IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH: BANGALORE

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

ITA Nos.1117 to 1119/Bang/2022
Assessment Years: 2016-17 to 2018-19

Mohammed Mujeeb Sikander 306, 3rd Floor, B.M.K. Commercial Centre Highland, Falnir Mangalore 575 002 **PAN NO : AELPS6817A**	**Vs.**	DCIT Central Circle-1 Mangalore
APPELLANT		**RESPONDENT**

Appellant by	:	Shri T.M. Shivakumar, A.R.
Respondent by	:	Shri Sunil Kumar Singh, D.R.

Date of Hearing	:	16.08.2023
Date of Pronouncement	:	30.10.2023

O R D E R

PER CHANDRA POOJARI, ACCOUNTANT MEMBER:

These 3 appeals by assessee are directed against different orders of CIT(A), all are dated 17.10.2022. Since certain issues in these appeals are common, all these appeals are clubbed together, heard together and disposed of by this common order for the sake of convenience.

ITA No.1117/Bang/2022 (AY 2016-17):

2. First, we take up ITA No.1117/Bang/2022 for adjudication. Ground Nos.1, 3, 4, 5, 6 & 7 are with regard to framing assessment u/s 153C of the Income-tax Act,1961 ['the Act' for short].

2.1 Facts of the issue are that for the Assessment Year ("AY") 2016-17 the assessee had filed his return of income on 07.10.2016 declaring total income of Rs.4,93,130/-. A search and

seizure action were carried out in the case of the Assessee under a warrant of authorization under Section 132 of the Act on 08.02.2018. The ld. Assessing Officer ("AO") issued notice u/s 153C(1)(a) of the Act dated 21.02.2019 calling upon the Assessee to file a return of income. In response, the assessee filed a return of income on 20.07.2019 declaring a total income of Rs.5,18,210/-. The ld. AO completed the assessment under Section 143(3) r.w.s. 153C of the Act making the following additions thus, determining the total income at Rs.2,17,45,422/-.

i. Rs.20,86,560/- u/s 69B of the Act being alleged difference in loan advanced to one Mr. Mahesh as allegedly told to the investigating Officer at the time of search and the figures as per the books of accounts.

ii. Rs.1,24,17,338/- u/s 68 r.w.s. 115BBE of the Act being past investments brought into the books of accounts.

iii. Rs.67,23,316/- u/s 68 r.w.s. 115BBE of the Act being amount standing in the name of Seahath Marine Products.

2.2 Aggrieved by the assessment order, the assessee filed appeal before the Commissioner of Income Tax (Appeals)-2 Panaji [CIT(A)] on 27.01.2020 raising the following grounds:

i. On the facts and circumstances of the case and in law the Ld. AO erred 'in not accepting the facts that search carried out u/s 132 was illegal and without legal warrant.

ii. On the facts and circumstances of the case and in law the Ld. AO did not provide reasonable opportunity of hearing.

iii. Oh the facts and circumstances of the case and in law the Li AO erred in making addition on the basis of statements which recorded under duress and undue pressure.

iv. On the facts and circumstances of the case and in law the Ld. 10 erred in not accepting facts that assessee withdraw the admission of income by retraction statements.

v. On the facts and circumstances of the case and in law the Ld. AO erred in ignoring the facts that assessee had retracted the statement recorded under

pressure and that in return of Income filed u/s 153C he had disclosed his true income

vi. *On the facts and circumstances of the case and in law the Ld.AO erred in making addition of Rs.20,86,560/- on account of amount paid to Mahesh*

vii. *On the facts and circumstances of the case and in law the Ld AO erred in adding additional amount paid to Mahesh that was allegedly not shown in Books of Accounts There is no evidences that the assessee had paid additional money to Mahesh*

viii. *On the facts and circumstances of the case and in law the Ld. AO erred making addition of Rs.1,24,17,338/- as capital introduced during the year*

ix. *On the facts and circumstances of the case and in law the Ld. AO erred making addition of Rs.67,23,316/- under the head Sundry Creditors*

x. *On the facts and circumstances of the case and in law Ld. AO erred in levying penalty under sections 271(1)(c) of the Act.*

xi. *The Assessee have right reserve to Amend modify delete and make any additional grounds of appeal.*

2.3 During the appellate proceedings the assessee raised additional grounds of appeal before the ld. CIT(A)-2, Panaji as under:

1. *The learned Assessing Officer erred in issuing notice u/s.1 53C(1)(a) of Income tax Act, 1961 in respect of the Appellant, who was searched under the provisions of section 132 of Income tax Act.*

2. *The learned Assessing Officer was wrong in passing an order u/s.153C of Income tax Act.*

3. *The Appellant submits that having been served a notice u/s.I32 for the search operation, the notice should have been issued u/s.153A and not 153C of Income tax Act.*

4. *The Appellant therefore submits that the order passed u/s. 1 43(3) r.w.s.153C is bad in law and required to be annulled.*

5. *For the above and any other grounds that may be advanced at the time of hearing, the Appeal he allowed.*

2.4 The ld. CIT(A) obtained a remand report from the ld. AO on the additional grounds raised by the Assessee. As per the information shared with the assessee, the AO has submitted two remand reports- the first one dated 07.06.2022 and the second dated 20.07.2022. The assessee filed written submissions dated 28.06.2022, 30.06.2022, 20.07.2022, 22.09.2022 and 07.10.2022.

After considering the remand report as well as assessee's submissions, the Ld. CIT(A) sustained all the additions made by the AO.

2.5 The ld. CIT(A) admitted the additional grounds raised by the assessee by relying upon the decisions of various courts including that of the Apex court in *National Thermal Power Corporation Ltd vs CIT (229 ITR 383).* However, he dismissed the additional grounds by holding that there was no search warrant in the name of the assessee and therefore the AO could have assumed jurisdiction only u/s 153C of the Act. He further held that as the assessee had duly responded to the notice u/s 153C of the Act and also participated in the proceedings the intent and purpose of the provisions contained in section 153A and 153C stood satisfied and hence mentioning of wrong section in the notice did not invalidate the proceedings initiated pursuant thereto. He also held that having participated in the proceedings, the assessee could not be allowed to turn around or raise objections for the first time before CIT(A) seeking invalidation of the proceedings initiated by issuing notice u/s 153C instead of 153A. He also held that since the notice u/s 153C, in substance and effect, is in conformity with or according to intent and purpose of the Act, the mistake of mentioning section 153C instead of 153A gets cured because of section 292B of the Act. Holding so, the ld. CIT(A) rejected the additional grounds. As regards other grounds the same were also dismissed and all the additions made by the AO were sustained.

2.6 Aggrieved by the order of ld. CIT(A) the assessee has filed appeal before this Tribunal on 12.12.2022 raising the following grounds of appeal.

1. *That the assessment order passed u/s 153C of the Act is without jurisdiction and bad in law as well as on facts and is liable to be quashed.*

2. *That the Ld. Commissioner of income-tax Appeals (`CIT (A)) erred in upholding the addition of Rs.2,12,27,214/- made to the returned income on wholly erroneous, illegal and untenable grounds.*

   That the assessment order passed u/s 153C of the Act is without jurisdiction and bad in law having been issued under the inapplicable provisions of the Act and is liable to be quashed.

4. *That the Order of Ld CIT(A) is perverse and liable to be quashed having been passed ignoring the relevant and the material facts.*

5. *That the Ld. C1T(A) erred in dismissing the jurisdictional ground on initiation and concluding the proceedings under the inapplicable section 153C instead of u/s 153A of the Act as he erred in:*

   - *holding that there was no search warrant issued in the name of the appellant.*

   a. accepting the U-turn of the Assessing Officer made in the Remand Report that no search and seizure action u/s 132 of the Act was carried out in the case of the appellant in spite of the contrary finding recorded in the assessment order.

   b. in blindly relying upon the Remand Report dated 20.07.2022 without providing the copy of warrant of authorization as well as the appraisal report and the satisfaction note (prepared before initiating action u/s 132 of the Act) whose contents have been selectively quoted by the Ld AO in his remand report.

   c. in ignoring that the said Remand Report itself contains admission of the fact that the search u/s 132 of the Act was in fact conducted on a group of assessees including the Appellant.

   d. in ignoring that the Remand Report dated 27.06.2022 clearly states that the search was conducted in the case of conducted in the case of Sri Sadhu Salian of M/s Y FM Co and its partners and that search was conducted in the case of the Appellant as he was one of the partners of the above concern.

   e. ignoring the fact that the ADIT(Inv) Queen's Road Bengaluru had made preliminary enquiries on the purchase of immovable properties by the Appellant and that only thereafter he had included the Appellant as one of the Assessees for search u/s 132 of the Act.

   f. not appreciating that there could not have been any seizure of documents from the Appellant's premises if there was no search in the Appellant's case as all the seized documents allegedly belonged to -the Appellant alone and not to Mr Salian.

g. *holding that the defect, if any, of issuing notice under the inapplicable section 153C in place of 153A is curable under the provisions of section 292B of the Act.*

h. *holding that no prejudice is caused to the respondent*

6. *That the AO could not have issued notice u/s 153C in place of notice u/s 153A of the Act as when a power is given under a statute to do certain thing in a certain way, the thing must be done in that way or not at all and other methods of performance are necessarily forbidden.* ***[Taylor vs Taylor (1875) 1 Ch D426,431; Nazir Ahmed vs King Emperor (AIR 1936 PC 253)]***

7. *That even otherwise the initiation of proceedings u/s 153C of the Act is without jurisdiction and bad in law due to absence of the mandatory satisfaction as required u/s 153C(1) of the Act.*

a. *That it is a borrowed satisfaction and has been recorded mechanically without application of mind.*

b. *That the satisfaction recorded by the Ld. AO does not satisfy the requirements of section 153C(1) of the Act.*

8. *That the Ld. CIT(A) erred in confirming the additions made to the total income solely on the basis of statement recorded u/s 132(4) of the Act without*

a. *appreciating that the said statement was not reliable having been obtained under pressure and duress from the Appellant at the time of search and the same had been duly retracted in time; and*

b. *without bringing on record any corroborative evidence and ignoring the facts on record.*

9. *That the defect of issuing notice under section 153C in place of 153A is a jurisdictional defect which would not get cured by the provisions of section 292B of the Act.*

10. *On the facts and the circumstances of the case, the Order o Ld. CIT(A) in confirming addition of Rs.20,86,560/- solely on the basis of statement u/s 132(4) of the Act completely ignoring the books of accounts of the Appellant.*

11. *On the facts and the circumstances of the case, the Ld. CIT(A) erred in confirming addition of Rs.1,24,17,338/- u/s 68 of the Act and charging tax at the rates prescribed under section 115BBE of the Act ignoring that the same was out of his own earnings and savings of more than 20 years and were duly recorded in the books of accounts.*

12. *On the facts and the circumstances of the case, the Ld. CIT(A) erred in confirming addition of Rs.67,23,316/- as unexplained cash credit u/s 68 of the Act and charging tax as per rates prescribed under section 11 5BBE of the Act without appreciating that the same was part of a trade advance received from Seahath Marine who had rejected the supplied made to them and that due to dispute, the same had remained to be settled*

13. That the appellant craves leave to add, amend, modify, rescind or supplement any of the Grounds stated here-in-above either before or at the time of hearing of this appeal

2.7 The Assessee is an individual. He was a Non- Resident Indian, resided in Middle East for about Two Decades (From the Year 1991 till year 2011). During this Tenure he had rendered his services in various organizations drawing emoluments including income from various trading business between rupees Five Lakhs to Ten Lakhs a month. Apart from rendering services in various organizations, assessee was also carrying out various trading businesses. The Law of the land in Middle East restricts to set up any independent business by a foreign individual other than own Citizens. The trading businesses were carried out through 3rd party, i.e. through sponsorship. While the assessee was abroad, he had invested in India in a Partnership Firm by name Yashaswi Fishmeal & Oil Company. The Firm was operative since Financial Year 2006-07. There were sixteen active partners in the firm and one of the Partner designated as Managing Partner died in the year 2010. After the death of Managing Partner a reconstitution of partnership deed was formed and there were only twelve continuing partners and balance 4 retired from the firm. A dispute arose among Partners in the year 2011 and the assessee had to move to India on an emergency basis leaving all his trading ventures there in Middle East. After his permanent movement there were continuous flow of his hard-earned investments through his NRE Bank accounts held at various Banks; State Bank of India Malpe Branch, Bhatkal Urban Bank etc. These amounts were further got infused in the partnership firm Yashaswi as well as in immovable/Movable assets. The assessee had dedicated his full time in Partnership Firm upon return from Middle East and the business of the firm grown multiple times. During the year 2015 a serious dispute arose among Partners of

the firm and the matter was referred to the Hon'ble High Court Bangalore and during the Financial Year 2016-17 the matter got settled as per Hon'ble High Court's order.

2.8 The assessee had commenced Raw Fish Trading business as a Proprietor of Allied International Marine Supplies, during the pendency of Court case. It was a fresh start up business of assessee. Raw Fish is highly perishable in nature and there were several conflicts arose with buyers for the reason of inferior quality of fish supplies. The assessee had to incur heavy losses in this venture. While the assessee was in chaos and panic situation, he was served a Notice from Deputy Director of Income Tax (Inv) Bangalore seeking his attendance on 16th January 2018, demanding copies of immovable property documents, IT return of previous years and other investments made by him. The assessee attended on 16th January 2018 and handed over all relevant documents. Followed by above stated Income Tax investigation appearance, to the shock of assessee, on 8th February 2018 an IT officer entered assessee's rented residence saying he would like to purchase specific land of Kadekar village, later he identified himself as IT officer investigation, and served the notice to assessee warranting him in the case of Sri Sadhu Salian of Y M Traders, with whom he had any business transactions. Followed by warrant notice, a search operation conducted at assessee's residence, under section 132 of the Act. The assessee had extended his full co-operation to the investigation team. The search has yielded few gold jewellery and cash and the same had been returned to assessee prior to concluding the search operation. There was no undisclosed income or properties detected other than the one that are reported in IT returns.

2.9 The Income Tax authorities involved in the search operation had brought pre-prepared printed statement at their convenience

and insisted the assessee to sign but surprisingly, the authorities refused to give copy of the same nor allowed the assessee to read the contents. When the assessee had refused to sign, the Income Tax authorities threatened him of implicating with serious allegations if he doesn't sign on the pre-prepared statement and forcibly took assessee's signature on the alleged statement. The Bank accounts of assessee and assessee's family members were made debit frozen status and he was put to greater injustice. After the search, the assessee was made to believe by the Income Tax authorities that his all-debit frozen bank accounts will be released soon. The assessee was desperately corresponding with Income Tax authorities to unfreeze the Bank accounts. Lately, they put him into difficult situation by releasing only one bank account and took his signatures forcibly on several other papers prepared by Income Tax authorities. The assessee was frequently following up with the Income Tax authorities to release the remaining bank accounts. The assessee's efforts yielded no results, the Income Tax authorities did not release any of the remaining bank accounts. During this time the assessee had realized that, the Income Tax authorities are trying to rely on the concocted statement got prepared by them in the name of the assessee. Thus, the assessee had sent a retraction letter dated 18th July 2018 and the delay in retraction is not fatal to the case of assessee.

2.10 The ld. A.R. submitted that the following main issues arise in the present appeal and the assessee seeks leave to make submissions issue wise:

> Issue No.1: The assessee is a 'searched person' and not '"other person".

Issue No.2: Without prejudice to submissions under Issue no.1, the ld. A.R. submitted that 'Satisfaction note' is not satisfying the requirements of Section 153C of the Act.

3. The ld. D.R. submitted that the warrant is not in the name of assessee. On the other hand, search was initiated u/s 132 of the Act in th case of Sadhu Salian on 8.2.2018. Consequent to this, residence of present assessee Mohammed Mujeeb Sikander, Flat No.002, Indrali, Penta Heights Udupi was covered u/s 132 of the Act and there was seized document in pages 1 to 34 marked as Annexure A-1/MMS/Sl.No.1 of Panchanama dated 8.2.2018. The above documents comprise of agreement copies, bank account statements and pertain to present assessee Mr. Mohammed Mujeeb Sikander. In view of this fact, the ld. AO duly recorded the satisfaction as required under the provisions of the Act and the assessment has been framed. Thus, he submitted that there is no merit in the argument of the assessee's counsel that the assessment order in case of assessee to be framed u/s 153A of the Act.

4. We have heard the rival submissions and perused the materials available on record. The material facts, which are necessary for adjudication of ground Nos.1,3,4,5,6 & 7 are as follows:

4.1 There was a search warrant issued in the name of Mr. Sadhu Salian on 8.2.2012, which was also covered the residence of Mr. Mohammad Mujeeb Sikander, the present assessee's flat No.002, Penta heights, Indrali, Udupi. The following documents were seized during the course of search of his premises.

Seized document in pages 1 to 34 contained in Annexure-A/1/MMS/Sl.No.1 of Panchanama on 8.2.2018 and

documents comprise of agreement copies, bank account statements, etc., which pertain to Mohammad Mujeeb Sikander.

4.2 In view of the above, the ld. AO was of the opinion that the books of accounts seized during the course of search initiated in case of Shri Sadhu Salian have a bearing on determining the total income of Mohammad Mujeeb Sikander for assessment year 2012-13 to 2017-18. Accordingly, he recorded satisfaction as required u/s 153C of the Act and issued notice to the assessee on 21.2.2019 for the assessment year 2016-17 & 2017-18. In response to the said notice, the assessee filed a return of income for the assessment year 2016-17 & 2017-18 on 20.7.2019. Consequently, assessment order was framed by the ld. AO u/s 143(3) r.w.s. 153C of the Act. The contention of the ld. A.R. in these grounds is that the assessment order is bad in law as the due procedure is not followed so as to issue notice u/s 153C of the Act and the assessment was ought to have framed u/s 153A of the Act. Now we take provisions of section 153A of the Act, which reads as follows:-

> *"153A. Assessment in case of search or requisition. (1) Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, in the case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003, the Assessing Officer shall—*
>
> *(a) issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years referred to in clause (b), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139 ;*
>
> *(a) assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made:*

Provided that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years:
Provided further that assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years referred to in this sub-section pending on the date of initiation of the search under section 132 or making of requisition under section 132A, as the case may be, shall abate.

(2) If any proceeding initiated or any order of assessment or reassessment made under sub-section (1) has been annulled in appeal or any other legal proceeding, then, notwithstanding anything contained in sub-section (1) or section 153, the assessment or reassessment relating to any assessment year which has abated under the second proviso to sub-section (1), shall stand revived with effect from the date of receipt of the order of such annulment by the Commissioner:

Provided that such revival shall cease to have effect, if such order of annulment is set aside.

Explanation–For the removal of doubts, it is hereby declared that—

(i) save as otherwise provided in this section, section 153B and section 153C, all other provisions of this Act shall apply to the assessment made under this section;

(ii) in an assessment or reassessment made in respect of an assessment year under this section, the tax shall be chargeable at the rate or rates as applicable to such assessment year."

4.3 The provisions of section 153C of the Act in so far as it is relevant for the present appeal, reads as follows:

*"**153C.** [(1)] Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, where the Assessing Officer is satisfied that any money, bullion, jewellery or other valuable article or thing or books of account or documents seized or requisitioned belongs or belong to a person other than the person referred to in section 153A, then the books of account or documents or assets seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person and that Assessing Officer shall proceed against each such other person and issue such other person notice*

and assess or reassess income of such other person in accordance with the provisions of section 153A :]

*[96]a[**Provided** that in case of such other person, the reference to the date of initiation of the search under section 132 or making of requisition under section 132A in the second proviso to [sub-section (1) of] section 153A shall be construed as reference to the date of receiving the books of account or documents or assets seized or requisitioned by the Assessing Officer having jurisdiction over such other person.]*

[(2) Where books of account or documents or assets seized or requisitioned as referred to in sub-section (1) has or have been received by the Assessing Officer having jurisdiction over such other person after the due date for furnishing the return of income for the assessment year relevant to the previous year in which search is conducted under section 132 or requisition is made under section 132A and in respect of such assessment year—

(a) no return of income has been furnished by such other person and no notice under sub-section (1) of section 142 has been issued to him, or

(b) a return of income has been furnished by such other person but no notice under sub-section (2) of section 143 has been served and limitation of serving the notice under sub-section (2) of section 143 has expired, or

(c) assessment or reassessment, if any, has been made, before the date of receiving the books of account or documents or assets seized or requisitioned by the Assessing Officer having jurisdiction over such other person, such Assessing Officer shall issue the notice and assess or reassess total income of such other person of such assessment year in the manner provided in section 153A.]"

4.4 The provisions of section 153A of the Act were introduced by the Finance Act, 2003 with effect from 1-6-2003. In respect of searches carried out under section 132 of the Act or requisition of books and other documents made under section 132A of the Act after 31-5-2003 the Assessing Officer shall issue a notice calling upon assessee to furnish return of income in respect of six assessment years immediately preceding assessment year relevant to the assessment year in which search is conducted or requisition is made. The Assessing Officer is empowered to re-assess the total income in respect of each assessment year falling within such six assessment years under the second proviso to section 153A of the

Act. If in respect of any assessment year falling within the six assessment years referred to earlier, any assessment or re-assessment is pending on the date of initiation of the search under section 132 of the Act or making of requisition under section 132A, the same shall abate. In terms of Sec.153C of the Act, if in the course of search of a person u/s.132 of the Act, any money, bullion, jewellery or other valuable article or thing or books of account or documents seized or requisitioned belongs or belong to a person other than the person who is searched u/s.132 of the Act, then the AO of the person in whose case search u/s.132 of the Act has been carried out has to arrive at a satisfaction that money, bullion, jewellery or other valuable article or thing or books of account or documents seized belong to some "other person". On arriving at such satisfaction, he has to hand over the documents or assets seized or requisitioned to the Assessing Officer having jurisdiction over such "other person" and that Assessing Officer shall proceed against each such "other person" and issue such "other person" notice and assess or reassess income of such "other person" in accordance with the provisions of section 153A of the Act.

4.5 In the present case, the ld. AO being Deputy Commissioner of Income-tax Central Circle-1, Mangalore having recorded the satisfaction for proceedings u/s 153C of the Act after duly recording the satisfaction as follows:

> *"A search was initiated under section 132 in the case of Mr. Sadhu Salian 08,02.2018 The residence of Mr. Mohammed Mujeeb Sikander, Flat No'002, Indrali, Penta Heights Udupi were covered u/s 132 The following documents seized during the course of search at the above residence premises of Mr. Mohammed Mujeeb Sikander pertains to the Assessee appellant:*
>
> *Seized documents in pages 1 to 34 contained in annexure A-1/MMS/Sl.no.1 of Panchanama dated 08.02.2018 The above*

documents comprise of agreement copies, hank account statement etc. The above documents pertains to Mr. Mujeeb Sikander.

In-view of the above facts: I am satisfied that the books/documents seed during the course of search initiated in the case of Mr. Sadhu Salian, have a bearing on determining the total income of Mr. Mohammed Mujeeb Sikander for AY 2012-13 to 2017-18 Hence this is a fit case for initiating proceedings u/s 153C".

4.6 From the above satisfaction note, it is quite clear that present assessee's income for the assessment year got impacted with the search action conducted in the case of Mr. Sadhu Salian. As such, the assessment of the assessee has to be framed u/s 153C of the Act for being a person other than the section referred in section 153A of the Act, since the warrant of search issued u/s 132 of the Act was in the name of Mr. Sadhu Salian and not in the name of present assessee Mr. Mohammad Mujeeb Sikander, Mangalore. The assessee should be considered as an "other person" as stipulated in section 153C of the Act and not searched person u/s 153A of the Act. The contention of the assessee's counsel is that there was search in the case of present assessee u/s 132 of the Act and therefore, the notice u/s 153A of the Act has to be issued by the ld. AO and thereafter the assessment orders are to be framed u/s 153A of the Act. This argument of the assessee's counsel is having no merit, since the search was carried out in the premises of the assessee on the strength of the warrant issued u/s 132 of the Act in the name of Mr. Sadhu Salian and not in the name of present assessee. This is being so, the consequent assessment order has to be framed in the case of present assessee by treating it as an "other person" as referred in section 153C of the Act and not u/s 153A of the Act.

4.7 Further argument of the assessee's counsel is that even the assessment order framed u/s 153C of the Act is without recording

satisfaction note on the file of AO, Deputy Commissioner of Income-tax Central Circle-1, Mangalore. We have carefully gone through the satisfaction note recorded by ld. AO as reproduced in earlier para of this order. It has to be noted that the ld. AO took recourse to the provisions of section 153C of the Act, so as to verify the transactions recorded in seized material marked as pages 1 to 4 contained in Annexure-A/1/MMS/sl.no.1 of Panchanama dated 8.2.2012, which comprise of agreement copies, bank account statements, etc., which pertain to Mohammad Mujeeb Sikander, the present assessee. It must be understood here that recording of satisfaction so as to show existence of undisclosed income is not a pre-requisite under the provisions of section 153C of the Act, which is distinguishable from the provisions of section 158BD of the Act, which is related to block assessments. The literal meaning of section 153C of the Act is that of the "other person", which incidentally the same AO, provisions of section 153A of the Act are made applicable and therefore, even if such details recorded are disclosed to the department by such "other person", the assessment may have to be framed for all assessment years. The pre-condition is that the document found during the course of search against whom warrant u/s 132 of the Act is issued should be related to such "other person", which is not disputed at all in the present case by the present assessee. The requirement of section 153C of the Act with reference to satisfaction seems to be only prima facie satisfaction and not a conclusive satisfaction. Thus, the ld. AO must be prima facie satisfied that the seized material found during the course of search action relating to "other person" than the person against whom the search warrant has been issued. In the present case, there is note dispute that search warrant has been issued in the name of assessee. On the other hand, it has been issued in the name of Sadhu Salian u/s 132 of the Act and that the

premises of the assessee has been covered through that warrant and it cannot be said that the assessee is the main person against whom the search warrant has been issued since there is no warrant in the name of assessee. In the present case, the satisfaction has been duly recorded by the ld. AO as reproduced elsewhere in this order.

4.8 In so far as the contention of ld. A.R. that the proceedings were to be initiated u/s 153A of the Act, it is not u/s 153C of the Act, we do not find any merit in it. It is evident from the body of the assessment order itself that the ld. AO has taken recourse to the provisions of section 153C of the Act and however, by mistake mentioned in the assessment order in para 1 as follows:

> *"A search & seizure action u/s 132 of the Income Tax Act, 1961 was carried out in the case of assessee under warrant of authorization u/s 132 of the Act on 8.2.2012".*

4.9 In reading this paragraph, the ld. A.R. misunderstood that warrant of authorization issued u/s 132 of the Act was in the name of present assessee. However, the ld. CIT(A) made it clear in his order that a search was initiated u/s 132 of the Act in case of Mr. Sadhu Salian on 8.2.2018, the residence of Mr. Mohammad Mujeeb Sikander, Flat No.008, Indrali, Penta heights, Udupi and were covered u/s 132 of the Act. Thus, it means that warrant of authorization was not in the name of Mr. Mohammad Mujeeb Sikander, the present assessee and the assessee being "other person" against whom the notice is to be issued u/s 153C of the Act and not u/s 153A of the Act being "other person". Considering the totality of facts and circumstances of the case and the legal position, we do not find any infirmity in the action of ld. AO in assuming the jurisdiction u/s 153C of the Act and in framing assessment order. The assessee has been accorded adequate

opportunities of hearing and also order is not time barred and we do not find any merit in this ground of the ld. A.R.

