242	-
02/10/07	Vehicle Maintenance	296	-	599	02/10/07	Vehicle Maintenance	296	-	500
	Advance for land - Ramanagaram	297	-	8,00,000		N. Shivakumar	49	5,00,000	-
	-do-	298	-	8,00,000		Siddalingappa	50	5,00,000	-
	-do-	299	-	8,00,000		Advance for land - Ramanagaram	297	-	10,00,000
	N. Shivakumar	49	5,00,000	-	03/10/07	Indian Overseas Bank 6633	298	5,00,000	-
	Advance for land - Ramanagaram	300	-	8,00,000		-do-	299	5,00,000	-
	-do-	301	-	8,00,000		-do-	300	5,00,000	-
	-do-	302	-	8,00,000		Advance for land - Ramanagaram	306	-	15,00,000
	-do-	303	-	8,00,000	04/10/07	Indian Overseas Bank 6633	311	8,00,000	-
	-do-	304	-	8,00,000		Advance for land - Ramanagaram	314	-	10,00,000
	-do-	305	-	8,00,000	05/10/07	Indian Overseas Bank 6633	315	3,00,000	-
	-do-	306	-	8,00,000		Advance for land - Ramanagaram	321	-	3,00,000
	-do-	307	-	8,00,000	09/10/07	Vehicle Maintenance	332	-	1,600
	-do-	308	-	8,00,000	11/10/07	-do-	333	-	500
	-do-	309	-	8,00,000	13/10/07	-do-	341	-	300

	Advance for land – Ramanagaram	310	-	8,00,000		Brought forward		91,32,262	38,02,970
	Siddalingappa	50	5,00,000	-	14/10/07	Vehicle Maintenance	344	-	1,449
	Advance for land – Ramanagaram	51	2,75,00,000		18/10/07	Advance for land – Nanjangud	349	-	7,500
	-do-	311	-	9,00,000		-do-	350	-	7,500
	-do-	312	-	9,00,000		-do-	351	-	7,500
	-do-	313	-	9,00,000		-do-	352	-	7,500
	-do-	314	-	9,00,000	19/10/07	Indian Overseas Bank 6633	353	2,50,000	-
03/10/07	Indian Overseas Bank 6633	315	5,00,000	-		Advance for land – Ramanagaram	354	-	50,000
	-do-	316	5,00,000	-		-do-	356	-	1,50,000
	-do-	317	5,00,000	-		-do-	357	-	8,00,000
04/10/07	-do-	327	8,00,000	-		-do-	358	-	8,00,000
05/10/07	-do-	330	3,00,000	-		Advance for land – Ramanagaram	359	-	8,00,000
07/10/07	Advance for land – Ramanagaram	340	-	9,00,000		-do-	360	-	8,00,000
	-do-	341	-	9,00,000		-do-	361	-	8,00,000
09/10/07	Vehicle Maintenance	348	-	1,650		-do-	362	-	8,00,000
11/10/07	-do-	349	-	500		-do-	363	-	50,400
	As per details	350	-	20		Brought forward		93,82,262	88,84,819
13/10/07	Vehicle Maintenance	357	-	300	21/10/07	Advance for land - Ramanagaram	364	-	36,200
14/10/07	-do-	360	-	1,449	23/10/07	Indian Overseas Bank 6633	366	30,000	-
	Advance for land – Ramanagaram	363	-	8,00,000	25/10/07	-do-	367	5,00,000	-
	-do-	364	-	8,00,000		-do-	368	15,00,000	-
	-do-	365	-	8,00,000		-do-	370	-	10,521
	-do-	366	-	8,00,000	28/10/07	-do-	373	9,50,000	-
	-do-	367	-	8,00,000		-do-	374	5,50,000	-
	-do-	368	-	8,00,000	30/10/07	-do-	376	10,000	-
	-do-	369	-	8,00,000		-do-	377	5,00,000	-
	-do-	370	-	8,00,000	31/10/07	-do-	382	2,50,000	-
	-do-	371	-	8,00,000		-do-	383	8,00,000	-
18/10/07	Advance for land – Nanjangud	374	-	7,500		Salary A/c	388	-	6,000
	-do-	375	-	7,500		Advance for land – Nanjangud	389	-	10,000
	Carried over		3,66,32,262	2,38,19,419		-do-	390	-	10,000
						-do-	391	-	20,000
						-do-	392	-	20,000
						Closing Balance		1,44,72,262	1,44,72,262

11.2 He further submitted that it is clear from a perusal of the above-mentioned chart that the assessee has conveniently removed the unexplained cash entries on 2/10/2007, 3/10/2008, 7/10/2007, 14/10/2007, etc. and made up his accounts. This is further substantiated by the fact that the opening balance as per both the cash book as on 1/10/2007 is the same. As these are related to cash credits and cash payments, which have been paid to various persons in cash within the month, the assessee has tried to wash his hands off the cash credit itself. The Id. CIT(A) in his order opined that, assessee cannot be allowed to do so for the following reasons:

- i) During the course of survey, cash book with such cash credit was found and impounded.
- ii) Corresponding entries in the ledger account and trial balance were also found.
- iii) The assessee was unable to explain the source and, in such circumstances, agreed to the consequences and offered the same for tax. Only much later, he retracted from his admission.
- iv) The assessee has conveniently removed certain entries from the cash book to present his view before the Department.
- v) The assessee has not discharged the onus on him to explain the credit in his books of account of cash of Rs.2.75 crores on 2/10/2007.

11.3. The Id. D.R. submitted that the assessee cannot deny the - entries in his cash book as found during the course of survey. Therefore, section 68 of the Act is clearly attracted. For this purpose, he submitted that the Id. CIT(A) relied on the

decision in the case of Shri G.C. Gurushanthappa v. ACIT, Circle-4(1), Bangalore vide ITA.Nos.564 & 886(B) dated 22/6/2012 for the assessment year 2008-09 represented by the same counsel, the ITAT has held as under :

"15. We have considered the rival submissions. we have also perused the original cash book as well as the re-casted cash book. The copies of original cash book are available at pages 25 to 65 of the paper book and the re-casted cash book is available at page nos. 66 to 113 of the assessee's paper book. Some of the vouchers to substantiate the claim of the assessee that the date of vouchers and the payment dates were different and they are placed at pages 114 to 128 of, the assessee's paper book. As rightly held by the CIT(A), .the description of the entry, the date and the dates in the original cash book are totally different from the re-casted cash book. The assessee has not attempted to file any reconciliation, as to how the discrepancies have risen. moreover, re-casted cash book was filed by the assessee before the CIT(A) for the first time. The plea of date of payment appears to be highly improbable. The payments in question are made to the workers at the site. It cannot be believed that the workers signed the vouchers and took the payments at a later date. In any event, there is no material except the sole self-serving statement of the assessee. The plea of the assessee cannot therefore, be accepted. we are of the view that the CIT(A) has rightly disbelieved the plea of the assessee."

11.4 In the circumstances and drawing support from the above decision, the ld. D.R. requested to uphold the additions.

12. We have heard the rival submissions and perused the materials available on record. In this case, during the course of survey trial balance was impounded which was inventorized marked as TGR/62 from pages 130 to 135, from the cash book print out and also ledger book. Therein, there was an entry of Rs.2.75 crores with regard to introduction of cash on 2.10.2007 and also there was another entry of Rs.20 lakhs relating to cash introduction on 9.3.2008 totally Rs.2.95 crores. However, the books produced during the course of assessment, wherein these

entries are not found. According to the ld. AO, the assessee has fabricated the books of accounts by removing these entries relating to the cash introduction so as to evade the tax and made addition on this count. In our opinion, additions have been made u/s 68 of the Act. Section 68 of the Act stipulates that where any sum is found credited in the books of accounts of an assessee, maintained for any previous year, and the assessee offers no explanation about the nature and sources thereof or the explanation offered by him is not, in the opinion of the ld. AO satisfactory, the sum so credited may be charged to income tax as income of assessee of the previous year. In the present case, it is not the case of the ld. AO that assessee has not maintained the books of accounts for the relevant assessment year. The contention of the lower authorities is that the entries found during the course of survey as recorded in cash book and ledger book the same was not reflected in the books of accounts produced by assessee during the course of assessment. The assessment in the present case based on the books of accounts produced by assessee before the ld. AO. The books of accounts of the assessee not at all rejected by the ld. AO. Once the ld. AO accepts the books of accounts of the assessee without rejecting the same, the ld. AO shall rely on the same book for the purpose of making addition u/s 68 of the Act. In other words, section 68 of the Act applies in respect of sum found credited in the books of accounts of the assessee maintained for any previous year relevant to the assessment year. Thus, the assessee is required to prove the entries of amounts credited in the books of accounts of the assessee in the relevant assessment year. The rough cash book as found during the course of survey cannot be considered as a regular books of accounts of the assessee maintained in the ordinary course of business of the assessee. The rough cash book or ledger book may contain various entries before entering the same to the

main cash book for the purpose of regular business of the assessee. In the present case, it is also the case of assessee that survey was conducted on 17.9.2010 and the statement was recorded on 3.9.2010 the same has been retracted by assessee vide retraction letter dated 3.1.2011. Being so, it would lose its validity.

12.1 Being so, the action of the ld. AO in relying on rough cash book for making addition u/s 68 of the Act was clearly sans documentary proof, which cannot be upheld and such adhoc addition is liable to be deleted. Admittedly, in this case, the AO placed reliance on the statement recorded from assessee's partner u/s 131 of the Act. According to ld. AR, there were no evidence brought on record by the AO with regard to this credit other than the statement recorded during the course of survey proceedings.

12.2 Further, there was a CBDT circular file no.286/98/2013-IT (Inv.II) dated 18.12.2014 which states as under:

“Instances/complaints of undue influence/coercion have come to notice of the CBDT that some assesseees were coerced to admit undisclosed income during Searches/Surveys conducted by the Department. It is also seen that many such admissions are retracted in the subsequent proceedings since the same are not backed by credible evidence. Such actions defeat the very purpose of Search/Survey operations as they fail to bring the undisclosed income to tax in a sustainable manner leave alone levy of penalty or launching of prosecution. Further, such actions show the Department as a whole and officers concerned in poor light.

2. I am further directed to invite your attention to the Instructions/Guidelines issued by CBDT from time to time, as referred above, through which the Board has emphasized upon the need to focus on gathering evidences during Search/Survey and to strictly avoid obtaining admission of undisclosed income under coercion/undue influence.

3. In view of the above, while reiterating the aforesaid guidelines of the Board, I am directed to convey that any instance of undue influence/coercion in the recording of the statement during Search/Survey/Other proceeding under the IT Act, 1961 and/or recording a disclosure of undisclosed income under undue pressure/coercion shall be viewed by the Board adversely.”

From the above Circular, it is amply clear that the CBDT has emphasized on its officers to focus on gathering evidences during search/survey operations and strictly directed to avoid obtaining admission of undisclosed income under coercion/under influence. Keeping in view the guidelines issued by the CBDT from time to time regarding statements obtained during search and survey operations, it is undisputedly clear that the lower authorities have not collected any other evidence to prove that the impugned income was earned by the assessee.

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12.3 At this stage, it is pertinent to refer to the judgment of the Supreme Court in the case of Vinod Solanki (2009) (233) ELT 157 observed as under :

"22. It is a trite law that evidences brought on record by way of confession which stood retracted must be substantially corroborated by other independent and cogent evidences, which would lend adequate assurance to the Court that it may seek to rely thereupon. We are not oblivious of some decisions of this Court wherein reliance has been placed for supporting such contention but we must also notice that in some of the cases retracted confession has been used as a piece of corroborative evidence and not as the evidence on the basis whereof alone a judgment of conviction and sentence has been recorded. [see Pon Adithan vs. Dy. Director, Narcotics Control Bureau (1999) 6 SCC 1]

12.4 In case of Romesh Chandra Mehta vs. State of West Bengal (1969) 2 SCR 461 although Hon'ble Court held that any statement made under ss. 107 and 108 of the Customs Act by a person against whom an enquiry is made by a customs officer is not a statement made by a person accused of an offence, but as indicated hereinbefore, he being an officer concerned or the person in authority, s. 24 of the Indian Evidence Act would be attracted.

12.5 It has been similarly held by the Hon'ble Supreme Court in the case of K.T.M.S. Mohd. & Anr. vs. Union of India (1992) (197 ITR 196) as under:

*"We think it is not necessary to recapitulate and recite all the decisions on this legal aspect. But suffice it to say that the core of all the decisions of this Court is to the effect that the voluntary nature of any statement made either before the customs authorities or the officers of Enforcement Directorate under the relevant provisions of the respective Acts is a sine qua non to act on it for any purpose and, if the statement appears to have been obtained by any inducement, threat, coercion or by any improper means, that statement must be rejected brevi manu. At the same time, it is to be noted that, merely because a statement is retracted, it cannot be recorded as involuntary or unlawfully obtained. It is only for the maker of the statement who alleges inducement, threat, promise, etc. to establish that such improper means have been adopted. However, even if the maker of the statement fails to establish his allegations of inducement, threat, etc., against the officer who recorded the statement, the authority, while acting on the inculpatory statement of the maker, is not completely relieved of his obligation at least subjectively to apply its mind to the subsequent retraction to hold that the inculpatory statement was not extorted. It thus boils down to this that the authority or any Court intending to act upon the inculpatory statement as a voluntary one should apply its mind to the retraction and reject the same in writing. It is only on this principle of law that this Court, in several decisions, has ruled that, even in passing a detention order on the basis of **an inculpatory** statement of a **detenu** who has violated the provisions of the Foreign Exchange Regulation Act or the Customs Act, etc., the detaining authority should consider the subsequent retraction and record its opinion before accepting the inculpatory statement lest the order be vitiated. Reference may be made to a decision of the Full Bench of the Madras High Court in *Roshan Beevi vs. Jt. Secretary to the Government of Tamil Nadu, Public Deptt. etc.* (1983) **Mad LW (Crl.) 289 : (1984) 15 ELT 289 : AIR 1984 NOC 103**, to which one of us (S. Ratnavel Pandian, J.) was a party."*

12.6. The ratio that emerges from the aforesaid decisions is that once a statement is retracted, the contents stated in the retracted statement must be substantially corroborated by other independent and cogent evidence. It has been consistently held by various courts that a sworn statement cannot be relied upon for making any addition and must be corroborated by independent evidence for the purposes of making assessments.

12.7 Further, similar issue came for consideration before the Hon'ble Supreme Court in the case of *CIT Vs. S. Khadar Khan & Sons* (352 ITR 480) (SC). In that case, a survey was

conducted in the premises of the assessee-firm. One of the partners in his statement offered an additional income of Rs. 20 lakhs for the assessment year 2001-02 and Rs. 30 lakhs for the assessment year 2002-03 but the statement was retracted by the assessee stating that the partner from whom the statement was recorded during the survey operation under section 133A of the Act was new to the management and had agreed to an adhoc addition. The Assessing Officer based on the admissions made by the assessee recomputed the assessment. The order was set aside by the Commissioner (Appeals) and this order was upheld by the Tribunal. On appeal to the High Court, the High Court held that in view of the scope and ambit of the materials collected during the course of survey, the action under section 133A would not have any evidentiary value and that it could not be said solely on the basis of the statement given by one of the partners of the assessee-firm that the disclosed income was assessable as lawful income of the assessee. On appeal to the Supreme Court; the Hon'ble Supreme Court dismissed the appeal in view of the concurrent findings of fact.

12.8 In view of the above discussion, the addition made by Id. AO u/s 68 of the Act at Rs.2,75,00,000/- is deleted.

13. Ground No.6 is with regard to confirming the addition of Rs.20 lakhs made u/s 68 of the Act.

13.1 The Id. A.R. submitted that the learned CIT(A) -11, has upheld the additions of Rs.20,00,000/- on the ground that the assessee has not explained the nature of transaction and further the assessee had not furnished an agreement with Shri Shivaraj from whom the assessee had received cash of Rs.20,00,000/ on 09-03-2008. The authorities below have relied on the draft cash book and upon which the information was called for from the assessee to prove the genuineness of the cash receipt. The assessee

submitted that very basis of calling for information was based on the draft cash book which doesn't have any evidentiary value. Further, such draft cash book was retracted by the assessee vide retraction statement dated 03-01-2011. Therefore, calling for information/documents based on such invalid cash book is arbitrary and uncalled for. Without prejudice, the ld. A.R. submitted that during the course of proceedings u/s 147 of the Act, the assessee had furnished the confirmation letter dated 22-08-2011 of Shri Shivaraj confirming the transaction. In fact, the assessee himself had written a letter to Shri Shivaraj requesting him to send confirmation letter directly to the learned assessing officer.

