

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर  
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, "B" JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य एवं श्री राठौड़ कमलेश जयंतभाई, लेखा सदस्य के समक्ष  
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA No. 944& 945/JP/2015  
निर्धारण वर्ष/Assessment Year : 2010-11& 2011-12

Asstt. Commissioner of Income-tax, Central Circle, Ajmer	बनाम Vs.	Smt. Kusum Devi Vijayvargiya, Near Ram Mandir, Chhabra Colony, Behind Bus Stand, Madanganj- Kishangarh
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AIGPV 4323 B		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

आयकर अपील सं./ITA No. 907 to 908/JP/2015  
निर्धारण वर्ष/Assessment Year : 2010-11 & 2011-12

Asstt. Commissioner of Income-tax, Central Circle, Ajmer	बनाम Vs.	Shri Prakash Chand Vijayvargia, Near Vijay Sizing, Behind Bus Stand, Mandanganj, Kishangarh
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAJPV 2585 L		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

आयकर अपील सं./ITA Nos. 933, 934 & 935/JP/2015  
निर्धारण वर्ष/Assessment Year : 2009-10, 2010-11 & 2011-12

Asstt. Commissioner of Income-tax, Central Circle, Ajmer	बनाम Vs.	Smt. Sudarshna Somani, H. No. 26/84, Near Jangid Dharmshala, Mandanganj- Kishangarh
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: BGUPS 7674 F		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

आयकर अपील सं./ITA No. 507/JP/2018  
निर्धारण वर्ष /Assessment Year : 2011-12

Income Tax Officer, Ward-02, Kishangarh	बनाम Vs.	Shri Raju, S/o Shri Rampalm, Nr. Pani Ki Tanki, Nr. Mandir Azad Nagar, Madanganj, Kishangarh
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ATAPR 0779 E		
अपीलार्थी /Appellant		प्रत्यर्थी /Respondent

आयकर अपील सं./ITA No. 927& 928/JP/2015  
निर्धारण वर्ष /Assessment Year : 2010-11 & 2011-12

Asstt. Commissioner of Income-tax, Central Circle, Ajmer	बनाम Vs.	Shri Abhishek Kumawat, Kamal Kunj, Main Road, Shivanji Nagar, Madanganj- Kishangarh
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ALIPK 7227 J		
अपीलार्थी /Appellant		प्रत्यर्थी /Respondent

आयकर अपील सं./ITA Nos. 909 to 912/JP/2015  
निर्धारण वर्ष /Assessment Year : 2008-09 to 2011-12

Asstt. Commissioner of Income-tax, Central Circle, Ajmer	बनाम Vs.	Shri Manish Kumar Singhal, Singhal Sadan, Jain Colony, Madanganj- Kishangarh
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: BHHPS 8381 M		
अपीलार्थी /Appellant		प्रत्यर्थी /Respondent

आयकर अपील सं./ITA Nos. 949 to 951/JP/2015  
निर्धारण वर्ष /Assessment Year : 2009-10 to 2011-12

Asstt. Commissioner of Income-tax, Central Circle, Ajmer	बनाम Vs.	Shri Vasu Dev Somani, H. No. 26/84, Near Jangid Dharmshala, Madanganj- Kishangarh
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AXTPS 5462 J		
अपीलार्थी /Appellant		प्रत्यर्थी /Respondent

आयकर अपील सं./ITA Nos. 954 & 955/JP/2015  
निर्धारण वर्ष /Assessment Year : 2010-11 & 2011-12

Asstt. Commissioner of Income-tax, Central Circle, Ajmer	बनाम Vs.	Shri Govind Narayan Sharma, Near Railway Phatak, Untra Road, Krishna Puri, Madanganj-Kishangarh
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AUFPS 0340 E		
अपीलार्थी /Appellant		प्रत्यर्थी /Respondent

निर्धारिती की ओर से /Assessee by : Sh. Nikhelesh Kataria (CA)  
राजस्व की ओर से /Revenue by: Sh. Ajay Malik (CIT)

सुनवाई की तारीख /Date of Hearing : 17/10/2023  
उदघोषणा की तारीख /Date of Pronouncement: 30/11/2023

आदेश /ORDER

PER BENCH:

These nineteen appeals are filed by the revenue aggrieved from the order of the Commissioner of Income Tax (Appeals-2), Udaipur-2 [ Here in after referred as Ld. CIT(A) ] for the assessment years 2008-09, 2009-10, 2010-11 & 2011-12 dated 23.09.2015, 28.09.2015, 14.09.2015, 12.02.2018, 22.09.2015, 21.09.2015, 15.09.2015 & 24.09.2015 which in turn arises from the order passed by the ACIT, Central Circle, Ajmer passed under Section 143(3) r.w.s 147 of the Income Tax Act, 1961 (in short 'the Act') dated 20.03.2014, 21.03.2014, 28.03.2014 & 10.03.2014.