4.10 The other argument of the ld. A.R. is that since the notice has to be issued u/s 153A of the Act instead of u/s 153C of the Act as in the present case, the assessment order to be quashed as the action of the ld. AO cannot be justified by taking recourse to section 292B of the Act. This section is intended to ensure that on technical grounds, return of income, assessment order, notice or summons or proceedings is not rendered invalid. This section does not empower the ld. AO to treat the proceedings taken u/s 153A of the Act instead of proceedings u/s 153C of the Act. However, in the present case, there is no necessity of pressing the assistance of section 292B of the Act since we have already held that the issue of notice u/s 153C of the Act is valid and it is not the case of issue of notice u/s 153A of the Act as the warrant of authorization issued u/s 132 of the Act was not in the name of assessee and it was in the name of Mr. Sadhu Salian and the assessee has to be treated as "other person" as stipulated in section 153C of the Act. Being so, there is no merit in the argument of the assessee's counsel that justify the action of the ld. AO by taking recourse to section 292B of the Act is bad in law. This ground of the assessee's appeal is also rejected. Thus, there is no merit in the grounds raised by assessee in ground Nos.1,3,4,5,6 & 7.

5. Ground No.2 is collective ground and general in nature as we are adjudicating each addition independently, this ground is only academic, not considered for adjudication.

6. Next ground No.8 is with regard to the grievance of assessee in confirming addition by ld. CIT(A) on the basis of statement recorded u/s 132(4) of the Act, which has been retracted by the assessee.

6.1 The ld. A.R. submitted that a search and seizure action u/s. 132 of the Act was carried out in the case of the assessee. During that action, statement u/s 132(4) of the Act was recorded from the appellant wherein he admitted to suppression of income under various heads and agreed to disclose the same and to pay tax thereon. However, in the return filed in response to notice u/s. 153C, the assessee had not offered this undisclosed income of Rs. 20,86,560/- admitted u/s. 132(4) to tax. The assessee was requested by AO's letter dated 12.10.2019 to show cause why Rs.20,86,560/- admitted as undisclosed income u/s. 132(4) was not declared in the return of income filed and why it should not be assessed as income for the relevant assessment year. In reply to the notice, the assessee stated that the statement u/s 132(4) of the Act made at the time of search was taken forcibly and the return filed in response to notice u/s 153A be considered as correct and that he had nothing to declare as undisclosed income. The ld. AO did not find the response acceptable for the following reasons:

- The assessee did not furnish any evidence during the course of assessment proceedings to prove that the loan reflected in the books is the actual loan advanced.
- The assessee neither filed any confirmation nor correspondence from the borrower to the effect that loan advance is the amount reflected in the books and not Rs. 2,10,00,000/- as admitted by the assessee during search.
- AO held the retraction of the statement is as invalid

6.2 The ld. A.R. submitted that the assessee retracted the statements given u/s 132 (4) by ante dating a letter filed on 30.07.2018. This letter narrated a set of incidents but was not supported by any evidences. The panchas had not subscribed to

the assessee's version in the panchanama nor was any complaint lodged with any authority. Thus, while the seized material and the statements corroborated each other there was nothing to corroborate the latter claims of the assessee. The ld. AO held that in the absence of any claim that the said seized material did not belong or pertain to the assessee nor there being any claim that the said seized material in fact reflected a different set of facts, the legal presumption provided u/s 292C of the Act had not been rebutted and the statements of the assessee, thus having been established beyond doubt would have to result in an assessment of income in assessee's hands. He submitted that the ld. AO also observed that the search proceedings at the residence of the assessee were completed in a peaceful manner in the presence of two panchas who witnessed the entire search proceedings. In the panchanama dated 08.02.2018, there was no reference to any untoward incident that happened during the course of search. The panchanama was duly attested by the assessee and two independent witnesses. Para 4 of the panchanama reads as under:

> *"A search of the above-mentioned place tons carried out by the said party in our presence in an orderly manner without hurting sentiments of any of the occupants of the premises. Nothing untoward happened in the course of the search."*

6.3 The ld. A.R. submitted that the assessee had appeared personally before the ADIT(Inv) in response to summons issued u/s 131 of the IT Act and a statement u/s 131 was recorded from him on 12.02.2018, wherein he has described the action u/s 132 of the Act that had taken place at his residence and confirmed the statement given u/s 132(4) on 08.02.2018 in the course of search proceedings reiterating the additional income declared.

7. The ld. D.R. submitted that the ground is related to the additions made to the total income on the basis of statement recorded u/s 132(4) of the Act. The ground reads as follows:

> *"8. The Ld. CIT(A) erred in confirming the additions made to the total income solely on the basis of statement recorded u/s 132(4) of the Act without*
>
> *a) appreciating that the said statement was not reliable having been obtained under pressure and duress from the appellant at the time of search and the same had been duly retracted in time; and*
> *b) Without bringing on record any corroborative evidence and ignoring the facts on record."*

7.1 The ld. D.R. submitted that during the course of search and seizure action u/s 132 of the Act carried out in the case of assessee on 08/02/2018, statement u/s 132(4) was recorded from the assessee wherein he admitted to suppression of income under various heads and agreed to disclose the same and to pay tax thereon. However, the assessee failed to offer the said undisclosed income in the return filed in response to Notice u/s 153C of the Act and further retracted the statement given u/s 132(4) by a letter filed on 30/07/2018. The assessee made disclosure in the statement recorded u/s 132(4) of the Act based on incriminating documents found during the course of search proceedings. Further, the statement of assessee was also recorded u/s 131 of the Act on 12/02/2018 under which the assessee confirmed his statement recorded u/s 132(4) on 08/02/2018. Before proceeding with the matter, he submitted that it will be important to recognize the undisputed facts of this case which are as under: (page23-24 of CIT(A) order for AY 2018-19:

i) Sworn statement was recorded u/s 132(4) on 08.02.2018

ii) Statement u/s 131 on 12.02.2018 confirming the statement u/s 312(4) on 08.02.2018

iii) Filed one more letter dated 29.02.2018 written in his own hand, seeking time to pay the tax on the additional income declared.

iv) Retracted the statements given /s 132(4) by ante dating a letter filed on 30.07.2018

7.2 The ld. D.R. submitted that the assessee retracting his statement after more than five months is clearly an afterthought. Once the disclosure was made and confirmed again and again, the Department was led to believe that necessary admissions has been made and taxes will be collected in the due course. Had he retracted the statement earlier, Department would have tried to collect more evidences as they deem fit. By withdrawing the statement on a later date without any corroborative evidence, is an effort to deny the rightful and admitted taxes. He submitted that the Assessing Officer has rightly observed in para 8.6 for AY 2018-19 as under:

> *"Hence, the statement can only be retracted either by way of a duly sworn affidavit or statements supported by convincing evidence through which the assessee could demonstrate that the statement initially recorded were under pressure/coercion and factually incorrect. Apparently, in the instant case none of the above parameters have been adhered to . The assessee has not brought on record any evidence to show that the statements were recorded under pressure.*

The disclosure as part of statement u/s 132(4) was given based on incriminating evidence and this was acknowledged in the order of CIT(A) in para 7.9 wherein it is stated:

> "*Several incriminating materials seized during the course of search showed unaccounted income emanating from these documents which needed to be assessed to tax. The allegation of the assessee*

appellant that the signature on 08.02.2018 was taken forcibly was false as no such incident was reported in the panchanama."

7.3 He further submitted that the statement recorded u/s 132(4) and the documents seized would come within the purview of the evidence under the Income Tax Act read with Section 3 of Evidence Act. Such statement enables the department to bring on surface the tax evasion, to examine the nature of incriminating documents, assets etc. found during the course of search and record the assessee's version with regard to the contents of such incriminating documents, its source, mode and manner of earning/application and its accountability in the books of account whether disclosed or not. Such a statement recorded on oath carries a significant evidentiary value which may be used by the Assessing Officer during the course of assessment proceedings as corroborative evidence along with documentary evidences unearthed during the course of Search and seizure action. Such statement cannot be retracted without strong evidence. The statement made u/s 132(4) can be retracted if the maker contends that earlier admissions were (i) were untrue or (ii) were on a mistaken understanding, misconception; or (iii) were not voluntary; or (iv) were under mental stress, undue influence, pressure. In the present case, assessee contends that the statement is recorded forcibly and narrated a set of events which were not supported by any evidence. The panchas (independent witnesses) also did not subscribe to assessee's version in panchanama nor did the assessee lodge any complaint with appropriate authorities. In such case, retracting of statement five months later, that too without any evidences amounts to afterthought and lacks merit. The same is stated by ld. CIT(A) in para no.7.17 which is reproduced as under:

"*While the admission made during the search can be disputed by the assessee appellant however it is equally well settled that the statement made voluntarily by the assessee appellant could form the basis of assessment. Mere fact that the assessee appellant retracted the statement at later point of time cannot make the statement unacceptable. The burden lies on the assessee appellant to show that the admission made by him in the statement earlier at the time of survey was wrong. Such retraction, however, should be supported by strong evidence stating that the earlier statement was recorded under duress and coercion, and this has to have certain definite evidence to come to the conclusion that indicating that there was an element of compulsion for assessee appellant to make such statement. However, a bald assertion to this effect cannot be accepted. The assessee appellant indulged in maintaining transaction on diaries and loose papers which was not permissible in any of the method of accounting. The assessee appellant, while filing the return of income, has not disclosed any undisclosed income and hence, retracted from the admission made by him during the course of search. Subsequent retraction from the surrender without having evidence or proof of retraction is not permissible in the eyes of law. The statement recorded during the course of search action which was in presence of independent witnesses has overriding effect over the subsequent retraction.*"

7.4 In this connection, he placed reliance on the order of Hon'ble High Court of Kerala in Nayyar Patel V. ACIT(Inv) (137 taxmann 149 (2022)) wherein the Hon'ble High Court opined that the statement recorded u/s 132(4) deserve due evidentiary value and cannot be retracted without adducing evidence to substantiate the retraction. The relevant portion of the order is reproduced as under:

"11. When the law is thus evident from the statutory provision and the judgments of this Court referred to above, it can be seen that in so far as this case is concerned, almost 13 months after the recording of the statements, the assessee had sought to retract from his statements, though partially, by his letter dated 28-7-1999. Even in this letter, the reasons stated by him are that the statement dated 22-6-1998 was recorded at the unearthly hour of 2.30 a.m. and that he was under fear and trepidation. He has not adduced any evidence to substantiate his allegations to retract from his statements under section 132(4). The assessee had also not stated why he had confirmed the correctness of the disclosures made in his statement of 22-6-1998, in the subsequent statements made by him on 24-6-1998 and 6-7-1998. That apart, if as stated by him, he was under fear and trepidation when the statement of 24-6-1998 was recorded, there is

absolutely no reason for him to have awaited till 28-7-1999 to retract from his statement. The fact that he was served a copy of the statements only on 27-7-1999, cannot in any manner justify the delay on the part of the assessee in retracting from his statement, especially in a case where the assessee even in his letter of retraction does not state that he was unaware of the contents of the statements recorded till he received a copy thereof on 27-7-1999. For this reason, according to us, the retraction of the statements made is only to be ignored and the matter has to be taken to its logical conclusion.

12. Though the law has already been declared by this Court, reading of the Tribunal's order shows that the Tribunal seems to harbour the impression that whenever the assessee wants to retract the statement, he will be free to do so. In our view, there is no law to that effect and nothing has been shown to us to substantiate these findings in the order of the Tribunal. In our view, therefore, the Tribunal was totally in error in brushing aside the statements of the assessee recorded under section 132(4) and deciding the case primarily on that basis. Instead, according to us, the Tribunal should have given due evidentiary value that the statements of the assessee deserve under section 132(4) of the Act and with reference to the other materials produced by the Revenue, decided the appeal in accordance with law. This has not been done by the Tribunal and for that reason, we set aside the impugned order and dispose of the appeal answering the questions in favour of the Revenue."

7.5 He further submitted that it is a settled mater that cogent and sufficient material have to be placed on record for retraction and that retraction should be done at the earliest point in time. The Hon'ble Rajasthan High Court in the case of CIT Bikaner V. Ravi Mathur held that statements recorded under Section 132(4) of the IT Act have great evidentiary value and it cannot be discarded in a summary and cryptic manner, by simply observing that the assessee retracted from his statement. One has to come to definite finding as on the manner in which retraction takes place. Such retraction should be made as soon as possible and immediately after such statement has been recorded by filing a complaint to the higher officials or otherwise brought to the notice of the higher officials by way of duly sworn affidavit or statement by convincing

evidence, stating that the earlier statement was recorded under pressure, coercion or compulsion. Retraction after a sufficient long gap or point of time, as in the instant case loses its significance and is an afterthought. Once statements have been recorded on oath, duly signed, it has a great evidentiary value and it is normally presumed that whatever stated at the time of recording of statements under Section 132(4) are true and correct and brings out the correct picture, as by that time the assessee is uninfluenced by external agencies.

7.6. He submitted that in the case of Avadh Kishore Das vs Ram Gopal (AIR 1979 SC 861), it was held that evidentiary admissions are not conclusive proof of the facts admitted and may be explained or shown to be wrong, but they do raise an estoppel and shift the burden of proof on to the person making them. The Hon'ble Supreme Court further held that unless shown or explained to be wrong, they are an efficacious proof of the facts admitted.

7.7. He further submitted that in the case of Bannalal Jat Constructions (P.) Ltd., (2019) 106 taxmann.com 128 (SC), where High Court upheld addition made by authorities below relying upon statement made in course of search proceedings by director of assessee-company, since assessee failed to discharge its burden that admission made by director in his statement was wrong and said statement was recorded under duress and coercion, SLP filed against decision of High Court was to be dismissed. The Hon'ble Bombay High Court in the same case held as under while upholding the addition made on the sworn statement:

> ***19.*** *Reverting back to the present case, the ITAT, on the basis of such statement of Shri Bannalal Jat, concluded that he was managing his business affairs of both his proprietary concern as well as appellant-company from his residence and that in the*

absence of individual cash-book of respective concerns and other details maintained by him, it is not possible to identify whether the cash so found belongs to the proprietary concern or to the assessee company. Subsequently, when the statement under Section 132(4) of the IT Act was recorded on 10.10.2014, which was concluded at his residence, Shri Bannalal Jat categorically admitted that the cash amount of Rs.1,21,43,210/- belonged to his company M/s. Bannalal Jat Construction Private Limited and the same was its undisclosed income. Thereafter another statement under Section 132(4) of the IT Act was recorded at his business premises on 11.10.2014. In reply to question No. 8, he was asked to explain the source of cash amounting to Rs.3,380/-found at his office and Rs.1,21,43,210/- found at his residence, he submitted regarding the amount of Rs.1,21,43,210/- found at his residence that he was unable to give any explanation and admitted that he was in the business of civil construction and in such business, various expenses have been inflated and shown in the books of accounts, and that the income so generated on account of such inflation in expenses is represented in the form of cash was found at his residence. This undisclosed income belonged to his company M/s Bannalal Jat Construction Pvt. Ltd. In response to question no. 11 wherein he was asked to provide any other explanation which he wishes to provide, he submitted that pursuant to search operations where various documents, loose papers, entries, cash, investment, advances and individual expenditure details have been found and taking all that into consideration, he surrendered Rs.4,01,43,210/- as his undisclosed income. He also categorically stated that the said disclosure is in the hands of M/s Bannalal Jat Construction Private Limited in respect of unexplained cash amounting to Rs.1,21,43,210/- and Rs.2,50,00,000 and Rs.30,00,000/- totaling to Rs.2,80,00,000 in his individual capacity.

20. *Subsequently, on 04.12.2014 during the post-search proceedings, statement of Shri Bannalal Jat was again recorded under Section 131 of the IT Act, wherein he was again confronted with the various documents seized and cash found during the course of search and the consequent surrender made by him in respect of his two concerns and in response thereto, he again confirmed the surrender of undisclosed income amounting to Rs.1,21,43,210/- and Rs.1,35,00,000/-. It is in this background that we have to view his reply to the show-cause notice submitted on 02.12.2016. This show-cause notice was issued to him by the assessing officer when the appellant-company offered the said undisclosed income to tax. The reliability, importance and sanctity of admission made during search could be refuted only by cogent and convincing evidence. We may in this connection refer to earliest judgment of the Supreme Court in Pullangode Rubber Produce Co. Ltd., (supra) wherein it was held that admission is an extremely important piece of evidence*

but it can't be said that it is conclusive. It is open to the person, who made admission to show that it is incorrect. The assessee should be given proper opportunity to show the correct state of affairs. The law with regard to this has developed much thereafter. There is no gainsay the fact that admission made during the search can be disputed by the assessee and at the same time however it is equally well settled that the statement made voluntarily by the assessee could form the basis of assessment. ***Mere fact that the assessee retracted the statement at*** *later point of time could not make the statement unacceptable. The burden lay on the assessee to show that the admission made by him in the statement earlier at the time of survey was wrong. Such retraction, however, should be supported by a strong evidence stating that the earlier statement was recorded under duress and coercion, and this has to have certain definite evidence to come to the conclusion that indicating that there was an element of compulsion for assessee to make such statement. However, a bald assertion to this effect at much belated stage cannot be accepted. The assessee indulged in maintaining transaction on diaries and loose papers which was not permissible in any of the method of accounting. The assessee, while filing the return of income, has not disclosed any undisclosed income and hence, retracted from the admission made by him during the course of search. Subsequent retraction from the surrender without having evidence or proof of retraction is not permissible in the eyes of law. The statement recorded during the course of search action which was in presence of independent witnesses has overriding effect over the subsequent retraction.*

(emphasis supplied)

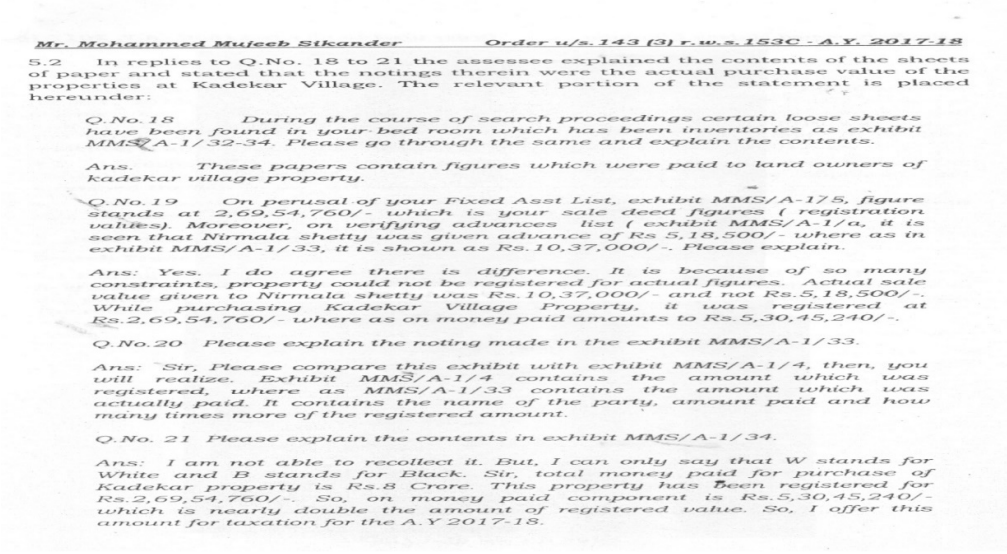
7.8. The ld. D.R. further submitted that the Hon'ble Chhattisgarh High Court in the case of ACIT vs. Hukum Chand Jain[2010] held that when assessee did not retract his statement immediately after search and seizure was over and in return also no explanation was offered for surrender of undisclosed income at the time of search and seizure operations under Section 132(4) , it could be said that assessee had failed to discharge onus of proving that confession made by him under Section 132(4) was a result of intimidation, duress and coercion or that same was made as a result of mistaken belief of law or facts.

7.9. In view of the above, he submitted that the action of AO in upholding the admissions made by the assessee as part of statement recorded u/s 132(4) of the Act should be upheld and assessee's contention that the statement was retracted five months later is devoid of merits and ought to be dismissed.

8. We have heard both the parties on this issue. In this case, the assessment order was framed u/s 143(3) r.w.s. 153C of the Act. In this case, there was a search consequent to search warrant issued in the name of Mr. Sadhu Salian u/s 132 of the Act. In the course of search action, the department has seized a document marked as follows from the assessee's premises:

> Seized document in pages 1 to 34 contained in Annexure-A/1/MMS/Sl.No.1 of Panchanama on 8.2.2018 and documents comprise of agreement copies, bank account statements, etc., which pertain to Mohammad Mujeeb Sikander.

8.1 There was recording of statement u/s 132(4) of the Act on 8.2.2018. The important questions and answers are as follows:



Mr. Mohammed Mujeeb Sikander *Order u/s. 143 (3) r.w.s. 153C - A.Y. 2017-18*

5.2 In replies to Q.No. 18 to 21 the assessee explained the contents of the sheets of paper and stated that the notings therein were the actual purchase value of the properties at Kadekar Village. The relevant portion of the statement is placed hereunder:

Q.No.18 During the course of search proceedings certain loose sheets have been found in your bed room which has been inventories as exhibit MMS/A-1/32-34. Please go through the same and explain the contents.

Ans. These papers contain figures which were paid to land owners of kadekar village property.

Q.No.19 On perusal of your Fixed Asst List, exhibit MMS/A-1/5, figure stands at 2,69,54,760/- which is your sale deed figures (registration values). Moreover, on verifying advances list (exhibit MMS/A-1/6, it is seen that Nirmala shetty was given advance of Rs. 5,18,500/- where as in exhibit MMS/A-1/33, it is shown as Rs.10,37,000/-. Please explain.

Ans: Yes. I do agree there is difference. It is because of so many constraints, property could not be registered for actual figures. Actual sale value given to Nirmala shetty was Rs.10,37,000/- and not Rs.5,18,500/-. While purchasing Kadekar Village Property, it was registered at Rs.2,69,54,760/- where as on money paid amounts to Rs.5,30,45,240/-.

Q.No.20 Please explain the noting made in the exhibit MMS/A-1/33.

Ans: Sir, Please compare this exhibit with exhibit MMS/A-1/4, then, you will realize. Exhibit MMS/A-1/4 contains the amount which was registered, where as MMS/A-1/33 contains the amount which was actually paid. It contains the name of the party, amount paid and how many times more of the registered amount.

Q.No. 21 Please explain the contents in exhibit MMS/A-1/34.

Ans: I am not able to recollect it. But, I can only say that W stands for White and B stands for Black. Sir, total money paid for purchase of Kadekar property is Rs.8 Crore. This property has been registered for Rs.2,69,54,760/-. So, on money paid component is Rs.5,30,45,240/- which is nearly double the amount of registered value. So, I offer this amount for taxation for the A.Y 2017-18.

5.3 It will be seen from the above that the assessee conceded that Rs. 8.00 crore was the actual investment whereas the registered value was shown at Rs 2,69,54,760. In view of this the assessee had offered the difference of Rs 5,30,45,240 as his undisclosed income for A.Y. 2017-18.

5.4 Thereafter, in a statement on oath recorded u/s 131 of IT Act at the office o the ADIT(Inv), Unit-II, Mangalore on 12.02.2018, the assessee confirmed th contents of the above statement and the relevant portion is as under:

Q.NO.5 Please describe in detail the events that had taken place in your residential and business premises

Ans. An Income tax action u/s 132 of the Income Tax Act, 1961 was conducted at my residence at Flat.No.002, Penta Heights, Indrali, Udupi. During the course of this action, information on various issues was called for and the same was submitted. I was present at residence during the action. During the course of the action, certain discrepancies were noticed and I have admitted undisclosed income to overcome these issues as follows:

Sl.No	Name	A.Y	Head on which undisclosed income declared	Additional income of Rs.
1	Md. Mujeeb Sikander	2016-17	Undisclosed Loan advances given	20,86,560
2	Smt. Shameena Mujeeb Sikander	2016-17	Capital Gain	40,00,000
3	Md. Mujeeb Sikander	2017-18	Undisclosed cash Purchase of land	5,30,35,240
	Md. Mujeeb Sikander	2017-18	Sundry Creditors (unverified)	68,60,000
	Md. Mujeeb Sikander	2018-19	Normal business income & Interest income	1,00,00,000
			Grand Total	**7,59,91,800**

Q.No.6 Do you confirm the statement given by you on 09.02.2018 as has been mentioned in the answer above?

Ans. I confirm the same. I undertake to declare and offer an amount of 20,86,560 for the AY 2016-17, Rs.5,99,05,240 for the AY 2017-18, Rs1,00,00,000/- for the AY 2018-19 in my hand and Rs.40,00,000 in the hands of my wife Smt. Shameena Sikander for AY 2016-7. I shall pay the tax on the total disclosure. I also undertake to state that I shall not claim any expenditure on the undisclosed income that has been offered by me in this statement.

5.5 In consequence to the above statements, assessee voluntarily filed a letter in his own hand writing before the Investigating Officer seeking time to pay the taxes due on the hitherto undisclosed income. The copy of the same is also placed hereunder:

22-02-2018.

From,
Mohammed Mujeb Sikander
Flat No: 002. Penta Hights.
Indrali, Udupi.

भारत सरकार GOVT. OF INDIA
23 FEB 2018
Addl./Joint Director of Income Tax (Inv.)
मंगलूरु Mangaluru

To The Addl. Director of Income tax. (INV)
U2. Mangalore.

Respected Sir.
Sub :- Request to grant time to clear the tax. on income declared in survey.

Search and seizure u/s 132 of the Income tax Act. was conducted on 8/2/2018 in my residential premises and authorised officer has noticed some additional income. and that I also agreed to declare that income.

Sir I am ready to pay the tax. but I need some time to clear the tax. I will pay the 20% of tax liability within 31st March 2018 and balance tax will be cleared within March 2019.

Please do the needful

Thanking you.

Your Truly.

(Mohammed Mujeeb Sikander)

6. Assessment proceedings:

6.1 Accordingly, in consequence of the search u/s 132 of IT Act, notice u/s 153C for AY 2017-18 was issued on 21.02.2019 and duly served on the assessee. In response, assessee filed return of income on 20.07.2019 wherein it was noticed that assessee did not admit the income disclosed during the search proceedings and which was also confirmed in subsequent proceedings.

6.2 In view of this the assessee was called upon vide notice dated 12.10.2019 to show cause as to why the said sum of Rs. 5,30,45,240 should not be brought to tax.