13.2 The ld. A.R. further submitted that the assessee within the limited scope has made earnest effort to make Shri Shivaraj respond to the summons of the learned assessing officer. The assessee has discharged his duty by providing information about the person from whom he has received the advance. The Hon'ble Supreme Court in Anees Ahmad & Sons v. CIT (A)(297 IT 441)(SC), the Hon'ble Court has held that merely for non-compliance with section 131(1) by other parties, no 'negative inference could be drawn and the assessee could not be penalized. The assessee also placed reliance on the decision of the Hon'ble Supreme Court in the case of Orissa Corporation Pvt. Ltd., 159 ITR 78 (SC). Further, without prejudice, the assessee has contended that the amount received as an advance was subsequently repaid on 24-02-2010. The authorities below without verifying the details of the transaction has impulsively made additions which otherwise is a genuine transaction. The ld. A.R. drawn support from the decision of ITAT Bangalore in the case of Sr. M Amarnath VS ACIT in ITA No.710/bang/2020 dated 11-10-2021 wherein it was held as under:

"Moreover, in this case, the assessee has contended that the amount of loan taken from both Sri. Manu K.P. and Smt. Roopa Manu has been paid in the subsequent year. I am of the view that the matter needs to be examined afresh by the A.O. The A.O. is directed to delete the addition u/s 68 of the I. T. Act in respect of loans received from Sri Manu KP. and Smt. Roopa Manu, if the assessee is able to prove that loan amount has been repaid (claim of the assessee it has been repaid in the year 2014)"

Therefore, the ld. A.R. submitted that the impugned additions made amounting to Rs.20,00,000/- without verifying the confirmation letter and subsequent repayment details is liable to be deleted.

14. The ld. D.R. relied on the orders of lower authorities.

15. We have heard the rival submissions and perused the materials available on record. It is observed that during the course of survey, a credit of Rs.20,00,000/- on 9/3/2005 in assessee's cash book could not be explained by the him, which was agreed to be offered for tax as unexplained income u/s 68 of the Act. On a later date, the assessee retracted from the said statement claiming that this amount related to one Shri Shivaraj. In evidence, a copy of the letter dated 25/6/2011 of Shri Shivaraj was filed before the AO by the assessee with his letter dated 22/8/2011. When the AO issued summons, there was no response. When this was confronted to the assessee, he was also unable to produce Shri Shivaraj for verification. He further observed that the said Shri Shivaraj is not assessed to tax as stated by the assessee and no PAN is mentioned in the said covering letter. No details with regard to nature of transaction and no agreement to sell/purchase, etc. are available to support the claim of the assessee. In such circumstances, the ld. CIT(A) observed that the claim of the assessee that this receipt is from Shri Shivaraj and therefore not taxable, cannot be accepted.

15.1 It was submitted that the fact is that the assessee had also filed his return of income when survey was conducted. If the amounts were explained or explainable, there was no need to offer it for tax at the time of survey. The name of Shri Shivaraj did not feature in the ledger accounts listed in the trial balance for the relevant year during the course of survey. This shows that the credit shown to be from Shri Shivaraj is not explained and, therefore, taxable as an unexplained receipt. Hence, the Id. CIT(A) upheld the action of the AO in this regard. We do not find infirmity in the orders of CIT(A) and the same is confirmed.

Accordingly, ground No.6 in this appeal is dismissed.

16. Ground No.7 is with regard to addition of Rs.49,28,730/- on the basis of profit & loss account found at the time of survey though it was the provisional profit & loss account.

16.1 The Id. A.R. submitted that the learned CIT (A) -11, has confirmed the addition of Rs.49,28,730/- being the alleged income of real estate found recorded in the provisional profit and loss account statement. The assessee during the course of assessment has emphasized the fact that the profit and loss account impounded during the course of survey is a provisional statement subject to corrections. The assessee had anticipated the income upon which he had accounted income in the provisional profit and loss account. However, during the year ending 31-03-2008, the anticipated income could not be realized and hence, the assessee made correction in the books of account. The assessee had furnished details of the entity (M/s Adarsh Vidya Sangha) from whom he anticipated the income. The learned assessing officer without calling for information/details from M/s Adarsh Vidya

Sangha on a presumption and surmise made additions on the basis of the provisional Profit and Loss account.

16.2 He submitted that the learned assessing officer could have issued summons to M/s Adarsh Vidya Sangha to ascertain the factual matrix but instead the learned assessing officer has chosen to make additions merely based on the provisional profit and loss account. It is for that specific purpose that Section 131 of the Act has been introduced so that in case of any suspicion, the authorities concerned may exercise the powers of a civil court under Section 131 and call upon any person concerned to prove the genuineness of transaction. That, unless a notice in due form under Section 131 of the Act is issued by the learned assessing officer concerned to test the veracity or the genuineness of the transaction, the assessee succeeds in his submissions. The assessee placed reliance on the decision of the Hon'ble High Court of Patna in the case of ACIT Vs. Hanuman Agarwal 151 ITR 150 (Patna) for the above proposition. Even if the assessee is following mercantile system of accounting, as per AS — 9, the income shall be recognized in the books of account on certainty rather on an anticipation. Accordingly, the assessee has filed correct profit and loss account by ignoring the draft/provisional profit and loss account statement prepared on anticipation of profits. The assessee begs to places reliance on the decision of the Hon'ble Supreme Court in the case CIT vs. Hero Cycles Ltd. (2015) 379 ITR 347(SC) wherein it was held as under:

"the Revenue cannot justifiably claim to put itself in the arm-chair of the businessman or in the position of the Board of Directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case. It further held that no businessman can be compelled to maximize his profit and that the income tax authorities must put themselves in the shoes of the assessee and see how a prudent businessman would act. The

authorities must not look at the matter from their own view point but that of a prudent businessman."

16.3 Applying the aforesaid ratio, the Id. A.R. submitted that the additions made on an anticipated profit and further, without considering the retraction statement is arbitrary and liable to be deleted.

16.4 He further submitted that the reopening of assessment u/s 147 of the Act was made based on the voluntary declaration made which was subsequently, retracted by the assessee vide retraction statement dated 03-01-2011. The voluntary declaration made by the assessee for the AY 2008-2009 is as follows:

Details	Assessment Year	Amount(Rs)
Unexplained Cash credits in draft cash books	2008-2009	2,75,00,000
Unexplained Cash credits in draft cash books	2008-2009	20,00,000
Commission on real estate found recorded in provisional profit and loss account.	2008-2009	49,28,730
Total		3,44,28,730

16.5 He submitted that the assessee had retracted the above additions for the reasons stated as aforesaid. However, the authorities below heavily relied on voluntary declaration ignoring the retracted statement of the assessee. The provisions of Sections 147 and 148 provide for the re- opening of assessments and re-assessment of income in cases where the Assessing Officer has

reason to believe that income has escaped assessment. It is trite to state that the reasons recorded by the Assessing Officer should be based on tangible materials that have come to his notice/are in his possession.

16.6 He submitted that the CIT(A) — 11 vide its order dated 12-09-2012, in the opening para, has categorically averred as under:

..... .the assessment for the assessment year 2008-2009 was reopened a the assessee had agreed to "voluntarily" declare additional income of Rs.5,03,80,530 (as is evident from pages 14 and 15 of the survey report) spread over the assessment years 2008-09, 2009-20 and 2010-11"

16.7 He submitted that the assessment was reopened solely on the basis of voluntary declaration made by the assessee in the statement recorded u/s 133A of the Act (subsequently retracted). If the statement recorded has no evidentiary value, then the voluntary declaration made in the course of survey has no legs to stand. The assessee via his retraction statement has categorically stated that the declaration was obtained with duress and such statement was not backed by any evidences. The reassessment proceedings initiated by issue of notice u/s 148 of the Act solely emanates from the statement recorded u/s 133A of the Act and it is fact that there is not a shred of material apart from such statement to initiate the reassessment proceedings.

16.8 The ld. A.R. for the assessee placed reliance on the decision of the Hon'ble Madras High Court in the case of A. Thangavel Nadar Stores Vs ITO in W.P No.21919 to 21921 of 2018 vide order dated 25-02-2019 wherein it was held that reassessment notice issued u/s 148 of the Act solely on the strength of statement recorded during the course of Survey u/s 133A of the Act was arbitrary and consequently, the entire reassessment proceedings was quashed. The Income Tax Appellate Tribunal,

Cochin, in ITA No.442/Coch/2018 dated 07-02-2019 in the case of CIT vs Toms Enterprises has quashed the proceedings on similar grounds. Therefore, proceedings initiated by issue of notice u/s 148 of the Act solely on the basis of statement recorded u/s 133A of the Act and subsequently, retracted by the assessee, is arbitrary and is liable to be quashed.

17. The ld. D.R. submitted that the very fact that a profit and loss account for the year was found at the time of survey, showing a profit of Rs.49,28,730/- from real estate over and above which had been declared in assessee's return of income and the assessee had agreed for taxation, the same shows that this is his income, which needs to be taxed. It is not the case of the assessee either that the credit of Rs.2.75 crores, not offered for tax in the return of income and which has been upheld u/s 68 of the Act would cover this income as well. The assessee's profit and loss account for the year in question as Annexure-E in the assessment order clearly mentions this amount as income, which the assessee had not disclosed in the return of income already filed. Hence, this addition to be sustained.

18. We have heard the rival submissions and perused the materials available on record. **This addition is deleted on similar lines as discussed in ground No.5 in paras 12 to 12.7 of this order.**

19. Next ground no.8 is with regard to addition of Rs.50 lakhs made u/s 68 of the Act.

19.1 The ld. A.R. submitted that the authorities below have held that the assessee had failed to prove the source of transaction and added a sum of Rs.50,00,000/- as unexplained cash credits u/s 68 of the Act. The authorities below have held that the parties from whom the assessee has received the amount have not responded to the notice issued u/s 133(6) of the Act. The assessee had

contended that the amount of Rs.50,00,000/- was outstanding even as on 31-03-2007 and these amounts were not received subsequently in the FY 2007-2008. The learned authorities below have not called for the balance sheet for the year ended 31-03-2007 to verify the veracity of the transaction. The assessee had furnished the addresses of the parties and the learned assessing officer ought to have made independent inquiries. Mere non-response from the parties would not render the transaction non-genuine. The assessee placed reliance on the decision of the Hon'ble High Court of Bombay in the case of CIT Vs. M/s. Nikunj Eximp Enterprises P. Ltd. 2016 taxman.com 171 (Bombay High Court), wherein it was held that mere non-service of notice is not a ground to raise the addition. One of the parties, Shri C.P Yogeshwar, who is a prominent politician has repaid a sum of Rs.12,00,000/-. The address is easily traceable in public domain. The act of the learned assessing officer proves beyond doubt that he has not made any earnest effort to send notices to elicit the required details. Therefore, the additions made solely on the ground of non-service of notice is bad in law and is liable to be deleted.

19.2 The ld. D.R. submitted that in respect of the credits in cash in the assessee's books of account during the year in question, the onus lies on the assessee to prove the genuineness of the same. Even during the appeal, the assessee has failed to produce any evidence with regard to (i) the nature of transaction and evidence thereof and (ii) confirmation from the parties. Merely because some important persons' names also figure does not mean that the assessee does not need to prove the source and the transaction. Hence, the ld. CIT(A) observed that the assessee has failed in this regard and, therefore, he came to the conclusion that the amount has rightly been brought to tax by the AO.

20. We have heard the rival submissions and perused the materials available on record. In this case, an amount of R.70 lakhs was shown as outstanding in respect of 12 parties. Out of this an amount of Rs.20 lakhs is from Shri Shiv Raj. The AO considered other than this credit of Rs.20 lakhs amounting (Rs.50,00,000 – Rs.20,00,000/-) i.e. Rs.50,00,000 as unexplained credit u/s 68 of the Act on the reason that letter sent to these parties have been returned unserved by an endorsement by postal authorities with “insufficient address”. These facts were brought to the notice of the assessee vide AO’s letter dated 7.10.2011 asking him to show cause as to why the above cash credits should not be treated as unexplained and brought to tax as unexplained credit u/s 68 of the Act for which assessee has written a letter dated 10.11.2011 stating that assessee has also sent letter to these parties requesting them to furnish the confirmation directly to ld. AO by RPAD. Finally, there was no confirmation letter from these parties filed by the assessee. Further, the contention of ld. A.R. is that ld. AO ought to have made independent enquiries and mere non-response from the parties would not render the transaction not genuine. It is noted that assessee has furnished the address of the parties in whose name the credits were outstanding. The ld. AO ought to have verified with these parties by exercising power u/s 133(6) of the Act which he failed to do so. Hence, this issue is remitted to the file of assessing officer for fresh consideration. The assessee shall co-operate with the authorities. If the parties are non-existent, the ld. A.O is at liberty to treat these credits as unexplained credits under Sec. 68 of the Act. The assessee cannot say “Catch me if you Can”. This ground of appeal is partly allowed for statistical purposes.

21. Gound nos. 9 to 11 are with regard to addition of Rs.1,05,00,000/- which was shown as liability towards Gopalan & Company.

21.1 The ld. A.R. submitted that the learned CIT(A) -11, has upheld the addition of Rs.1,05,00,000/-on the ground of unexplained liability. The learned assessing officer held that the liability shown in the books of account is not genuine. The assessee has received the amount of Rs.1,05,00,000/- from M/s Gopalan Enterprises on account of eviction of illegal occupants of the property. The assessee had received the sum of Rs.1,05,00,000/- as under:

Sl.no	Cheque No.	Date	Amount (Rs)	Deposited in
1	381304	24-12-2005	15,00,000	Karnataka Bank
2	382162	27-01-2006	90,00,000	IOB

21.2 He submitted that the learned CIT(A) -11, in para 9.3 of the order has stated the above facts and admitted that the amounts were received in FY 2005-2006 relevant to the assessment year 2006-2007. This amount was shown as liability in the books of account assessee and the same was carried forward to the AY 2008-2009. The authorities below held that the assessee not proved the liability and hence, added the opening balance of the liability as income of the assessee. He submitted that the learned CIT(A) — 11, in page 9.3 of the order has averred as under:

“..... ..the very fact that the entire payment for the purpose as claimed has already been received much earlier shows prima facie that the transaction has already been completed during the

relevant year itself. Logically, no client would pay the full amount till the said job is actually done or services actually rendered"

21.3 The Id. A.R. submitted that the CIT (A)- 11 has admitted that the amount is received much earlier and the client has paid the full amount as the job was completed in the earlier year. Therefore, if the job is completed in the year other the assessment year under consideration, then the receipt ought to have taxed the received in the FY 2005-2006 in which the amounts were received. The authorities below have added the opening balance of the liability which is opposed to law and judicial decisions. The credit balance appearing in the accounts of the assessee which does not pertain to the year under consideration, cannot be a subject matter of addition under section 68. The assessee placed reliance on the decision of the Hon'ble High Court of Delhi in the case of CIT Vs Usha Stud Agricultural Farms Ltd (2008) 301 ITR 0384 Delhi (HC), wherein it was held as under:

"Here, the CIT(A) has deleted the addition of Rs. 15 lakhs mainly on the ground that this credit balance of Rs. 15 lakhs is being reflected in the accounts of the assessee over the past four to five years or so and hence this was not a fresh credit entry of the previous year under consideration and these credit entries were already made and accounted for in the assessment years 1995-96 and 1997-98 which were introduced in the form of advance against breeding stallions owned by the assessee and thus these credit entries did not relate to the year under consideration for being considered under section 68 of the Act.

8. Since it is a finding of fact recorded by the CIT(A) that this credit balance appearing in the accounts of the assessee, does not pertain to the year under consideration, under these circumstances, the Assessing Officer was not justified in making the impugned addition under section 68 of the Act and as such no fault can be found with the order of the Tribunal which has endorsed the decision of the CIT(A)."