2. Since the issues involved in all the appeals of the different assessee for all different assessment years involving identical facts, issues and even the grounds of the revenue being similar for all these nineteen appeals were thus, heard together and are being disposed off by this consolidated order.

3. At the outset, the Id. AR has submitted that the matter pertaining to Smt. Kusum Devi Vijayvargiya in ITA no. 944/JP/2015 may be taken as a lead case for discussions as the issues involved in the lead case are common and inextricably interlinked or in fact interwoven and the facts and circumstances of other cases are identical except the difference in the amount in other assessment year. The Id. DR did not raise any specific objection against taking that case as a lead case. Therefore, for the purpose of the present discussions, the case of ITA No. 944/JP/2015 is taken as a lead.

3.1 Based on the above arguments we have also seen that for these appeals are on similar facts, similar arguments and similar grounds raised, therefore, were heard together these three appeals and are disposed by taking lead case facts, grounds and arguments from the folder in ITA No. 944/JP/2015 for the assessment year 2010-11 and the order there in

passed shall mutatis mutandis apply to ITA Nos. 945/JP/2015, 907 & 908/JP/2015, 933 to 935/JP/2015, 507/JP/2018,927 & 928/JP/2015,909 to 912/JP/2015, 949 to 951/JP/2015, 954 & 955/JP/2015.

4. Before moving towards the facts of the case we would like to mention that the revenue has assailed the appeal in ITA No. 944/JP/2015 on the following grounds;

*"1. Whether on the facts and in the circumstances of the case the CIT(A) was right in modifying the G.P. addition, made by the A.O. on transaction facilitated by the assessee, by holding that only net commission income of Rs. 225/- per Rs. 1 lac could be taxed on the bank deposits taken by the A.O as turnover without giving any specific findings on the owner of the deposits made in the bank accounts.*

*2. Whether on the facts and in the circumstances of the case the CIT(A) was right in not appreciating the facts that the assessee has been unable to produce the depositors who had deposited cash in bank account, she also failed to give the name and addresses of the persons (beneficiaries) and in absence of these basic details, it was not proved by the assessee that she was providing facility of bringing unrecorded sales proceeds of any seller through her bank accounts and therefore in this situation, there was no other option except to hold that the deposits in bank accounts are nothing but assessee's own trading receipts/sale proceeds and withdrawals were for the corresponding purchases and expenses."*

*3. (i) Whether on the facts and in the circumstances of the case, the CIT(A) was right in not appreciating the facts that in this case it was established by the A.O. that assessee was engaged in the business of marble trading and the deposits in bank accounts represents the sale proceeds.*

*(ii) The A.O. has rightly applied the rate on gross profit of trading business of marble considering the amount of deposits in her bank accounts as trading receipts being unrecorded sales in her hands.*

*The appellant craves the right to amend alter or add to any of the grounds of appeal given above.”*

5. The fact as culled out from the records is that based on the FIU-IND information that suspicious transactions in the form of cash deposit below the threshold limit were taking place in the bank account maintained by the assessee in different branches of Kishangarh, the Investigation Wing carried out survey under section 133A of the I.T. Act on 18.01.2011 at the business cum residential premises and also recorded statements u/s 131 for the purpose of making enquiries. Thereafter, the case of the assessee was centralized in the office of ACIT, Central Circle, Ajmer vide CIT, Ajmer's order No. CIT/AJM/2010-11/652 dated 10.06.2011 from ITO, Ward, Kishangarh. The assessments for A.Y 2008-09 to 2010-11 were re-opened u/s 147 and also case for A.Y 2011-12 selected for scrutiny.

5.1 The assessee filed original return of income on 29.10.2012 declaring total income at Rs. 2,32,390/-. The assessee claimed to have earned the income from commission. A notice u/s 148 of the IT. Act was issued on 18.03.2013 and same was duly served upon the assessee on 22.03.2013. In compliance, assessee vide letter dated Nil received in this office on 05.04.2013 has stated that return of income filed on 29.10.2012 may be

treated return in response to notice u/s 148 of the IT. Act. The assessee also asked reasons for re-opening the assessment. The reasons recorded were forwarded to the assessee.