6.3 In reply to this the assessee replied stating that the return of income filed in response to notice u/s 153C reflects his true income and also referred to the letter dated 18.7.2018 filed on 31.7.2018 before the ADIT(Inv.), Unit 2, Mangaluru which is also scanned and placed hereunder:

Udupi,
18-7-2018

From,

Mohammed Mujeeb Sikander,
Sikander Meeran House,
Jamiya Mohalla, Main Road Gangolli,
Kundapur, Udupi-576216.

भारत सरकार GOVT. OF INDIA
आयकर/संयुक्त आयकर निदेशक का कार्यालय (अन्वेषण)
31 JUL 2018
Addl./Joint Director of Income Tax (Inv.)
मंगलूरु Mangaluru

To,

The Assistant Director of Income Tax (Inv)
Unit –2, Ground Floor,
Albuquerque House,
Opp. Forum Fiza Mall,
Pandeshwara, Mangaluru.

Sir,

This has reference to the IT search conducted on 08/02/2018 in my Previous residence rental Flat at 002, Penta Heights Indrali, Udupi in the case connected with Janatha Fishmeal & Oil Company and my subsequent visits to your office at Mangalore based on summons issued to me.

On 8th January 2018 I received notice from Deputy Director of Income Tax (Inv) Bangalore seeking my attendance on 16/Jan/2018 along with copies of previous IT returns, Copies of Immovable properties registered on my name and Investment details, for which I attended on the said date and presented all the documents for verification.

On 08/Feb/2018 at around 7:30 am One middle aged Gentleman along with One Women which I presumed husband and wife knocked the door and asked me and on enquiry by me they informed orally that, they need to deal the land of about 4 acres located at Kinnimulky Udupi. I called them inside and expressed my unwillingness to deal/ sell the said property but informed them that, If I get good offer I can think of selling the same. After few minutes of negotiations, the Gentleman went outside the door and called another three personnel of which two of them were police and said that they are from IT Cell and would like to conduct search, for which I fully co-operated and allowed them to do their task. The search was conducted

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from morning till mid night which includes my car as well as, all Bank accounts under my name and my family members were frozen on the same day.

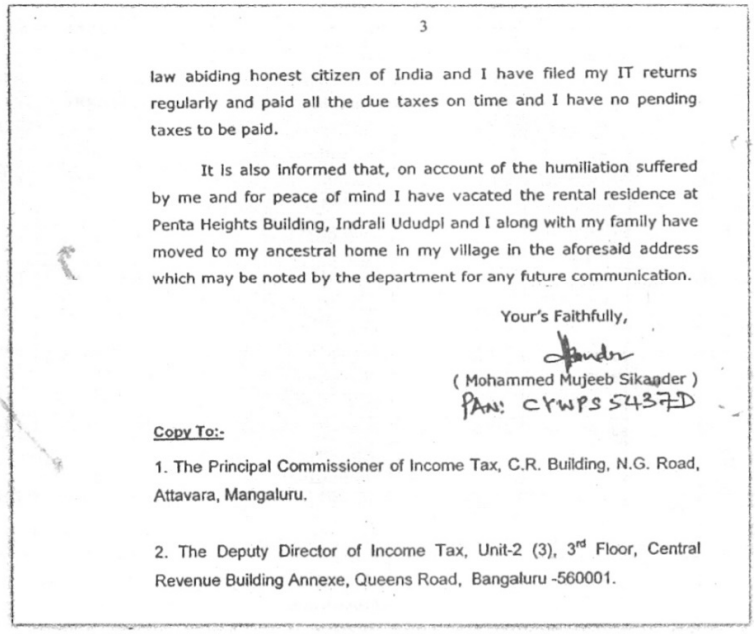
The Gold Jewellery and cash were handed over back to me and further collected copies of all the records pertaining to immovable properties registered on my name along with IT return Files. The Officer by name Mr. Baliga went out in the evening and returned at night with few pages of statement typed and asked me to sign. When I asked him to give me a copy of the said pre pared document to which he had insisted me to sign but surprisingly he refused give the copy of the same nor allowed me to read the contents of the same. When I refused sign the said document without knowing its contents, the said official had threatened me by saying that, if I refuse to sign the same, I will be implicated with serious allegations and report to the authorities that I didn't co-operate. Yet I didn't agree to sign. Then he called another officer who came to my rented residence at 11:30 PM and he was very rude and started to drag out the boxes and cabinets again and threatened me to either sign on the statement or face the consequences. Since the said officials had created seen in the apartment complex and in the neighborhood and also due to their threat I was forced to sign some document produced by them.

On 12/Feb/2018 based on summons issued by the Department, I attended the office of Assistant Director(Inv) at Mangalore.

I requested to unfreeze the Bank accounts for which they said u need to sign on the undertaking that you would pay proposed tax/penalty etc. I have unwillingly signed the undertaking in order to unfreeze my bank accounts. As of date only one bank's account was allowed to be operated after taking my signature on several documents. However, the other personal Bank accounts of mine are still in frozen condition.

Frankly speaking the search and the untoward incident created in my residence on the aforesaid date has shattered my life, my business, my family. I am totally de-motivated due to the humiliation.

I here by specifically withdraw all such alleged statements prepared by your sub ordinate officers in my name and on which my signature was forcibly taken as against the Provisions of the Income Tax Act and against the Principals of Natural Justice. I am a respectful



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law abiding honest citizen of India and I have filed my IT returns regularly and paid all the due taxes on time and I have no pending taxes to be paid.

It is also informed that, on account of the humiliation suffered by me and for peace of mind I have vacated the rental residence at Penta Heights Building, Indrali Ududpi and I along with my family have moved to my ancestral home in my village in the aforesaid address which may be noted by the department for any future communication.

Your's Faithfully,

(Mohammed Mujeeb Sikander)
PAN: CYWPS5437D

Copy To:-

1. The Principal Commissioner of Income Tax, C.R. Building, N.G. Road, Attavara, Mangaluru.

2. The Deputy Director of Income Tax, Unit-2 (3), 3rd Floor, Central Revenue Building Annexe, Queens Road, Bangaluru -560001.

8.2 Further, on analysis of the seized material, the ld. AO has recorded as follows:

6.7 Analysis of the seized material:

It is seen there from that the names of the persons mentioned in the list given above by the assessee matches with the names of the persons mentioned in the seized material at pages 33 & 34 of A-1/MMS. The data from the list furnished by the assessee and the data available from the seized material is tabulated hereunder:

As appearing in seized material (Page 33 of A-1/MMS)			**As furnished by the assessee and reflected in the balance sheet as on 31.03.2017**			
Numbers as mentioned in the seized material	Name of the persons	Amount as per seized material	Description of property	Extent (cents)	Doc No. Date	Amount
15	Renuka D Shetty	25,62,000	SY No. 93-5 Kadekar Village	42.00	10510/16-17 13-02-2017	25,62,000
16	Nirmala D Shetty	10,37,000	SY No. 93-6 Kadekar Village	8.50	10978/16-17 27-02-2017	5,18,500
4	Kishore GPA Holder	25,00,000	SY No. 88-32C1 Kadekar Village	18.00	10513/16-17 13-02-2017	25,00,000
5	Damodar M Shetty	21,35,000	SY No. 89-2A1 Kadekar Village	27.16	10515/16-17 13-02-2017	21,35,000
11	Ashok Poojary	10,98,000	SY No. 89-7 Kadekar Village	18.00	10511/16-17 13-02-2017	10,98,000
1	Saraswathi Shirigar, Kanthappa Shirigar, Bhoja Shirigar, Rama Shirigar	8,50,000	SY No. 35-17A Kuthpady, Kadekar Village	23.00	10982/16-17 27-02-2017	9,50,000
12		9,76,000				
Total		**1,11,58,000**				

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As appearing in seized material (Page 34 of A-1/MMS)			**As furnished by the assessee and reflected in the balance sheet as on 31.03.2017**			
Numbers as mentioned in the seized material	Name of the persons	Amount as per seized material	Description of property (name of purchasers)	Extent (cents)	Date	Amount
6	Name is not mentioned in seized material	21,35,000	SY No. 89-2A3 Kadekar Village (Prasad, Kishore, Damodar)	35.00	9794/ 16-17 19-01-2017	21,35,000
07 & 8	-do-	35,99,000	SY Nos. 89-3 & 89-2B Kadekar Village (Prasad, Kishore, Damodar)	59.00	9791/ 16-17 19-01-2017	35,99,000
03	-do-	12,81,000	SY No. 89-4 Kadekar Village (Prasad, Kishore, Damodar)	21.00	9800/ 16-17 19-01-2017	12,81,000
13	-do-	25,01,000	SY No. 93-1 Kadekar Village (Prasad, Kishore, Damodar)	41.00	98021 /16-17 19-01-2017	25,01,000
10	-do-	15,25,000	SY No. 89-5 Kadekar Village (Prasad, Kishore, Damodar)	25.00	9790 19-01-2017	15,25,000
02	-do-	14,33,500	SY No. 35-17BP2 Kadekar Village (Prasad, Kishore, Damodar)	23.50	9786/ 16-17 19-01-2017	14,33,500
09	-do-	12,81,000	SY No. 88-9 Kadekar Village (Prasad, Kishore, Damodar)	21.00	9801/ 16-17 19-01-2017	12,81,000

14	-do-	26,84,000	SY No. 93-4 Kadekar Village (Prasad, Kishore, Damodar)	44.00	9789/ 16-17 19-01-2017	26,84,000
Total		**1,64,39,500**				**1,64,39,500**

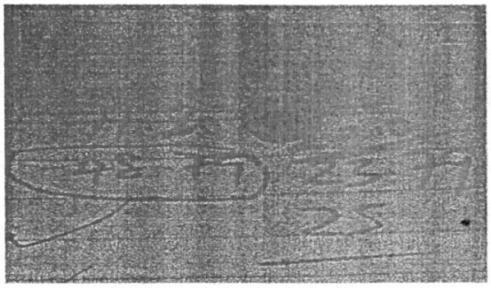
6.8 As can be seen from the above that while in certain cases the seized material indicates the amount as "/4" or "/3" or "/2" wherein these amounts are to be paid as a cumulative sum to four or three or two persons being the co-owners as the case may be.

6.9 For example in the case of Sherigars, the amount is indicated as "/4" and four names are mentioned which are also reflected in the sale deed. The number mentioned also correlates with the property number thus evidencing the fact that these are entries regarding the transaction with the said parties in respect of the said properties.

6.10 Similarly, the analysis of Page 34 of seized material of A-1/MMS reveals as under:

6.11 The transactions are made with three parties in respect of properties at 6, 7, 8, 3, 13, 10, 2, 9 and 14. The aggregation of these values result in a sum of Rs 1,64,39,500 which is again marked as "/3" with the resultant figure of Rs 54,79,833.34 also drawn in respect of each person. This page contains the properties purchased from the 3 co-owners Prasad, Kishore and Damodar as evident from the sale deeds produced.

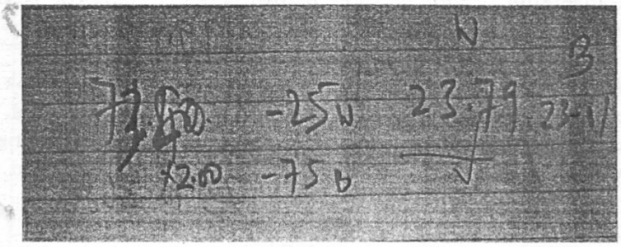
6.12 At the top right hand corner of Page 34 of seized material of A-1/MMS the sums appear as under:



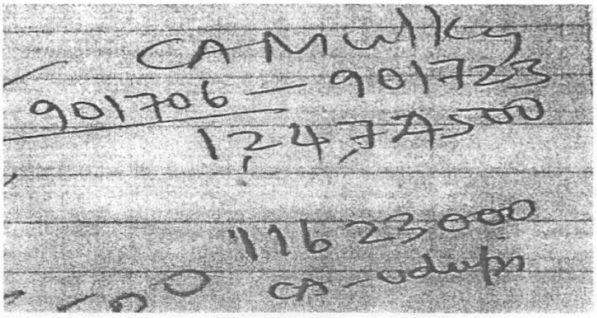
6.13 A simple aggregation of the figures 25 and 23.79 gives the total of 48.79 being the registered value of the properties referred to in SL Nos. 1, 2 and 3 of the list given by the assessee vide letter dated 6.11.2019.

6.14 The figure 71.80 (agreed value) minus 48.79 (registered value) is equal to 23.01 mentioned with the remark "B" which stands for black. This can be seen in page No. 32 of seized material of A-1/MMS.

6.15 The assessee in his statement u/s 132(4) has admitted that "B" stands for "Black" in reply to Q No. 21 of the statement. This again corroborated with a noting in page 32 of seized material of A-1/MMS, reproduced below, which will be discussed in the subsequent para.



6.16 The notings CA Mulky and CA Udupi in the figure reproduced below refers to the Currrent Account of Bharath Co-operative Bank Mulky Branch from which the assessee has paid Rs. 1,24,74,500 through cheque Nos. 901706 to 901723. Similarly Rs. 1,16,23,000 has been paid from Current Account of Bharath Co-operative Bank Udupi Branch from which cheques have been issued:



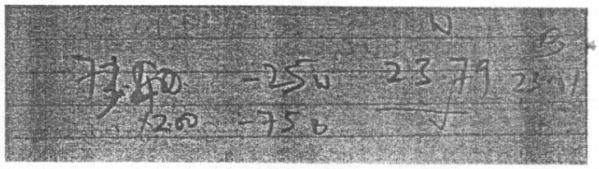
6.17 Further it is significant to note that, the figure mentioned at the left hand bottom corner 2,75,97,500 is the total of Rs. 1,64,39,500 (in Page 34 of seized material of A-1/MMS) and Rs. 1,11,58,000 (Page 33 of seized material of A-1/MMS).

6.18 Similarly the other figure mentioned at the left hand corner 2,40,97,500 is the total of Rs. 1,24,74,500 and Rs. 1,16,23,000 being the cheques issued from Bharath Co-operative Bank Mulky and Udupi Branches respectively. The cheques issued number wise tallies with the amounts recorded in the registered sale deeds.

6.19 Hence, it is unambiguously proved that the notings in page 33 and 34 of seized material of A-1/MMS relate to the property transactions of the assessee at Kadekar village.

6.20 This is further corroborated by entries in page 32. This sheet clearly marks entries as W and B which evidently stand for White and Black as "White" figures is corroborated by the sale deeds. The same is dealt with hereunder:-

A. The first entry is as under:

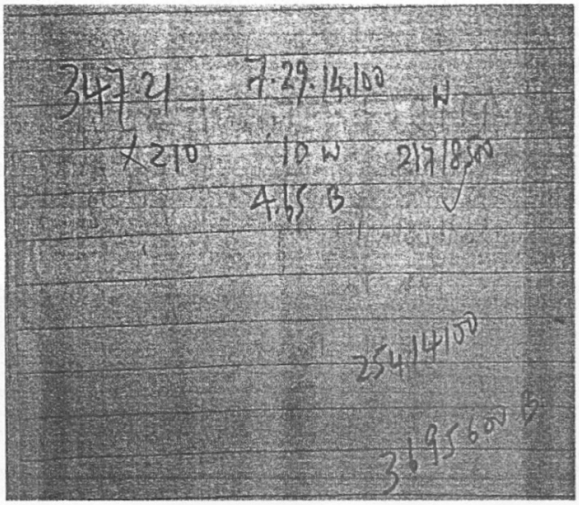


- Here 73.40 represents the area in cents and 2.00 represents the agreed price of Rs. 2,00,000 per cents. Hence, the total consideration payable in respect of these properties is Rs. 1,46,80,000,

- As seen from the seized material above 25W (25,00,000 in white) and 23.79W (23,79,000 in white) is the money paid in cheques. 75B stands for Rs. 75,00,000 in black and B 23.01 stands for Rs. 23,01,000 in black. Hence, the total payment in white is Rs. 48.79 lakhs and black is Rs. 98.01 lakhs aggregating to Rs. 1,46,80,000 i.e the cost agreed upon. These payments are made to parties referred in Sl Nos. 1, 2 and 3 of the assessee's submission dated 06.11.2019 as the cheque payments of Rs. 48,79,000 (Rs. 25,00,000 + Rs. 10,98,000 + Rs. 12,81,000) clearly matches with the total white payments referred to in page 32 discussed above.

- Therefore, this correlates with the entries in top right hand corner of page 34 the details of which are brought out in para 6.12

B. The second entry is as under:



- Here 347.21 represents the area in cents and 2.10 represents the agreed price of Rs. 2,10,000 per cents. Hence, the total consideration payable in respect of these properties is Rs. 7,29,41,100.

- As seen from the seized material above 10W (10,00,000 in white) and 2,17,18,500 in white is the money paid in cheques. Hence, the money payable in black is Rs. 5,01,95,600 (Rs. 7,29,41,100 – Rs. 10,00,000 – Rs. 2,17,18,500). This Rs. 5,01,95,600 is the sum comprising of 4.65B (stands for Rs. 4,65,00,000 in black) and 36,95,600 B mentioned in the seized material placed above.

- The entry 25414100 represents the sum of Rs. 2,17,18,500 paid in cheques and Rs. 36,95,600 paid in black referred to in the earlier paragraphs. 4.65B stands for Rs. 4,65,00,000 in black.

8.3 In the assessment year 2016-17, the assessee has shown additional capital introduction at Rs.1,24,17,338/-. The assessee has not explained the source of the same. This credit was also not explained by the assessee properly and the addition has been made. Another addition of unexplained credit u/s 69B of the Act at Rs.20,86,560/-, which was the loan advanced by assessee and this amount has been admitted during the course of search as the assessee has not given satisfactory explanation for the source of the same. The assessee's contention is that assessee has already

retracted his statement and there was no valid evidence to frame the assessment u/s 143(3) r.w.s. 153C of the Act. Now the contention of the ld. A.R. is that there is no seized material to frame the assessment u/s 153C of the Act and he only relied on the statement recorded u/s 132(4) of the Act, which has been retracted. In our opinion, there was sufficient seized material, so as to frame the assessment u/s 153C of the Act and coupled with the statement recorded u/s 132(4) of the Act which has been retracted, it is only self-service document. Further, as held by jurisdictional High Court in the case of Canara Housing Development Company vs. Deputy Commissioner of Income-Tax (274 CTR 122), wherein held as under:

> *"Section 153A starts with a non obstante clause. The fetters imposed upon, the Assessing Officer by the strict procedure to assume jurisdiction to reopen the assessment under Sections 147 and 148, have been removed by the non obstante clause with which sub section (1) of Section 153A opens. The time-limit within which the notice under Section 148 can be issued, as provided in Section 149 has also been made inapplicable by the non obstante clause. Section 151 which requires sanction to be obtained by the Assessing Officer by issue of notice to reopen the assessment under Section 148 has also been excluded in a case covered by Section 153A. The time-limit prescribed for completion of an assessment or reassessment by Section 153 has also been done away with in a case covered by Section 153A. With all the stops having been pulled, out, the Assessing Officer finder Section 153A has been entrusted with the duty of bringing to tax the total income of an assessee whose case is covered by Section 153A, by even making reassessments without any fetters, if need be. Therefore, it is clear even if an assessment order is passed under Section 143(1) or 143(3) of the Act, the Assessing Officer is empowered to reopen those proceedings and _reassess the total income 'taking note of the undisclosed income, if any, unearthed during the search. After such reopening of the assessment, the Assessing Officer is empowered to assess or reassess the total income of the aforesaid years. The condition precedent for application of Section 153A is there should be a search under Section 132. Initiation of proceedings under Section 153A is not dependent on any undisclosed income being unearthed during such search. The proviso to the aforesaid section makes it clear the assessing officer shall assess or reassess the total income in*

respect of each assessment year falling within such six assessment years. If any assessment proceedings are pending within the period of six assessment years referred to in the aforesaid sub-section on the date of initiation of the search- under Section 132, the said proceeding shall abate. If such proceedings are already concluded by the assessing officer by initiation of proceedings under Section 153A, the legal effect is the assessment gets reopened. The block assessment roped in only the undisclosed income and the regular assessment proceedings were preserved, resulting in multiple assessments. Under Section 153A, however, the Assessing Officer has been given the power to assess or reassess the "total income' of the six assessment years in question in separate assessment orders. The Assessing Officer is empowered to reopen those proceedings and reassess the total income, taking note of the undisclosed income, if any, unearthed during the search. He has been entrusted with the duty of bringing to tax the total income of an assessee whose case is covered by Section 153A, by even making reassessments without any fetters. This means that there can be only one assessment order in respect of each of the six assessment years, in which both the disclosed and the undisclosed income would be brought to tax. When once the proceedings are initiated under Section 153A of the Act, the legal effect is even in case where the assessment order is passed it stands reopened. In the eye of law there is no order of assessment. Re-opened means to deal with or begin with again. It means the Assessing Officer shall assess or reassess the total income of six assessment years. Once the assessment is reopened, the assessing authority can take note of the income disclosed in the earlier return, any undisclosed income found during search or and also any other income which is not disclosed in the earlier return or which is not unearthed during the search, in order to find out what is the "total income" of each year and then pass the assessment order. Therefore, the Commissioner by virtue of the power conferred under Section 263 of the Act gets no jurisdiction to initiate proceedings under the said provision because the condition precedent for initiating proceedings under Section 263 is any order passed under the Act by the Assessing officer is erroneous insofar as it is prejudicial to the interest of the revenue. Once the order passed by the Assessing officer gets reopened, there is no order which can be said to be erroneous insofar as it is prejudicial to the interest of the revenue which confers jurisdiction on the Commissioner to exercise the power of the jurisdiction.

The Tribunal has proceeded on the assumption by virtue of the judgment of the special bench of the Mumbai, the scope of enquiry under Section 153A is to be confined only to the undisclosed income unearthed during search and if there is any other income which is not the subject matter of search, the same cannot be taken

into consideration. Therefore, the revisional authority can exercise the power under Section 263. In the entire scheme of 153A of the Act, there is no prohibition for the assessing authority to take note of such income. On the contrary, it is expressly provided under Section 153A of the Act the Assessing Officer shall assess or reassess the "total income" of six assessment years which means the said total income includes income which was returned in the earlier return, the income which was unearthed during search and income which is not the subject matter of aforesaid two income. If the commissioner has come across any income that the assessing authority has not taken note of while passing the earlier order, the said material can be furnished to the assessing authority and the assessing authority shall take note-of the said income also in determining the total income of the assessee when the earlier proceedings are reopened and that income also shall become the subject matter of said proceedings. In that view of the matter the reasoning given by the Tribunal is not justified. The Commissioner did not have jurisdiction to initiate any proceedings under Section 263 of the Act. COMMISSIONER OF INCOME TAX vs. ANIL KUMAR BHATIA (2012) 82 CCH 113 Del HC, relied on; ALL CARGO GLOBAL LOGISTICS LIMITED - (2012) 16 ITR (TRIBUNAL) 380 (MUM)(SB), disapproved."

8.4 Being so, the ld. AO has considered the entire seized material along with statement recorded u/s 132(4) of the Act for making additions. Hence, we do not find any merit in the argument of ld. A.R. The ground No.8 of assessee's appeal is rejected.

9. Next ground no.9 is with regard to defect of issuing notice u/s 153C of the Act in the place of section 153A of the Act is a jurisdictional defect which would not get cured by the provisions of section 292B of the Act.

10. We have heard the rival submissions and perused the materials available on record. In this case, search warrant was issued u/s 132 of the Act in the case of Mr. Sadhu Salian on 8.2.2018 at the residence of Mr. Mohammed Mujeeb Sikander at Flag No.002, Penta Heights, Indrali, Udupi was covered under the warrant issued in the name of Mr. Sadhu Salian. The following documents were seized in the course of search at the above address of Mohammed Mujeeb Sikander which pertain to assessee:

"Seized documents in page 1 to 34 contained in Annexure A-1/MMS/Sl.No.1 of Panchanama on 8.2.2018. The above documents comprise of Agreement copies, Bank account statements, etc., which pertains to Mr. Mohammed Mujeeb Sikander."

10.1 It is undisputed fact that there was no search warrant in the name of the assessee. There is no dispute that incriminating material relevant to assessee was found as a result of search and seizure operation in the case of another entity. It is clear that the Assessing Officer can assume jurisdiction only under section 153C as no search warrant was issued in the name of the assessee. The *sine qua non* for issuing notice under section 153A is that there should be warrant of search in the name of the assessee to whom notice was issued. In the present case, undisputedly no search warrant was issued in the name of the assessee but the assessee had responded to the notice issued under section 153C by filing return of income, participated in the proceedings till the matter resulted in framing of the assessment order. During the course of assessment proceedings, the assessee was given due opportunity of meeting the case made against him and in the result, there was no prejudice caused to the assessee. This notice, in substance and effect, is in conformity with or according to the intent and purpose of the Act. The purpose of issuing notice is to call upon the assessee to file return of income disclosing income found in the incriminating material found as a result of search and seizure in the case of Sadhu Salian**.** This being the intent and purpose of the provisions contained in section 153A and 153C, stands satisfied if the notice is responded and the assessee has participated in the assessment

proceedings. The fact that wrong section was mentioned in the notice does not invalid the proceedings initiated pursuant thereto.

10.2 In the present case, assessee having participated in the proceedings assessee cannot be allowed to turn around or raise objections for the first time before the Commissioner (Appeals) seeking invalidation of the proceedings initiated by issuing notice under section 153C instead of 153A of the Act. Even if, for argument's sake, it is assumed that notice under wrong section was issued to the assessee and assessment order passed accordingly, still the mere fact that wrong section was mentioned in the assessment order or notice does not invalidate the assessment order as the respondent- assessee had responded to notice issued u/s 153C and no prejudice is caused to the respondent-assessee as he has participated in the assessment proceedings. Reliance in this regard is placed on the decision of the Hon'ble Punjab & Haryana High Court in the case of Om Sons International v. CIT120111 15 taxmann.com 184/120121 211 Taxman 195 (Mag.) and the decision of the Hon'ble Andhra Pradesh High Court in the case of Bharathi Cement Corpn. (P.) Ltd. v. CIT 2013 33 taxmann.com 643 and also the decision of the Hon'ble jurisdictional High Court in the case of CIT v. Micro Labs Ltd. [20121 348 ITR 75/26 taxmann.com 89/211 Taxman 15 (Mag.) (Kar.).

10.3 It is undisputed fact that there was no search warrant in the name of the assessee. There is no dispute that incriminating material relevant to assessee was found as a result of search and seizure operation in another case. It is clear that AO can assume jurisdiction only u/s 153C as no search warrant was issued in the name of the assessee.