21.4 Therefore, he submitted that the learned authorities below are not justified in making additions of the opening balances since the amounts were acknowledged in the FY 2005-2006 relevant to the AY 2006-2007. The assessee also placed reliance on the decision of the ITAT Bangalore in the case of K N R Roofing Pvt. Ltd. Vs ACIT in ITA No.3125/Bang/2018 dated 20-09-2019 wherein it was held that it is only the credit entry appearing in the books of account of an assessee for the relevant previous year, that can be treated as unexplained cash credit in the absence of proper explanation by the assessee and not the opening balances. Therefore, the opening balance of Rs.1,05,00,000/- cannot be added as unexplained cash credits u/s. 68 of the Act.

21.5 He further submitted that assessee had offered the receipt of Rs.1,05,00,000/- as income for the AY 2010-2011 in which the assessee claimed expenditure against the receipt/income. The authorities below brushed aside the submission of the assessee and impulsively made additions for the AY 2008-2009. The assessee submits that if the receipt of Rs.1,05,00,000/- is considered as income for the AY 2008-2009, then appropriate relief has to be given for the AY 2010-2011, wherein the assessee has already offered the receipt of Rs.1,05,00,000/- received from M/s Gopalan Enterprises as income with a claim of expenditure of Rs.49,37,769/- against the income.

21.6 Further, without prejudice to the above submission, the additions under section 68 of the Act can be made on any sum of money received during the financial year and as such the assessee received the entire sum of Rs. 1,05,00,000/- during the FY 2005-2006 and hence, the additions in the FY 2008-2009 is unwarranted and the same is liable to be deleted.

22. The ld. D.R. submitted that the assessee has claimed that this was received in the year ended 31/3/2006 on two occasions i.e. Rs.15,00,000/- (on 24/12/2005) and Rs.90,00,000/-- (on 27/1/2006) from M/s. Gopalan Enterprises and not M/s Gopalan & Co., which was wrongly shown earlier. It was claimed that it was for eviction of tenants from one of the client's properties. The very fact that the entire payment for the purpose as claimed has already been received much earlier shows *prima facie* that the transaction has been completed during the relevant year itself. Logically, no client would pay the full amount till the said job is actually done or services actually rendered. Even otherwise, the client would not wait for such a long time (4 to 5 years) for services to be rendered after having made full payment. Moreover, despite specific query by the ld. CIT(A), the assessee failed to produce any evidence of actually having incurred any expenditure in the year relevant to the assessment year 2010-11 in which he has claimed the expenses on this receipt and, according to him, has offered it for tax after claiming expenses. Hence, the ld. CIT(A) observed that it is clear, therefore, that the liability shown in the name of M/s Gopalan Enterprises/ M/s Gopalan & Co. did not exist in the financial year relevant to the assessment year 2008-09 as whatever transaction took place had already been completed much prior i.e. in financial year relevant to the assessment year 2006-07 itself. The addition on account of unexplained liability on this count cannot be said to be wrong. This also shows that, because of the survey and as the assessee was caught, he has come up with this explanation and offered a part of the said receipt as income four to five years later in order to escape from interest and penal proceedings. This cannot be accepted. The same has rightly been taxed in the year in question. Hence, the ld. CIT(A) upheld the addition made by the AO.

23. We have heard the rival submissions and perused the materials available on record. There was outstanding balance in the name of Gopalan & Company at Rs.1.05 Crores. The ld. AO verified u/s 133(6) of the Act, wherein that party said that he do not have no firm by name Gopalan & Company. Later, the assessee stated that liability shown in the name of Gopalan & Company instead of Gopalan Enterprises, which is a typographical error made by him. However, the ld. AO not agreeing with the contention of the assessee, he made addition of Rs.1.05 crores. Later, before the ld. CIT(A), it was stated that the assessee has received said amount from Gopalan Enterprises on account of eviction of illegal occupants of the property and he gave the details of the same. It was also stated that these amounts have been received in the financial year 2005-06 relevant to assessment year 2006-07 and not relating to the assessment year 2008-09. In our opinion, if it is carried forward balance from earlier assessment year 2006-07 to the present assessment year 2008-09, it cannot be questioned in the assessment year under consideration as this being an opening balance. However, the ld. CIT(A) given a finding that no client would pay the full amount till the work is actually done or service is actually rendered. This cannot be reason to sustain the addition. The ld. CIT(A) ought to have verified whether this transaction is relating to assessment year under consideration or earlier assessment year when the assessee given full details of transaction as this being a financial transaction. In view of this we remit this issue to the file of A.O for fresh consideration to carry out necessary examination on this issue. Accordingly, this ground of appeal is partly allowed for statistical purposes.

24. Next ground nos.12 to 14 are with regard to addition of Rs.10 lakhs being amount received from ICFAI.

24.1 The ld. A.R. submitted that the CIT (A)-11, has confirmed the additions of Rs.10,00,000/- being the amount received from ICFAI on the ground that the liability was non-existent as on 31-03-2008. The assessee had received amounts from two units of ICFAI, one at Hyderabad and another unit at Kanakapura Road, Bangalore. The assessee had received an amount of Rs.18,00,000/- from Bangalore unit vide cheque No.460200 amounting to Rs.10,00,000 dated 31-01-2008, cheque No. 473802 amounting to Rs.3,00,000 dated 02-08-2008 and cheque No.473936 amounting to Rs.5,00,000/- dated 13-08-2008. The assessee had also received a sum of Rs.1.50 crore from Hyderabad ICFAI, which the assessee adjusted in the FY 2009-2010. The assessee after settling the accounts, the assessee had a net balance of Rs.18,00,000/-. The authorities below have failed to examine the said facts. The learned CIT(A) -11, in para 10.2 of the order has reproduced the details furnished by the assessee in which the bank commission was paid on revoking bank guarantee. Out of the said balance of Rs.18,00,000/-, the assessee had paid a sum of Rs.4,46,715/- on 31-08-2009 a sum of Rs.6,06,679/- on 04-02-2010 towards commission on revocation of bank guarantee. It is a fact on record and the assessee cannot be fastened with a tax liability until the settlement of accounts which eventually happened in the FY 2009-2010 (payment of commission on revocation of bank guarantee). The said fact is captured in para 10.2 of appellate order.

24.2 Therefore, the ld. A.R. submitted that the assessee after settling the accounts (including commission on revocation of bank guarantee) has offered the balance amount of Rs.7,46,606/- (Rs.18,00,000 less: 4,46,715 Less: Rs.6,06,679) as income for the

AY 2010-2011, which the authorities below have undisputedly accepted. Therefore, the additions made in the FY 2007-2008 is arbitrary and is liable to be deleted as the assessee has already offered a sum of Rs.7,46,606/- as income for the AY 2010-2011.

24.3 Without prejudice, the CIT(A) -11 ought to have directed the learned assessing officer to deduct a sum of Rs.7,46,606/- for the AY 2010-2011, which was offered to tax as taxing the same amount twice for the AY 2008-2009 and for the AY 2010-2011 tantamount to double taxation.

25. The ld. D.R. submitted that the transaction with ICFAI up to the year ended 31/3/2008 have already been taken into account as income as Rs.30,98,000/- (facilitation charges) mentioned in the profit and loss account found during the survey has already been declared in the return of income filed for the assessment year in question. There is no question of any 'liability' still existing. In the background of the party having denied the existence of the liability, the assessee's mere claim that this receipt was from a different unit cannot be accepted as no separate transaction has been shown to have been entered with the Bangalore unit by him. Merely because he has been questioned, he cannot choose to offer it in a subsequent year. The liability of Rs.10,00,000/- was actually non-existent as on 31.3.2008 as rightly held by the AO and, therefore, the ld. CIT(A) upheld the said addition made by the ld. AO.

26. We have heard the rival submissions and perused the materials available on record. The assessee has shown outstanding balance payable to ICFAI at Rs.10 lakhs. The contention of the ld. D.R. is that the ICFAI, Hyderabad sent a written communication to the ld. AO that they have advanced a sum of Rs.1.5 Crores on 19.3.2009, which is received back by them on 10.9.2009 and there was no outstanding from the assessee. As per the communication

by ld. AO with the ICFAI, Hyderabad, the transactions for which ld. AO received the reply from ICFAI is not relating to the assessment year under consideration. The assessee has stated before lower authorities that out of Rs.18 lakhs outstanding from the ICFAI, assessee paid a sum of Rs.4,46,715/- for bank commission on 31.8.2009 and a sum of Rs.6,06,679/- as commission on 4.2.2010 to bank. So the balance is only Rs.7,46,606/- which has been offered as income in the assessment year 2010-11. In our opinion, the exact amount outstanding from the ICFAI has not properly examined by the lower authorities and assessee has also not given details of these Rs.10 lakhs. Hence, in our opinion, it is appropriate to remit this issue to the file of ld. AO for fresh consideration. This issue is remitted to the file of ld. AO for fresh consideration which shall be decided by him after giving an opportunity of hearing to the assessee.

27. Next ground nos.15 & 16 are with regard to addition of Rs.4,90,000/- received from M.D. Pavitra on behalf of assessee's wife Smt. Indrani towards sale of agricultural land.

27.1 The ld. A.R. submitted that the learned CIT(A) -11 confirmed the additions of Rs.4,90,000/- on the ground that explanation offered by the assessee is not acceptable. The learned CIT (A), without application of mind has endorsed the view of the learned assessing officer. The amount of Rs.4,90,000/- is the liability which has flown from the FY-2006-2007. In para 11.1 and 11.2 of CIT(A) order, it is categorically held that assessee's wife vide sale deed dated 04-11-2016 had sold an agriculture land and received a consideration of Rs.15,75,000/-. A part of the consideration being Rs.4,90,000/- out of the total sale consideration amounting to Rs.15,75,000/- was paid to the assessee during the FY 2006-2007

and it is an admitted fact on record as sale deed was executed on 04-11-2016.

27.2 He submitted that the sum of Rs.4,90,000/- is the liability, the assessee owes to his wife, which the assessee squared off in the FY 2009-2010. It is a fact that the sum of Rs.4,90,000/- has flown from the FY 2006-2007 and this being an opening balance, and the credit balance appearing in the accounts of the assessee which does not pertain to the year under consideration, cannot be a subject matter of addition under section 68 as per the ration laid down by the Hon'ble High Court of Delhi in the case of CIT Vs Usha Stud Agricultural Farms Ltd (2008) 301 ITR 0384 Delhi (HC). Therefore, the additions made amounting to Rs.4,90,000/- being the opening balances cannot be brought to tax for the FY 2007-2008 relevant to the AY 2008-2009. It is a liability that the assessee owes to his wife and not Ms. D Pavithra, which the assessee squared off in the FY 2009-2010. Therefore, the additions made amounting to Rs.4,90,000/- is liable to be deleted.

27.3 The ld. A.R. further submitted that the amount of Rs.4,90,000/- is not the income chargeable to tax as it is sourced from the sale of agriculture land belonging to wife and therefore, levying tax on sale of agricultural land is unconstitutional as the same is exempt u/s 10(37) of the Act.

28. The ld. D.R. submitted that the assessee has simply taken recourse to this when the facts emerged on account of scrutiny assessment as a result of survey. The explanation of the assessee was not acceptable and the inference drawn by the ld. AO founded on facts and hence, the ld. CIT(A) upheld the same.

29. We have heard the rival submissions and perused the materials available on record. The assessee has shown a liability of Rs.4.90 lakhs payable to Mrs. D. Pavitra. The ld. AO has verified

the same with D. Pavitra vide summons issued u/s 131 of the Act on 18.7.2011. Mrs. D. Pavitra appeared before the ld. AO on 27.7.2011. she submitted that she does not know the assessee and her father Dr. M.S. Dhananjaya known to assessee and he has no transaction with the assessee and she had given Rs.5 lakhs on the direction of her father Dr. M.S. Dhananjaya who has purchased an agricultural land from Smt. Annapoorna and assessee was jointly owned property at Bettahalli, Narsapur Taluk, Mysore District. The property has been registered in her father's name on 4.11.2006 and thereafter there was no transaction with the assessee. These facts were brought to the knowledge of assessee. The assessee has stated that assessee has received an amount of Rs.4.90 lakhs from D. Pavitra on behalf of her father, which is payable to assessee's wife Smt. Annapoorna. The said amount has been transferred to Smt. Annapoorna during the year ending 31.3.2010. According to the ld. AO, transferring of the amount of Rs.4.9 lakhs from the assessee's account to assessee's wife Smt. Annapoorna's account is an afterthought and no credence should be given to that transfer of entry. If these transactions are not emerged in the assessment year under consideration, then no addition could be made. If these were opening balance in the assessment year under consideration, no addition be made. As per section 68 of the Act, only the credit emerged in assessment year under consideration could be questioned u/s 68 of the Act and not the opening balance. Being so, the ld. A.O has to verify this transaction as to which assessment year it relates and decide accordingly. This ground of appeal is partly allowed for statistical purposes.

30. Next ground no.17 is with regard to addition of Rs.22,52,700/-, which represents withdrawal from capital account in partnership firm M/s. Karkesia Estates.

30.1 The ld. A.R. submitted that the CIT (A) -11 has confirmed the addition of Rs.22,52,700/- being outstanding liability payable to M/s Karkesia Estate on the ground that M/s Karkesia Estate has not responded to the notice issued u/s 133(6) of the Act. The assessee during the course of assessment had furnished the details of M/s Karkesia Estate. The assessee contended that non-response from the party cannot be a ground to treat the genuine transaction as otherwise. The assessee has predominantly paid for the expenses via cheque. The learned assessing officer has not examined the bank statement furnished by the assessee but by merely elide on non-compliance of notice issued u/s 133(6) of the Act to M/s Karkesia Estate and has made additions on hyper technically ground.

30.2 He further submitted that the learned assessing officer could have exercised the powers of a civil court under Section 131 and call upon any person concerned to prove the genuineness of transaction. That, unless a notice in due form under Section 131 of the Act is issued by the learned assessing officer concerned to test the veracity or the genuineness of the transaction, the assessee succeeds in his submissions. The assessee placed reliance on the decision of the Hon'ble High Court of Patna in the case of ACIT Vs. Hanuman Agarwal 151 ITR 150 (Patna) for the above proposition. Therefore, the additions made amounting to Rs.22,52,700/- is liable to be deleted.

31. The ld. D.R. submitted that the financial transactions with Karkesia Estate are not clear. The assessee along with his mother have been admitted as partners of Karkesia Estate on 18/1/2008 along with the other Partners. On 31/3/2008, only the assessee (97% share) and his mother (3% share) were partners, the other partners having retired. Despite repeated and specific opportunities, the balance sheet and statements of account of Karkesia Estate as on

31/3/2008 have not been filed. This liability between 18/1/2008 to 31/3/2008 claimed by the assessee is not explained and even bank account details, copies of account for the relevant period have not been filed. In the absence of any explanation or details furnished either before the AO or in appeal, this liability remains unexplained and the addition made is, therefore, the ld. CIT(A) upheld the same.

32. We have heard the rival submissions and perused the materials available on record. The ld. AO has treated the amount withdrawn from capital account in partnership firm M/S Karkesia Estates at Rs.22,52,700/-. The assessee has filed bank statement before the ld. AO establishing the withdrawal of said amount from M/S Karkesia Estate. However, it has not been verified. The finding of ld. CIT(A) is that the assessee has not filed balance sheet and statement of account of M/s Karkesia Estate, so as to verify the withdrawal of this amount from M/s Karkesia estate. In our opinion, it is appropriate to remit this issue to the file of ld. AO to examine the issue after going through the balance sheet and financial statements of Karkesia estate and also bank statements of both the parties. This issue is remitted to the file of ld. AO for fresh consideration after giving an opportunity of hearing to the assessee.

33. Ground no.18 is with regard to sustaining addition of Rs.89,000/- out of Rs.8,90,000/- claimed towards vehicle expenditure.

33.1 The ld. A.R. submitted that the leaned CIT(A)-11 has restricted the disallowance to 10% of the actual expenditure of Rs.8,90,000/- being Rs.89,000/- claimed on account of vehicle expenditure on the ground that the assessee would have used the vehicle for personal purpose. The authorities below have made ad-hoc disallowance without appreciating the practical aspects. The

learned CIT(A) has admitted that obtaining bills from petrol bunks is not in vogue.

33.2 He further submitted that the authorities below had pointed out that any part of the expenditure in question was found to have not been incurred by the assessee wholly and exclusively for business. There was no mention of rationale in arriving at the percentile of disallowance in the instant case. Further, there was no provision in the present Income Tax Statute which provide for ad-hoc disallowances. Therefore, he submitted that the disallowance made amounting to Rs.89,000/- is liable to be deleted.