5.2 The assessee raised objection against reopening the assessment vide letter filed on 18.04.2013 and the objection raised by the assessee reads as follows:

1. It is true that during the period under consideration we were having bank account through which the marble dealers or intending customers brought the money here.
2. Those persons deposited the money at these accounts and after deducting the commission the amount was paid either them or their persons.
3. That income on these deposit were disclosed in the return filed.

The Id. AO noted that the objections raised are general in nature and therefore they are disposed off as such.

5.3 Based on the statement of assessee's husband where in he has confirmed that the he was managing affairs of the business transaction carried out in the bank accounts and maintained by him and his wife. He was asked about the business activities carried out wherein he stated that all the activities were conducted from residential premises. He further stated that his bank accounts were used by marble traders to bring case against unrecorded sales in their books of accounts. The cash deposited by other

parties based in different parts of the country was withdrawn and handed over to the marble traders and for this activity they used to Pay commission to the assessee. He was confronted regarding transactions in his wife's bank accounts and stated that the entire transactions in the bank accounts were carried out by him. He further stated that deposit do not belong to her and the amounts have been deposited by outstation various parties and after making withdrawal the same has been handed over to the concerned parties (Marble traders). He also stated that no books of accounts are maintained. During the course of survey, he was asked regarding names of the parties for whom these transactions have you been done in his wife's bank accounts he replied that all the deposits in the bank accounts belong to the different parties. It is relevant to mention here that the prevailing market practice in the business of marble trading is that there is a large scale under invoicing and under billing of sales. Generally for obtaining sale consideration of actual transaction from the buyer located outside the hometown or throughout India the traders obtain part amount through cheque and for balance amount they have been using their confidants ( Facility Providers). The confidants are having multiple bank accounts either in their name or in the name of their family members or concerns / firms. Their bank account numbers are intimated to the buyers who deposit the

balance amount, which is actually on money, in the bank account of the confidants. The buyer deposit amount below ₹50,000 to avoid mentioning PAN on pay in slips. After receipt of the amount in bank account, the confidants, i.e. Facility providers withdraw the amount of on money and handover to the beneficiaries i.e. the sellers. The facility providers claim that they receive Rs. 200/- to 300 per ₹1,00,000/- received in their bank account by way of Commission. As has been admitted by the assessee during survey u/s. 133A. The assessee is also prima facie found engaged in providing facility of bringing cash payment of the marble traders by allowing them to use her bank accounts. Also this is in conformity with the prevailing market practice in this business in the region. On perusal of balance sheet filed by the assessee along with the return of income, it was surprised by that no bank account has been disclosed whereas the assessee is maintaining 11 bank account having total credit 19,75,57,105/- and an amount of transfer recorded for a sum of Rs. 1,85,78,700/-. It is further noticed by the Id. AO that the deposits as well as withdrawals appearing in these bank accounts have not been accounted for in the books of account and not been considered in return of income. In the situation, in order to determine the income attributable to these bank transactions, the assessee

vide questionnaire dated 02.09.2013 was asked the following specific questions:

- i) Party wise details of deposits made in all the bank accounts with the name and address of the beneficiaries.
- ii) Assessment year wise total amount of deposit in each bank account

In compliance she stated that complete details of marble traders with addresses were furnished in investigation wing. Further the assessee submitted neither bank statements nor names and address of the beneficiaries with details of deposits party wise and assessment year wise. The bank account statements were called from the bank authorities by issue of notice u/s. 133(6) of the Act and copies of the same were also made available to the assessee. As the assessee failed to produce the beneficiaries for confirmation a letter dated 20.01.2014 common for the A. Y. 2008-09 to 2011-12 was issued. The assessee has not filed any reply to the letter. The assessee failed to produce any of the persons to prove that she has done work for them to bring cash through her bank accounts from out station and handed over to them. Thus, she has remained unable to prove the identity of the persons to whom facility of bringing cash against sales was provided and failed to prove genuineness of transactions made in her bank accounts. Thus, the assessee unable to produce the depositors

who had deposited cash in bank account, assessee also failed to give names and address of the persons to whom the amount withdrawn from these accounts on various dates were given. In the absence of this basic information, it cannot be accepted that the assessee was just allowing her bank account to bring the sale proceeds of unaccounted sales of some sellers and for that he used to get the commission. It was asked to produce the parties for verification and confirmation. The assessee also failed to produce these parties for verification to which the amount withdrawn from these accounts on various dates given. Thus, the contention that commission income was earned by the assessee on deposits made in the banks is not accepted by the Id. AO. In absence of these basic information, the Id. AO did not accept the contention that the assessee was just allowing her bank account to bring the sale proceeds of unaccounted sales of some sellers and for that she used to get commission only. The Id. AO further noted that ***had the assessee furnished the names and address of depositors as well as beneficiaries to whom payments were made, the assessee's claim could be accepted that she was just a broker earning commission.*** In absence of these basic details, it is not proved that she was providing facility of bringing unrecorded sales proceeds of any sellers through her bank accounts. In this situation the Id.