10.4 The *Sine qua non* for issuing notice u/s 153A of the Act is that there should be warrant of search in the name of the

assessee to whom notice was issued. In the present case, undisputedly no search warrant was issued in the name of the assessee and the assessee had responded to the notice issued u/s 153C by filing return of income, participated in the proceedings till the matter resulted in framing of the assessment order. During the course of assessment proceedings, the assessee was given due opportunity of meeting the case made against him and in the result, there was no prejudice caused to the assessee. Furthermore, it is not the case of the assessee that his case even does not fall within the scope and ambit of the provisions of section 153A of the Act. The only contention is that it should have been done under section 153A instead of 153C. Even if the plea of the assessee is conceded, the provisions of section 292B of the Act will come into play. Under the provisions of section 292B, certain acts are not to be treated as invalid by reason of mistake or defect or omission either in the return of income, assessment, notice, summons or other proceedings. In other words, notice cannot be invalidated by reason of any mistake such as mentioning section 153C instead of 153A. If this mistake is not allowed to be cured, the very purpose and object of enacting the provisions of section 292B is defeated. This notice, in substance and effect, is in conformity with or according to the intent and purpose of the Act. The purpose of issuing notice is to call upon the assessee to file return of income disclosing income found in the incriminating material found as a result of search and seizure in the case of Mr. Sadhu Salian. This being the intent and purpose of the provisions contained in section 153A and 153C, stands satisfied if the notice is responded and the assessee has participated in the assessment proceedings. In the present case, the assessee participated in the proceedings, assessee cannot be allowed to turn around or raise objections for the first

time before the CIT(A) seeking invalidation of the proceedings initiated by issuing notice u/s 153C instead of 153A. Hon'ble Karnataka High Court in the case of CIT v. Sri Durga Enterprises 120141 44 taxmann.com 442/120151 231 Taxman 886 (Kar.)dealing with a case where notice u/s 148 was challenged on the ground that period within which specified, the Hon'ble jurisdictional High Court quoting the provisions of section 292B of the Act held as under:

> *"9. In the present case, as observed earlier, the appellant not only responded to the notice under Section 148 of the Act within one month, but on the basis of the return filed earlier, participated in the proceedings till the matter reached the FAA and was disposed of A glance at Section 292B of the Act, shows that under this provision, certain Acts are not to be treated as invalid, may be by reason of any mistake, defect or omissions, either in return of income, assessment, notice, summons or other proceedings. In other words, a notice cannot be invalidated by reason of any mistake, such as the one occurred in the present case, namely, the period of filing return of income was not specified as contemplated by Section 148 of the Act. If such a defect is not allowed to be cured, or treated as invalid so as to declare the notice invalid, despite the fact that appellant had taken that notice as valid and responded to it in letter and spirit and participated in the proceedings, the very purpose/objective of the provisions contained in Section 292B of the Act would stand frustrated/defeated. The intent of the Legislature is clear from the language employed in this provision which states that a defective notice, such as the one in the present case, cannot be declared invalid by reason of any mistake, defect or omission, if the notice in 'substance' and in 'effect' is in conformity with or according to the intent of purpose of this Act. The intent or purpose of issuing the notice is to call upon the appellant to file return, if the Assessing Officer finds that income has escaped the assessment. This being the intent and purpose of the provisions contained in Section 148 of the Act, in our opinion, it stands satisfied if the notice is responded within reasonable time, which in the present case was 30 days, irrespective of the fact whether the period was specified or not in the notice for filing return of income. In the present case, if the appellant had not responded to this notice at all and had raised such ground of challenge, perhaps, he would not succeed (sic). But having responded and participated in the proceedings, he cannot be allowed to turn around and raise objection for the first time before the Tribunal seeking invalidation of the proceedings initiated by issuing notice under Section 148 of the Act. In the circumstance, we allow this appeal answering both the substantial questions of law in favour of the Revenue and against the appellant. In view of the peculiar facts and circumstances of the case, there shall be no order as to costs. "*

10.5 The ratio laid down by the Hon'ble jurisdictional High Court in the case cited supra would have been squarely applicable to the present case, even if plea of the assessee was considered. So, this ground, even if found acceptable, would yield no relief to the assessee. The AO, in the remand report, has given cogent reasons for not accepting this plea of the assessee. It may also not be out of place to refer to the judgment of the Hon'ble Supreme Court in Commissioner of Income-tax v. Laxman Das Khandelwal [2019] 108 taxmann.com 183 (SC) wherein the Hon'ble Court has held that according to section 292BB, if the assessee had participated in the proceedings, way of legal fiction, notice would be deemed to be valid even if there be infractions as detailed in said section. The scope of section 292BB is to make service of notice having certain infirmities to be proper and valid if there was requisite participation on part of the assessee. In view of this, we do not find any infirmity in issuing notice u/s 153C of the Act to the assessee and thereafter framing assessment u/s 143(3) r.w.s. 153C of the Act. This ground of assessee is dismissed.

11. Next ground No.10 is with regard to addition u/s 68 & 69B r.w.s. 115BBE of the Act at Rs.20,86,560/-.

11.1 The ld. A.R. submitted that this addition has been made solely on the basis of statement u/s 132(4) of the Act, which is completely contrary to the facts on record and without any evidence whatsoever. The AO has referred to the alleged reply to question no. 14 of the said statement u/s 132(4) wherein the assessee had allegedly stated that he had advanced Rs.2,10,00,000/- to one Mr Mahesh and he offered to tax Rs.20,86,560/- as undisclosed income since as per the balance sheet outstanding amount in the name of Mr. Mahesh was only

Rs.1,89,13,440/-. He submitted that the said statement was taken forcibly and there is no truth in it.

11.2 He further submitted that the ld. AO had issued a notice u/s 142(1) of the Act dated 12.10.2019 asking the assessee to state why the amount of Rs.20,86,560/- declared / admitted in the statement u/s 132(4) was not included in the Return of Income filed on 20.07.2019. To the said query the Assessee had duly replied that as per his books of accounts, the outstanding amount in the name of Mr. Mahesh was only Rs.1,89,13,440/- and that he had nothing to declare and that his signatures/initials were taken forcibly on the statement u/s 132(4) prepared by the investigating officer and that the same was against the principle of natural justice. Further the assessee had also submitted complete address of Mr. Mahesh including his mobile no. as under:

> *Name: Mahesh Udyavar*
> *Address :C/o M/s. Unity Fish Meal & Oil Co.*
> *D.No. 12-450, Fishing industrial area,*
> *Pithrody Post,*
> *Udyavar, Udupi-574118*
> *Contact No. 9686694521*

11.3 He submitted that the said reply dated NIL to the Query raised in notice u/s 142(1) of the Act dated 12.10.2019 is reproduced below for ready reference!

> *Your goodself has issued above referred notice asking to show cause why Rs.20,86,560/- should not be assessed as income. In this regard I would like to state that*
>
> *A statement u/s 132(4) of the Income Tax Act made at the time of search at me residence on 08/02/2018 was prepared by your Investigation Officer and on which my initial/sign was taken forcibly as against the Provision of Income Tax Act and against the Principles of Natural Justice. And hence the return filed in response to notice under section 153A on 20.07.2019 to he*

considered as true reflection and I have nothing to declare as undisclosed income.

As per my financial statements for AY 2016-17 balance outstanding on account of Mr. Mahesh is Rs.1,89,13,440/-

Mr Mahesh details are
Name: Mahesh Udyavar
Address: C/o Unity Fish Meal & Oil Co
D.No.. 12-45D, Fishing Industrial area,
Pithrody Post,
Udyavar, Udupi-574118
Contact No. 9686694521

For further details please refer to my written response to the Assistant Director of Income Tax (Inv.), Mangalore on 18 July 2018.

11.4 He submitted that the ld. AO, however, did not appreciate the Assessee's reply and has made a lengthy order on the issue of the retraction of statement of the assessee and without bringing on record any evidence whatsoever, added Rs.20,86,560/- u/s 69B of the Act.

11.5 He further submitted that during the first appellate proceedings the following submissions were made on this issue:

Undisclosed Loan Advance:

It is seen from the assessment order under para 6.1 page 2 of 17, that learned Assessing officer from the Balance Sheet has worked out and stated that, assessee had given a sum of Rs.2,10,00,000/- to Shri Mahesh. In the same para, the learned Assessing officer has stated in the balance sheet, the balance due is mentioned as Rs.1,89,17,440/-. This is a wrong statement recorded by the learned Assessing officer.

In the Balance Sheet as on 31-03-2016 learned CiT (A) may observe that a sum of Rs. 2, I 0,00,000/- is shown under current assets as due from Shri Mahesh. In this connection we are enclosing herewith ledger account of Shri Mahesh, wherein Honorable CIT(A) may kindly see that appellant .had advanced Rs.2,00,00,000/- through cheques on several dates, ledger enclosed, and of which Rs.1,00,00,000/- is received back during the same financial year as seen in the ledger extract and leaving the balance of Rs.1,00,00,000/-, we do not know how the learned Assessing officer has mentioned that the balance sheet discloses Rs.1,89,13,440/- and the

difference between Rs.2,10,00,000/- and Rs.1,89,00,000/- amounting to Rs.20,86,560/- has been wrongly added by the learned Assessing Officer.

In this connection the appellant submits that Rs.89,13,440 /- was disclosed under Sundry Debtors as due amount from Shri Mahesh against the supplies made. This is as per statement of accounts for year ending 31-03-2017, extract of ledger accounts for the year ending 31-03-2017 is enclosed, even as on 3103-2017 the amount due from Shri Mahesh is Rs.1,00,00,000/-(ANNEXURE-4) under advances and Rs.89,13,440/- is under Sundry Debtors. ANNEXURE-5). Therefore, addition of Rs.20,86,560/- for Assessment Year 2016-17 may kindly be deleted

11.6 He submitted that the assessee had advanced Rs.2,00,00,000/- by various cheques and received back Rs.1,00,00,000/- during the F.Y. 2015-16 leaving behind a balance of Rs.1,00,00,000/- as on 31.03.2016. In this regard he requested us to peruse the copy of the Ledger account (Mr. Mahesh Adv) in the assessee's books for F.Y. 2015-16 as submitted before ld. CIT(A) and the group summary of loans and advances (asset) for the subsequent FY (as on 31.03.2017) as submitted before ld. CIT(A). He submitted that the assessee is not able to understand how the AO has worked out the so-called undisclosed income and recorded the same in the alleged statement u/s 132(4) of the Act. It is further submitted that an amount of Rs.89,13,440/- was due from Mr. Mahesh against supplies made to him during F.Y. 2016-17. The copy of sales A/c and the Journal Voucher submitted as additional evidence is enclosed. He submitted that the same duly tallies with the Return of Income for AY 2017-18. The said amount of Rs.89,13,440/- had remained due and payable at the end of the year and was duly reflected in the Sundry Debtors (Group Summary) duly submitted before the ld. CIT(A). From the above it would be clear that during the FY 2015-16, the Assessee had advanced only Rs. 2 crore to Mr. Mahesh and not Rs.2,10,00,000/- and that he had received back Rs. 1 crore during

the same FY. He submitted that the trade receivable of Rs.89,13,440/- is a separate amount due from Mr. Mahesh. Thus, the ld. A.R. submitted that when we add the amount due under the head Advances (Rs.1,00,00,000/-) and under the head Sundry Debtor (Rs.89,13,440/-) the total amount due is Rs.1,89,13,440/- as on 31.03.2017 and therefore no addition of any kind was called for.

11.7. The ld. D.R. submitted that assessee has failed to discharge the initial onus by explaining the source of funds for Rs.20,86,560/- between the loan advanced as per assessee's submissions during search and the advance reflected in the books of accounts. The ld. AO therefore, made addition of the impugned amount in the assessment order.

12. We have heard the rival submissions and perused the materials available on record. Facts involved are that during the search u/s. 132 of the Act at the residence of the assessee on 08.02.2018, a statement u/s 132(4) of the Act was recorded. In reply to Q.No.13 of the statement dated 08.02.2018, the assessee stated that he had advanced a loan of Rs.2,10,00,000/- to Sri Mahesh whereas it was seen that only Rs.1,89,13,440/- was reflected in the balance sheet filed with the return of income of the assessee. In view of this discrepancy, the assessee in reply to Q.No.14 of the said statement had admitted that the difference of Rs.20,86,560/- would be offered as his undisclosed income for A.Y. 2016-17. However, in the return filed in response to notice u/s. 153C of the Act, the assessee had not offered this undisclosed income of Rs. 20,86,560/- admitted u/s. 132(4) to tax. The assessee was requested by AO's letter dated 12.10.2019 to show cause why Rs.20,86,560/- was admitted as undisclosed income u/s. 132(4) was not declared in the return of income filed and why it should not be assessed as income for the relevant

assessment year. In reply to the notice, the assessee stated that the statement u/s 132(4) of the Act made at the time of search was taken forcibly and the return filed in response to notice u/s 153A be considered as correct and that he had nothing to declare as undisclosed income.

12.1 In this case, the total advance as reflected in balance sheet of the assessee was at Rs.1,89,13,440/-. However, during the course of search action on recording the statement u/s 132(4) of the Act on 3.2.2018, the assessee has stated that he had advanced a sum of Rs.2,10,00,000/- to one Mr. Mahesh. As answered to question no.14 assessee has admitted additional income of Rs.20,86,560/-. However, the same has not been offered in the return filed in response to notice u/s 153C of the Act. However, this statement was retracted by the assessee stating that statement was recorded at the time of search at his residence on 8.2.2018 was prepared by Income Tax Investigating Officer and on which his signature was taken forcibly as against the principles of Income Tax Act and against the principles of natural justice. Hence, return filed in response to notice u/s 153A of the Act on 20.7.2009 is to be considered as true and he has nothing to declare as undisclosed income. This has been countered by the ld. AO by observing as under:

- *"The assessee has stated that the loan advanced to Sri Mahesh is R 2,10,00,000.*
- *As the balance shown in the return of income was lesser than the actual loan advanced, he had declared the difference as his additional income in the statement u/s 132(4).*
- *The assessee has not furnished any evidence during the course of assessment proceedings to prove that the loan reflected in the books is the actual loan advanced.*
- *The assessee has neither filed any confirmation nor correspondence from the borrower to the effect that loan advance is the amount reflected in the books and not Rs. 2,10,00,000/- as admitted by the assessee during search.*
- *The assessee states that he has retracted the statement which was illegally taken according to him. The reasons why the retraction of*

the statement is invalid is discussed in the subsequent part of this order."

12.2 Accordingly, he made addition of Rs.20,86,500/-. In our opinion, as per section 31 of Indian Evidence Act, 1878, admissions are not conclusively proved as against admitted proof. In the absence of rebuttable conclusion, admission bind the maker when these are not rebutted or retracted. An admission is an extremely important piece of evidence but it cannot be said that it is a conclusive and the maker can show that it was incorrect. In our opinion admission made by the assessee will constitute a relevant piece of evidence but if the assessee contends that in making the admission, he had proceeded on a mistaken understanding or on misconception of facts or untrue facts, such admission cannot be relied upon without considering the aforesaid contention. In our opinion, the voluntary admissions are not conclusive proof of the facts admitted and may be explained or shown to be wrong but they do raise an estoppel and shift the burden of proof to the person making the admission. It is to be noted that, unless shown or explained to be wrong, they are an efficacious proof of the facts admitted. Thus, the burden to prove "admission" as incorrect is on the maker and in case of failure of the maker to prove that the earlier stated facts were wrong, these earlier statements are sufficed to conclude the matter. If retracted or proved sufficiently, the earlier stated facts lose their effect and relevance as binding evidence and the authorities cannot conclude the matter on the basis of the earlier statements alone. However, bald retraction of earlier admission will not be enough after retraction. Such statements cannot automatically become nullified. If the assessee proves that the statement recorded was involuntary and it was made under coercion, the statement has no legal validity.

12.3 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 assessees 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.

……

……

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 In view of the above, we are of the opinion that the lower authorities have not brought on sufficient evidence to suggest that assessee has advanced a sum of Rs.2,10,00,000/- in the place of a sum of Rs.1,89,13,440/- shown by the assessee in its balance sheet. Accordingly, this addition is deleted and the ground is allowed.

13. Next ground for our consideration is ground No.11 regarding addition u/s 68 of the Act at Rs.1,24,17,338/-.

13.1 The ld. A.R. for the assessee submitted that the AO has added Rs.1,24,17.338/- u/s 68 of the Act. He submitted that the said amounts reflect the assessee's own funds transferred from different bank accounts of the assessee himself. He submitted that the details of the same as submitted before ld. CIT(A) are reproduced below for ready reference:

> *Ground No.3:*
> *Introduction to Capital during the year:*
>
> *On Para 15.2, the learned Assessing Officer has detailed the disallowance of 1,24,17,338/- as under:*

Date	Bank Account details	Credit:-	Remarks
06.04.2015	ICICI Bank SB No.055901501971	10,00,000.00	This amount is transferred from NRE A/c to ICICI Bank A/c
26.06.2015	Bharat Co-Operate Bank A/c.003212100002005	15,00,000.00	This amount is transferred through SRI, to NRE A/c No.65668
30.06.2015	ICICI Bank SB No.055901501971	3,00,000.00	These amounts are transferred from Middle East to ICICI NRE A/c.
30.06.2015	ICICI Bank SB No.055901501971	3,91.930.00	
30.06.2015	ICICI Bank SB No.055901501971	2,88,433.00	

02.07.2015	ICICI Bank SB No.055901501971	8,70,150.00	
06.07.2015	ICICI Bank SB No.055901501971	3,91,930.00	
07.07.2015	Bharat Co-operative Bank A/c. 003212100002005 by Ch.No.134425	12,00,000.00	Transferred through ICIC1 A/c.No.501971
08.07.2015	ICICI Bank SB No.055901501971	3,87.758.00	Transferred through ICICI A/c.No.501971 from Middle East.
09.07.2015	ICICI Bank SB No.055901501971	2.98,100.00	
27.07,0115	ICICI Bank SB No.055901501971	7,89,037.00	
04.01.2016	Bharat Co-operative Bank A/c. 005315312100001438	25,00,000.00	Transferred through SDI NRI A/c to Bharath Co-Op. Bank
07.01.2016	Bharat Co-operative Bank A/c. 005315312100001438	25,00,000.00	Transferred through SBI to, Bharath Co-Op. Bank
	Total : —	**1,24,17,338.00**	

13.2 He submitted that all the above amounts were credited out of the assessee's own earning made in Middle East and therefore the same cannot be considered as unexplained credits u/s. 68 of Income Tax Act and charged to tax as per provisions of section 115BBE of Income tax Act. He submitted that there is no case for addition of the said amount u/s 68 of the Act and he prayed that the same may be deleted.

13.3. The ld. D.R. submitted that no explanation whatsoever was given other than filing the list of cheques credited to his various bank accounts. The assessee did not furnish any explanation for the source of these deposits other than stating that it is reflected in

his bank account. In the course of hearings before ld. AO, the assessee or the ld. A.R. were not able to give any explanation for the source of these credits other than stating that they are reflected in the books of accounts of the assessee. The ld. AO observed that merely because the cheques are credited to the bank account of the assessee without any explanation for the source of these cheques, the same cannot be held as explained. The assessee did not furnish the books of accounts or any evidence as to the source of these credits. In view of the above, he submitted that in the absence of any evidence or explanation to the sources for the introduction of capital of Rs.1,24,17,338/- was added to the income of the assessee under section 68 of the Act by the ld. AO.

14. We have heard the rival submissions and perused the materials available on record. In this case, the assessee introduced a sum of Rs.1,24,17,383/- during the assessment year under consideration. The assessee has been asked for sources of such capital introduction. The assessee has not given any explanation other than filing the list of cheques credited to his various bank accounts. It is incumbent upon the assessee to explain the sources from where he has received said money. Merely because the amount has come through cheque does not discharge the burden cast upon the assessee. The assessee is not led any piece of evidence to support the sources of the said capital introduced by the assessee. The assessee putting over all arguments absolutely by not producing iota of evidence regarding source of said capital introduced by the assessee. In view of this, we have no hesitation in confirming the addition made by ld. AO sustained by ld. CIT(A). This ground of appeal of the assessee is rejected.

15. Next ground no.12 is with regard to addition of Rs.67,23,316/- made u/s 68 of the Act.

15.1 The ld. A.R. submitted that the assessing officer has made an addition of Rs. 67,23,316/- u/s 68 of the Act which is the credit balance as at the end of the year standing in the name of Seahath Marine. The confirmation of the accounts submitted by the assessee and the explanation given therein were rejected on the ground that the letter sent by the AO to the address of the sundry creditors was returned by the postal authorities with a comment "not known" and that the assessee did not furnish the PAN number of M/s Seahath Marine. He submitted that this was a running account and there was an opening credit balance amounting to Rs.27,23,316/- as on 01.04.2015. Thereafter, M/s Seahath Marine gave further advance against sale of fish on 26.06.2015 and 15.07.2015 in all amounting to Rs.40,00,000/-. The assessee sold raw fish to the said entity which was however rejected due to quality issue and the dispute has arisen between the two parties. Accordingly, the outstanding amount was a genuine paid advance received by the assessee in the course of the business which is also duly confirmed by the said entity. The relevant paragraphs of the assessment order rejecting the submissions made by the assessee are reproduced below by the ld. A.R. for ready reference:

> *17.5 Rebuttal of the contentions of the assessee on the issue of Sundry Creditors:*
> *The reply of the assessee is carefully considered but the same is not acceptable for the following reasons:*
>
> *During the course of hearing on 13.11.2019, the AR of the assessee stated that the loan taken from Seahath Marine is shown under the head sundry creditors.*
>
> - *In the reply dated 6.12.2019 the assessee claims that he has sold fish to Seahath Marine Ltd. and they have a dispute regarding the transaction. lf the assessee has sold fish to then Seahath Marine ought to have been the debtor of the assessee as the amount is*

receivable from Seahath Marine. In the instant case it is credit balance.

- *During the course of hearing the assessee was specifically asked to give the present address of the creditor and the same was furnished by the assessee.*
- *The notice sent to Seahath Marine to confirm the claim of the assessee has been returned by the postal authorities with the remarks "Not Known".*
- *The purported confirmation filed by the assessee is a ledger extract of Seahath Marine as appearing in the books of the assessee only, signed by one Shahid*
- *No other details of the creditor like PAN or confirmation of the facts claimed by the assessee is filed*

17.6 In view of the facts discussed above the assessee has failed to satisfactorily explain the credit of Rs.67,23,316 shown in the balance sheet the same is charged to tax as the income of the assessee u/s 68 of the Act and added to the income of the assessee and taxed as per the rates prescribed in Sec. 115BBE of the Act.

(Addition: Rs.67,23,316)

15.2 He further submitted that in the first appeal the ld. CIT(A) also did not appreciate the assessee's submissions and confirmed the addition by holding that the action of the AO appears judicious. He submitted that the submissions of the assessee made in brief before the Ld. CIT(A) are reproduced below for ready reference:

3.Additions to Sundry Creditors:

The learned assessing officer has added a sum of Rs.67,23,316/- standing as sundry creditors, in the Balance Sheet in the name of Seahath Marine Products. The appellant was trading with the above creditor for supply of fish. Out of the total amount Rs.67,23,316/-, Rs.27,23,316/- is opening balance as on 01.04.2015 the balance amount of Rs.40,00,000/-is received during the financial year 2015-16. Irk the fish trade business, which is one of the unorganized sector business and highly perishable in nature, most of the times due to scarcity of fish, advances are given to the supplier, the same case being here. Unfortunately, the customer raised dispute relating to product quality and hence the matter still stands unsettled. The learned Assessing Officer has added the entire amount of Rs.67,23,316/- for the financial year 2015-16. (ANN EXURE-10)

15.3 He submitted that the relevant paragraph of the order of Ld. CIT(A) are reproduced below for ready reference:

> *12.2 The credit of Rs.61,23,316/- shown in the balance sheet was accordingly charged to tax by the AO as the income of the assessee appellant u/s 68 of the Act. During the course of the appellate proceedings, Ld' AR of the appellant contended that they had sold the fish to Seahath Marine and had also shown the amount receivable from them as their income in the relevant year but since there was a dispute about the quality of the fish and no payment was received' the amount was shown as a credit to Seahath Marine in the books' This argument is not acceptable because as mentioned by the AO in the assessment order credit balance. Furthermore, the appellant was, if the assessee appellant had sold Fish to then Seahath Marine ought to have been the debtor of the assessee appellant as the amount was receivable from Seahath Marine whereas in the instant case it was unable to give any documentary evidence of the steps taken by him to recover the money from Seahath Marine. No other confirmation other `than a ledger extract of Seahath Marine signed by one Shahidas appearing in the books of their books could be produced before the AO by the assessee appellant and in fact, the notice sent to Seahath Marine by the Ao to confirm the claim of the assessee appellant was returned by the postal authorities with the remarks "Not Known", thereby putting in doubt the very existence of this party.*
>
> *12.3 In view of the aforesaid, the action of the Ao appears judicious. The grounds on which the Ao rejected the explanation of the appellant withstand the canons of judicial scrutiny and the appellant in the present appeal has not been able to bring forth any valid arguments would necessitate any modification of the stand adopted by the Ao. Ground 9 of the appeal is accordingly dismissed.*

15.4 He further submitted that it is not in dispute that Rs.27,23,316/-out of Rs.67,23,316/-, was the opening balance standing in the name of M/s Seahath Marine. The AO has treated even this amount as unexplained cash credit. He submitted that this Tribunal and the courts have time and again held that opening balances standing in the name of sundry creditors cannot be considered for addition u/s 68 of the Act. He relied upon the ratio of the decisions of coordinate bench of this Tribunal in *Glen Williams vs Asst Commissioner of Income Tax Circle 1 (1) Bangalore [ITA no.1078/Bang/20141* and in *M/s. K N R Roofing Pvt. Ltd vs Asst Commissioner of*

Income Tax Circle I Bangalore [ITA no.3125/Bang/2018/. The relevant para-11 of the Order of this Tribunal in *M/s. K N R Roofing Pvt. Ltd. (supra) is reproduced below for ready reference:*

> *"11. We have considered the rival submissions. We are of the view that u/s. 68 of the Act, 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. Therefore, the opening balances cannot be added u/s. 68 of the Act."*

15.5 He submitted that as regards the balance Rs.40,00,000/- received during the year from M/s Seahath Marine the Ld. AO has ignored the confirmation of the accounts submitted by the assessee with due signature of the said party. He has also ignored the fact that the assessee had sold material to the said entity against the credit advances and due to dispute on the quality, the matter had remained unsettled. He submitted that the same is a genuine trade advance that has remained to be adjusted and does not represent unexplained cash credit as alleged. Hence, he submitted that the same may be deleted.

15.6 The ld. D.R. submitted that there is no merit in the argument of the assessee's counsel that they have sold the fish to Seahath Marine and also shown the amount as receivable from them as their income in the relevant year but since there was a dispute about the quality of fish, no payment was received, the amount was shown as a credit to Seahath Marine in the books. Had the assessee sold the fish to then Seahath Marine, ought to have been the debtor of the assessee as the amount was receivable from Seahath Marine, however, in the present case, it was shown as a credit balance in assesse books of accounts which is not possible and the assessee has not proved the identity of parties and genuineness of transaction

and even the creditworthiness as required u/s 68 of the Act and addition to be sustained.