34. The ld. D.R. submitted there is merit in the assessee's submissions that the practice of obtaining bills for fuels from petrol bunks is not in vogue. Equally, it cannot be ruled out that the assessee would have used the vehicle for his personal purposes. Hence, the ld. CIT(A) restricted the disallowance to 10% of the actual expenditure of Rs.8,90,000/-, which works out to Rs.89,000/-. Accordingly, he directed the AO to restrict the disallowance to only Rs.89,000/-.

35. We have heard the rival submissions and perused the materials available on record. The assessee claimed vehicle expenditure of Rs.89,000/-. The ld. AO made an addition towards vehicle maintenance at Rs.4,45,900/-. However, the ld. CIT(A) sustained it at 10% of total expenditure of Rs.8,90,000/- and restricted disallowance at Rs.89,000/- only. In our opinion, since the assessee has not furnished log book to suggest that the vehicle is exclusively used only for the purpose of business, the disallowance of 10% of total expenditure worked out at Rs.89,000/- is justified. Hence, this ground of assessee's appeal is rejected.

36. In the result, the assessee's appeal in ITA No.1466/Bang/2012 is partly allowed for statistical purposes.

ITA 1467/12: (AY 2009-10):

37. The assessee raised following main grounds:

- 1. The order of the learned Commissioner of Income-tax [Appeals] in so far as it is against the appellant is opposed to law, weight of evidence, facts and circumstances of the case.*
- 2. authorities below as against returned income of Rs.27,33,082/- under the facts and circumstances of the case.*
- 3. The authorities below were not justified in relying on the statement made by the appellant at the time of survey which has no evidentiary value and were further not justified in not appreciating the retraction statement made by the appellant.*
- 4. The learned CIT(A) was not justified in confirming the addition of Rs.1,42,00,000/- made under Section 69 of the Act where the appellant had never invested such sum and such investment was never held by the appellant under the facts and circumstances of the case.*
- 5. Without prejudice the addition of an amount of Rs 65 lakhs which has been paid by the Purchaser even as per the registered sale deeds can by no stretch of imagination be attributable to be the payment by the appellant on the facts and circumstances of the case.*
- 6. The learned CIT(A) was not justified in confirming the addition of Rs.18,00,000/- made under Section 69 of the Act where the appellant had debited an investment of Rs.5,00,000/- on account of investment in cold storage business and the balance of Rs.13,00,000/- invested by Mr.Kumar Swamy as unexplained investment of the appellant on the facts and circumstance of the case.*
- 7. The learned CIT(A) was not justified in confirming the addition of Rs.25,00,000/- made under Section 68 of the Act under the facts and circumstances of the case.*

8. *The learned CIT(A) was not justified in confirming the addition of Rs.13,00,000/- made under section 68 of the Act where the Appellant had established the identity M/s. TMT Ltd. and had established that part of the amounts were subsequently repaid and also establishing the pendency of civil suit under the facts and circumstances of the case.*
9. *The learned CIT(A) was not justified in confirming the addition of Rs.8,00,000/- being the amount received from ICFAI where such sum has been considered in the profit and loss account for AY: 2010-11.*
10. *Without prejudice, if Rs.8,00,000/- were to be treated as income for AY 2009-10, then the authorities below were not justified in not giving deduction of expenses incurred on that behalf.*
11. *Without prejudice, the learned CIT(A) erred in not directing the assessing officer to give a suitable deduction in the AY: 2010-11 where the appellant had offered the amount of Rs.7,46,606/- [net of expenses] received from ICFAI to avoid double taxation.*
12. *The learned CIT(A) was not justified in confirming the addition to the extent of 10% of the travelling and vehicle maintenance charges where the appellant is in possession of the relevant bills / supporting vouchers which were produced before the authorities below under the facts and circumstances of the case.*
13. *The learned CIT(A) was not justified in confirming the addition of Rs.27,17,859/- which was received by the appellant against the advance made to Hashmuk B Mardia for purchase of property which was jointly owned by the appellant and such never formed part of the sale consideration under the facts and circumstances of the case. The authorities failed to appreciate that it was payment of advance to the co purchaser and return of the same.*
14. *Without prejudice the amount of Rs 27,17,859 invested should have been allowed as a cost on the facts and circumstances of the case.*
15. *The learned CIT(A) was not justified in confirming an addition of Rs.6,10,000/- where the appellant had established the identity of the creditors and produced confirmation letters under the facts and circumstances of the case.*
16. *The appellant craves leave to add, alter, delete or substitute any or all of the grounds mentioned above.*

17. For the above and such other grounds that may be raised, the appellant prays that the appeal may be allowed for the advancement of substantial cause of justice and equity.

37.1 The assessee has raised following additional grounds:

1. *The ld. AO is not justified in conducting survey at the residential premises of the appellant which is void in terms of Sec.133A of the Act under the facts and circumstances of the case.*
2. *The ld. AO is not justified in taking statements on oath during the course of survey proceedings under the facts and circumstances of the case having regard to the ratio of the decision of the Hon'ble High Court of Kerala in the case of Paul Mathews Et Sons reported in 263 ITR 101.*
3. *The ld. AO is not justified in making additions of Rs.5,03,80,530/- based on the statements taken on oath during the course of survey to be spread over for a period of three years from A.Y: 2008-09 to 2010-11 and more particularly Rs.61,52,800/- for A.Y: 2009-10 under the facts and circumstances of the case by ignoring the retraction statement filed by the appellant dt. 03.01.2011 before the ld. A.O and further without any documentary evidence for the said additions. The details of assumed addition of Rs.61,52,80,0/- are furnished in the subsequent ground no. 4, 5 & 6.*
4. *The ld. AO is not justified in bringing into tax Rs.18,52,800/- as unaccounted profit on sale of Malagar Estate based on the statement taken on oath during the course of survey proceedings under the facts and circumstances of the case.*

38. We have heard the both the parties on admission of additional grounds. In our opinion, all the facts are already on record and there is no necessity of investigation of any fresh facts for the purpose of adjudication of above ground. Accordingly, by placing reliance on the judgement of Hon'ble Supreme Court in the case of NTPC Vs. CIT 229 ITR 383 (SC) we inclined to admit the additional ground for the purpose of adjudication as there was

no investigation of any fresh facts otherwise on record and the action of the assessee is bonafide.

39. The crux of the above additional grounds is that survey conducted at the residential premises of assessee is void-ab-initio. Consequently, based on the material gathered during the course of survey by framing assessment is also bad in law.

39.1 The ld. A.R. submitted that a survey U/s 133A of the Act was conducted in the case of the assessee on 17-09-2010. The Survey was conducted u/s 133A of the Act on 17-09-2010 at residential premises at No.523, "SUMUKHA", 3rd Main, BSK 3rd stage, Bangalore -560085 of the assessee besides business premises. The power of entry into the residential and business premises prescribed under section 132 of the act can be exercised by the income-tax authority only, in consequence of information in his possession and also with an additional condition that such authority should have reason to believe, on the basis of such information, that there is willful omission, non-compliance or concealment on the part of the assessee. Under section 132, an income-tax authority can enter and search any building, break open the lock of any door, search any person, seize any books, money, bullion, jewellery or other valuable article, make a note of inventory of any such money, bullion, etc. He may also examine on oath any person and any statement obtained during such examination may thereafter be used in evidence in any proceeding under the Act. Whereas for exercising power of survey under section 133A of the Act, no such prior information or reason is necessary and it also overrides other provisions of the Act with non obstante clause. In the survey operation, the income-tax authority can enter only the business premises and also only during the hours at which such place is open for the conduct of business or profession.

Therefore, conducting survey at the residential premises of the assessee is illegal and hence, the entire proceedings is liable to be quashed.

39.2 The Id. A.R. further submitted that the authorities below ought not to have relied on the mere statement made by the assessee during the course of survey conducted under section 133A of the Act. The statement made at the time of survey has no evidentiary value and therefore, admission made by the assessee without any corroborative evidence is devoid of merits. The authorities below have solely relied on the statement of the assessee obtained through coercion and such statement is opposed to the law and judicial decisions. The authorities below have failed to appreciate the fact that mere confession statement without any credible evidence would not automatically bind on the assessee.

39.3 He further submitted that section 133A(3)(iii) enables the authority to record the statement of any person which may be useful for, or relevant to, any proceeding under the Act. Section 133A, however, enables the Income-Tax authority only to record any statement of any person which may be useful, but does not authorize taking any sworn statement. On the other hand, such a power to examine a person on oath is specifically conferred on the authorized officer only under Section 132(4) of the Income-tax Act in the course of any search or seizure. Thus, the Income-tax Act, whenever it thought fit and necessary to confer such power to examine a person on oath, the same has been expressly provided. Whereas section 133A does not empower any Income-tax Officer to examine any person on oath. Thus, in contradistinction to the power under Section 133A, Section 132(4) of the Income-tax Act enables the authorized officer to examine a person on oath and any statement made by such person during such examination can

also be used in evidence under the Income-tax Act. On the other hand, whatever statement is recorded under Section 133A of the Income- tax Act it is not given any evidentiary value obviously for the reason that the officer is not authorized to administer oath and to take any sworn statement which alone has evidentiary value as contemplated under law. Therefore, the statement elicited during the survey operation has not evidentiary value.

39.4 In this regard he placed reliance on the decision of the Hon'ble Kerala High Court in case of Paul Mathews & Sons v Commissioner Of Income Tax reported in [2003] 263 ITR 101 (Ker) and the Hon'ble Supreme Court in case of The Commissioner Of Income Tax vs M/S. S. Khader Khan Son reported in (2013) 352 ITR 480 (Supreme Court), in which, it was highlighted that the statement under section 133A of the Act has no evidentiary value for the reason that the authorities are not empowered to administer oath and to take sworn statement u/s 133A of the Act.

39.5 Further, he submitted that the ITAT, Cochin, in ITA No.442/Coch/2018 dated 07-02-2019 in the case of CIT vs Toms Enterprises has held that in contradistinction to the power under section 133A, section 132(4) of the Income-tax Act enables the authorized officer to examine a person on oath and any statement made by such person during such examination can also be used in evidence under the Income-tax Act. On the other hand, whatever statement is recorded under section 133A of the Income Tax Act it is not given any evidentiary value obviously for the reason that the officer is not authorized to administer oath and to take any sworn statement which alone has evidentiary value as contemplated under law. Therefore, the additions made merely on the basis of statement recorded during the course of survey is not

adequate document/evidence to bring a particular transaction into the tax net.

39.6 He further submitted that an admission is an extremely important piece of evidence but it cannot be said that it is conclusive and it is open to the person who made the admission to show that it is incorrect and that the assessee should be given a proper opportunity to show that the books of accounts do not correctly disclose the correct state of facts. Be that as it may, the assessee has filed a retraction statement dated 03.01.2011 and the authorities below without verifying the veracity of the retraction statement has impulsively made additions merely based on the statement which is non-est eye of law. The statement recorded during the course of survey has been retracted by the assessee and therefore, he submitted that there is no other material or evidence to support the disclosure made and no additions could be made on the basis of such retracted statement.

39.7 The Id. A.R. further submitted that the Hon'ble High Court of Karnataka in the case of Commissioner of Income Tax and Another Vs. Dr. N. Thippa Setty 322 ITR 525 held that where an order of re-assessment is based entirely on statements recorded under Section 132(4) of the Act and subsequently such statement is retracted, then the same was liable to be aside. In the case of assessee though the statement recorded u/s 133A doesn't have any evidentiary value, subsequently, such statement was retracted by the assessee for the valid reasons and therefore, the reassessment order made on such invalid foundation is bad in law and the aforesaid decision is squarely applicable to assessee's case.

39.8 The ld. A.R. placed reliance on the circular issued by CBDT in F.No.286/2/2003 dated 10.03.2003 to the following effect:

*F.No. 286/2/2003-IT(Inv) Govt.of India,
Ministry of Finance & Company Affairs,
Department of Revenue, Central Board of Direct Taxes,
No.254/North Block, New Delhi 10th March 2003*

*To All Chief Commissioner of Income Tax (Cadre Control)
&All Directors General of Income Tax Investigation.
Sir, Subject: Confession of Additional income during the
course of search & seizure and survey operation Regarding.
Instances have come to the notice of the Board where assessee
have claimed that they have been forced to confess the
undisclosed income during the course of the search & seizure
and survey operations. Such confessions, if not based upon
credible evidence, are later retracted by the concerned
assessee while filing returns of income. In these circumstances,
on confessions during the course of search & seizure and
survey operations do not serve any useful purpose. It is,
therefore, advised that there should be focus and
concentration on collection of evidence of income which leads
to information on what has not been disclosed or is not likely
to be disclosed before the Income Tax Departments. Similarly,
while recording statement during the course of search &
Seizures and survey operations no attempt should be made to
obtain confession as to the undisclosed income. Any action on
the contrary shall be viewed seriously. Further, in respect of
pending assessment proceedings also, assessing officers should
rely upon the evidences/materials gathered during the course of
search/survey operations or thereafter while framing the
relevant assessment orders. Your faithfully*

Sd/-

(S.R.Mahapatra)

Under Secretary (Inv.II)'

39.9 He further submitted that the assessment proceedings were initiated on the basis of mere statement of the assessee without any corroborative evidence. Therefore, in view of the aforesaid circular, mere reliance of confession statement without any corroborative evidences would invalidate the entire proceedings

and hence, the assessment proceedings initiated solely of such grounds is liable to be quashed.

39.10 The ld. A.R. placed reliance on the decision of the Hon'ble Income Tax Appellate Tribunal, Bangalore vide ITA No.499,500,501508 and 509 of 2021 dated 18-07-2022 in the case of DCIT vs M/s Gokula Education Foundation, wherein it was held as under:

"12.3 Ld. CIT(A) further observed that the AO has relied upon the sworn statements of Mr. D. V. Guruprasad which are ambivalent in nature which certainly necessitates further inquiry M/s. Gokula Education Foundation (Medical) Bengaluru and gathering of clinching/formidable evidence to just the addition.

12.4. Ld. CIT(A) observed that inquiry from persons, students who allegedly paid the money was essential to corroborate loose sheets as required by the decision of Hon'ble Supreme Court in the case of CBI vs VC Shukla (1998) 3 SCC and Common Cause (A Registered Society) and Others vs Union of India in Writ Petition Civil Appeal No 505 of 2015 reported in 394 ITR 220(SC). And since such corroborative evidence is not found, one is constrained from sustaining an addition so made in view of the decisions of the Hon'ble Supreme Court cited supra. Hence the addition is found to be unsustainable.

12.5. As discussed earlier, there is no corroborated evidence other than the statement of Shri D. V. Guru Prasad to support the entries in the loose sheets. Accordingly, as discussed in earlier para, we delete the addition"

39.11 He submitted that the aforesaid decision of the Hon'ble Jurisdictional ITAT is squarely applicable to the assessee's case as additions is made solely on the statement recorded, which was subsequently retracted. There is no iota of evidence either through a person or through an asset to confirm the alleged cash transactions. Therefore, alleged difference on sale of Malagar Estate amounting to Rs.18,52,800/-, alleged Investment in cold storage at Mysore of Rs.18,00,000 and alleged unexplained cash credits in

cash book of Rs.25,00,000/-, overall additions amounting to Rs.61,52,800/- based on mere statement of the assessee and the assessment proceedings completed on such incongruities is liable to be quashed.

40. Regarding ground relating to conducting survey at residence, the ld. D.R. in his written submissions stated as follows:

- i. The said address is given in the return of income.
- ii. In all the documents relating to real estate transactions, the income from which the assessee has declared business income show the same address.
- iii. The wife of the assessee in her statement recorded on 17.9.2010 in reply to Q.No.2 has stated that the real estate business is carried on at the said address as well as at Bull Temple Road. This statement is still valid and has not been retracted.

Therefore, he submitted that the claim that the survey at the residential premises of the assessee is void, and is factually incorrect. Assuming without admitting that survey was not legal, the evidences collected are still valid and assessments based on such evidences are not vitiated.