16. We have heard the rival submissions and perused the materials available on record. We have noted that assessee has shown sundry creditors in the name of Seahath Marine Products at Rs.67,23,316/-. The ld. AO has asked for PAN of Seahath Marine Vide order sheet noting dated 13.11.2019. The assessee has only furnished the address of the party but he has not provided the PAN of the said creditors. The ld. AO written a letter to M/s. Seahath Marine Products. The letter has been returned with a comment from the postal authority that "not known". In view of this, the addition has been made u/s 68 of the Act. Now the contention of the ld. A.R. is that the said creditor filed a confirmation letter in the form of signature of the said party in the ledger account of the assessee. According to the assessee's reply, assessee received a payment from said party for supply of the raw fish which has been rejected by that party. Hence, the credit has been stood in the name of that party. Since there was a dispute between the parties, he is not in a position to file a confirmation letter. In our opinion, the addition made by ld. AO u/s 68 of the Act, there is a burden cast upon the assessee to prove the identity and creditworthiness of the parties and genuineness of the transaction. The assessee in this case filed only the addresses of parties by not furnishing PAN number of the parties. The assessee has not discharged the burden cast upon the assessee u/s 68 of the Act. The assessee has taken a bald plea that there was a dispute between the parties, hence, he is not in a position to file requisite details. However, the parties shall exist to receive the notice issued by the department. The postal sent by the AO has been returned with the comment that "not

known", it means that whether Seahath Marine Company has a non-existent person and this is only a paper entry shown by the assessee, hence, in our opinion, having no alternative, we confirm the addition made by the lower authorities. This ground of appeal of the assessee is rejected.

17. In the result, the assessee's appeal in ITA No.1117/Bang/2022 is partly allowed.

ITA No.1118/Bang/2022 (AY 2017-18):

18. In this appeal, the assessee filed additional evidences under Rule 29 of the Income Tax Rules, 1963 containing Annexures-1 to 5, which are as follows:

a) The convenience sheet depicting the flow of funds by way of FDs/ Proceeds of matured FDs/ Loan Accounts.
b) Bank statements of the assessee's loan account no. 005333920001978 maintained with Bharat Bank.
c) Bank statement of FD account no. 0092204100000 maintained with Bharat Bank.
d) Bank statement of FD accounts no. 005320410000155 maintained with Bharat Bank.
e) TDS details of in respect of Assessee bank account maintained with Bharat Bank.

18.1 It was submitted that the documents mentioned at sl.no.2 to 5 above are the bank account statements which the assessee believes to be forming part of the assessment records as it is on the basis of these vary documents that the AO made additions. However due to change in the Counsel, the assessee does not readily have evidence of himself submitting the said documents before the AO. These bank statements were present before the AO in the form of ledger accounts uploaded on the portal as part

of reply to the notice u/s 142(1) dated 10-12-2019. As the bank statement would be more authentic to explain the source of credits the ld. A.R. requested that the same may be admitted as an Additional Evidence. The ld. A.R. submitted that the assessee was prevented from submitting these documents as the AO never asked for them and the assessee had submitted only the ledger accounts as the ld. AO had given only 1 days' time to reply. (Reference: Notice U/s 142(1) dated 10-12-2019 by which he directed the assessee to submit the details by 02.30 PM on the next date).

18.2 As regards the document at Sl. No.1 the same is convenience sheet explaining the flow of funds within the various bank accounts of the assessee maintained with the Bharat Bank. Since this chart would assist in explaining the movement of funds, the ld. A.R. submitted that the same is an essential document which was rejected by the Ld. CIT (A) for unreasonable cause. He submitted that the assessee was not trying to bring any new-facts or data. Assessee was only trying to make a better presentation of movement of funds within the bank accounts- which details were already forming part of the records before the lower authorities. He prayed that the said convenience sheet may be admitted as additional evidence in the interest of justice and fair play.

19. We have heard the rival submissions and perused the materials available on record. These evidences are filed before the ld. CIT(A) and he has rejected it as there was no sufficient cause. In our opinion, he ought to have admitted these additional grounds, which are very important to examine various deposits made into assessee's bank accounts. Accordingly, we admit these additional evidences for adjudication.

20. Ground Nos.1,3,4,5,6 & 7 in this appeal are similar to that of ground Nos.1,3,4,5,6 & 7 in ITA No.1117/Bang/2022 for the AY 2016-17. Accordingly, these grounds are disposed of on similar lines.

21. Ground No.2 is general in nature, which do not require any adjudication.

22. Ground Nos.8 & 9 are similar to that of ground nos.8 & 9 in ITA No.1117/Bang/2022 for the AY 2016-17. Accordingly, these grounds are also disposed of on similar lines.

23. Next ground No.10 is with regard to confirming addition of Rs.5,99,96,600/- being unexplained investment.

23.1 The ld. A.R. submitted that the ld. AO has made an addition of Rs.5,99,96,600/- on the ground that the assessee has paid sales consideration in cash over and above what is recorded in the register sale deeds of the immovable properties acquired during the Previous Year. He referred to para 5 (5.1 to 5.5), 6(6.1 to 6.25) of the assessment order wherein the AO has held based upon the purported statement u/s 132(4) that the pencil scribblings on certain loose sheets seized by the Department that the assessee has paid Rs.5,99,96,600/- in cash. The AO has also held at para 7, 8 and 9 of the assessment order that the retraction of the statement given under oath was not valid and accordingly has made the said addition disregarding the assessee's submissions made before him. In this regard assessee relied upon the submissions made before the AO and the ld. CIT(A) on this issue.

23.2 The ld. A.R. submitted that the lower authorities have presumed that such a statement was in fact recorded during the search. However, as explained before the lower authorities

the Revenue officials had brought a pre-prepared typed statement and insisted the assessee to sign on it. The fact that the statement was pre-prepared is evident from the fact that the assessee did not have any computer or printer at his home and therefore the statement should have been recorded in someone's hand writing and could not be in a typed format. Further the statement/letters extracted by the investigating authorities during post search proceedings was also under duress as the authorities had frozen the bank accounts bringing to halt all the affairs of the assessee and the assessee was persuaded to provide such undertakings during the post search proceedings. He submitted that from the tone of the letters/undertakings it can be seen that the same was not given voluntarily as there was no requirement. No assessee would give such letter or undertaking unless the same has been forced upon him. He submitted that the pencil scribblings found on the loose sheet were not under his hand writing nor does he know the meanings of various notings found therein. The amount alleged to have been paid in cash comes to almost three times the registered value of the property and such high valuation itself is an indicator of non-reliability of the figures mentioned therein. The relied upon documents were dumb documents and did not reveal any unaccounted income as alleged by the AO. The pencil scribblings also do not have any evidentiary value as the same were written in pencil probably for some kind of guess work and certainly not made by the assessee. Keeping in view of the above, the ratio of the following decisions of the Hon'ble Apex Court and that of the jurisdictional High Court of Karnataka are respectfully relied upon by the ld. A.R. for the assessee for the proposition that the scribblings on the loose sheet cannot be relied upon.

a. *Central Bureau of Investigation vs V C Shukla and Others (1998) 3 SCC 410;*
b. *Common Cause and Others vs Union of India (2017) 11 SCC 31;*
c. *Sunil Kumar Sharma vs Dy.CIT (Karn) [2022/ 448 ITR 485 (Karn)*

In view of the above, the ld. A.R. for the assessee submitted that the addition of Rs.5,99,96,600/- made by the AO u/s 69B of the Act may be deleted.

23.3 The ld. D.R. submitted that on the basis of evidence found during the course of search, the undisclosed cash payment of Rs.5,99,96,600/- being the total of the amount shown as paid in black in seized material was charged to Income Tax as the income of the assessee for the assessment year under consideration u/s 69B of the Act. Same to be confirmed.

24. We have heard the rival submissions and perused the materials available on record. The analysis of seized material shown a total payment as follows:

6.21 The summary of the payments recorded in the 3 sheets discussed above is as below:

Cheques recorded in Page no. 33 & 34	
Page no.	**Cheque Amount**
33	1,11,58,000
34	1,64,39,500
Total	**2,75,97,500**

Payment recorded in Page No. 32		
73.4 x 2,00,000 per cent = 1,46,80,000		
White	**Black**	**Total**
25,00,000	75,00,000	**1,00,00,000**
23,79,000	23,01,000	**46,80,000**
48,79,000	**98,01,000**	**1,46,80,000**

Payment recorded in Page No. 32		
347.21 x 2,10,000 per cent = 7,29,14,100		
White	**Black**	**Total**
10,00,000	4,65,00,000	**4,75,00,000**
2,17,18,500	36,95,600	**2,54,14,100**
2,27,18,500	**5,01,95,600**	**7,29,14,100**

Payment recorded in Page No. 32		
Page No.	**White**	**Black**
32	25,00,000	23,01,000
	23,79,000	4,65,00,000
	10,00,000	36,95,600
	2,17,18,500	75,00,000
Total	**2,75,97,500**	**5,99,96,600**

HENCE THE TOTAL AMOUNT PAID IN CASH IN RESPECT OF THESE PROPERTIES IS Rs. 5,99,96,600

6.22 Another facet of this is the bank accounts maintained by assessee at Mulky and Udupi. The details of cheque payments issued from these banks towards the purchase of these properties are tabulated hereunder:

CA Mulky			CA Udupi		
Cheque No	Amount	Mentioned in Sale Deed	Cheque No	Amount	Mentioned in Sale Deed
Chq 901712	4,27,000	9800/16-17	Chq 016283	7,25,000	5231/16-17
Chq 901713	4,27,000	9800/16-17	Chq 025613	11,35,000	10515/16-17
Chq 901714	4,27,000	9800/16-17	Chq 025614	10,98,000	10511/16-17

Chq 901721	4,77,834	9786/16-17	Chq 025604	4,27,000	9801/16-17
Chq 901722	4,77,833	9786/16-17	Chq 025605	4,27,000	9801/16-17
Chq 901723	4,77,833	9786/16-17	Chq 025606	4,27,000	9801/16-17
Chq 901718	5,08,334	9790/16-17	Chq 025610	25,62,000	10510/16-17
Chq 901719	5,08,333	9790/16-17	Chq 025607	8,94,667	9789/16-17
Chq 901720	5,08,333	9790/16-17	Chq 025608	8,94,667	9789/16-17
Chq 901706	7,11,667	9794/16-17	Chq 025609	8,94,666	9789/16-17
Chq 901707	7,11,666	9794/16-17	Chq 025611	5,18,500	10978/16-17
Chq 901708	7,11,667	9794/16-17	Chq 025624	2,37,500	10982/16-17
Chq 901715	8,33,667	9802/16-17	Chq 025625	2,37,500	10982/16-17
Chq 901716	8,33,667	9802/16-17	Chq 025626	2,37,500	10982/16-17
Chq 901717	8,33,666	9802/16-17			
Chq 901709	11,99,667	9791/16-17		-	
Chq 901710	11,99,667	9791/16-17			
Chq 901711	11,99,666	9791/16-17			
	1,24,74,500			**1,16,23,000**	

24.1 It is also noted that the assessee has admitted these details in the statement recorded u/s 132(4) of the Act which can be seen from the following questions and answers:

5.2 In replies to Q.No. 18 to 21 the assessee explained the contents of the sheets of paper and stated that the notings therein were the actual purchase value of the properties at Kadekar Village. The relevant portion of the statement is placed hereunder:

Q.No.18 During the course of search proceedings certain loose sheets have been found in your bed room which has been inventories as exhibit MMS/A-1/32-34. Please go through the same and explain the contents.

Ans. These papers contain figures which were paid to land owners of kadekar village property.

Q.No.19 On perusal of your Fixed Asst List, exhibit MMS/A-1/5, figure stands at 2,69,54,760/- which is your sale deed figures (registration values). Moreover, on verifying advances list (exhibit MMS/A-1/a, it is seen that Nirmala shetty was given advance of Rs 5,18,500/- where as in exhibit MMS/A-1/33, it is shown as Rs.10,37,000/-. Please explain.

Ans: Yes. I do agree there is difference. It is because of so many constraints, property could not be registered for actual figures. Actual sale value given to Nirmala shetty was Rs.10,37,000/- and not Rs.5,18,500/-. While purchasing Kadekar Village Property, it was registered at Rs.2,69,54,760/- where as on money paid amounts to Rs.5,30,45,240/-.

Q.No.20 Please explain the noting made in the exhibit MMS/A-1/33.

Ans: Sir, Please compare this exhibit with exhibit MMS/A-1/4, then, you will realize. Exhibit MMS/A-1/4 contains the amount which was registered, where as MMS/A-1/33 contains the amount which was actually paid. It contains the name of the party, amount paid and how many times more of the registered amount.

Q.No. 21 Please explain the contents in exhibit MMS/A-1/34.

Ans: I am not able to recollect it. But, I can only say that W stands for White and B stands for Black. Sir, total money paid for purchase of Kadekar property is Rs.8 Crore. This property has been registered for Rs.2,69,54,760/-. So, on money paid component is Rs.5,30,45,240/- which is nearly double the amount of registered value. So, I offer this amount for taxation for the A.Y 2017-18.

24.2. The contention of the ld. A.R. is that the assessee has withdrawn the statement, which has been filed before the authorities on 28.2.2018.

5.5 In consequence to the above statements, assessee voluntarily filed a letter in his own hand writing before the Investigating Officer seeking time to pay the taxes due on the hitherto undisclosed income. The copy of the same is also placed hereunder:

22-02-2018.

From,
Mohammed Mujeb Sikander
Flat No: 002. Pearl Heights.
Indrali, Udupi.

भारत सरकार GOVT. OF INDIA
आय / संयुक्त आयकर निदेशक का कार्यालय (अन्वेषण)
28 FEB 2018
Addl./Joint Director of Income Tax (Inv.)
मंगलूरु Mangaluru

To The Asst. Director of Income tax. (INV)
Ck2. Mangalore.

Respected Sir.
Sub :- Request to grant time to clear the tax. on income declared in survey.

Search and seizure u/s 132 of the Income tax Act. was conducted on 8/2/2018 in my residential premises and authorised officer has noticed some additional income. and that I also agreed to declare that income.

Sir I am ready to pay the tax, but I need some time to clear the tax. I will pay the 20% of tax liability within 31st March 2018 and balance tax will be cleared within March 2019.

Please do the needful

Thanking you.
Your Truly.

(Mohammed Mujeeb Sikander)

25. We have carefully gone through the above evidence brought on record by the ld. AO. This is not the case where there is no seized material. The seized materials disclosed various unaccounted payment to various parties. This is also supported by statement recorded u/s 132(4) of the Act. The contention of the ld. A.R. is that the statement recorded u/s 132(4) of the Act has been retracted. In our opinion, the retraction is only self-serving document. The evidence speak itself that the assessee had made various unaccounted payment to various parties. Since it has not been disclosed by assessee in its books of accounts, this is to be brought to tax. Accordingly, the same has been rightly brought by ld. AO and the addition is sustained. This ground of appeal of the assessee is rejected.

26. Next ground Nos.11 to 14 of the assessee's appeal are with regard to sustaining addition of Rs.20.46 crores as short-term capital gain towards alleged relinquishment of goodwill in the partnership firm M/s. Yashaswi Fishmeal & Oil Company.

26.1 The ld. A.R. submitted that the AO has treated the amount received by the assessee on his retirement from the Firm as consideration for relinquishment of his right in the Goodwill and the Ld. CIT(A) has confirmed it. He submitted that in *Malabar Fisheries v. CIT, (1979) 120 ITR 49 (SC)*, the Hon'ble Supreme Court has explained that the firm as such has no separate rights of its own in the partnership assets and that it is the partners who own 'jointly by or in common' the assets of the partnership and, therefore, the consequence of the distribution, division or allotment of assets to the partners which flows upon dissolution after discharge of liabilities is nothing but a mutual adjustment of rights between the partners and there is no question of any extinguishment of the firm's rights in the partnership assets

amounting to a transfer of assets within the meaning of section 2(47) of the Act. The relevant para-18 of the said judgement [*Malabar Fisheries v CIT (supra)*] is reproduced below for ready reference:

> *18. Having regard to the above discussion, it seems to us clear that a partnership firm under the Indian Partnership Act, 1932 is not a distinct legal entity apart from the partners constituting it and equally in law the firm as such has no separate rights of its own in the partnership assets and when one talks of the firm's property. Or firm's assets all that is meant is property or assets in which all partners have a joint or common interest. If that be the position, it is difficult to accept the contention that upon dissolution the firm's rights in the partnership assets are extinguished. The firm as such has no separate rights of its own in the partnership assets but it is the partners who own jointly in common the assets of the partnership and, therefore, the consequences of the distribution, division or allotment of assets to the partners which flows upon dissolution after discharge of liabilities is nothing but a mutual adjustment of rights between the partners and there is no question of any extinguishment of the firm's rights in the partnership assets amounting to a transfer of assets within the meaning of s.2 (47) of the Act. In our view, therefore, there is no transfer of assets involved even in the sense of any extinguishment the firm's rights in the partnership assets when distribution takes place upon dissolution.*

26.2 He further submitted that the law as explained by the Apex Court in Malabar Fisheries (supra) has not been overruled so far and remains a good law. Mere omission of section 47(ii) or insertion of section 45(4) by Finance Act 1989 had not changed the law that the 'distribution of a capital asset on dissolution or otherwise' was not a 'transfer' within the meaning of section 2(47) of the Act. Till the time amendment was brought about vide Finance Act, 2021 there was no provision under the Act holding or deeming a such transaction to be a 'transfer' bringing it into the ambit of section 45. It is only with the insertion of section 9B that the 'receipt of a

capital asset' by the Partner in connection with dissolution or reconstitution of a firm has been deemed to be transfer of the said asset from the Firm to the Partner. That prior to amendment of sections 45(4), 48 and insertion of subsection (5) of section 45 and section 9B of the Act, there was no charging section nor any machinery provision to bring to tax such amount received at the time of retirement / reconstitution of the Firm.

26.3 He further submitted that the Apex Court has held in *Narayanappa* v. *Bhaskara Krishnappa* [A.I.R. 1966 S.C. 1300, 1303, 1304.] that there could be no relinquishment of any rights in the assets of the Firm by the retiring Partner as "*During the subsistence of the partnership, however, no partner can deal with any portion of the property as his own. Nor can he assign his interest in a specific item of the partnership property to anyone. His right is to obtain such profits, if any, as fall to his share from time to time and upon the dissolution of the firm to a share in the assets of the firm which remain after satisfying the liabilities set out in clause (a) and sub-clauses (i), (ii), and (iii) of clause (b) of section 48". The decision of the Apex Court in Narayanappa* v. *Bhaskara Krishnappa (supra)* was followed by Hon'ble Gujarat High Court wherein it was held that there could be no relinquishment of rights in the Goodwill of the firm on retirement of the Partner. [*Commissioner of Income-Tax v. Mohanbhai Pamabhai, 1971 SCC On Line Guj 101: (1973) 91 ITR 393.* The said Gujarat High Court judgment has been affirmed by Supreme Court in *CIT v. Mohanbhai Pamabhai, 1987 Supp SCC 704].*

26.4 He submitted that various High Courts and Tribunals have followed the above decisions of the Apex Court and have held that there is no element of 'transfer' when a capital asset or money is received by the Partner in connection with the dissolution or reconstitution of the Firm. However, there are certain other

decisions which have taken a view that with insertion of sub-section (4) in section 45 and omission of provisions of section 47(ii) vide the Finance Act, 1987 the profits and gains arising from 'transfer' of a capital asset on dissolution or otherwise of the Firm was liable to be taxed as capital gains in the hands of the Firm. All these decisions did not consider, with due respect, that the definition of 'transfer' given u/s 2(47) was not capable of addressing the principles explained by Apex Court in Malabar Fisheries Co (supra) and in CIT v. Mohanbhai Pamabhai (supra) *and that unless the transaction fits into the definition of 'transfer' there could be not capital gains chargeable to tax.*

26.5 He further submitted that it is in the above background that the Legislature considered it appropriate to amend the law by substituting sub-section (4) of section 45 with a new one, inserting new section 9B and amending section 48 whereby the law now provided that the receipt of a capital asset by the Partner in connection with dissolution or retirement would be deemed to be transfer (section 9B) and the profits or gains arising from such receipt by the Partner shall be chargeable to tax as income of the Firm under the head "Capital gains" and shall be deemed to be the income of the Firm to be computed as per the formula given therein.

26.6 He submitted that by bringing about amendments in section 45 and 48 and inserting new section 9B in the Act vide Finance Act, 2021, the Legislature has unequivocally agreed with the assessment made in the Memorandum Explaining the Provisions of Finance Bill, 2021 that the provisions of sub-section (4) of section 45 as it existed then were not clear and would not apply to a situation where assets are revalued or self-generated assets are recorded in the books of accounts and payment is made by the Firm to the

partner in excess of his capital contribution. It may be noted here that the amendments introduced in the Finance Bill, 2021 had to undergo further changes by the time the Bill became an Act of Parliament. It is submitted that it is to overcome the inadequacies in subsection (4) of section 45 that the law has been amended as explained above.

26.7 In the instant case assessee has received the subject amount on retirement from his Firm. The Assessment Year involved in 2017-18 i.e. much before the amendments introduced vide Finance Act, 2021. The AO has brought it to tax as consideration received towards relinquishment of his rights in Goodwill. It is submitted that as held by in *CIT v. Mohanbhai Pamabhai (supra)* and *Malabar Fisheries v. CIT (supra)* there was no element of transfer involved as the Partner did not have any right over any specific asset of the Firm and hence, he could not have transferred nor relinquished his right in the said specific asset (Goodwill in the instant case). Thus, there was no transfer of any asset by way of relinquishment or otherwise and hence there was no capital gain.

26.8 Without prejudice to the above submissions, he submitted that even if it were to be held that there arose any Capital Gain in the subject transaction, the same was to be taxed in the hands of the Firm (M/s Yashaswi Fish Meal and Oil Company) and not in the hands of the Partner.

26.9 Without prejudice, he further submitted that pre-amended section only applies to the case of dissolution of a firm and not to re-constitution of the Firm. In the instant case there was no dissolution of the firm but only reconstitution of the Firm and hence the same is beyond the scope of section 45(4) of the Act. The fact that the amended sub-section (4) specifically mentions the case of 'reconstitution' of the Firm in addition to 'dissolution' clearly

shows that the Legislature did not mean to include the cases of reconstitution of the Firm within the provisions of section 45(4) of the Act. The amount is not taxable at all as it is not an amount received on dissolution of the partnership.

26.10 He further submitted that the Hon'ble Finance Minister herself has stated in the Memorandum Explaining the provisions of Finance Bill, 2021 that it has been noticed that there is uncertainty regarding applicability of provisions of aforesaid sub-section [i.e. subsection (4) of section 45] to a situation where assets are revalued or self-generated assets are recorded in the books of accounts and payment is made to partner which is in excess of his capital contribution.

26.11 That prior to amendment of sections 45(4), 48 and insertion of subsection (5) of section 45 and section 9B of the Act, there was no charging section nor any machinery provision to bring to tax such amount received at the time of retirement / reconstitution of the Firm.

27. The ld. D.R. submitted that the addition made by the AO is in conformity with the extant provisions duly supported by judicial pronouncements and has to be upheld. During the course of the appellate proceedings, Learned AR of the assessee argued that in actuality, 20,45,99,993/- were paid by the partners on 25/04/2016 to the firm Yashaswi Fish Meal and the firm remitted the amount to the assessee on 28/04/2016, being the date on which the assessee retired from the firm. They quoted the judgment of Hon'ble High Court of Gujarat in the case of Mohanbhai Pamabhai IT Reference Nos. 22, 23, 24 & 25 wherein it is held that where assessee retires from firm and received amount which included a proportionate share of

goodwill, section 2(47) did not apply and the amount so received could not be charged to tax as capital gain. It was also contended that the judgment having been upheld by the Hon'ble Apex Court, the same was binding.

27.1 He further submitted that to put the matters in the right perspective, the Hon'ble Supreme Court did not pass any reasoned order in this case but merely dismissed the appeals. This does not make the judgment of the Hon'ble Gujarat High Court as binding as the High Court is not the jurisdictional High Court in this case. Secondly, the case relied upon by the Ld. AR is even otherwise distinguishable on facts as in that case the finding was that there was no transfer of interest of the assessees in the goodwill when they retired from the firm and, in any case, no consideration was received or accrued even if there was transfer of such interest and since there was no consideration received or accrued as a result of transfer of such interest, no capital gains were chargeable. The position is entirely different in this case. The capital account of the assessee in the books of the firm M/s Yashaswi Fish Meal & Oil Co. shows that the firm had raised goodwill in the books to the extent of the assessee's share which was written off by the contributions of the continuing partners. On 28.04.2016, Goodwill to the extent of Rs.20,45,99,993/- (rounded off to 20,46,00,000), being the amount payable over and above the capital account balance of the assessee was created. As per the entries recorded in the books of the firm, the assessee relinquished his share of goodwill to the continuing partners of the firm in their profit-sharing ratio and the assessee received a consideration of Rs.20,46,00,000/- as consideration for this relinquishment. Thus, the fact is that in the instant case, goodwill was raised in the books and written off at the time of settlement in a definitive ratio amongst the

continuing partners and this is corroborated by the books of the firm. The assessee having received the sum as a result of transfer of his share of Goodwill is liable to pay tax thereon. AO was therefore entirely justified in making addition of Rs. 20,46,00,000/- as goodwill relinquished.

28. We have heard the rival submissions and perused the materials available on record. The assessee was partner in the firm Yashaswi Fish Meal & Oil Company from 8.2.2007. The assessee retired from the said partnership firm vide retirement deed dated 28.4.2016. The assessee has received 25 Crores in full and final settlement for relinquishment of all subsisting rights in the partnership firm. As per memorandum of understanding dated 23.3.2015 between the assessee and the assessee M/s. Yashaswi Fish Meal & Oil Company, the assessee has received Rs.25 Crores to relinquishment of his share in the firm and entire amount shall be paid on or before 31.5.2015 and the dispute was settled through the arbitration. There was also compromise proposal filed before the Hon'ble High Court and there was a judgement vide dated 28.4.2016, wherein the continuing partners agreed to pay Rs.25 Crores to the assessee in full and final settlement of all his claims in that firm. The assessee also acknowledged that he has relinquished his subsistent payment of Rs.25 crores was made by assessee and same has been acknowledged by assessee and this has also supported by assessee's account with Yashaswi Fish Meal & Oil Company, which reads as follows:

Yashaswi Fish Meal & Oil Company (2016 - 17audit)
Pithrody, Udyavara - 574 118

Mohammaed M Sikandar Capital A/c
Ledger Account

1-Apr-2016 to 31-Mar-2017

Page 1

Date		Particulars	Vch Type	Vch No.	Debit	Credit
1-4-2016	Dr	Opening Balance				4,58,89,842.00
2-4-2016	Cr	ICICI Bank - 350	Payment	2	1,50,00,000.00	
20-4-2016	Cr	ICICI Bank - 350	Payment	175	3,04,00,007.00	
25-4-2016	Dr	Profit & Loss A/c	Journal	118		12,87,000.00
	Cr	Income Tax Upto 2016 -1 7	Journal	120	17,76,835.00	
					4,71,76,842.00	4,71,76,842.00

For YASHASWI FISH MEAL & OIL COMPANY

Authorised Signatory

28.1 During the course of assessment, the ld. AO asked the assessee as to why this amount of Rs.3 crores could not be brought to tax. He replied vide his letter dated 6.11.2009 that unregistered MoU entered by the assessee with M/s. Yashaswi Fish Meal & Oil Company was timebound and the same was invalidated on 31.3.2015 due to non-fulfillment. Thereafter, the matter has been decided in Hon'ble High Court of Karnataka, Bangalore on 28.4.2016 as per which assessee received Rs.25 Crores and not Rs.3 crores. The ld. AO after examining the accounts of the assessee observed that out of Rs.25 Crores received by assessee, Rs.4,54,00,007/- was capital account balance and balance amount of Rs.20,45,99,993/- is the portion of goodwill received by the assessee to be taxed. The assessee filed written response on 13.11.2019 stating as follows:

I have visited your office on 06.11.2019 along with my Authorized representative and submitted the relevant records for the various years.