40.1 The ld. D.R. further submitted that the Hon'ble Apex Court in Dr. Pratap Singh and Anr. v. Director of Enforcement and Ors. (1985) 155 ITR 166 (SC) has inter-alia observed that "illegality of a search does not vitiate the evidence collected during such illegal search." Further, the Hon'ble Apex Court again in Pooran Mal v. DIT (1974) 93 ITR 505 (SC) has held that evidence obtained as a result of illegal search or seizure is not liable to be rejected. Further, in CIT v. Kamal & Co. (2009) 308 ITR 129, the Hon'ble Rajasthan High Court held that the Revenue was entitled to use the material collected during the course of illegal survey.

40.2 Regarding ground relating to making additions based on statements recorded during the survey, ignoring the retraction of statement, the ld. D.R. submitted that as submitted above, the retraction of assessee is illegal and unwarranted. Since, no valid reasons were given for retraction and the assessee failed to prove the duress; the AO has ignored the retraction letter dated 03.02.2011 filed by the assessee. The AO has based his assessment on the evidences gathered during the survey. It is claimed that the AO is not justified in taking statements on oath during the course of survey under the facts and circumstances of the case. However, it may be pointed out that no admission was taken in the statement recorded during the course of survey on 17-09-2010. The incriminating material was confronted to the assessee during the course of subsequent sworn statements recorded few days after survey that too during office hours. The admission of additional income by the assessee was based on specific pieces of evidence found in the survey, as can be seen from the said statements of assessee. Therefore, the ld. D.R. submitted that this ground has no relevance.

40.3 Regarding various grounds against upholding of additions, the ld. D.R. submitted that the AO has made additions based on the facts and evidences. The Ld. CIT (A) has rightly upheld the additions after giving proper reasoning. Therefore, the Tribunal may refuse to allow any further relief to the assessee. In this case, strong reliance is placed on the Assessment Order and the Order of the CIT (A). He submitted that if the Tribunal finds that the retraction of statement is illegal and unwarranted based on the facts and circumstances of the case; then all the additions based on sworn deposition of the assessee may be upheld.

Findings on Additional grounds:

41. In ground No.1, the main contention of the ld. A.R. is that the ld. AO is not justified in carrying out the survey u/s 133A of the Act at the residential premises of the assessee. In our opinion, the assessee has given the residential address in his return of income filed for the assessment year 2009-10. It is also brought on record by ld. AO that the same address has been given for carrying out the real estate business in addition to the address at Bull Temple Road, Bengaluru. These facts have been confirmed even by assessee's wife in her statement recorded on 17.9.2010. Being so, conducting survey by ld. AO at the residential premises of the assessee u/s 133A of the Act is justified. Hence, the ground No.1 in additional ground is rejected.

42. In the next additional ground no.2, the assessee has challenged taking statement from the assessee u/s **131/133A of the Act.** In our opinion, these provisions empower the ld. AO to record statement on conducting survey u/s 133A of the Act. Being so, we do not find any infirmity in this procedure followed by the ld. AO on survey. Hence, this ground of assessee is also rejected.

43. Next additional ground no.3 is very general and very collective ground raised with regard to various additions made by the ld. AO, which we will address while adjudicating the main grounds of appeal nos.4, 5 & 6.

44. The next additional ground no.4 is with regard to addition of Rs.18,52,800/- as unaccounted profit on sale of Malagar Estate based on the statement taken on oath. In our opinion, the addition relating to this issue in main ground no.4 in this assessment year under consideration stating that addition was made u/s 69 of the Act at Rs.1.42 Crores is bad in law. Since we are adjudicating the main ground no.4, this ground is dismissed as infructuous and

adjudicating this ground separately is not at all required. Hence, this ground is dismissed.

Main grounds:

45. Now coming to the main grounds, **ground Nos.1 & 2** are general in nature and does not require any adjudication.

46. Ground no.3 in main ground which is akin to ground nos.1 & 2 in additional grounds. Hence, this ground is not adjudicated separately and dismissed.

47. Ground Nos.4 & 5 are with regard to confirming addition of Rs.1,42,00,000/- u/s 69 of the Act.

47.1 The Id. A.R. submitted that the learned assessing officer held that the assessee has not explained the source of cash payment of Rs.1.42 crore made to the vendors and treated the entire amount as unexplained investment u/s 69 of the Act. The learned CIT(A) confirmed additions on the ground that the assessee had failed to discharge the onus of proving that he had not made cash payment of Rs.1.42 crore to the vendor and upheld the additions for the same reasons as that of the learned assessing officer.

47.2 He submitted that the assessee has entered into an agreement to sale dated 11-10-2007 with Sri. T Ragavendra Rao and other (Vendors). The assessee had paid a sum of Rs.90,00,000/- as advance out of the sale consideration of Rs.2.42 crore agreed upon to be paid as per the agreement of sale. The learned assessing officer issued summons to the Vendors. However, the summons came back unserved with the remarks "Door lock". Thereafter the learned assessing officer committed the case u/s 131(1)(d) to the ITO, Chikmagalur. It is alleged that sworn statement was recorded from the vendors and in the sworn statement, the vendors have confirmed that they have received a sum of Rs.90 lakhs by way of DD and the balance amount of Rs.1.42 crore by way of cash. It is pertinent to note that in para 3.3

of the appellate order, reproduced from the sworn statement of the vendors, it is alleged that the sellers have given specific information of receipt of the payments made in cash by the assessee, wherein, the payment of Rs.62,44,625/- was paid on 10-05-2008, reflecting in loan account No.0507847001223 (Canara Bank) being one of the vendors, and the balance of cash payment Rs.79,55,375/- was paid 03-06-2008. If any prudent businessmen or the purchaser would make cash payment for the purchase of property, it would be a round off amount closest to the nearest thousands or lakhs. In the present case, the vendors have received odd amounts to clear of the loan amount and for other purposes. It is very unlikely that any purchaser would have made such kind of amounts. It is evident that the statements are recorded in such a manner in order to suit/confirm the predetermined additions.

47.3 The veracity of the statements recorded from the vendors have not been tested and it is only a unilateral statement which does not hold weightage of law. The assessee has not been provided an opportunity of cross examination and hence, the principles of natural justice is violated. In this regard the assessee begs to place reliance on the decision of the Hon'ble Supreme Court in the case of Andaman Timber Industries 281 CTR 214 (SC), wherein it was held that any material collected at the back of assessee or statement recorded at the back of assessee cannot be used in evidence against the assessee, unless the same is confronted to the assessee at assessment proceedings and right of cross-examination have been granted to assessee to such statements. Therefore, additions made merely on statement and without providing an opportunity of cross examination is arbitrary and is liable to be deleted.

47.4 Without prejudice to the above and assuming without conceding, even if the assessee has made payment as per the agreement of sale dated 1110-2007, then the entire cash amount

would have been paid on the date of the agreement of sale i.e., 11-10-2007, relevant to the FY 2007-2008. The vendors could have deposited/utilized the said sum subsequently. Merley, if the vendors avers that the entire cash amount has been received on 10-05-2008 and 03-06-2008, would not validate the transactions of receipt in the FY 2008-2009 relevant to the AY 2009-2010. Therefore, if the assessee has paid the alleged cash, then it ought to have been taxed in the AY 2008-2009 and not in the AY 2009-2010. Hence, the additions made amounting to Rs.1.42 crore is liable to be deleted.

47.5 He further submitted that it is also evident from para 3.3 of the appellate order that there was a registered sale deed dated 03-06-2008 executed by the vendors in favour of actual purchasers being Sri Javeed Haroon, Sunil Beberwal and Shobha Awatramani. The assessee has relinquished the agreement of sale dated 11-10-2007 and has become a confirming party to the sale deed dated 03-06-2008. On 03-06-2008, i.e, the date of sale deed, it is an admitted fact that the vendors have received a sum of Rs.79,55,375/-. It can be inferred that the actual purchasers have paid the sum of Rs.79,55,375/- and such inference can be drawn with high probability. Therefore, the additions made on assumption and merely on the statement of the third party without verifying the genuineness of the statement is arbitrary and is liable to be deleted. He placed reliance on the decision of the Hon'ble Supreme Court in the case of CIT vs Odeon Builders (P) Ltd (2019) 110 Taxmann.com 64 (SC) wherein it was held that no addition can be made on the basis of third-party information.

47.6 He submitted that the Rajasthan High Court, in the case of Kan Singh Rathore D.D. in ITA No. 192/2014 has also held that an confronted reliance on a statement made by the third parties cannot be considered as basis for making an addition to the

income. The assessee must also be given a fair opportunity to examine the evidence relied upon by the leaned assessing officer. Therefore, the additions made merely on statement of the third party and for the fact that the vendors statement is not supported by any corroborative evidence becomes a valid and undisputable ground to establish that the additions made amounting to Rs.1.42 crore is arbitrary and untenable in law.

48. The Id. D.R. submitted that the assessee had already entered into an agreement dated 11/10/2007 to purchase the said property for Rs.2.32 crores and a substantial amount i.e. Rs.90 lakhs has already been paid by the assessee to the said party. However, he has not accounted for the payment of balance amount i.e. Rs.1.42 crores, which the sellers have stated to have received from the assessee in cash. The agreement to sell and the statement of the recipients clearly point to the inference that the assessee has paid the balance amount to the sellers. The statements of the sellers have been confronted to the assessee by the AO. The sellers have given specific information of receipt of these payments i.e. payment of Rs.62,44,625/- in loan account No.0507847001223 (Canara Bank) on 10/5/2008 in cash by Shri T.G. Ranganath, the assessee, and the balance Rs.79,55,375/- on 3/6/2008 in cash along with details of utilization of the same. For this he referred to Annexure-A of the assessment order in answer to questions No.11 to 16. The denial of the assessee is merely because he is unable to explain the source. His claimed that the same may have been paid by the actual purchaser as per registered deed (registered on 3/6/2008 for Rs.1,55,00,000/- in favour of the actual purchaser) has not been substantiated as the agreement to sell was between him and the sellers. The sellers know only the assessee and have received the amount from the assessee as per their categorical statement. The assessee was the confirming party in the registered deed, being an agreement-holder for the property at Rs.2.32 crores.

Any transaction less than the said amount would have to be explained by him as he is the person involved and responsible. As he has failed to do so, this amount of Rs.1.42 crores, which he promised to pay to the sellers and the same, having been acknowledged to have been received by the sellers, in the circumstances of the case, is clearly taxable in his hands as the source for the payment remains unexplained. A perusal of the sale deeds dated 3/6/2008'also shows that payments to the sellers have been made through the assessee, the confirming party. It is also interesting to note that the advance payment of Rs.90 lakhs was also made by the assessee himself. Apparently, it is only later that he has been compensated for this amount by the actual purchaser (no details have been furnished regarding receipt of payment from the vendors of Rs.1,55,00,000/- claimed). It is clear that, at this time, he has made the balance payment of the promised amount i.e. Rs.1.42 crores also to the sellers. He is bound to explain the source of this amount he promised to pay and which the receivers have acknowledged to have received from him. Since he has failed to discharge this onus, the addition of Rs.1,42,00,000/- is correctly made and, therefore, the Id. CIT(A) upheld the same.

49. We have heard the rival submissions and perused the materials available on record. During the course of survey, an agreement for purchase of property was entered by assessee marked as TGR/26 was found, which shows assessee's entry for which said agreement on 11.10.2007 with Raghavendra Rao and 9 others for purchase of estate called as Malagar Estate for a total consideration of Rs.2.32 Crores. An advance of Rs.90 lakhs has been paid through DDs drawn in favour of T. Raghavendra Rao, T. Upendra and T.S. Bala Krishna Rao. The Id. AO has issued summons to all these parties on 18.7.2021 u/s 131 of the Act. The summons sent to them were returned unserved with the remarks

that "Door Locked". In respect of shri T. Raghavendra Rao & T. Upendra and in case of T.S. Bala Krishna Rao, it was endorsed as "Party Absent". Consequently, the ld. AO has requested the ITO Chikmagaluru to issue summons to them u/s 131(1)(d) of the Act and he recorded their statement on 24.8.2011. In their statement, they have confirmed the receipt of Rs.2.32 Crores from the assessee towards the sale of their property to the assessee at Malagar Estate. They have also confirmed that they have received Rs.90 lakhs through banking channels and balance Rs.1.42 Crores was received by cash. The ld. AO has asked the assessee to explain the above cash payment vide his letter dated 17.10.2011. The assessee vide his letter dated 11.11.2011 has confirmed above payment of Rs.90 lakhs by DD and submitted that the balance amount has not been paid by the assessee. Due to financial difficulties, the said property has been sold to other parties, wherein assessee has been confirmed party. Out of that transaction, the assessee has earned a profit of Rs.58,47,200/- for the year ended on 31.3.2009. However, the ld. AO not agreeing with the contention of the assessee has made addition of Rs.1.42 Crores in the hands of assessee u/s 69 of the Act. First of all, the final sale deed has not been registered in favour of present assessee and on the other hand, it has ben registered on 3.6.2008 in favour of purchaser being Shri Javeed Haroon, Sunil Beberwal & Shobha Awatramani and assessee has relinquished the agreement of sale dated 11.10.2007 and assessee was only the confirming party to the sale deed dated 3.6.2008 and on execution of sale deed, the vendor has received a sum of Rs.79,55,375/-. However, the ld. AO not bringing on record the actual sale deed executed by the parties on 3.6.2008, he arbitrarily made addition in the hands of assessee that assessee has been paid balance consideration by way of cash at Rs.1.42 Crores, by relying on the statements recorded by ITO, Chikmagaluru from the vendors

Shri T. Raghavendra Rao, T. Upendra and T.S. Bala Krisna Rao. In our opinion, the ld. AO must have verified with the actual purchaser of the property i.e. Javeed Haroon, Sunil Beberwal & Shobha Awatramani but he failed to do so. The ld. CIT(A) has also recorded the facts that there was a sale deed executed on 3.6.2008 in favour of above 3 parties and the payment has been recorded that vendors have received payment. However, he has not taken any step to verify with the actual purchaser of the said property and when the assessee has stated before the lower authorities, the payment has been paid by the actual purchaser. They should have verified with the actual purchaser. Even otherwise, when the assessee has only confirming party in the final sale deed, it is clear that the payment has been made by the actual purchaser known by the assessee and the assessee has to offer the income earned from this transaction only and same to be brought to taxation, if it is not offered for taxation. On the other hand, if it is already offered for taxation, an amount of Rs.58,47,200/- transaction related to Malagar Estate no amount again to be brought to taxation. Accordingly, the ld. AO is directed to verify these facts and decide accordingly after giving an opportunity of hearing to the assessee. This ground of assessee is remitted to the file of ld. AO for fresh consideration.

49.1 Ground No.5 is infructuous in view of our finding in ground No.4.

50. Next ground no.6 is with regard to addition of Rs.18 lakhs made u/s 69 of the Act.

50.1 The ld. A.R. submitted that the learned CIT(A) -11, has upheld the addition of Rs.18,00,000/- on the ground that the assessee has not explained the source of investment in Cold Storage at Mysore. The assessee has paid sum of Rs.5,00,000/-vide

DD dated 18.07.2008 taken on SB account No.6633 maintained with Indian Overseas Bank, Jayanagar. That apart, the assessee had received a sum of Rs.13,00,000/- from Mr. Kumaraswamy. The learned authorities below without verifying the source of receipt has arbitrarily made additions. The learned assessing officer has held that as the receipts are in the name of the assessee, the money belongs to assessee and as it was alleged that the assessee has not offered proper explanation, it was treated as unexplained investment of the assessee.

50.2 The ld. A.R. submitted that the assessee had furnished the information pertaining to the source of investments. The assessee submits that if any property is registered in the name of the assessee, then the source for investment has to be sought for and it cannot be held that merely the property is registered in the name of the assessee, it cannot be held that entire money is sourced from the assessee's funds. Like-wise, merely if a receipt is in the name of the assessee that doesn't mean that it sourced out of assessee's funds. The authorities ought to have conducted inquiries to ascertain the facts.

50.3 He submitted that the learned assessing officer could have exercised the powers of a civil court under Section 131 and call upon any person concerned to prove the genuineness of transaction. That, unless a notice in due form under Section 131 of the Act is issued by the learned assessing officer concerned to test the veracity or the genuineness of the transaction, the assessee succeeds in his submissions. The assessee places reliance on the decision of the Hon'ble High Court of Patna in the case of ACIT Vs. Hanuman Agarwal 151 ITR 150 (Patna) for the above proposition. Therefore, the additions made amounting to Rs.18,00,000/- is liable to be deleted.

51. The ld. D.R. submitted that the investment of Rs.18 lakhs is clearly made in the name of Sri Sai Raksha Cold Storage, a proprietary concern of the assessee, as per the information collected from the assessee by' the AO during the course of survey. The assessee's claim that, out of this, a sum of Rs.13,00,000/- was made by Shri Kumara Swamy, an agriculturist, cannot be accepted as an explanation in this regard. Shri Kumara Swamy is not shown as a creditor. Also his explanation that the amount of Rs.5 lakhs invested by him was wrongly shown in the account of Sudha Raghuram, which has been corrected subsequently, is not acceptable. During the course of survey, the unexplained expenditure was accepted and offered for tax, which was retracted later. On the facts and in the circumstances, the ld. CIT(A) observed that as the assessee is unable to explain the source of Rs.13,00,000/-plus Rs.5,00,000/- mentioned above, the said amounts have been correctly brought to tax by the AO and the action of the AO is, therefore, upheld.

52. We have heard the rival submissions and perused the materials available on record. In this ground, assessee has challenged addition of Rs.18 lakhs made u/s 69 of the Act. The document impounded during the course of survey marked as TGR/70, which is a file in the name of Sri Sai Raksha Cold Storage at Mysore which is a proprietary concern of assessee. In the file, there was an application containing pages 20 to 22 as per which assessee has made a payment of Rs.18 lakhs as follows:

18.7.2008	-	Rs.9 lakhs
18.7.2008	-	Rs.4 lakhs
18.7.2008	-	<u>Rs.5 lakhs</u>
Total	-	<u>Rs.18 lakhs</u>

However, the balance sheet filed along with return of income have no details of this payment though during the course of survey, assessee has admitted that assessee has paid through DDs from IOB Bank, Jayanagar has been paid. However, it has not been accounted in the books of accounts of the assessee on the wrong impression that the transaction was relating to the partnership firm and offered for taxation. However, the same has been retracted vide letter dated 3.1.2011. Further, assessee has filed a letter dated 11.11.2011 stating that assessee has paid Rs.5 lakhs through banking channel bearing cheque no.772620 dated 18.7.2008 drawn on IOB SB account No.6633. Further, the assessee furnished a copy of the bank account also for the consideration of ld. AO. That amount has been used to draw DD to APMC, Mysore. Since the DD has been handed over to Sunanda Raghuram, it is wrongly debited to Sunanda Raghuram's account instead of Sri Sai Cold Storage account. The assessee has furnished a copy of ledger account to ld. AO. Balance of Rs.13 lakhs has been paid through DD No.461558 and 461559 for Rs.9 lakhs and Rs.4 lakhs respectively were arranged by Shri Kumara Swamy, Agriculturist, B.J. Mole, Malavalli Taluk, Mandya District on 18.7.2008. Since the said amount is not directly paid by assessee, the said amount of Rs.13 lakhs is accounted in the assessee's books of accounts. However, the ld. AO as of the opinion that since the APMC has issued receipts of Rs.18 lakhs in the name of assessee, the same has been treated as income of the assessee. In our opinion, the facts of record require reverification at the end of AO since he has not carried out proper enquiry and only on the reason that the receipt was in the name of Shri Sai Cold Storage, the addition was made in the hands of the assessee. In our opinion, the ld. AO has to verify the document furnished by the assessee at the time of assessment where the payment has been gone from the bank account of the assessee or

otherwise and decide the issue afresh. Accordingly, the issue is remitted back to the file of Id. AO for fresh consideration after giving an opportunity of hearing to the assessee.

53. Next ground No.7 is with regard to addition of Rs.25 lakhs made u/s 68 of the Act

53.1 The Id. A.R. submitted that the CIT(A)-11, has confirmed the additions of Rs.25,00,000/- being the amount received from one Mr. Swamy on the ground that the assessee had failed to explain the transaction or its genuineness. The assessee during the course of proceedings has furnished the information of Mr. Swamy. The learned assessing officer has issued summons u/s 131 of the Act. However, it is alleged that there was no response from Mr. Swamy. The learned assessing officer has proceeded to make additions merely on the ground of statement made during the course of survey, which was subsequently retracted.

53.2 He submitted that the assessee has discharged his duty by providing information about the person from whom he has received the advance. The Hon'ble Supreme Court in Anees Ahmad & Sons v. CIT (297 IT 441)(SC), the Hon'ble Court has held that merely for non-compliance with section 131(1) by other parties, no 'negative inference could be drawn and the assessee could not be penalized. The assessee also places reliance on the decision of the Hon'ble Supreme Court in the case of Orissa Corporation Pvt. Ltd., 159 ITR 78 (SC). Further, without prejudice, the assessee has contended that the amount received as an advance was subsequently repaid. The authorities below without verifying the details of the transaction has impulsively made additions which otherwise is a genuine transaction. Therefore, the additions made amounting to Rs.25,00,000/- is liable to be deleted.

54. The ld. D.R. submitted that the assessee has failed to discharge the onus on him to prove the cash credits of Rs.25,00,000/- from one Shri Swamy. He had accepted this initially to prove the said credit and had agreed to offer for tax and it was on 11/11/2011 that he retracted from the same by simply saying that he had repaid these during the year itself and enquiries may be conducted from the said person itself. This explanation of the assessee is no explanation. He has failed to explain the nature of the transaction or its genuineness. Moreover, having agreed to the same as unexplained consequent to survey, and only much later i.e. after a year, he has retracted with no explanation. The same cannot be accepted. Hence, the ld. CIT(A) upheld the action of the AO in bringing the amount of Rs.25,00,000/- to tax.

55. We have heard the rival submissions and perused the materials available on record. During the course of survey, ledger account for the period 1.4.2008 to 31.3.2009, wherein the land advance of Rs.35 lakhs received from Shri Kumara Swamy has been shown. However, this amount has not been reflected in the return of income filed by the assessee. The assessee has stated that the said amount has been repaid as follows:

14.12.2008	-	Rs.5 lakhs
15.02.2009	-	Rs.10 lakhs
24.03.2009	-	<u>Rs.10 lakhs</u>
Total	-	<u>Rs.25 lakhs</u>

In the course of assessment to verify the genuineness of the transaction correspondence made u/s 131 of the Act with the above party, no response from said party. The assessee also sent a letter to the said letter through RPAD requesting him to directly send the confirmation letter to the ld. AO. No response from that party.

According to the ld. AO, the assessee has not discharged burden cast upon him. The same position continued before the ld. CIT(A). Now the contention of ld. A.R. is that the said amount has been squared up in the assessment year under consideration and not outstanding at the end of the assessment year under consideration, the addition cannot be made. In our opinion, if this credit was appearing in the rough cash book, which is not the regular books of accounts maintained by the assessee, then addition cannot be made u/s 68 of the Act. Further, if the amount has been received and repaid in the same assessment year and there was no outstanding balance at the end of assessment year, section 68 of the Act cannot be invoked. In view of this, we remit this issue to examine whether this amount appearing in the rough cash book or in the regular cash book and whether it is squared up in the assessment year under consideration or at the end of the financial year relevant to assessment year 2009-10. If it is not relating to the assessment year under consideration, no addition could be made. With this observation, we remit this issue to the file of ld. AO for fresh consideration.

56. Next ground no.8 is with regard to addition of Rs.13 lakhs made u/s 68 of the Act in the name of TMT Limited.

56.1 The ld. A.R. submitted that the learned CIT(A) - confirmed the additions of Rs.13,00,000 /- being the liability shown in the balance sheet, on the ground that explanation offered by the assessee was not acceptable. The learned CIT (A), without application of mind has endorsed the view of the learned assessing officer.

56.2 He submitted that the assessee during the course of proceedings has furnished the information of M/s TMT India

Limited 5-8-13, Century Complex, Nampally, Hyderabad, PAN: AAAC7964P from whom the assessee has received a sum of Rs.13,00,000/-. The learned assessing officer has issued summons u/s 131 of the Act. However, it is alleged that there was no response from M/s TMT. The learned assessing officer has proceeded to make additions merely on the ground that the assessee has failed to prove the genuineness of the transaction.

56.3 He submitted that the assessee has discharged his duty by providing information about the person from whom he has received the advance. The Hon'ble Supreme Court in Anees Ahmad & Sons v. CIT (A)(297 IT 441)(SC), the Hon'ble Court has held that merely for non-compliance with section 131(1) by other parties, no 'negative inference could be drawn and the assessee could not be penalized. The assessee also placed reliance on the decision of the Hon'ble Supreme Court in the case of Orissa Corporation Pvt. Ltd., 159 ITR 78 (SC). Further, without prejudice, the assessee has contended that the amount received as an advance was subsequently repaid. He submitted that The authorities below without verifying the details of the transaction has impulsively made additions which otherwise is a genuine transaction. Therefore, the additions made amounting to Rs.13,00,000/- is liable to be deleted.

57. The ld. D.R. submitted that the assessee has not been able to establish any transaction with M/s TMT India Ltd. for which the liability to the extent of Rs.13,00,000/- has been claimed. No agreement or confirmation from the said party has been furnished in support of his claim. Merely because some repayment has been made subsequently as claimed, cannot explain this liability to be a genuine one. In view of this, the ld. CIT(A) confirmed the addition of Rs.13,00,000/-.

58. We have heard the rival submissions and perused the materials available on record. This ground is with regard to addition of Rs.13 lakhs. There was outstanding balance shown in the balance sheet in the name of TMT India Ltd. The ld. AO issued a notice u/s 131 of the Act. There was no response from TMT India Ltd. Hence, the addition has been made. In the present case, the assessee has furnished the detailed address of the parties also and the details of transaction. The ld. AO issued a notice u/s 131 of the Act but there was no response. If it is a trade credit, the transaction duly recorded and considered for the computation of income of assessee, the transaction cannot be doubted as non-genuine transaction. Hence, in our opinion, the credit being a trade credit arisen in the normal course of trading activity of assessee concern and the same has been considered for computation of income of the assessee in the assessment year under consideration and no addition be made. With this observation, we direct the ld. AO to decide the issue in the light of above observations. The issue is remitted to the file of AO for fresh consideration after giving an opportunity of hearing to the assessee.

59. Next ground Nos.9 to 11 are with regard to addition of Rs.8 lakhs received from ICFAI.

60. This issue came for consideration in AY 2008-09 in ITA No.1466/Bang/2022 as ground Nos.12 to 14 vide para 26, wherein we have remitted this issue to the file of the ld. AO for reconsideration. This addition is also bearing on the similar addition made in AY 2008-09. Hence, this issue is also remitted to the file of ld. AO for fresh consideration to decide the same after giving opportunity of hearing to the assessee.

61. Ground no.12 is with regard to sustaining addition of 10% on travelling and vehicle maintenance expenditure.

62. This ground is allowed in terms of our finding in assessment year 2008-09 in ground no.18 in para 35 of this order.

63. Ground Nos.13 & 14 are with regard to confirming addition of Rs.27,17,859/- received by assessee from Hushmukh B. Mardia as advance for sale of property.

63.1 The ld. A.R. submitted that the learned assessing officer held that a sum of Rs.27,17,859 which was paid by the assessee on behalf of the other co-purchasers and which was subsequently received back as the income of the assessee. The learned CIT(A) -II has endorsed the view of the assessing officer and thereby the authorities below have made and confirmed additions without application of mind.

63.2 He further submitted that the assessee along with Sri Munju Mutha and Sri Hasmukh B Mardia (Co-purchasers) purchased a property at V.V Puram, Bangalore. The purchasers had no money at the relevant time to be paid to the vendor of the property and the assessee has paid the following amounts on behalf of the co-purchasers:

Date	Cheque No.	Amount
13-01-2008	788871	5,00,000
23-02-2008	791683	5,00,000
02-04-2008	791684	5,00,000
02-04-2008	791685	5,00,000
		20,00,000
Value of proportionate amount for DD obtained in favour of the Sub-registrar Bangalore		7,17,859
Total		27,17,859

63.3 He submitted that the amount paid on behalf of the co-purchasers were subsequently recovered on the following dates and the same was accounted in the books of account:

Date	Bank account where the amount is credited/cash	Amount
23.05.2008	IOB Chikamagaluru 9999	1,00,000
24.05.2008	IOB Chikamagaluru 9999	10,00,000
30.06.2008	Cash	17859
08.07.2008	IOB — 6633	5,00,000
16.07.2008	IOB — 6633	6,00,000
30.07.2008	IOB Chikamagaluru 9999	5,00,000
Total		27,17,859

63.4 He further submitted that the amount advanced and subsequently returned has been added as income of the assessee. The learned authorities below have irrationally made additions without acknowledging the fundamentals of accounting. The assessee subsequently has given release deed in favour of other co-purchasers (Releasees). The assessee has received a consideration of Rs.36,99,999 towards the release deed executed on 12.09.2008 and after deducting proportionate cost of Rs.35,55,953, which the learned assessing officer and CIT(A) have admitted, has offered a sum of Rs.1,44,046 as income for the AY 2009-2010. The assessee submitted that during the course of proceedings the co-purchaser details were produced and the address and other details were also evident from the purchase deed/release deed. The learned authorities below without calling for any information or without causing adequate enquiries have in a haste held that the amount of Rs.27,17,859 received back from other co-purchasers as income of the assessee. In this regard, he placed reliance on the decision of the

ITAT Bangalore Bench in the case of ITO Vs Umadevi Shankrappa Thimappa in ITA No.984/bang/2012 dated 31-07-2013 wherein it has deleted the addition made as the A.O. failed to look into information already on record and additions was made without making any proper enquiries.

63.5 He submitted that without prejudice, the authorities below have to have provided for the cost of Rs.27,17,859 as the assessee has claimed cost proportionately and the learned CIT(A) -II has admitted this fact in para 12.1 of the order. Therefore, the additions made amounting to Rs.27,17,859 merely on mechanical grounds and without appreciating the facts and without causing adequate enquiries is liable to be deleted.

64. The ld. D.R. submitted that it is apparent from the facts of the case that the assessee has under-declared income from the transaction involving the sale of V.V.Puram property to the extent of Rs.27,17,850/-. The explanation of the assessee that the excess receipt is on account of earlier payments made to vendors by him earlier on behalf of the co-purchasers is without any evidence and, therefore, not believable. Despite repeated opportunities, the assessee has not come up with any proof in support of his claim. In view of this, the assessee's claim is rejected and the addition of Rs.27,17,850/- made by the AO is confirmed.

65. We have heard the rival submissions and perused the materials available on record. In our opinion, the facts narrated by the ld. AR before us are to be verified at the end of ld. AO as the findings recorded by the ld. AO is contrary to the submissions made by the assessee before us. Hence, the issue is remitted back to the file of ld. AO for fresh consideration after giving an opportunity of hearing to the assessee.

66. Ground no.15 is with regard to addition of Rs.6.1 lakhs as unexplained cash credit.

66.1 The ld. A.R. submitted that the learned assessing officer has added a sum of Rs.6,10,000/- as unexplained cash credits as it was alleged that the creditors have not responded to for the correspondence made. The learned CIT(A)-II has confirmed the said additions.

66.2 He submitted that the learned assessing officer has issued notice u/s 133(6) of the Act. The learned merely relied on non-compliance of notice issued u/s 133(6) of the Act and has made additions on hyper technically ground. The learned assessing officer could have exercised the powers of a civil court under Section 131 and call upon any person concerned to prove the genuineness of transaction. That, unless a notice in due form under Section 131 of the Act is issued by the learned assessing officer concerned to test the veracity or the genuineness of the transaction, the assessee succeeds in his submissions. The assessee placed reliance on the decision of the Hon'ble High Court of Patna in the case of ACIT Vs. Hanuman Agarwal 151 ITR 150 (Patna) for the above proposition.

66.3 Further, he submitted that the assessee had furnished the details of the creditors from whom he has received the amount of Rs.6,10,000/-. The assessee has discharged his duty by providing information about the person from whom he has received the amount. The Hon'ble Supreme Court in Anees Ahmad & Sons v. CIT (A)(297 ITR 441)(SC), the Hon'ble Court has held that merely for non-compliance with section 131(1) by other parties, no 'negative inference could be drawn and the assessee could not be penalized. He placed reliance on the decision of the Hon'ble Supreme Court in the case of Orissa Corporation Pvt. Ltd., 159 ITR 78 (SC). The authorities below without verifying the

details of the transaction has impulsively made additions which otherwise is a genuine transaction. Therefore, the additions made amounting to Rs.6,10,000/- is liable to be deleted.