Again, I have received your notice mentioned in reference above on 07.11.2019 related to a sum of Rs. 25 crores received as per the order of Karnataka High Court which is a total tax free.

It was held that share capital along with accrued profit, goodwill, brokerage and commission which was received by Assessee. Partner in the term of consent deed on account of retirement of assessee from partnership firm and payment made to assessee of his shares on his retirement were not liable to taxed as a capital gain also under sec. 28(v). It was held in James P. D Silva Vs DCIT cir. 28(3) Mum.

Similar Judgement was given by Gujarath High Court off in CIT vs. Mohan Bhai Pama Bhai (1973)91 ITR 393 that amount received on retirement by partner of firm was not subject to Income tax.

28.2 The ld. AO not agreeing with the contention of the assessee taxed the same as income in the hands of the assessee. In the present case, the assessee was the partner of the firm namely M/s. Yashaswi Fish Meal & Oil Company and on 8.2.2017, assessee retired from the partnership firm after dispute with the remaining partners vide Retirement deed dated 28.4.2016 for which the assessee has been paid Rs.25 crores in full and final settlement of all his claims with the firm partners and the same has been acknowledged by the assessee. Out of the above amount, the outstanding balance in the assessee's capital account was Rs.4,54,00,007/- and balance amount of Rs.20,45,99,993/- has been considered as capital gain in the hands of the assessee. Now the issue before us is whether the assessee is liable to pay capital gain tax. The amount received from the firm on retirement over and above the capital account balance lying in his account on the date of retirement. In other words, whether the assessee was paid sums over and above the sum outstanding to the credit of his capital account on his retirement firm is liable to be paid capital tax.

28.3 Similar issue was subject matter of consideration in several cases and there is conflict of opinion among Courts on whether there would be incidence of tax or not.

28.4 We also make it clear that the fact that there was revaluation of the assets of the firm and resultantly the capital account of the firm stood enhanced is also not relevant. What is the credit in capital account of the partner alone has to be seen. So long as there is no prohibition on revaluation of assets of the firm and there is no tax incidence on revaluation of assets of the firm, the credit to the partners' capital account on revaluation cannot be looked at adversely.

28.5 Capital asset has been defined in section 2(14) of the Act, as meaning "Property" of any kind held by the assessee, whether or not connected with his business or profession. The above exhaustive definition is subject to the following exclusions like stock-in-trade, consumable stores or raw material held for the purpose of business or profession, personal effects agricultural land in India, certain gold bonds, special bearer bonds and gold deposit bonds. The share or interest of a partner in the partnership and its assets would be property and, therefore, a capital asset within the meaning of the aforesaid definition. The next question is as to whether it can be said that there was a transfer of capital asset by the retiring partner in favour of the firm and its continuing partners so as to attract a charge under section 45 of the Act.

28.6 The Hon'ble Bombay High Court had an occasion to deal with identical case as that of the Assessee in the present case which was a case of situation (b) referred to earlier in Tribhuvandas G.Patel Vs. CIT 115 ITR 95(Bom). In the case of Tribhuvandas G. Patel (supra), the assessee was a partner in the firm of KEW. The assessee had served on the other two partners a notice of dissolution of the firm with effect from 31-12-1960, which was not accepted by the other

partners. The assessee, therefore, filed a suit for dissolution and accounts, but, ultimately, the disputes between the parties were amicably settled out of court and under a deed dated January 19, 1962, the assessee retired from the firm with effect from 31-8-1961, and the remaining partners continued to carry on the business of the firm. On the occasion of such retirement, the assessee was paid: (1) 1 lakh as his share of profits of the firm for the broken period ended 31-8-1961, (2) Rs. 50,000 as his share of the value of the goodwill, and (3) Rs. 4,77,941 as his share in the remaining assets of the firm. The issue with regard to taxability of the sum of Rs. 4,77,941 or any part thereof to capital gains tax arose for consideration before the Hon'ble Court. The Hon'ble Court took up for consideration as to what is the real nature of the transaction when a partner retires from the partnership. Does the transaction amount to any relinquishment of his share or interest in the partnership in favour of the continuing partners, or does it stand on the same footing as an adjustment of his rights that results upon dissolution of the partnership. On behalf of the assessee, it was contended that retirement of a partner and quantification of his share and payment thereof to him stands on the same footing as adjustment of rights that results upon dissolution of a firm and, therefore, since there was no transfer of any capital asset in the instant case, the sum of Rs. 4,77,941/- or any part thereof was not liable to be charged under the head "Capital gains". This was not accepted by Hon'ble Bombay High Court and they held that a clear distinction exists between retirement of a partner from a firm and dissolution of the firm. In the case of retirement of a partner from the firm it is only that partner who goes out of the firm and the remaining partners continue to carry on the business of the partnership as a firm, while in the case of dissolution of the firm as such no more exists and the dissolution is between all the partners

of the firm. Thereafter the Hon'ble Court held that where accounts are taken and the partner is paid the amount standing to the credit of his capital account there would be no transfer. If, on the other hand, the partner is paid a lump sum consideration for transferring or releasing his interest in the partnership assets to the continuing partners then there would be an element of transfer. The Hon'ble Court held that what one has to see is whether the terms of the deed of retirement constitutes release of any assets of the firm in favour of the continuing partners. Having regard to the particular mode employed by the assessee and the continuing partners to effect and bring about retirement of the assessee from the partnership, the Court held that the transaction will have to be regarded as amounting to "transfer" within the meaning of section 2(47) of the Income-Tax Act, inasmuch as the assessee could be said to have assigned, released and relinquished his interest and share in partnership and its assets in favour of the continuing partners and the transaction cannot be regarded as amounting to any distribution of capital assets upon dissolution of a firm. The above decision was followed by the Hon'ble Bombay High Court in the other two cases of *N.A. Modi Vs. CIT 162 ITR 420(Bom) and CIT Vs. H.R. Aslot 115 ITR 255(Bom).*

28.7 As against the decision of the Hon'ble Bombay High Court in the case of Tribhuvandas G. Patel (supra), the Assessee preferred appeal before the Hon'ble Supreme Court and the Hon'ble Supreme Court in the case of Tribhuvandas G. Patel Vs. CIT 236 ITR 515 (SC) framed three questions of law for consideration and the following two questions (Question No.2 & 3), which are relevant for the present case were decided as follows:

> *"2. Whether, on the facts and in the circumstances of the case, the sum of Rs. 50,000 received by the assessee as his share of the value of the goodwill or any part thereof was liable to tax as capital gain?*

3. Whether, on the facts and in the circumstances of the case, the sum of Rs. 4,77,941 or any part thereof was liable to tax as capital gain by reason of section 47(ii) of the Act?"

So far as question No. 2 is concerned, it has already been answered in favour of the assessee. In view of the decision of this court in CIT v. B.C. Srinivasa Setty [1981] 128 ITR 294 the said question must be held to have been rightly answered in favour of the assessee.

So far as question No. 3 is concerned the assessee invoked clause (ii) of section 47 to contend that the said sum of Rs. 4,47,941 does not represent a capital gain. Mr. Sharma, learned counsel for the assessee-assessee, has brought to our notice the decision of this court in CIT (Addl.)v. Mohanbai Pamabhai [1987] 165 ITR 166 where it has been held, following the decision in Sunil Siddharthbhai v. CIT [1985] 156 ITR 509 (SC), that even where a partner retires and some amount is paid to him towards his share in the assets, it should be treated as falling under clause (ii) of section 47. Therefore, following this decision, this question has to be and is answered in favour of the assessee and against the Revenue."

28.8 The decision in the case of Tribhuvandas G.Patel (supra) is a case where the deed of reconstitution specifically referred to release of rights of the outgoing partners in the assets of the partnership and further the fact that a specified sum over and above the sum standing to the credit of the partner's capital account was paid to the retiring partner, which excess sum was attributed to the retiring partner giving up his rights over the properties of the firm. It is only because of the provisions of Sec.47(ii) of the Act that the Hon'ble Court held that there was no incidence of tax on capital gain on the transaction.

28.9 The decision will therefore have to be viewed as not applicable to cases after the amendment to the law w.e.f. 1-4-1989 whereby Sec.47(ii) of the Act was deleted and simultaneously Sec.45(3) & 45(4) were introduced.

28.10 Therefore, the question whether there will be incidence of tax on capital gain on retirement of a partner from the partnership firm would depend on the mode in which retirement is

affected as laid down by the Hon'ble Bombay High Court in the cases of Tribhuvandas G. Patel (supra) and N.A. Modi's case (supra). Therefore, the decision of the ITAT Mumbai in the case of Sudhakar M. Shetty Vs. ACIT 130 ITD 197 (Mumbai) following the decision of the Pune Bench of the ITAT in the case of *Shevantibhai C. Mehta* v. *ITO (2004) 83 TTJ 542(Pune)* holding that question of taxability of an amount received by a partner on retirement from firm would depend upon mode in which retirement is affected, holds good. Therefore, taxability in such situation would depend on several factors like the intention as is evidenced by the various clauses of the instrument evincing retirement or dissolution, the manner in which the accounts have been settled and whether the same includes any amount in excess of the share of the partner on the revaluation of assets and other relevant factors which will throw light on the entire scheme of retirement/reconstitution.

28.11. In the case of Sudhakar M. Shetty (supra), the ITAT came to the conclusion after taking into consideration the sequence of events in that case (Paragraph-40 of the said order) which led to ultimately the partner retiring from the firm. A Partnership firm in that case came into existence on 1.8.2005 between the Assessee and another as partners. On 16.9.2005 another partner joined the partnership. On 23.9.2005 the firm purchased a property for a consideration of Rs.6.5 Crores with 81 tenants therein to be vacated by the firm. On 26.9.2005 two more partners were inducted into the Partnership firm. On 8.3.2006 a sanction was obtained for setting up a 5 Star hotel over the property purchased by the firm. Thereafter, on 26.3.2006 one partner retired from the firm. Prior to such retirement a revaluation of the assets of the firm which was the land that was purchased by the firm took place. There was surplus of Rs.154,39,90,000/- on revaluation. This was credited in the profit-sharing ratio of the partners in their respective capital account.

Thereafter on 22.5.2006, the Assessee retired from the partnership firm. The amount standing to the credit of the Assessee's capital account was Rs.4.45 Crores on which interest of Rs.26,85,963/- was paid and profit on revaluation of land at Rs.30,87,98,087/- was also credited. Thus, a sum of Rs.35,59,84,050/- was standing to the credit of the Assessee's capital account as on 31.3.2006. As per the deed of retirement the Assessee was paid the sum standing to the credit of his capital account and he gave up all his rights as partners and also over the property that the firm had purchased. All these factors were cumulatively considered as nothing but an act by which the Assessee gave up his rights over the property of the firm and therefore the sum of Rs.30,87,98,087/- (gain on valuation of the property of the firm) was construed as a capital gain for giving up rights over the property of the firm liable to tax on capital gain. In such a scenario one has to construe the act of giving up or relinquishing rights as partner as transfer of capital asset and the capital gain will be the sum paid over and above the sum standing to the credit in the capital account.

28.12 It can be seen from the facts of the case of Sudhakar M. Shetty (supra), the revaluation of the assets took place in AY 2006-07. The Assessee Sudhakar M. Shetty retired in AY 2007-08 and what was taxed was virtually the sum credit to his capital account consequent to revaluation of assets that took place in AY 2006-07. As we have already observed it should not be taken that the revenue has taxed the gain on revaluation of assets. All cumulative factors will have to be seen to come to a conclusion regarding the real nature of gain before concluding that there was in fact capital gain on relinquishment of right as partner in the firm.

28.13 Facts of the present case are similar to the facts in the case of Sudhakar M. Shetty. In the present case, as discussed

above, assessee has received Rs.20,45,99,993/- over and above the credit amount outstanding in his name and this amount being a goodwill payable to the assessee on his retirement from the firm. In our opinion, this amount is liable for capital gain tax as goodwill.

28.14 Further, same view was taken by the coordinate bench in the case of P. Girija Reddy Vs. ITO in ITA No.297/Hyd/2012 dated 25.5.2022 reported in 32 CCH 360 (Hyd), wherein held that ultimately payment received by the assessee in consideration of the retiring partner assessing or relinquishing her share or right in a partnership and its assets in favour of continuing partners, as taxable u/s 45 of the Act. For clarity, we reproduce the relevant extract of the said order as below:

22. The share or interest of a partner in the partnership and its assets would be property and, therefore, a capital asset within the meaning of the aforesaid definition. To this extent, there can be no doubt. The next question is as to whether it can be said that there was a transfer of capital asset by the retiring partner in favour of the firm and its continuing partners so as to attract a charge under s. 45 of the Act.

.....

24. Partnership as a form of carrying on business evolved so that two or more persons can to join together by pooling resources in the form of capital and expertise. One of the devices used by assessee to evade tax on capital gain was to convert in asset held individually into asset of the firm in which the individual is a partner. Similarly, partnership assets were converted into individual assets on dissolution or otherwise.

25. Such introduction of capital asset as capital contribution by a partner up to 1st April, 1988 did not result in incidence of capital gain. It was so held by the Hon'ble Supreme Court in the case of Sunil Siddharthbhai vs. CIT (1985) 49 CTR (SC) 172 : (1985) 156 ITR 509 (SC). The Hon'ble Supreme Court held that under the IT Act, 1961, where a partner of a firm makes over capital assets which are held by him to a firm as his contribution towards capital, there is a transfer of a capital asset within the terms of s. 45 of the Act, because an exclusive interest of the partner in personal assets is reduced, on their entry into the firm, into a share interest. On such introduction of capital the partner's capital account is credited

with the market value of the property. Such entry does not represent the true value of consideration. It is a notional value only, intended to be taken into account at the time of determining the value of the partner's share in the net partnership assets on the date of dissolution or on his retirement, a share which will depend upon deduction of the liabilities and prior charges existing on the date of dissolution or retirement. It is not possible to predicate before hand what will be the position in terms of monetary value of a partner's share on that date. At that time when the partner transfers his personal asset to the partnership firm, there can be no reckoning of the liabilities and losses which the firm may suffer in the years to come. All that lies within the womb of the future. It is impossible to conceive of evaluating the consideration acquired by the partner when he brings his personal asset into the partnership firm when neither can the date of dissolution or retirement be envisaged nor can there be any ascertainment of liabilities and prior charges which may not have even arisen yet. Therefore, the consideration which a partner acquires on making over his personal asset to the firm as his contribution to its capital cannot fall within the terms of s. 48 of the Act. And as that provision is fundamental to the computation machinery incorporated in the scheme relating to the determination of the charge provided in s. 45, such a case must be regarded as falling outside the scope of capital gains taxation altogether. In coming to the above conclusion the Hon'ble Court relied on the decision of the Hon'ble Supreme Court in Addanki Narayanappa vs. Bhaskara Krishnappa AIR 1966 SC 1300. The Hon'ble Supreme Court in the said decision explained the nature of partnership and the right of the partners over the assets of the partnership as follows (p. 1303 of AIR) :

> *"....whatever may be the character of the property which is brought in by the partners when the partnership is formed or which may be acquired in the course of the business of the partnership it becomes the property of the firm and what a partner is entitled to is his share of profits, if any, accruing to the partnership from the realisation of this property, and upon dissolution of the partnership to a share in the money representing the value of the property. No doubt, since a firm has no legal existence, the partnership property will vest in, all the partners, and in that sense every partner was an interest in the property of the partnership. During the subsistence of the partnership, however, no partner can deal with any portion of the property as his own. Nor can he assign his interest in a specific item of the partnership property to anyone. His right is to obtain such profits, if any, as fall to his share from time to time and upon the dissolution of the firm to L share in the assets of the firm which remain after satisfying the liabilities set out in cl. (a) and sub cls. (i), (ii) and (iii) of cl. (b) of s. 48."*

The position was later explained in the same judgment as follows (p. 1304) :

"The whole concept of partnership is to entry upon a joint venture and for that purpose to bring in as capital money or even property including immovable

property. Once that is done whatever is brought in would cease to be the exclusive property of the person who brought it in. It would be the trading asset of the partnership in which all the partners would have interest in proportion to their share in the joint venture of the business of partnership. The person who brought it in would, therefore, not be able to claim or exercise any exclusive right over any property which he has brought in, much less over any other partnership property. He would not be able to exercise his right even to the extent of his share in the business of the partnership. As already stated, his right during the subsistence of the partnership is to get his share of profits from time to

> *time as may be agreed upon among the partners and after the dissolution of the partnership or with his retirement from partnership of the, of his share in the net partnership assets as on the date of dissolution or retirement after a deduction of liabilities and prior charges."*

26. Parliament with the avowed object of blocking this escape route for avoiding capital gains tax by the Finance Act, 1987, introduced sub-s. (3) to s. 45 w.e.f. 1st April, 1988. The effect of this was that the profits and gains arising from the transfer of a capital asset by a partner to a firm are chargeable as the partner's income of the previous year in which the transfer took place and the amount recorded in the books of account of the firm, shall be deemed to be the full value of consideration received or accruing as a result of transfer of the capital asset.

.....

30. The Finance Act, 1987, w.e.f. 1st April, 1988, omitted this clause, the effect of which was that distribution of capital assets on the dissolution of a firm would w.e.f. 1st April, 1988 be regarded as "transfer". Therefore, instead of amending s. 2(47), the amendment was carried out by the Finance Act, 1987, by omitting s. 47(ii), the result of which was that distribution of capital assets on the dissolution of a firm was regarded as "transfer". The effect was that the profits or gains arising from the transfer of a capital asset by a firm to a partner on dissolution or otherwise would be chargeable as the firm's income in the previous year in which the transfer took place and for the purposes of computation of capital gains, the fair market value of the asset on the date of transfer was deemed to be the full value of the consideration received or accruing as a result of the transfer.

31. Thus Parliament brought into the tax net transactions whereby assets were brought into a firm or taken out of the firm. Thus s. 45(4) covers cases where there is dissolution of the firm and distribution of assets of the firm by the firm to its partners.

32. Dissolution and retirement are two different concepts. In the case of retirement, the retiring partner goes out of the firm but the remaining partners continue to carry on the business of the partnership as a firm. In the case

of dissolution, the firm no longer exists and the dissolution is between all the partners of the firm.

33. In the case of retirement of a partner there could be two situations. In the first situation there can be a retirement of a partner from the firm and the firm might continue its existence and the retiring partner might be given assets in lieu of amounts payable to him on retirement. This could be done either on the basis of settling amounts standing to the credit of his capital account or on a lump sum basis. There could be a second situation where the retiring partner is paid consideration in cash and he gives up his rights as partner including his rights over the assets of the partnership. This again can be done either on the basis of settling amounts standing to the credit of his capital account or on a lump sum basis.

……..

36. The situation with which, we are concerned in this appeal is a case where the retiring partner is paid consideration in cash and she gives up her rights as partner including his rights over the assets of the partnership. There is divergence of view on the question as to whether there is any transfer at all in such situation by the firm in favour of the retiring partner or by the retiring partner in favour of the firm and its continuing partners.

……..

48. In the case of the assessee the clauses in the retirement deed do convey interest in assets and further refer to the fact that the assessee will not have any interest over the assets of the firm. This is evident from clause No. 17 and 18 of the partnership deed dated 26.12.2007 which read as follows:

> *"17. On and with effect from the Effective Date, the Retiring Partners shall have no right, title or interest in the firm or its assets. The capital account of the Retiring Partners prior to their retirement was as follows:*

Name of the Retiring Partner	*Credit in the Capital Account (Rs.)*
P. Ravinder Reddy	*82,217,952.20*
P. Girija	*82,217,952.20*

> *18. All payments to the Retiring Partners by the Firm shall be on account of settlement of their capital accounts as set forth above. The Retiring Partners agree and confirm that they have no current claims of whatsoever nature against the Firm."*

49. Thus, in our opinion, it was a case of lump sum payment in consideration of the retiring partner assigning or relinquishing her share or right in the partnership

and its assets in favour of the continuing partners. We are of the view that the manner of the retirement in case of the assessee is such that it can be regarded as assigning or relinquishing by the retiring partner of her share or right in the partnership firm and its assets in favour of the continuing partners. Therefore, we are of the view that the assessee satisfies the parameters laid down by the Bombay High Court in the cases referred to above and, therefore, there was a transfer of interest of the retiring partner over the assets of the partnership firm on her retirement and, therefore, there was a liability to tax on account of capital gain."

28.15. In view of the above, these grounds of assessee are dismissed.

29. Next ground no.15 is with regard to addition of Rs.27,01,900/- being the alleged difference between the value as per stamp duty and registered value.

29.1 The ld. A.R. submitted that the ld. AO erred in making addition u/s 56(2)(vi) of the Act without referring the matter to Valuation officer. He submitted that the Assessing officer erred in making addition of Rs.27,01,900/- being the difference between value as per stamp duty and registered value without appreciating that the subject properties were in remote place / agriculture lands and the valuation applied by the Registrar was not as per the guidelines. The assessee had duly disputed before the AO that the Stamp Duty Value was higher than the fair market value (FMV) of the properties as on the date of transfer as the same were undeveloped / agriculture lands and located in remote interior place and also that even the Stamp Duty authorities did not follow the Govt. guidelines on the subject while computing the value for the stamp duty purposes. The submissions made before the AO is reproduced below for ready reference:

> *"Your goodself has issued above referred notice asking to show cause why Rs.2,01,900/- should not be assessed as income under the head income from other sources. In this regard I would like to state that Property at Mallur village 86 cents and 32 cents was agricultural property, so value of that agricultural property as per*

my purchase deeds was less than the government value of that property. And property at Kuthpady village 23 cents (not 25 cents) and 23.5 cents are undeveloped properties located at interior place, so value of that properties as per purchase deeds was less than the government value of that property. Hence I registered all aforementioned properties by paying stamp duty on Government value even though my purchase price was less.

If actual purchase price of the property is less that Government value than there is o question of income and in this regard I request you to not to add the difference price to my income."

29.2 He submitted that the submissions made before the ld. CIT(A) in this regard with a request to refer the matter to valuation officer is reproduced below for ready reference:

"Income from other sources of ₹ 27,01,900/-:

This addition is relating to the difference in the Stamp Duty value of the sale consideration in respect of immovable properties registered during the year under consideration. All the properties purchased during the year by the Appellant were Agricultural lands at different places near Udupi. The guideline value as fixed by the Government relates to non-agricultural residential properties. The valuation fixed by the Government is always for residential properties sold in urban areas. As per the guideline issued by Government of Karnataka, if the lands are converted for specific purposes and such converted lands are alienated without development, such alienated lands shall be valued at 40% of site rate area or agricultural land converted in that area, if converted for industrial purposes, 55% more than that agricultural land rate, if converted for residential purposes, 65% more than the agricultural land rate, if it is converted for commercial purposes, 80% more than agricultural land rate, whichever higher value between two values has to be adopted as guideline value for registration purposes by the Sub-registrar. In this case, the Sub-registrar has valued the land entirely on the basis of guideline and hence the difference between sale value and stamp duty value. The Appellant hereby requests the matter of valuation to be referred to the Departmental Valuation Officer to enable to get a fair value for the purposes of section 56 of additions."

29.3 However, the ld. AO did not refer the matter for valuation of the subject property by the Valuation Officer even though the Proviso to section 56(2)(vi) duly provided for it. He did not make any effort to ascertain the true value of the properties in spite of the fact that the assessee disputed that the Stamp Duty Value was higher than the fair market value (FMV) of the properties as on the date of transfer. The ld. AO has mechanically applied the provisions of section 56(2)(vi) without considering the Proviso to the said section which mandated him to refer the valuation to the Valuation Officer if the Assessee disputed that the Stamp Duty Value was higher than the FMV of the properties as on the date of transfer. The CIT(A) also failed to appreciate that the AO was legally bound to refer the issue to the Valuation Officer as provided in the Proviso to section 56(2)(vi) of the Act. The said proviso to section 56(2)(vi) of the Act is reproduced below for ready reference:

> *"**Provided** that where the stamp duty value of immovable property as referred to in sub-clause (b) is disputed by the assessee on grounds mentioned in sub-section (2) of section 50C, the Assessing Officer may refer the valuation of such property to a Valuation Officer, and the provisions of section 50C and sub-section (15) of section 155 shall, as far as may be, apply in relation to the stamp duty value of such property for the purpose of sub-clause (b) as they apply for valuation of capital asset under those sections:"*

He reproduced the sub-section (2) of section 50C of the Act below for ready reference:

> (2) *Without prejudice to the provisions of sub-section (1), where—*
>
> *(a) the assessee claims before any Assessing Officer that the value adopted or assessed or assessable by the stamp valuation authority under sub-section (1) exceeds the fair market value of the property as on the date of transfer;*
>
> *(b) the value so adopted or assessed or assessable by the stamp valuation authority under sub-section (1) has not been disputed in any appeal or revision or no reference has*

been made before any other authority, court or the High Court,
the Assessing Officer may refer the valuation of the capital asset to a Valuation Officer and where any such reference is made, the provisions of sub-sections (2), (3), (4), (5) and (6) of section 16A, clause (i) of sub-section (1) and sub-sections (6) and (7) of section 23A, sub-section (5) of section 24, section 34AA, section 35 and section 37 of the Wealth-tax Act, 1957 (27 of 1957), shall, with necessary modifications, apply in relation to such reference as they apply in relation to a reference made by the Assessing Officer under sub-section (1) of section 16A of that Act.