67. The ld. D.R. submitted that the issue is only with regard to the addition of Rs.6,10,000/-. Merely stating that the said credits have been made up during the year is no explanation. The assessee has failed to explain the transaction and prove the source of credits as brought out by the AO. No further explanation or evidence has been produced during the appeal hearing. Therefore, this addition of Rs.6,10,000/- made by the ld. AO was upheld by the ld. CIT(A).

68. We have heard the rival submissions and perused the materials available on record. The authorities below without verifying the details of the transaction has made additions. Therefore, the additions made amounting to Rs.6,10,000/-is remitted to the file of Ld. A.O for reconsideration. This ground of appeal is allowed for statistical purposes.

68.1 In the result, the assessee in ITA No.1467/Bang/2012 is partly allowed for statistical purposes.

ITA 1457/2012 (2009-10) (Revenue's appeal):

69. The revenue has raised following grounds of appeal:

- 1) *The order of Ld. CIT(A) is clearly opposed to law as far as the findings on the following issues are perverse, contrary to the facts and circumstance of the case and hence not sustainable.*
- 2) *The Ld. CIT(A) erred in deleting the unproved liability shown at Rs 1,89,33,883/- even though accepting the fact that the transactions in the capital account of the firm Karkesia Estate is unclear but merely based on the submission by the assessee that it represented the withdrawals from the said firm without appreciating the fact that the assessee did not corroborate his claim with evidence by not producing the books of account. etc. of the above firm where the assessee is a partner.*

- 3) *The Ld. CIT(A) again erred in deleting the unproved liability shown at Rs 2,10,50,377/- while accepting the fact that the transactions in the capital account of the firm M/s Sargod Plantation is unclear but merely based on the submission by the assessee that it represented the withdrawals from the said firm without appreciating the fact that the assessee did not corroborate his claim with evidence by not producing the books of account, etc. of the above firm where the assessee is a partner.*
- 4) *The Ld. CIT(A) ought to have followed the decision in the case of Prabhavathi S Shah reported in 231 ITR 1 (Born) before forming the findings on the issues which had warranted further enquires as to the utilization of the withdrawn amounts from the firms or verified the books of account or allowed the AO to verify them to establish the genuineness.*
- 5) *The Ld. CIT(A) erred in deleting the unproved liability of Rs 38,00,000 in the case of Sri Sigabathulla by merely admitting the assessee's submission which had furnished the address and ledger extract duly signed by the party without appreciating the fact that there was no conclusive evidence and also the genuineness of the transaction was not proved by the assessee.*

69.1 Ground No.1 is general in nature, which do not require any adjudication.

70. Ground no.2 is with regard to deleting the unproved liability shown at Rs.1,89,33,883/- in favour of M/s. Karkesia Estate.

70.1 Facts of the case are that the AO found from the statement of accounts that the assessee had shown liability in a sum of Rs.1,89,33,883/- in favour of M/s Karkesia Estate to whom he issued a letter u/s 133(6) of the Act for confirmation of the liability. In the light of the party's failure to comply with the said letter of the AO, the assessee submitted to the AO that the address of the party concerned as furnished by him was correct and the claim of liability was correct as could be made out from transactions other than maintenance made through cheques and, therefore, he was not responsible for

the party's failure to comply with the AO's letter. Holding that the responsibility to prove the genuineness of the liability in favour of the party concerned, the AO disallowed the assessee's claim and brought the sum of Rs.1,89,33,883/- to tax as his income from other sources.

70.2 The Id. CIT(A) observed that the assessee has furnished a copy of the balance sheet of Karkesia Estate and has reconciled the transaction with regard to the books of account as under:

No.	Particulars	As per Books of Karkesia Estate/Balance Sheet		As per Appellant's Books	
		Dr.(Rs.)	Cr.(Rs.)	Dr.(Rs.)	Cr.(Rs.)
1.	Balance as on 1/4/2008		4,17,10,000	4,17,10,000	
2.	Less: Withdrawals	1,89,33,864			1,89,33,864
3.	Net loss for the period	13,01,485			13,01,485
	Balance as on 31/3/2009 – Net		2,14,74,631	2,14,74,631	

70.3 The Id. CIT(A) observed that although the nature of transactions is not very clear, in the absence of any adverse findings, the explanation of the assessee that the liability shown actually pertains to drawings during the year from the capital account is accepted with regard to the financial year in question. The addition on account of liability towards Karkesia Estate is, therefore, deleted. This does not alter the finding given in the assessment year 2008-09 that the balance as on 31/3/2008 is unexplained in that the decision in the appellate order for the assessment year 2009-10 will not have any impact on the addition confirmed in the appellate order in this regard for the assessment year 2008-09. For this assessment year, the Id. CIT(A) decided that the assessee gets a relief of Rs.1,89,33,883/-. Against this revenue is in appeal before us.

70.4. The Id. D.R. submitted that the assessee had shown liability Rs 1,89,33,883 towards Karkesia Estate, firm in which he was partner during the relevant period. The AO caused enquires with the firm and there was no response. When reverted back, the assessee claimed that said amount was withdrawn from his capital account of the firm and the same is shown as drawings by the firm in its balance sheet. The AO recorded his finding that the said firm did not show the said amount as receivable and therefore, the liability is not proved. The Id CIT(A) after examining the same evidences has recorded in her order that the nature of transaction is not very clear. However, she proceeded to delete the addition. The Id. D.R. submitted that this is opposed to the law and procedure. When the nature of transaction is not very clear, the Id. CIT(A) should not have deleted the addition.

70.5 The Id. A.R. for the assessee submitted that the learned CIT(A) -II after considering the facts and circumstances of the case allowed the assessee's appeal and deleted the addition of Rs.1,89,33,883/-. The assessee is a partner in the Firm named M/s Karkesia Estate. It is evident from para 6.3 of the Ground Nos.3 & 4 appellate order, the assessee had capital account balance of Rs.4,17,10,000/-(credit) as on 01-04-2008 and the same was reflected in the books of account of the Firm and also in the books of account of the assessee. The assessee during the financial year 2008-2009 had withdrawn a sum of Rs.1,89,33,864/- from the firm and the same was debited to the capital account of the assessee in the books of account of the firm.

70.6 He submitted that the learned assessing officer held that the sum of Rs.1,89,33,864/- withdrawn from the partnership as unexplained liability and added the same to the income of the

assessee. The assessee had furnished the details of the partnership firm before the learned CIT(A) -II and the assessing officer. The learned CIT (A) -II after considering the balance sheet of M/s Karkesia Estate and the submissions of the assessee held that the amount of Rs.1,89,33,864/- represents the drawing from the partnership and hence, deleted the additions. To controvert the findings, the learned CIT (A) -II has not brought on record any adverse findings. The assessee had furnished address of the partnership firm and information was called for under 133(6) of the Act. However, the party's failure to respond to the notice cannot be a ground to fasten the liability on the assessee which otherwise is genuine. Further, the learned assessing officer has not exercised his powers under section 131(1)(d) if the Act. Without examining the books of account and the details furnished by the assessee, as held by the CIT(A) -II, the additions made is arbitrary and hence, this ground of appeal filed by the department is liable to be rejected as the amount of Rs.1,89,33,864/- represents the drawings from the partnership firm and by not the income/liability as capriciously contended by the learned assessing officer.

71. In our opinion, the ld. CIT(A) after examining the records produced by the assessee came to the conclusion that this impugned addition pertains to the drawings in the assessment year from the capital account of the assessee. He ought to have called for remand report from ld. A.O before deleting the same. Hence, we remit this issue to the file of Ld. A.O for his consideration to decide the same after giving an opportunity of hearing to the assessee. The assessee shall furnish all details which were submitted before ld. CIT(A). The Ld. A.O has to go through the balance sheet of Karkesia Estate and also consider the reconciliation of the transaction with regard to books of accounts of the assessee as

reflected in the table reproduced in earlier para. This ground of the revenue is allowed for statistical purposes.

72. Ground Nos.3 & 4 are with regard to deletion of unproved liability shown at Rs.2,10,50,377/- in the capital account of the firm M/s. Sargod Plantation.

73. Facts of the case are that the assessee had claimed liability in favour of M/s Sargod Plantation to the tune of Rs.2,10,50,377/-. There was no response from the said party to the AO's notice u/s 131 the Act. The assessee objected to the AO's proposal to the said amount to tax on the ground that he held responsible for the firm's failure to respond to the AO's notice. He also informed the AO that in the enclosed copy of the balance sheet the sum of Rs.2,10,50,377/- had been shown as withdrawn and shown in his books of account as liability. Affirming that the assessee continued to be a partner of the firm, the AO has observed that the claim of withdrawal of the amount of Rs.2,10,50,377/- as capital from the firm and depiction of the same as liability is not borne out by documentary evidence in as much as the said amount has not been shown on the asset side of the firm's balance sheet. Therefore, the AO held that the liability shown in this regard is not genuine and brought the same to tax as the assessee's income from other sources.

74. The ld. D.R. submitted that regarding liability of Rs.2,10,50,377/- towards Sargod plantation, the facts and findings of ld. AO & ld. CIT(A) are same as detailed in preceding ground. When the nature of transaction is not very clear, the ld. CIT(A) should not have deleted the addition.

75. The ld. A.R. submitted that the learned CIT(A) -II after considering the facts and circumstances of the case allowed the assessee's appeal and deleted the addition of Rs.2,10,50,377/-. The assessee is a partner in the Firm named M/s Sargod

plantations. It is evident from para 7.3 of the appellate order, the assessee had capital account balance of Rs.5,88,00,000/- (credit) as on 01-04-2008 and the same was reflected in the books of account of the Firm and also in the books of account of the assessee. The assessee during the financial year 2008-2009 had withdrawn a sum of Rs.2,10,50,377/- from the firm and the same was debited to the capital account of the assessee in the books of account of the firm.

75.1 He submitted that the learned assessing officer held that the sum of Rs.2,10,50,377/- withdrawn from the partnership as unexplained liability and added the same to the income of the assessee. At the cost of repetition, the assessee had furnished the details of the partnership firm before the learned CIT(A) -II and the assessing officer. The learned CIT (A) -II after considering the balance sheet of M/s Sargod Plantations and the submissions of the assessee held that the amount of Rs. 2,10,50,377/- represents the drawing from the partnership and hence, deleted the additions. To controvert the findings of the learned CIT (A) -II has not brought on record any adverse findings. The assessee had furnished address of the partnership firm and information was called for under 133(6) of the Act. However, the party's failure to respond to the notice cannot be a ground to fasten the liability on the assessee which otherwise is genuine. Further, the learned assessing officer has not exercised his powers under section 131(1)(d) of the Act. Without examining the books of account and the details furnished by the assessee, as held by the CIT(A) -II, the additions made are arbitrary and hence, this ground of appeal filed by the department is liable to be rejected as the amount of Rs. 2,10,50,377/- represents the drawings from the partnership firm and by not the

income/liability as capriciously contended by the learned assessing officer.

75.2 He further submitted that the department has relied on the decision of The Smt. Prabhavati S. Shah Vs. Commissioner of Income-Tax 231 ITR 1 (Born). The assessee had furnished all the information like balance sheet of the partnership firms, address of the partnership, the details of amount withdrawn etc. The decision of the Hon'ble High Court of Bombay, is distinguishable as according to the said decision, it is held that the powers of the appellate authority is co-terminus to that of the assessing officer and the appellate authority ought to have considered the additional evidence furnished by the assessee and allowed the relief. Therefore, he submitted that the aforesaid decision is not applicable to the assessee's case.

76. We have heard the rival submissions and perused the materials available on record. There was a liability shown by assessee in the balance sheet at Rs.2,10,50,377/- in the name of M/s. Sargod Plantation, wherein the assessee was partner. The ld. AO has tried to verify this ground by issuing summons u/s 131 of the Act dated 18.7.2011. However, there was no response from this party. The ld. AO was of the opinion that since the assessee, being a partner of that firm, the assessee has to substantiate this credit. However, before the ld. CIT(A), assessee filed the details of transactions with reconciliation as appearing in the books of accounts of M/s. Sargod Plantation as well as in assessee's books of accounts as below:

No.	Particulars	As per books of Sargod Plantations/Balance sheet		As per Appellant's Books	
		Dr.(Rs.)	Cr.(Rs.)	Dr.(Rs.)	Cr.(Rs.)
1.	Balance as on 1.4.2008		5,88,00,000	5,88,00,000	
2.	Less: Withdrawals	2,10,50,377			2,10,50,377
3.	Add: Profit for		19,08,598	19,08,598	

	the year				
	Balance as on 31.3.2009 - Net		3,96,58,221	3,96,58,221	

76.1 After going through the above reconciliation, the Id. CIT(A) has deleted the addition. Now the contention of Id. D.R. is that an opportunity of examining the above account statement ought to have been given to the Id. AO, which Id. CIT(A) failed to do so. In our opinion, the Id. CIT(A) ought to have called for remand report from the Id. AO, on this issue which he failed to do so. Hence, in the present case, the Id. CIT(A) after calling for the details from the assessee and going through the assessee's account with Sargod Plantation and came to conclusion that the amount shown by assessee at Rs.2,10,50,377/- was the withdrawal from that firm and deleted the addition. In our opinion he should have given an opportunity to Ld. A.O to go through the details filed assessee before him. Hence, we remit this issue to the file of assessing officer for fresh consideration. These grounds of appeal of revenue are allowed for statistical purpose.

77. Ground no.5 is with regard to deletion of unproved liability of Rs.38 lakhs.

77.1 Facts of the issue are that the AO found from the documents available that the assessee had claimed liability in favour of one Shri Sigabathulla to the tune of Rs.38,00,000/-. When asked, the assessee replied that the amount had been transferred to the account of M/s Sargod Plantations as it was received from Shri Sigabathulla on behalf of the said firm and that he could not be held responsible if the enquires with the said firm did not yield any response. Holding that this stand of the assessee was tantamount to escapism to prove the genuineness of the

claim, the AO disallowed the claim and brought the same to tax as the assessee's income.

77.2 Regarding liability of Rs.38,00,000/- towards Sigabathulla, the ld. D.R. submitted that the assessee has claimed above liability. He claimed that said amount was received on behalf of Sargod plantation. Since the other party did not confirm the transaction, the ld. AO added the same. Before ld. CIT(A) the assessee had produced the ledger extract confirmed by the party and based on the same the ld. CIT(A) deleted the addition. Since it was fresh evidence produced, it was incumbent on the part of ld. CIT(A) under Rule 46A to remand the matter to AO. He submitted that deleting the addition based on fresh material without offering opportunity to ld. AO is opposed to the law and procedure.

78. The ld. A.R. submitted that the learned CIT(A)-II after considering the facts and circumstances of the case allowed the assessee's appeal and deleted the addition of Rs.38,00,000/-. The learned assessing officer held that the assessee has discharged the onus of proving the genuineness of the transaction and accordingly, made additions of Rs.38,00,000/-. The assessee has received the amount of Rs.38,00,000/- from Sri. Sigabathulla on behalf of M/s Sargod Plantations. The amount received was subsequently transferred to M/s Sargod Plantations during the FY 2009-2010. The assessee had also furnished the address and other details of Mr. Sigabathulla. The learned assessing officer issued summons u/s 131 of the Act to verify the genuineness of the liability, however, there was no response for the correspondence. The learned CIT(A)-II held that the assessee had furnished the signed copy of the ledger extract of the creditor with seal, signature and PAN and further held that the assessee had done majority of the transactions through cheque.

The CIT(A) -II deleted the additions as the assessee had discharged his onus.

78.1 In this regard the ld. A.R. placed reliance on the principles laid down by the Supreme Court in the case of Orissa Corporation [1986] 159 ITR 78. In the said decision the Supreme Court has observed that when the assessee furnishes names and addresses of the alleged creditors and the GIR numbers, the burden shifts to the Department to establish the Revenue's case and in order to sustain the addition the Revenue has to pursue the enquiry and to establish the lack of creditworthiness and mere non-compliance of summons issued by the Assessing Officer under section 131, by the alleged 'creditors will not be sufficient to draw and adverse inference against the assessee. Therefore, he requested that this ground of appeal filed by the department is liable to be rejected.