29.4 He further submitted that the Hon'ble Calcutta High Court in *Sunil Kumar Agarwal v. Income Tax, 2014 SCC On Line Cal 5979* has held that *'even if, the assessee does not make a prayer to the A.O for referring the valuation to the DVO while disputing the valuation of the property made by the Stamp Duty Authority, the A.O being a quasi-judicial authority was duty bound to act fairly and suo-moto refer the matter to the DVO'.* The relevant portion of the said judgement is reproduced below for ready reference:

"For the aforesaid reasons, we are of the opinion that the valuation by the departmental valuation officer, contemplated under Section 50C, is required to avoid miscarriage of justice. The legislature did not intend that the capital gain should be fixed merely on the basis of the valuation to be made by the District Sub Registrar for the purpose of stamp duty. The legislature has taken care to provide adequate machinery to give a fair treatment to the citizen/taxpayer. There is no reason why the machinery provided by the legislature should not be used and the benefit thereof should be refused. Even in a case where no such prayer is made by the learned advocate representing the assessee, who may not have been properly instructed in law, the assessing officer, discharging a quasi judicial function, has the bounden duty to act fairly and to give a fair treatment by giving him an option to follow the course provided by law."

29.5 He submitted that under facts and circumstances exactly similar to that of the assessee, the Hon'ble Kolkata Bench of ITAT relying upon *Sunil Kumar Agarwal v. Income Tax* (supra) set aside the matter to the AO to refer the issue of valuation to the DVO *[Karb Associates Pvt. Ltd Vs DCIT Circle-8(1), Kolkata I.T.A. No.1941/Kol/2019].* The ld. A.R. also relied upon the order of jurisdictional Bench of ITAT, Bengaluru in *Somashekar Venkataswamappa v. CIT, 2019 SCC On Line ITAT 2011* for the proposition that the AO should have referred the matter to the valuation officer as prescribed under Proviso to section 56(2) of the Act.

29.6 The ld. D.R. submitted that the assessee accepted that the registered value of the property was less than the stamp duty value however, the assessee did not furnish any explanation why the same was not assessable as income as per the provisions of Sec. 56(2)(vii)(b)(ii). Accordingly, the ld. AO added the difference of Rs.27,01,900/- to the income of the assessee under the head income from other sources.

29.7 He further submitted that as regards the contention that the difference between such actual cost and the guidance value adopted by State Government authorities for purposes of determination of stamp duty payable on registration of the property cannot be regarded as the assessee's undisclosed income and that the AO failed to refer the valuation of the capital asset to a Valuation Officer as required under section 50C (2) read with section 56(2)(vii)(b) of the Act.

29.8 He submitted that the aforesaid section clearly mandates that whenever any immovable property is purchased for a consideration which is less than the stamp duty value of the

property by an amount exceeding fifty thousand rupees, the stamp duty value of such property as exceeds such consideration shall be chargeable to tax under the head *'income from other sources.'* The AO having done this, the same has to be held judicious and in consonance with the provisions of the Act.

29.9 He further submitted that the assessee, at this stage cannot take also the stance that no reference was made to the Valuation Officer because, as provided in the third proviso, the AO needed to refer it to the Valuation Officer only in case the valuation was disputed by the assessee during the assessment proceedings before the AO. On the contrary, the assessee, during the assessment proceedings, had accepted that the registered value of the property was less than the stamp duty value and at no stage, requested that the matter be referred to the valuation officer. The fact that no request was made before the AO by the assessee to refer the case to the valuation officer was accepted by the Ld. AR of the assessee during the appellate proceedings. As such, the AO did not need to refer the valuation to the Valuation Officer.

29.10 He further submitted that as per provisions of Sec. 56(2)(vii) of the Act, the amount by which the stamp duty value exceeds the sale consideration needs to be treated as income from other sources. The difference between the stamp duty value and the sale consideration in respect of such properties was Rs.27,01,900/- and the same has been rightly added by the AO to the income of the assessee. No infirmity exists in the action of the AO.

30. We have heard the rival submissions and perused the materials available on record. In this case, it is an admitted fact that there is a difference between valuation adopted by the

registration authority for the purpose of stamp duty and the value mentioned in the sale deed which is at Rs.27,01,900/-. This fact has been accepted by the assessee during the assessment proceedings that registered value of the property was less than the valuation by stamp duty authorities. At that stage, assessee has not requested that the matter be referred to the valuation officer for determining fair market value. Hence, the AO has not referred the matter for valuation as per the provisions of section 56(2) of the Act as there was no request from the assessee. As per section 56(2) of the Act, the assessee shall make a claim before the ld. AO that the value adopted or assessed by the stamp valuation authority under section 56(1) of the Act exceeds the fair market value of the property as on the date of transfer. The assessee has accepted the fact that registered value of property was less than the stamp duty value at the assessment stage. Further, the assessee made a contention that the ld. AO being a quasi-judicial authority was duty bound to act fairly and Suo-motu he should refer the matter to the DVO. For that purpose, assessee relied on the order of the Kolkata Bench in the case of M/s. Karab Associates Pvt. Ltd. In that case, the assessee has not been properly instructed by its consultant and not asked for reference to the DVO. In the present case, it is not the case of the assessee that the consultant not advised him properly and more so, assessee has accepted the value mentioned in the registered sale deed before the AO and never asked for reference to the DVO and even before us it has not whispered whether there is a failure on the part of the ld. A.R. representing assessee to sought for reference to the DVO or advise the assessee. Therefore, while deciding the issue of reference to the DVO, the lower authorities were conscious of the facts brought on record by the assessee. Being so, the lower authorities referring the provisions of section

56(2) of the Act, they took a view that as per this provision, assessee should have made a request before the ld. AO to make reference to the DVO for determining the fair market value of the property instead of accepting the value mentioned in the sale deed. The view taken by the lower authorities is not only on the due consideration of facts on record but also on interpretation of the provisions of section 56(2) of the Act. Therefore, the contention of assessee that there is an error in the order of the lower authorities on this issue while interpreting the provisions of section 56(2) of the Act is not correct and in our view, it is not an error committed by the lower authorities. The law would assist only the person who is vigilant and not the person who is sleeping over his rights. The assessee ought to have been vigilant before the ld. AO and exercise the discretion provided in section 56(2) of the Act in seeking reference to the DVO for the purpose of determining the fair market value and he ought not to have accepted the valuation considered for stamp duty purpose. Therefore, we do not find any merit in the argument of the ld. Counsel for the assessee and the same is rejected.

31. Next ground nos.16 & 17 of the assessee's appeals are with regard to sustaining addition of Rs.10,63,50,835/- as unexplained investment u/s 69A of the Act on account of deposit into various bank accounts.

31.1 The ld. A.R. submitted that the AO has made an addition of Rs.10,63,53,835/- as unexplained investment u/s 69A of the Act. The same comprises of the following three credits in the assessee's bank account maintained with Bharat Co-operative Bank, Mulky Branch, Bengaluru.

Sl. No.	Date	Amount
1	19.07.2016	Rs.4,62,50,669/-
2	05.10.2016	Rs.3,01,00,166/-
3	08.03.2017	Rs.3,00,00,000/-
	TOTAL	**Rs.10,63,53,835/-**

31.2 He submitted that vide notice u/s 142(1) of the Act dated 10.12.2019, the AO required the assessee to explain by 2:30pm on the next day the source of the following credits appearing in the assessee's bank account maintained with Bharat Co-operative Bank, Mulky Branch, Bengaluru and to explain how the same are reflected in the assessee's account with necessary documentary evidence.

Sl. No.	Date	Amount
1	14.06.2016	Rs.13,95,00,000/-
2	14.06.2016	Rs.10,70,00,000/-
3	19.07.2016	Rs.4,62,50,669/-
4	05.10.2016	Rs.3,01,00,166/-
5	08.03.2017	Rs.3,00,00,000/-
	TOTAL	**Rs.35,28,50,835/-**

31.3 The assessee explained vide reply dated 11.12.2019 that he had received Rs.25,00,00,000/- on his retirement from the firm M/s Yashaswi Fish Meal & Oil Co. in April, 2016 as per the final settlement order of Karnataka High Court. The said amount was received into his current account with ICICI Bank (Rs.11,05,00,007/-) and into his Canara Bank Account (Rs.13,94,99,993/-). He further gave credit entry wise source of

funds which were nothing but the proceeds of the matured FDs opened by using the said Rs.25,00,00,000/-. The contents of the said letter are reproduced below for ready reference:

> *"Your good self has issued above referred notice. In this regard I would like to state you that:-*
>
> *As per the Karnataka High Court order final settlement amount of Rs 25,00,00,000/- received from previous partnership firm M/s Yashaswi Fish meal & oil co. in April 2016. Out of total receipt of Rs. 25,00,00,000/- Rs. 11,05,00,007/- was credited to my ICICI bank account C.A/c and balance Rs. 13,94,99,993/- was credited to my Canara Bank Account.*
> *1. On 14-06-2016 Rs. 13,95,00,000/- transferred form Canara Bank a/c to Bharat Co-op Bank ltd A/c- Source was as mentioned above.*
> *2. On 14-06-2016 Rs. 10,70,00,000/- transferred form ICICI Bank a/c to Bharat Co-op Bank ltd A/c- Source was as mentioned above.*
> *3. On 19-07-2016 credit of Rs. 4,62,50,669/- to Bharat co-op bank was a closure proceeds of fixed deposit in Bharath Co-operative Bank Ltd-Source for deposit was receipt from the previous partnership firms.*
> *4. On 05-10-2016 credit of Rs. 3,01,00,166/- to Bharat co-op bank was a closure proceeds of fixed deposit in Bharath Co-operative Bank Ltd. Source for deposit was receipt from the previous partnership firms.*
> *5. On 08-03-2017 credit of Rs. 3,00,00,000/- to Bharath Co-op bank Ltd A/c was receipt of loan taken against FD in Bharath Co-op Bank A/c.*
>
> *Ledger account of Fixed Deposit account and Loan on FD is attached here.*
>
> *Thanking you*
> *Yours Truly*
>
> *For Mohammed Mujeeb Sikander*
> *Pan CYWPS5437D*
> *Date: 11/12/2019"*

31.4 He submitted that the Assessing Officer, however, held that *'The assessee has not produced the books of accounts nor filed any explanation for the source of these credits to the bank account.'* He treated the credits at serial no. 3, 4 and 5 above as income chargeable to tax u/s 69A of the Act at the rates prescribed u/s 115BBE of the Act. He submitted that the action of the AO is arbitrary and without any basis. The averment of the AO that the assessee did not furnish any explanation as to the nature of credit, source of the same and whether the credit is offered to tax as part of income or not is perverse and contrary to facts on record. The AO has not at all considered the assessee's reply dated 11.12.2019 the contents of which have been reproduced in the previous paragraphs. The ld. AO has made a huge addition of Rs.10,63,50,835/- without any basis. The contents of the assessment orders at para no. 18.3 to para 18.6 are reproduced below for ready reference:

> *"18.3 In response to this the assessee furnished the sources for the credit of Rs.13,95,00,000 and Rs. 10,70,00,000 as being the amount received from Yashaswi Fish Meal and Oil Company on his relinquishment of the rights in the firm. However in respect of the other credits of Rs. 10,63,50,835/- the assessee has not furnished any explanation to the nature of the credit, source for the same, whether the credit is offered to tax as a part of the income during the year or in any earlier years or is not liable to tax.*
>
> *18.4 The assessee has not produced the books of accounts nor filed any explanation for the source of these credits to the bank account. Assessee has not included the said receipts in his Return of Income. Thus in the absence of any valid explanation to the source of these credits in bank accounts, the same is assessed as income of the assessee.*
>
> *18.5 As per the provisions of Sec. 69A where the assessee is found to be the owner of any money, bullion, jewellery or other valuable article and is not recorded in the books and assessee offers no explanation or the explanation offered by the assessee is not, in the opinion of the Assessing Officer, satisfactory, the money and the*

value of the bullion, jewellery or other valuable article will be deemed to be the income of the assessee of that previous year.

18.6 Accordingly Rs. 10,63,50,835 being the credits no satisfactory explanation is given by the assessee is charged to income-tax as the income of the assessee for the relevant previous year as per the provisions of Sec. 69A and taxed as per the rates prescribed in Sec. 115BBE of the Act.

(Addition: Rs.10,63,50,835)"

31.5 He submitted that it is not in dispute that the assessee received the following amounts from his Firm on his retirement into his bank accounts maintained with ICICI Bank and Canara Bank.

a. 13,95,00,000/- into Canara Bank
b. 10,70,00,000/- into ICICI Bank

The said amounts were transferred on 14.6.2016 into his account no.005312100001438 maintained in the Bharat Bank, Mulky Branch Mangalore in the name of Allied International Marine Supplies (proprietary business). The said amounts were used to open the following four FDs on the same day i.e. on 15.06.2016 which is duly reflected in the Bank Statement:

c. Fixed Deposit (Ujire branch) – 5 crores
d. Fixed Deposit (Ahmedabad branch) – 5 crores
e. Fixed Deposits (FD No. 005320410000155 and FD no. 005320120001466) – 14.60 crore. It is submitted that the FD No. 005320410000155 was for Rs.4.6 Crore and the FD no. 005320120001466 was for Rs.10 crore. Both the FDs were opened in the name of the assessee in Bharat Bank, Mulky Branch Mangalore.

31.6 The FD of Rs.4.6 crore matured on 19.07.2016. The proceeds on closure of the said FD together with interest on FD of Rs.2,50,669/- (interest is Net of TDS) [i.e. 4,60,00,000 + 2,50,669 = 4,62,50,669) was transferred on the same day to the Bharat Bank

Current Account which is the amount credited on 19.07.2016. The AO has added the said amount as unexplained. He submitted that the AO has not considered the assessee's reply in this regard and hence the said illegal addition.

31.7 He further submitted that the next amount added is in respect of credit entry of Rs.3 crore on 08.03.2017. This is grossly illegal as the same was a loan given by the Bank against FD no.005320410000182 of the assessee. The Bank loan account no. 0053204100001978 for Rs.3 crore was also available on record. Further, even in the bank statement of Bharat Bank from which the figure was picked up by the AO, the narration itself indicates that it was a loan given by the Bank. It was explained that the assessee had wished to withdraw the FD of Rs.3 crore which was not done on the request of the Bank Manager (who wanted the FDs to be retained till the month end) and instead the Bank gave a loan of Rs.3 crore against lien on assessee's FD. The narration in the bank statement is reproduced below for ease of reference:

TRAN DT	VALUE DT	PARTICULARS	CREDIT	BALANCE
08.03.2017	08.03.2017	005333920001978 DISBURSEMENT CREDIT	300,00,000.00	400,63,828.09 CR

31.8 He further submitted that the third amount added by the AO is Rs.3,01,00,166/- credited on 05-10-2016. He submitted that the actual amount credit on the said date is Rs.3,01,00,966/- which has been wrongly noted in the notices, replies as well as assessment order as Rs.3,01,00,166/-. This amount represented the closure proceeds of FD of Rs.3 crore opened on 14.09.2019 from out of closure proceeds amounting to Rs.5,0,85,342/- received on closure of FD of Rs.5 crore (FD a/c no. 009220120000024) opened on 15.06.2016. Out of the closure proceeds of Rs.5,0,85,342/- the assessee had transferred Rs.2,07,85,342/- to his current account

(005312100001438) maintained with Bharat Bank and for the balance amount of Rs.3 crore a new FD had been opened on 14.09.2016.

31.9 He submitted that the ld. AO had not appreciated the flow of funds within the bank accounts of the Assessee and hence the same was put into a flow chart for the convenience of explaining the same before the ld. CIT(A). The ld. CIT(A) without appreciating the facts rejected the ground and confirmed the entire addition of Rs.10,63,50,835/- by holding that the assessee was unable to establish that the said papers were filed before the AO. In this regard, he submitted that the assessee had duly explained the source of various credits appearing in its bank accounts which were sought vide notice u/s 142(1) dated 10.12.2019 as explained in paragraph…. Above. All these details were very much before the AO who has completed the search assessments. The flow chart was only meant for better presenting the facts for ease of understanding and nothing new had been submitted to the CIT(A). Since the same has been rejected, the assessee has moved an application before this Bench for admission of additional evidence under Rule 29 of Income Tax (Appellate-Tribunal) Rules, 1963 which he requested to be allowed.

31.10 In light of the above, the ld. A.R. submitted that out of the said Rs.10,65,50,835/-, the credits amounting to Rs.7,63,50,835/- are proceeds of two FDs opened on 15.06.2016 from out of Rs.25,00,00,000/- received from the partnership firm on assessee's retirement from it. The balance Rs.3,00,00,000/- credited on 08.03.2017 is the short-term loan disbursed by the bank against lien on assessee's FDs as the bank manager did not want the assessee to break the FDs and withdraw the amount affecting his performance targets etc. He submitted that there is no

merit in sustaining the said addition of Rs.10,63,50,835/- and liable to be deleted.

32. The ld. D.R. submitted that the facts involved are that during the course of assessment proceedings the following credits of Rs.35,28,50,835/- were seen by the AO in the Bharath Co-operative Bank of the assessee. The Assessee furnished the sources for the credit of Rs.13,95,00,000/- and Rs.10,70,00,000/- as being the amount received from Yashaswi Fish Meal and Oil Company on his relinquishment of the rights in the firm. However, in respect of the other credits of Rs.10,63,50,835/- the assessee did not furnish any explanation to the nature of the credit, source for the same, whether the credit is offered to tax as a part of the income during the year or in any earlier years or is not liable to tax. The assessee did not produce the books of accounts nor filed any explanation for the source of these credits to the bank account. The ld. AO found that the assessee had not included the said receipts in his Return of Income. Accordingly, Rs.10,63,50,835/- being the credits in assessee's bank for which no satisfactory explanation is given by the assessee was charged to Income-Tax by the AO as the income of the assessee for the relevant previous year as per the provisions of Sec. 69A of the Act.

32.1 He further submitted that during the course of the appellate proceedings, the Ld. AR of the assessee produced certain documents towards explaining the aforesaid credits. The Ld. AR was asked to adduce proof that these documents were submitted to the AO at the time of the assessment proceedings, however, he claimed his inability to do so. It is therefore clear that the aforesaid evidence was never produced before the AO. In this context, the ld. D.R. submitted that it is important to note that an

assessee cannot adduce additional evidence as a matter of right. While adjudicating appeals, compliance has to be ensured with Rule 46A and the evidences filed at the appellate stage for the first time and which were not filed earlier before the AOs cannot be considered as grounds of appeal. Relevant provisions as contained in Rule 46A read as under;

"Production of additional evidence before the Commissioner (Appeals). 46A. (1) The appellant shall not be entitled to produce before the Commissioner (Appeals) any evidence, whether oral or documentary, other than the evidence produced by him during the course of proceedings before the Assessing Officer, except in the following circumstances, namely :— (a) where the Assessing Officer has refused to admit evidence which ought to have been admitted ; or (b) where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by the Assessing Officer; or (c) where the appellant was prevented by sufficient cause from producing before assessing Officer any evidence which is relevant to any ground of appeal;" or (d) where the Assessing Officer has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal. (2) No evidence shall be admitted under sub-rule (1) unless the Commissioner (Appeals) records in writing the reasons for its admission. (3) The Commissioner (Appeals) shall not take into account any evidence produced under sub-rule (1) unless the Assessing Officer has been allowed a reasonable opportunity— (a) to examine the evidence or document or to cross-examine the witness produced by the appellant, or (b) to produce any evidence or document or any witness in rebuttal of the additional evidence Page 25 of 78 produced by the appellant. (4) Nothing contained in this rule shall affect the power of the Commissioner (Appeals) to direct the production of any document, or the examination of any witness, to enable him to dispose of the appeal, or for any other substantial cause including the enhancement of the assessment or penalty (whether on his own motion or on the request of the Assessing Officer) under clause (a) of sub-section (1) of section 251 or the imposition of penalty under section 271."

32.2 Thus, he submitted that if the assessee intends to file evidences which were not filed before the AO, has to scrutiny thereof has to be undertaken in the context of Rule 46A. Rule 46A enjoins that evidence can be admitted subject to fulfillment of certain pre-conditions which embody rule of equity that a person should not suffer if he was prevented by sufficient cause for making compliance. In the context of 'sufficient cause' it will be relevant to keep in mind the observations made by the Supreme Court in the

case of Sarpanch, Lonard Gram Panchayat {AIR 1968 SC 222} that discretion is to be exercised to advance substantial justice only when no 'negligence', 'inaction' or want of `bonafide' is imputable. In this case, the assessee has not been able to show that no negligence, inaction or want of bonafide was involved in the failure to produce such evidences before the AO during the assessment proceedings. Consequently, these evidences cannot be admitted at this stage. Purport of Section 69B of the Act has been discussed in paras relating to Ground 6 of the appeal. These are equally applicable for Section 69A of the Act as well and therefore are not being repeated here for reasons of brevity. In view of the judicial pronouncements discussed in paras relating to Ground 6 of the appeal and the facts involved, the action of the ld. AO has to be upheld.

33. We have heard the rival submissions and perused the materials available on record. The main contention of the assessee is that these deposits are from the known sources and cannot be made addition u/s 69A of the Act. In our opinion, before us, the ld. A.R. filed additional evidences which are required to be examined in the light of this ground. Accordingly, the issue in dispute in these grounds is remitted to the file of AO for fresh consideration. He should decide the issue after giving opportunity to the assessee and if the assessee is able to explain the source of deposit into bank account due credit to be given and the assessee is not required to prove the source of source of credits. With the above observation, we remit the issue to the file of ld. AO for fresh consideration.

34. Next ground no.18 is with regard to addition of Rs.95,80,215/- made u/s 68 of the Act.

34.1 The ld. A.R. submitted that the AO called for source of capital introduced amounting to Rs.25,95,94,705/- as per the balance sheet. It was explained that the said capital represented Rs.25,00,00,000/- received on retirement from partnership firm which is brought in the books together with other investments made during the earlier years out of savings from own income earned abroad having been in Middle East for almost 20 years. The break up of credits in the capital account represented by various assets (movable as well as immovable) and the amounts returned/received during the year were provided to the AO as under:

Amount received from Yashaswi	
Fish Meal	*₹25,00,00,000*
Value of immovable property purchased	
In March 2015	*₹35,00,000*
Value of Fixed Deposit in ICICI Bank	*₹ 3,25,580*
Bank Account Bharath Co-op.	*₹ 9,98,396*
Investment in Rehabar	*₹10,00,000*
Investment in Prime Care	*₹20,00,000*
Investment in Apts Logistics	*₹5,00,000*
Receipt from LIC	*₹16,749*
Income of son	*₹ 14,490*
Income of spouse	*₹ 14,490*
Receipt from Touheed Trust	*₹12,25,000*

	₹25,95,80,215
	==========

34.2 He submitted that the AO however did not appreciate the submissions of the assessee and held that the investment made by the assessee in the properties, firms and banks cannot be a source for introduction of capital. He only accepted Rs.25,00,00,000/- received from the partnership firm and Rs,14,490/- (son's income)

and proceeded to hold amount of Rs.95,80,215/- (being the difference between Rs.25,95,94,705/- and Rs. 25 Crore) as unexplained credits u/s 68 of the Act and taxed it at the rates prescribed u/s 115BBE of the Act. The relevant para 20.2 (without table) and para 20.3-20.6 of the assessment order are reproduced below for ready reference:

> ***"20. <u>Introduction of Capital:</u>***
>
> *20.1 During the course of assessment proceedings it was seen that in the Balance Sheet a sum of Rs. 25,95,94,705 was shown as capital introduced. In view of this assessee, vide letter dated 22.10.2019 was requested to furnish the sources for the introduction of capital. In response to this, the assessee furnished the following on 21.11.2019 as his reply explaining the sources:*
>
> *20.2 As can be seen from the response of the assesse, the assesse has furnished explanation to the sources for Rs. 25,00,00,000 being the amount received from M/s Yashaswi Fish Meal and Oil Company. However, regarding the source for the balance Rs. 95,94,705/-, the assessee has not filed any explanation other than giving a list of investments. It is not understood how the investment by the assessee in the properties firms and banks can be a source for introduction of capital. The analysis of the credits is as follows:*
>
> *20.3 As analysed above none of the investments can be a source for introduction of capital. The assessee has not furnished any evidence to show that the source of the amounts introduced as capital has been offered to tax during the year or in any earlier year or whether the source is exempt from tax. The assessee has also not produced the books of accounts claiming that the tally data is corrupted. The assessee has not filed the Statement of Affairs for earlier years nor has filed the balance sheet in spite of repeated requests.*
>
> *20.4 In view of the above as the assessee has not explained the source for introduction of capital of Rs. 95,80,215 (as per chart above) the same is added to the income of the assessee.*
>
> *20.5 As per the provisions of Section 68 where any sum is found credited in the books of an assessee maintained for any previous*

year, and the assessee offers no explanation about the nature and source thereof or explanation offered by the assessee is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year.

20.6 Accordingly Rs. 95,80,215 being the credits to the capital account recorded in the books for which no satisfactory explanation is given by the assessee is charged to income-tax as the income of the assessee for the relevant previous year as per the provisions of Sec. 68 and taxed as per the rates prescribed in Sec. 115BBE of the Act.

(Addition: Rs.95,80,215)"

34.3 He submitted that during the appeal proceedings before the ld. CIT(A), it was explained that the assessee was earlier working in Middle-east for more than 15 years. Out of the savings he had invested in properties as well as in business entities- all are before F.Y. 2015-16. For the year under consideration all such investments of earlier years were brought into the books of accounts by crediting the assessee's capital account and debiting all such investment/assets. Since the said investment/assets were all made/acquired prior to F.Y. 2016-17, the same could not be considered for addition u/s 68 of the Act as the same were opening balances. The assessee furnished complete details of each and every credit to the capital account and also made oral submissions. The relevant portion of the written submission dated 28.06.2022 is reproduced below by the ld. A.R. for our ready reference:

With regard to addition of ₹95,80,215/- is concerned, in Para-20, Page 41 of the Asst. Order, the learned Assessing Officer has given the breakup of Capital Introduction, which is as under:

a)	*Value of immovable property purchased In March 2015*	*₹35,00,000*
b)	*Value of Fixed Deposit in ICICI Bank*	*₹ 3,25,580*
c)	*Bank Account Bharath Co-op.*	*₹ 9,98,396*
d)	*Investment in Rehabar*	*₹10,00,000*

e)	*Investment in Prime Care*	*₹20,00,000*
f)	*Investment in Apts Logistics*	*₹ 5,00,000*
g)	*Receipt from LIC*	*₹ 16,749*
h)	*Income of spouse*	*₹ 14,490*
i)	*Receipt from Touheed Trust*	*₹12,25,000*

		₹95,80,215
		========

In this regard, the Appellant would like to submit as under:

As already mentioned earlier, the assessee was working for more than 20 years in Middle East, There were certain investments made while he was abroad, some of those investments have been brought into the books of account during the year under consideration. The details of individual break up is as under:

a) *<u>Value of immovable property purchased in March 2015</u>:*

This is the amount paid to one Mr. Kishore Poojari in March 2015 itself. On 17.03.2015, a sum of ₹25,00,000/- was paid by cheque No.137306 and ₹10,00,000/- was paid on 10.04.2015 to Mr. Damodar Shetty by cheque No.107307. These amounts were paid for the purchase of immovable property out of the amount drawn from Yashaswi Fish Meal. The Appellant had drawn ₹35,00,000/- from Yashaswi on 15.03.2015. This amount was paid for purchase of the property. It is indicated in ICICI Bank SB account {ANNEXURE -9}, which is produced before the Hon'ble Commissioner.

b) There was a Fixed Deposit made in ICICI Bank of ₹3,25,580/- during the year 2015 before 31st March. This amount also is from ICICI. The journal entry has been passed to bring the same on the record.

c) Similarly there was a Bank account with Bharath Co-Op. Bank, A/c.No.35104, having a credit balance of ₹9,98,390/-. This amount is brought on record.

d, e & f) Similarly the Appellant had paid a sum of ₹20,00,000/- to one Prime Care Medicals, ₹5,00,000/- to Apts Logistics and ₹10,00,000/- to one Rehabar Equipment's. These amounts are paid when he was abroad and the same has been brought on record through the Journal Entry and the transaction has happened during Financial Year 2014-15 and not during the current year. Therefore, the same is required to be deleted.

(i) There is a sum of ₹12,25,000/- brought on record in respect of breakup of this amount is, the Appellant had paid a sum of ₹10,00,000/-on 19.03.2016 by Cheque No.020115 from out of his Bharath Bank A/c.No.1438 of Mulki Branch. This amount was returned by said Touheed Education Trust by NEFT on 02.08.2016. It was credited to Bharath Bank account No.1438.

Similarly, a sum of ₹2,25,000/- was paid by the Appellant by Cheque No.20154 on 01.10.2016, which has been debited to Bharath Bank A/c.No.1438. This has been returned by said Touheed Education Trust by RTGS on 20.10.2016, which is also reflected in the same Bharath Bank, Mulki Branch A/c.1438. The copies of Bank accounts are produced for Hon'ble Commissioner's reference. {ANNEXURE -10}
Therefore all the amounts are explainable and hence there is no additions to be made u/s.68.

34.4 He submitted that the ld. CIT(A) did not appreciate the submissions of the assessee and after quoting the provisions of section 68 and the case laws relating to that section he confirmed the additions made by the AO u/s 68 of the Act. He submitted that as explained before the lower authorities the credits to the capital account do not represent any receipts from third party but mere journal entries passed to bring into the books the assets/investments of the assessee made in the earlier years. Therefore, he submitted that the addition of Rs.95,80,215/- may be deleted as the said amount is not a credit appearing for the first time during the year under consideration.

35. The ld. D.R. submitted that during the course of assessment proceedings, AO observed that in the Balance Sheet of the assessee, a sum of Rs.25,95,94,705/- was shown as capital introduced. The assessee furnished explanation to the sources for Rs.25,00,00,000/- being the amount received from M/s Yashaswi Fish Meal and Oil Company. However, regarding the source for the balance Rs.95,94,705/-, the assessee did not file any explanation other than giving a list of investments. The assessee did not furnish any evidence to show that the source of the amounts introduced as capital were offered to tax during the year or in any earlier year or whether the source was exempt from tax. The assessee did not produce the books of accounts claiming that the tally data is corrupted.

Since, the assessee could not explain the source for introduction of capital of Rs.95,80,215/-, the same was added to the income of the assessee by the AO as per the provisions of Sec. 68 of the Act. He submitted that section 68 of the Act states that where any sum is **found credited in the books of accounts maintained by an assessee for any previous year,** and the assessee offered no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to Income-Tax as the income of the assessee of that previous year. In terms of section 68 of the Act, the assessee is bound to explain as to how the nature and source of the amounts found credited in their books. If the assessee offers an explanation, which, in the opinion of the Assessing Officer, is not satisfactory, the said sums found credited in the books of accounts of the assessee may be charged to Income Tax as the income of the assessee. Therefore, he submitted that the onus is on the assessee to establish the creditworthiness of various persons and as to how the share application money was brought in. Therefore, furnishing the list of names or stating that the monies were paid by cheques will not, by itself, establish the creditworthiness and genuineness of the transaction. The initial onus is on the assessee to discharge the burden cast upon them to prove the creditworthiness and genuineness of the transaction. Assessee has to discharge the legal obligation cast upon them to prove the genuineness of the transaction, the identity of the creditors and creditworthiness of the investors, who should have the financial capacity to make the investment in question to the satisfaction of the Assessing Officer so as to discharge the primary onus. If the assessee does not discharge the primary onus cast upon them, the question of the Assessing

Officer to investigate the creditworthiness of the creditors/subscribers would not arise. In view of the aforesaid facts involved, the ld. D.R. submitted that the action of the AO has to be upheld.

36. We have heard the rival submissions and perused the materials available on record. The assessee has introduced a capital amount of Rs.25,25,94,705/-. The contention of the assessee is that this represents various assets and amounts returned/received during the year. The assessee accepted a sum of Rs.25 Crores being the amount received from M/s. Yashaswi Fish Meal & Oil Company. However, there is no explanation for the balance amount of Rs.95,94,705/-. He has not filed any details for the same. In our opinion, the assessee has to explain the source for investment of Rs.95,94,705/-. The assessee failed to bring on record the necessary details of sources of this amount of Rs.95,94,705/-. **Having no alternative, we have no hesitation in confirming the addition made by the ld. AO to the tune of Rs.95,94,705/-.**

37. Next ground no.19 is with regard to confirming addition of Rs.60,000/- being disallowance on account of alleged non-payment of TDS.

38. We have heard the rival submissions and perused the materials available on record. Facts involved are that on perusal of the Profit & Loss account filed with the return of income, ld. AO observed that the assessee had paid commission of Rs.2,00,000/-. During the course of the assessment proceedings, the assessee stated that part of the commission was paid without deducting TDS. In view of this, the sum of Rs.60,000/- was disallowed by the AO as per provisions of the

Act and added to the income of the assessee. Since the assessee himself has admitted that the payments were made without deducting TDS, which is mandatorily needed to be deducted, the AO had no option but to disallow the same. In the case of Maharashtra State Electricity Distribution Co. Ltd. Vs ACIT 2011-TIOL-722- ITAT-MU, it was held that provisions of sec. 40(a)(ia) are attracted when the assessee fails to deduct tax at source under Chapter XIV-B or pay such tax to the exchequer within the stipulated period. In the case of Marc Signage Vs ITO 2010-TIOL-778-ITAT-KOL Matrix Glass & Structures Pvt. Ltd. Vs ITO 2011-TIOL-181-ITAT-KOL, it was held that when assessee did not make TDS, disallowance u/s 40(a)(ia) is to be made on the whole payments relating to the eligible transaction during the year.

38.1 The assessee has made payment of Rs.60,000/- towards commission without deduction of TDS, which assessee is required to deduct TDS. It is an admitted fact that the total amount paid is Rs.2 lakhs and out of this an amount of Rs.60,000/- is not subject to TDS. Being so, the ld. AO is justified in making disallowance u/s 40(a)(ia) of the Act. The addition is sustained.

39. Next ground no.20 is with regard to sustaining addition of Rs.68.60 lakhs being unexplained creditors.

39.1 The ld. A.R. submitted that the AO has made the above addition of Rs.68,60,000/- solely on the basis of alleged declaration made u/s 132(4) of the Act. He submitted that the said amounts were received from Mr. Mohammed Zubair and Mrs. Shameena Mohammed. The same were genuine credits and the same were not liable to be assessed to tax u/s 68 of the Act.

40. The ld. D.R. submitted that the facts involved are that during the course of search u/s. 132 on 08.02.2018 in the statement u/s. 132(4) (in reply to Q.No.15) the assessee had stated that he was not in a position to prove the credit worthiness of the persons who had advanced loans to him and admitted that Rs.68,60,000/- would be offered as undisclosed income for A.Y, 2017-18. Assessee, however, retracted from this disclosure later on. During the course of assessment proceedings, the assessee was requested by the AO to furnish the ledger account extract of Sri Mohammed Zubair and Smt. Shameena Mohammed as appearing in his books for the period 01.04.2016 to 31.03.2017 along with their complete present postal address. PAN and contact details (e-mail and mobile number) being the suppressed loan given. The assessee furnished the copy of the ledger account of Mohammed Zubair but no details of Shameena Mohammed were filed before the AO. The assessee did not furnish the postal address, PAN and contact details of Mohammed Zubair. In respect of Mrs. Shameena Mohammed, AO found that she was not assessed to tax and no return of income had been filed by her till date. The ld. AO observed that in the instant case, the creditworthiness of the lenders was suspected as the assessee had not furnished any proof to demonstrate that they had the creditworthiness to give the loans aggregating to Rs.68,60,000, more so in view of the fact that they were not even assessed to tax that merely because the loans were reflected in the books of the assessee, these transactions cannot be accepted as portrayed. The matter had to be viewed in its entirety and after taking into account the facts enlisted above. Accordingly, the ld. D.R. submitted that the AO on the basis of aforesaid details and taking into account the statement of the assessee u/s 132(4) and the explanation given during the assessment

proceedings held the explanation offered by the assessee in respect of the credit of Rs.68,60,000/- as not satisfactory and taxed this as per the provisions of Sec. 68 of the Act. He submitted that the purport of Section 68 of the Act has been discussed in paras relating to Ground 10 of the appeal and is not being repeated here for reasons of brevity but are equally applicable here. In view of the judicial pronouncements discussed in paras relating to Ground 10 of the appeal and the facts involved, he requested that the action of the AO has to be upheld.

41. We have heard the rival submissions and perused the materials available on record. The assessee is said to be received a sum of Rs.68.60 lakhs from two persons Mrs. Md. Zubera and Mrs. Shameena Mohammad. The assessee has not provided the details regarding identity, creditworthiness and genuineness of the transaction. Under section 68 of the Act, the assessee is required these 3 ingredients. In the absence of these details, the ld. AO is at liberty to make addition u/s 68 of the Act. Even before us also, the assessee has not furnished iota of evidence with regard to sources of these credits. Hence, we have no hesitation in confirming this addition u/s 68 of the Act. **This ground of appeal is rejected. This appeal in ITA No.1118/Bang/2022 for the AY 2017-18 is partly allowed for statistical purposes.**

ITA No.1119/bang/2022 (AY 2018-19):

42. Ground Nos.1, 3, 4, 5, 6 & 7 which reads as follows:

1. *That the assessment order passed u/s 143(3) read with 153D of the Act is without jurisdiction and bad in law as well as on facts and is liable to be quashed.*

3. *That the assessment order passed u/s 143(3) read with 153D of the Act is without jurisdiction and bad in law having been issued under the inapplicable provisions of the Act and is liable to be quashed.*

4. *That the Order of Ld CIT(A) is perverse and liable to be quashed having been passed ignoring the relevant and the material facts.*

5. *That the Ld. CIT(A) erred in dismissing the jurisdictional ground on initiation and concluding the proceedings under the inapplicable section 143(3) read with section 153Dof the Act as he erred in:*

   a) *holding that there was no search warrant issued in the name of the appellant.*

   b) *Remand Report that no search and seizure action u/s 132 of the Act was carried out in the case of the appellant in spite of the contrary finding recorded in the assessment order.*

   c) *in blindly relying upon the Remand Report dated 20.07.2022 without providing the copy of warrant of authorization as well as the appraisal report and the satisfaction note (prepared before initiating action u/s 132 of the Act) whose contents have been selectively quoted by the Ld AO in his remand report.*

   d) *in ignoring that the said Remand Report itself contains admission of the fact that the search u/s 132 of the Act was in fact conducted on a group of assessees including the Appellant.*

   e) *in ignoring that the Remand Report dated 27.06.2022 clearly states that the search was conducted in the case of Sri Sadhu Salian of M/s YFM Co and its partners and that search was conducted in the case of the Appellant as he was one of the erstwhile partners of the above concern.*

   f) *ignoring the fact that the ADIT(Inv) Queen's Road Bengaluru had made preliminary enquiries on the purchase of immovable properties by the Appellant and that only thereafter he had* ***included the Appellant as one of the Assessees for search u/s 132***

   g) *not appreciating that there could not have been any seizure of documents from the Appellant's premises if there was no search in the Appellant's case as all the seized documents allegedly belonged to the Appellant alone and not to Mr. Salian.*

   h) *holding that the defect, if any, of issuing notice under the inapplicable section 153C in place of 153A is curable under the provisions of section 292B of the Act.*

   i) *holding that no prejudice is caused to the respondent.*

6. That the AO could not have passed assessment order us 143(3) read with section 153D of the Act as when a power is given under a statute to do certain thing in a certain way, the thing must be done in that way or not at all and other methods of performance are necessarily forbidden. [Taylor vs Taylor (1875) 1 Ch D426,431; Nazir Ahmed vs King Emperor (AIR 1936 PC 253)]

7. That even otherwise the initiation of proceedings u/s 143(2) read with section153C of the Act is without jurisdiction and bad in 11w due to absence of the mandatory satisfaction as required u/s 153C(1) of the Act.

a) That it is a borrowed satisfaction and has been recorded mechanically without application of mind.

b) That the satisfaction recorded by the Ld. AO does not satisfy the requirements of section 153C(1) of the Act.

42.1 These grounds are akin to the grounds in assessment years 2016-17 & 2017-18 and challenging the framing of assessment u/s 153D of the Act. In view of our findings in ground Nos.1,3,4,5,6 & 7 in assessment years 2016-17 & 2017-18, these grounds are dismissed accordingly.

43. Ground No.2 of this appeal is general, which do not require any adjudication.

44. Ground Nos.8, 10 & 11, are relating to making addition of Rs.1 Crore on the basis of statement recorded u/s 132(4) of the Act, which reads as follows:-

8. That the Ld. CIT(A) erred in confirming the additions made to the total income solely on the basis of statement recorded u/s 132(4) of the Act without

a) appreciating that the said statement was not reliable having been obtained under pressure and duress from the Appellant at the time of search and the same had been duly retracted in time; and

b) without bringing on record any corroborative evidence and ignoring the facts on record.

10. That the Ld. CIT(A) erred in confirming addition to the total income without appreciating that:

a) *the documents seized from the Appellant did not belong to him.*

b) *the relied upon documents were dumb documents and did not reveal any unaccounted income as alleged.*

c) *the alleged scribblings made in pencil found were not made by the Appellant and probably by some third party and its relevance is unknown to the Appellant.*

d) *the alleged lose sheets and the alleged scribblings made in pencil on them did not have any evidentiary value as held by Hon'ble Apex Court and followed by the jurisdictional Hon'ble High Court of Karnataka in catena of cases. [Central Bureau of Investigation vs V C Shukla and Others (1998) 3 SCC 410; Common Cause and Others vs Union of India (2017) 11 SCC 31; Sunil Kumar Sharma vs Dy. CIT (Karn) [20221 448 ITR 485 (Karn)]*

11. *That the Ld. CIT(A) erred in confirming addition of Rs.1,00,00,000/- as additional income allegedly declared as such in the statement given by the appellant u/s 132(4) of the Act.*

44.1 Facts of this issue are that the ld. A.R. submitted that the statement was recorded from assessee u/s 132(4) of the Act on 8.2.2018 vide answer to question no.23. The assessee offered additional income of Rs.1 crore as his income from business and interest for the assessment year 2018-19. However, the same has not been offered in the return of income filed in response to notice issued u/s 153A of the Act on 20.7.2019. Hence, the ld. AO made addition of Rs.1 Crore to the returned income on the basis of declaration made by assessee in the statement recorded u/s 132(4) of the Act on 8.2.2018. The contention of the ld. A.R. is that the assessee filed retraction letter of the statement made on 8.2.2018 before ADIT (Investigation), Mangalore that the said statement was prepared by Investigating Officer and on which his initial/signature was taken forcibly and this letter has been filed on 8.7.2018. However, the ld. AO observed that the allegation of assessee that his signature was obtained on 8.2.2018 was false as no such incident was reported in the panchanama. The assessee

cannot allege that signature in the statement on 12.2.2018 i.e. 4 days after search, which was again taken forcibly is also false. Accordingly, the ld. AO made addition of Rs.1 crore to the returned income on the basis of statement recorded u/s 132(4) of the Act.

45. We have heard the rival submissions and perused the materials available on record. Cochin Bench of Tribunal in the case of ITO Vs.M/s. Toms Enterprises in ITA No.442/Coch/2018 dated 7.2.2019 has held as under:

8. "We have heard the rival submissions and perused the record. In this case, the books of account of the assessee were required to get audited u/s. 44AB of the Act. It is an admitted fact that books of account of the assessee had not been rejected by the Assessing Officer. However, the Assessing Officer relied on the statement of Shri Tomy C. Vadayil, managing partner of the assessee recorded u/s. 131(1) of the Act on 25/09/2014 for the purpose of framing the assessment wherein he has stated as follows:

> *"Question:- 8 - Explain the procedure of sale of goods in your firm. For e.g. I am showing a sale bill TPA 536 dated 03/01/2014 of Toms Pipes Pvt. Ltd. Please explain the sale of goods to Toms enterprises?*
> *Ans: - We buy goods from the company by fixing our price (up to 160% of the cost price). From the price we give different types of discounts (Trade discount, monthly quantity discount, annual quantity discount, quarterly quantity discount). In addition to that we also give cash discounts.*
> *Question:- 9- In addition to the above what are your major expenses?*
> *Ans: - Other major expenses are distribution expenses, advertisement, Sales promotion, Salary incentive.*
> *Question:- 10 After deducting the above expenses will you give the approximation of gross profit and net profit?*
> *Ans: - We plan and prepare price list in order to get approximately 15% gross profit and 4% net profit. However, if we are not able to achieve the required turn over, then we will lose our control on net profit because of fixed cost that will increase the over head expenditure."*

8.1 As seen from the above, the managing partner stated that the assessee is getting GP at 15% and net profit at 4%. Contrary to this, the assessee has shown gross profit at 10.55%. It was also explained by the Ld. AR the reason for declaring GP at lower rate in the assessment year instead of 15% as stated in the sworn statement and this was due to offering higher discount to the customers to sustain in the market. This was the case of

offering lower rate of profit on sale. The Assessing Officer rejected the contention of the assessee and he estimated the income of the assessee on the basis of GP at 15% by placing reliance on the sworn statement recorded u/s. 131 of the Act. After careful consideration of the circumstances and facts of the this case, we are of the opinion that the statement recorded u/s. 131 of the Act was valid statement and it could be used for the purpose of assessment provided they are supported by corroborative documents.

8.2 Under section 131 of the Act, the income tax authority is empowered to examine on oath. Section 131 of the Act confers power to the income tax authority to record the statement in the course of proceedings before them. The power invested u/s. 131(1) is only to make enquiries and investigation and not basically meant to voluntary disclosure or surrender of concealed income. As per section 31 of the Indian Evidence Act, 1878, admissions are not conclusively proved as against admitted proof. In the absence of rebuttable conclusion, admission bind the maker when these are not rebuttable or retracted. It was held by the Supreme Court in the case of Pullengode Rubber Produce vs. State of Kerala (91 ITR 18) that an admission is an extremely important piece of evidence but it cannot be said that it is conclusive and the maker can show that it was incorrect. In the case of Satinder Kumar (HUF) vs. CIT (106 ITR 64), the High Court of Himachal Pradesh held that the admission made by an assessee constitute a relevant piece of evidence but if the assessee contends that in making the admission, he had proceeded on a mistaken understanding or on misconception of facts or untrue facts, such admission cannot be relied upon without considering the aforesaid contention. In the case of Avadh Kishore Das vs. Ram Gopal AIR 1979 (SC) 861, it was held that evidentiary admissions are not conclusive proof of the facts admitted and may be explained or shown to be wrong but they do raise an estoppel and shift the burden of proof to the person making the admission. The Supreme Court further held that unless shown or explained to be wrong, they are an efficacious proof of the facts admitted. Thus, the burden to prove "admission" as incorrect is on the maker and in case of failure of the maker to prove that the earlier stated facts were wrong, these earlier statements are suffice to conclude the matter. If retraction is proved sufficiently, the earlier stated facts loose their effect and relevance as a binding evidence and the authorities cannot conclude the matter on the basis of the earlier statements alone. However, bald retraction of earlier admissions will not be enough even after retraction. Such statements cannot automatically become nullified. If the assessee proves that the statement recorded u/s. 131 was involuntary and it was made under coercion or during their admission, the statement recorded u/s. 131 has no legal validity.

8.3 There was a circular issued by CBDT issued circular in F. No. 286/98/2013-IT(Inv.II) dated 18th December 2014 stating as follows:

"Instances/complaints of undue influence/coercion have come to notice of the CBDT that some assessees 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.

8.4 Without commenting on the authenticity of the statement by the managing partner of the assessee Shri Tomy C. Vadayil, we are of the opinion that there is no corroborative evidence to support the claim made by the Assessing Officer. Even otherwise, uncorroborative statements collected by the Assessing Officer cannot be an evidence for sustenance of addition made by the Assessing Officer.

8.5 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]

8.6 Yet again in Romesh Chandra Mehta vs. State of West Bengal (1969) 2 SCR 461 although this 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.

8.7 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."

8.8 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.

8.9 We are of the view that the statement recorded u/s. 131 cannot be independently used for making any addition in the hands of the assesse and the said statement cannot, in our view, be the sole basis for making any addition and must be independently corroborated by evidences. Thus, on a careful reading of the decisions of the Hon'ble Supreme Court referred before us, we are of the view that the legal position that emerges is that a sworn statement, though binds the assessee, it cannot be the sole basis for making the assessment. It is open to the assessee to show the circumstances in which confessional statements were recorded and once the assessee proves that confessional statements were recorded under threat and coercion and retracts from the same, the confessional statements cannot be the sole basis for making assessments or for making any addition in the hands of the assessee.

9. Further, in the case of CIT vs. S. Khader Khan Son (300 ITR 157), the Madras High Court held as follows:

"The principles relating to section 133A of the Income Tax Act, 1961, are as follows: (i) an admission is extremely an 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; (ii) in contradistinction to the power under section 133A, section 132(4) 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 authorised to administer oath and to take any sworn statement which alone has evidentiary value as contemplated under law; (iii) The expression "such other materials or information as are available with the Assessing Officer" contained in Section 158BB of the Income-tax Act, 1961, would include the materials gathered during the survey operation under Section 133A; (iv) The material or information found in the course of survey proceeding could not be a basis for making any addition in the block assessment; (v) Finally, the word "may" used in Section 133A (3)(iii) of the Act, viz., "record the statement of any person which may be useful for, or relevant

to, any proceeding under this Act, as already extracted above, makes it clear that the materials collected and the statement recorded during the survey under Section 133A are not conclusive piece of evidence by itself.

A survey was conducted in the premises of the assessee-firm. One of the partners in his sworn 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. However, the said statement was retracted by the assessee-firm in its letter dated August 3, 2001, stating that the partner from whom a statement was recorded during the survey operation under section 133A, was new to the management and he could not answer the enquiries made and as such he agreed to an ad hoc addition. The Assessing Officer based on the admissions made by the assessee, which were directly relatable to the defects noticed during the action under section 133A of the Act, recomputed the assessment. The order was set aside by the Commissioner of Income-tax (Appeals) and this order was upheld by the Tribunal. On appeal to the High Court:

> *"Held, dismissing the appeal, that in view of the scope and ambit of the materials collected during the course of survey action under section 133A shall not have any evidentiary value. 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."*

10. On further appeal by the Department in Civil Appeal No. 13224 of 2008 and 6747 of 2012 dated 20/09/2012, the Supreme Court held as follows:

> *"Heard Counsels on both sides. Leave granted. Civil Appeal filed by the Department pertains to 2001-02. In view of the concurrent findings of the fact, this Civil Appeal is dismissed."*

Hence, the ratio laid down by the Madras High Court was confirmed by the Supreme Court.

11. From the foregoing discussion, the following principles can be culled out:

(i) An admission is extremely an 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, vide decision of the Apex Court in Pullangode Rubber Produce Co. Ltd. v. State of Kerala [(1973) 91 I.T.R. 18];

(ii) In contradistinction to the power under section 133A, section 132(4) of the Income-tax Act enables the authorised 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 authorised to administer oath and to take any sworn statement which alone has evidentiary value as contemplated under law, vide Paul Mathews and Sons v. Commissioner of Income-tax [(2003) 263 I.T.R. 101];

(iii) The word "may" used in Section 133A (3)(iii) of the Act, viz., "record the statement of any person which may be useful for, or relevant to, any proceeding under this Act, makes it clear that the materials collected and the statement recorded during the survey under Section 133A are not conclusive piece of evidence by itself.

(iv) Finally, the statement recorded by the Assessing Officer on 25/09/2014 u/s. 131 cannot be the basis to sustain the addition since it is not supported by corroborative material.

12. In our opinion, the Assessing Officer has made the addition only on the basis of sworn statement of the managing partner. Accordingly, we dismiss the ground taken by the Revenue. The appeal of the Revenue is dismissed."

8.34 Further, in the case of CIT Vs. Dr. N. Thippa Setty (322 ITR 525) (Karn.), the jurisdictional High Court has held as under:

"Held, dismissing the appeals, that it was clear that the statements made by the assessee under section 132(4) of the Act were retracted not once but twice and that the Department had accepted the retraction. No cogent and valid reasons had been assigned by the Assessing Officer for reopening the assessment. There were no good or sufficient reasons for reopening of the assessment under section 148 of the Act against the assessee."

45.1 In our opinion, addition could not be made solely on the basis of the statement given by the assessee during the course of statement recorded u/s 132(4) of the Act, more so when it was retracted by him. In the present case, the assessment has been u/s 153A of the Act and it should be on the basis of seized materials or any other corroborative materials collected during the course of search action. The present addition is based on the sworn statement recorded during the course of search action and in our opinion, this statement has been retracted. Hence, the

addition cannot be sustained. Accordingly, we delete the addition of Rs.1 Crore made by ld. AO sustained by ld. CIT(A). These grounds of appeal of the assessee are allowed.

46. Next ground No.9 is reproduced as under:

That the defect of issuing notice under section 143(2) read with section 153C of the Act is a jurisdictional defect which would not get cured by the provisions of section 292B of the Act.

46.1 After hearing both the parties, we are of the opinion that as seen from the assessment order para 3.1 of this A.Y., a notice u/s 143(2) of the Act dated 6.8.2019 was issued and served on the assessee and it also noted that the assessee has been provided with an opportunity to produce the evidences, if any in support of return of income filed for assessment year 2018-19, for which the assessee has duly replied and participated in the assessment before the ld. AO. Now the assessee cannot contend that there was no service of notice u/s 143(2) of the Act, which is devoid of merits. This ground of assessee is rejected. This appeal is partly allowed.

47. In the result, the appeals of the assessee in ITA Nos.1117 & 1119/Bang/2022 are partly allowed except ITA No.1118/Bang/2022, which is partly allowed for statistical purposes.

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

Sd/-	**Sd/-**
(Beena Pillai)	**(Chandra Poojari)**
Judicial Member	**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.