79. We have heard the rival submissions and perused the materials available on record. This ground is with regard to deletion of Rs.38 lakhs, which is being an unproved credit. This amount has been shown in the name of Sri Sigabathulla. On enquiry by ld. AO, the assessee has submitted that the amount had been transferred to the account of M/s. Sargod Plantation on behalf of said firm that he could not be responsible if the enquiry with the said firm did not yield any response. Hence, the ld. AO has made addition. However, the ld. CIT(A) after going through the extract of ledger account appearing in the books of accounts of the assessee, he deleted the addition. In our opinion he should have given an opportunity to Ld. A.O to go through the details filed assessee before him. Hence, we remit this issue to the file of assessing officer for fresh consideration. This ground of appeal of revenue is allowed for statistical purpose.

ITA No.173/Bang/15 (AY 2010-11):

80. The assessee has raised following grounds of appeal:

1. *The order of the Id. Commissioner of Income Tax (Appeals) - II, Bangalore insofar as it is against the assessee is opposed to law, weight of evidence, facts and circumstances of the case.*
2. *Appellant denies himself liable to be assessed on a total income of Rs.1,56,14,180/- as against returned income of Rs.28,49,360/- under the facts and circumstances of the case.*
3. *The Id. Commissioner of Income Tax (Appeals) - II, Bangalore is not justified in upholding the action of the Id. Assessing Officer insofar as survey operations conducted u/s 133A of the Act, more particularly conducting survey operations in the residential premises of the appellant under the facts and circumstances of the case.*
4. *The Id. Commissioner of Income Tax (Appeals) - II, Bangalore is not justified in upholding the action of the Id. Assessing Officer insofar as obtaining statement on oath from the appellant during the course of survey proceedings u/s 133A of the Act under the facts and circumstances of the case.*
5. *The Id. Commissioner of Income Tax (Appeals) - II, Bangalore is not justified in blindly following the action of the Id. Assessing Officer insofar as survey proceedings are concerned without considering the retraction letter filed by the appellant under the facts and circumstances of the case*
6. *Without prejudice to the above the Id. Commissioner of Income Tax (Appeals) II, Bangalore is not justified in confirming the difference in opening capital balance of the appellant in the books amounting to Rs.20,96,061/- under the facts and circumstances of the case.*
7. *The Id. Commissioner of Income Tax (Appeals) - II, Bangalore is not justified in confirming the addition in respect of eviction charges paid by the appellant amounting to Rs.41,41,540/- under the facts and circumstances of the case.*
8. *The Id. Commissioner of Income Tax (Appeals) - II, Bangalore is not justified in confirming the addition in respect of professional charges paid by the appellant amounting to Rs.3,87,100/- under the facts and circumstances of the case.*

9. *The Id. Commissioner of Income Tax (Appeals) - II, Bangalore is not justified in confirming the addition made in respect of income from real estate business amounting to Rs.70,00,000/- under the facts and circumstances of the case.*
10. *The appellant denies himself liable to be charged interest u/s 234B & 234C of the Act under the facts and circumstances of the case.*
11. *For the above and such other grounds that may be raised, the appellant prays that the appeal may be allowed for advancement of substantial cause of justice and equity under the facts and circumstances of the case.*

81. Ground No.1 is general in nature, which do not require any adjudication

82. Ground Nos.2 to 5 are disposed of as discussed in ground Nos.3 & 4 in assessment year 2009-10 in this order herein above.

83. Ground No.6 is with regard to addition of Rs.20,96,061/- being the difference in opening capital account.

84. The Id. A.R. submitted that the learned CIT(A) -11, confirmed the additions of Rs.20,96,061/-, being the alleged difference in opening capital account, on the ground that the assessee was not able to substantiate with valid reasons for the disparity in the opening balances. The assessee submitted that there is no disparity in the opening balance. The authorities below have misconstrued the accounting entries as the assessee has carried forward the same balances as that of previous year. The assessee for the sake of clarity is reproducing the table depicting the closing balance as at 31.03.2009 and opening balance as at 01.04.2009:

Closing Capital Account as on 31.03.2009

Particulars	Debit	Credit	Closing Capital account - 31.03.2009
Opening Capital as on 01-04-2008		4,32,177	
Add: Agriculture land and house — inherited		6,00,000	
Add: Net profits for 31.03.2009		24,77,227	
Total		35,09,404	
Less: drawings for 31.03.2009	2,43,215		
Less: Loss on sale of shares (short term capital loss)	23,60,000		
Total	26,03,215	35,09,404	
Closing Balance (Credit less Debit) -31.03.2009			9,06,189

Opening Balance as on 01.04.2009

Particulars	Opening Capital account - 01.04.2009
Opening Capital as on 01-04-2009 (as alleged by the authorities below) — this is the gross balance carried forward before making adjustments to the items below	30,02,215
Less: Short term capital loss of 31-03-2009 (same as previous year)	(23,60,000)
Add: Short term capital gains (subsumed in net profit for the year ended 31.03.2009)	1,44,046
Add: CITI bank credit card (subsumed in net profit for the year ended 31.03.2009)	1,09,918
Add: Income Tax Refund	10,010
Closing Balance (Credit less Debit) – 31.3.2009	9,06,189

84.1. The Id. A.R. further submitted that the Short term capital loss, Short term capital gains, CITI Bank Credit card, IT Refund are accounted under different sub-ledgers under the capital account ledger account. The assessee for the sake of representation has segregated the ledgers and has carried forward the ledger balances. If the assessee had net off the ledger accounts with the capital account, then the net balance would have been Rs.9,06,189. The assessee had furnished the sub-ledger accounts within the capital account ledger. The authorities below have conveniently brushed aside the submissions of the assessee. Therefore, the assessee submitted that there is no disparity in the opening capital account as alleged by the authorities below as it is only the adjustment of sub-ledgers within the capital account ledger.

84.2 He further submitted that without prejudice, even assuming that there is a disparity in the opening capital account, no addition in respect of opening balance can be made in the year under consideration. If at all an addition is warranted, it can be made only in the preceding year. In this regard he placed reliance on the following judicial decisions:

- i. Smt. Surapu Indira Devi Vs. ACIT (ITA No. 96/Hyd/2012) dt. 08-08-2013;
- ii. Sri Grosu Murali Krishna Vs. DCIT (ITA No. 178/Hyd/2011) dt. 05-03-2014.

84.3 He further submitted that in the case of Smt. Surapu Indira Devi Vs. ACIT (Supra), vide para 15, it was held that:

"15. We have heard both the parties. We are of the opinion that even though there may be difference of opinion as to the amount of agricultural income which could be obtained from the land and the lack of evidence produced with respect to the same, the issue of Assessing Officer not accepting the opening balance

and treating the same as NIL is incorrect. The CIT(A) has also confirmed the order of the Assessing Officer and hence, the lower authorities have erred as they have overlooked the principle that the opening balance cannot be disturbed this year. The authorities can only reopen for the earlier year. We rely on the decision of ACIT Vs. Smt. N Sasikala (2005) 92 TV (Chennai) 119 wherein it has been held as follow:

5.....The learned counsel for the assessee submitted that the assessee has filed the return of income for the assessment year 1991-92 along with cash flow statement and the statement of affairs. Cumulative cash balance was saved by the assessee over a period of time. The assessee explained the total assets and liabilities position and he further submitted that the assessee has also filed return of income for the assessment year 1990- 91. If the Department doubted the availability of cash balance, it can go to the concerned assessment year 1990-91, and treat it as unexplained income, but it cannot treat the opening balance in the assessment year 1991-92 as unexplained. The learned counsel for the assessee strongly supported the order of the CIT(A).

6..... The Tribunal held that the A.O. has failed to take cognizance of the return for 1990-91, while deciding the issue of 1991- 92 as the return was before him. The opening balance of cash cannot be treated as unexplained in the assessment year 1991-92. In view of this position, we have no hesitation in confirming the order of the CIT(A) and reject the ground taken by the Revenue".

84.5 Therefore, he requested that the additions made amounting to Rs.20,96,061/- is liable to be deleted for the reasons as aforementioned.

85. The Id. D.R. submitted that the opening balance of the assessee has shown a difference of Rs.20,96,061/-. Before Id. CIT(A), during the appeal proceedings, the assessee has merely reiterated the submissions filed by him before the AO. At page 3 of the assessment order, the AO has stated that the short-term capital gain has already been accounted for in the capital account. The Id. CIT(A) further observed that assessee has taken/added

the figures of previous financial year to the capital account of financial year 2009-10, which is not an acceptable accounting practice. Hence, the AO's action in adding the difference in capital balance amounting to Rs.20,96,061/- is confirmed by the ld. CIT(A).

86. We have heard the rival submissions and perused the materials available on record. The addition has been made on the reason that there was difference in opening capital account and the assessee was not able to substantiate with the valid reason for the disparity in the opening balance. According to the ld. AO, the opening balance as on 1.4.2009 in th capital account was Rs.30,02,250/-. However, the same has been shown in the financial year ending on 31.3.2009 (AY 2009-10) shown at Rs.9,06,189/-. Thus, there was a difference of Rs.20,96,061/-, which has been debited as opening balance at higher side. Before us, ld. A.R. submitted that there is no disparity in the brought forward opening balance from 31.3.2009 to 1.4.2009 and he has furnished the details of the same, which was reproduced in earlier para. In our opinion, it is appropriate to remit this issue to the file of ld. AO to go through the above capital account as on 31.3.2009 and decide the issue afresh. The issue is remitted to the file of ld. AO for fresh consideration after giving an opportunity of hearing to the assessee.

87. Ground no.7 is with regard to addition of Rs.41,41,540/- being disallowance of eviction expenses.

87.1 The ld. A.R. submitted that the learned CIT(A) -11, has confirmed the additions of Rs.41,41,540/- being the eviction expenses incurred by the assessee. The assessee has received the amount of Rs.1,05,00,000/- from M/s Gopalan Enterprises on

account of eviction of illegal occupants of the property. The assessee had received the sum of Rs.1,05,00,000/- as under:

SI.No	Cheque	Date	Amount (Rs)	Deposited in
1	381304	24-12-2005	15,00,000	Karnataka Bank
2	382162	27-01-2006	90,00,000	IOB

87.2 He further submitted that the learned CIT(A)-11, has added the above sum of Rs.1,05,00,000/- as unexplained income for the AY 2008-2009. The learned assessing officer has held that the assessee had furnished the ledger copies of some of the parties to whom the assessee had paid money on account of eviction charges. The contention of the learned assessing officer is that the narration against these names was "Advance Given". The assessee submitted that as agreed by the learned assessing officer, the assessee is continuously incurring expenses from the FYs 2005-06 to 2009-2010 and hence these amounts were shown as advances in the books of account. Subsequently, on the completion of eviction the assessee has accounted for the expenses and offered net of expenses as income.

87.3 He further submitted that the learned assessing officer without verifying the veracity of the transaction has concluded that the assessee has not incurred eviction expenses. If the assessee had not incurred eviction expenses, then M/s Gopalan Enterprises would not have paid money to the assessee. It is a prudent understanding that as to why any person would advance such huge money, if it is not rewarded with the purpose for the which it was paid. The learned assessing officer could have caused inquires with M/s Gopalan Enterprises to ascertain the facts. The authorities below have added the receipt as

income in one year and disallowed the expenses in another year. The irrational act of the authorities below is deplorable as the additions have been made in haste without application of mind. Therefore, he submitted that disallowance made amounting to Rs.41,41,540/- is liable to be deleted.

88. The ld. D.R. submitted that the total amount disallowed under this head comes to Rs.45,28,640/-. Of this, a sum of Rs.41,41,540/- relates to deduction claimed towards payment of eviction expenses. Neither in the written submissions nor during the appeal hearing the ground relating to eviction expenses of Rs.41,41,540/- was pressed. Hence, this ground was dismissed by the ld. CIT(A).

88.1 The other component is a sum of Rs.3,87,100/- claimed as payment of professional charges. Before the ld. CIT(A), during the appeal hearing, the assessee did not produce any material in support of his claim so as to negate the findings of the AO in this regard at pages 4 and 5 of the assessment order. The AO has also stated that the relevant vouchers/bills in support of the claim were not produced before him. Therefore, the action of the AO in disallowing the assessee's claim in this regard and bringing it to tax is in order and, accordingly, his action was confirmed by the ld. CIT(A).

89. We have heard the rival submissions and perused the materials available on record. In our opinion, this issue is required to be re-examined at the end of ld. AO as this addition has been made on protective basis and relating to transaction with Gopalan Enterprises, which was adjudicated in earlier assessment year 2008-09 herein above in this order in ground Nos.9 to 11 in para nos.21 to 23 of this order This issue is

remitted to the file of AO for fresh consideration after giving an opportunity of hearing to the assessee.

90. Ground No.8 is not pressed and accordingly dismissed as not pressed.

91. Ground No.9 is regarding confirming the addition made in respect of income from real estate business amounting to Rs.70,00,000/-.

91.1 The ld. A.R. submitted that the learned CIT(A) — II, has confirmed additions of Rs.70,00,000/- on the ground that it represents the business income of the assessee. The learned CIT (A) -II has relied solely on the statement made by the assessee in the course of survey action. The CIT (A) — II has held that assessee has not furnished tangible evidence to substantiate the retraction made. In this regard the assessee reiterated that the authorities below ought not to have relied on the mere statement made by the assessee during the course of survey conducted under section 133A of the Act. The statement made at the time of survey has no evidentiary value and therefore, admission made by the assessee without any corroborative evidence is devoid of merits. The authorities below have solely relied on the statement of the assessee obtained through coercion and such statement is opposed to the law and judicial decisions. Hence, he submitted that The authorities below have failed to appreciate the fact that mere confession statement without any credible evidence would not automatically bind on the assessee.

91.2 In this regard the ld. A.R. placed reliance on the decision of The Hon'ble High Court of Karnataka in the case of Commissioner of Income Tax and Another Vs. Dr.N.Thippa Setty 322 ITR 525 held that where an order of re-assessment is based entirely on statements recorded under Section 132(4) of the Act

and subsequently such statement is retracted, then the same was liable to be aside. Therefore, he submitted that applying the above ratio, the assessment made merely on the statement of the assessee without any cogent evidence will vitiate the proceedings and hence, additions confirmed amounting to Rs.70,00,000/- on the basis of the statement is liable to be deleted.

92. The Id. D.R. submitted that the AO has stated that, in the course of survey action, expenses to the tune of only Rs.17.75 lakhs were sent to have been accounted for. When the assessee was confronted with this fact, he stated that his income from real estate business amounted to Rs.90,00,000/-. The AO, after allowing expenses of Rs.20,00,000/- as claimed by the assessee to have been incurred in earning this income, has taken the income at Rs.70,00,000/-, which appears to be correct. Other than making statements in general terms that he was coerced to declare the income, the assessee has not presented any tangible evidence that will substantiate the retraction made by him later. Also, mere non-rejection of books of account will not render the addition invalid. Hence, the addition of Rs.70,00,000/- made on the basis of the statement of the assessee recorded and his inability to substantiate his retraction was confirmed by the Id. CIT(A).

93. We have heard the rival submissions and perused the materials available on record. The addition is based only on the basis of statement recorded u/s 133A of the Act. As discussed in earlier para in assessment year 2008-09 in ITA No.1466/Bang/2012 addition cannot be made only on the basis of statement recorded u/s 133A of the Act without any corroborative material and the judgement of Hon'ble Supreme Court in the case of M/s. S. Khader Khan Sons cited (supra) in support of the case of

assessee. Accordingly, the addition is deleted and the ground raised by the assessee in this appeal is allowed.

94. The ground No.10 is with regard to charging of interest u/s 234B & 234C of the Act which is mandatory and consequential in nature to be charged accordingly.

95. In the result, the appeal of the assessee in ITA No.173/Bang/2015 is partly allowed for statistical purposes.

96. In the result, appeals of the assessee in ITA No.1466/Bang/2012, ITA No.1467/Bang/2012 & ITA No.173/Bang/2015 are partly allowed for statistical purposes and appeal of the revenue in ITA No.1457/Bang/2012 is partly allowed for statistical purposes.

Order pronounced in the open court on 30th Oct, 2023

**Sd/-
(Beena Pillai)
Judicial Member**

**Sd/-
(Chandra Poojari)
Accountant Member**

Bangalore,
Dated 30th Oct, 2023.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(Judicial)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

**Asst. Registrar,
ITAT, Bangalore**