AO noted that there is no other option except to hold that the deposit in the bank accounts are nothing but assessee's own trading receipts/ sale proceeds and withdrawals were for the corresponding purchase and expenses. Accordingly, the assessment was framed, estimating G.P. rate of 16% on the total turnover of Rs.17,89,78,405/- which came to Rs.2,86,36,545/-.

6. Against the order of the Id. AO the assessee preferred an appeal before the Id. CIT(A). The Id. CIT(A) considering the facts and circumstances in detailed and after considering the submission of the assessee allowed the appeal of the assessee directing the Id. AO to assess only commission income of Rs.225/- per lacs (@Rs.300 per lac less expenses @25%).

7. Aggravated from the said order of the Id. CIT(A) the revenue preferred the appeal before the Income Tax Appellate Tribunal. The appeal of the revenue was decided on 20.10.2016 and was allowed statistically, as the Id. AO was directed to follow certain direction. The relevant finding of the coordinate bench is reproduced here in below:

2.3 *We have heard the rival contentions and perused the material available on record. The issue under consideration relates to cash deposits amounting to*

*Rs.11,37,60,458 made in six bank accounts maintained by the assessee. The AO has held these receipts as receipts from the business of marble trading and the Id CIT(A) has held that these receipts belong to the marble traders and assessee who has facilitated these receipts should be brought to tax in terms of her commission income. Undisputedly, these bank accounts are opened in the name of the assessee and operated by the assessee herself with the assistance of her husband. The stand of the assessee is that she is not carrying on any business in the nature of marble trading as alleged by the AO. She has further stated that all these bank accounts were used by various marble traders operating in and around Kishangarh to bring cash against their unrecorded sales made to various parties from all over India. The assessee further submitted that the cash deposited by the various parties was subsequently withdrawn and handed over to the marble traders to whom the said money belong. The assessee submitted that for the activity of facilitating the receipt of cash in her bank accounts and, subsequent withdrawal and handing over the cash to the marble traders, she used to get the commission from the said marble traders. Here it is relevant to note that the entire transactions in various bank accounts in terms of monitoring the cash deposits as well as subsequent withdrawal and handing over the cash has been carried out by the assessee herself with the assistance of her husband to whom she has authorised and not by the marble traders. Here it is also relevant to note that the AO has also stated in his order about the said market practice in the business of marble trading where there is large scale under invoicing and under billing of sales. The Id. AO has stated that “generally, for obtaining sale consideration of actual transaction from the buyers located outside the hometown or throughout India, the traders obtain part amount through cheques and for balance amount, they have been using their confidants (facility providers). The confidants are having multiple bank accounts either in their name or in the names of their family members or concern/forms. Their bank account numbers are intimated to the buyers*

*who deposit the balance amount which is actually on-money, in the bank account of the confidants. The buyers deposit amount below Rs. 50,000/- to avoid mentioning PAN on pay-in-slips. After receipt of amount in bank account, the confidants i.e, facility providers withdraw the amount of on-money and hand over to the beneficiaries i.e. sellers.” The AO has therefore, given his prima facie finding that the assessee is found prima facie engaged in providing facility to bring cash payments of the marble traders by allowing them to use her bank account which is in conformity with the prevailing market practice in this region.*

2.4 *The said prima facie finding by the AO is on the basis of statement of the assessee and her husband which have been recorded during the course of survey. With a view to arrive at a definitive finding and to corroborate the said statements given by the assessee in terms of acting as facility providers, the AO has asked the assessee specific questions during the course of assessment proceedings whereby the assessee was asked to provide party-wise details of deposits made in all the bank accounts as well as names and addresses of all the*

beneficiaries/marble traders to whom the cash was withdrawn and handed over by the assessee.

2.5 In compliance, the assessee has stated that the details of marble traders alongwith addresses were furnished to the Investigation wing who has carried out the survey, recorded her and her husband's statement and also obtained various exercise book, diaries and loose papers. On perusal of the statement of assessee's husband which was recorded during the course of survey and placed on record, we find that in response to various questions such as question No. 11,14,15,16 & 19 which are raised in the context of various exercise book, diaries and loose papers found during the course of survey, the assessee's husband has stated that all these documents contained data in terms of names and addresses of various parties who have deposited the money in her various bank accounts and also details of various marble traders/beneficiaries to whom that money belongs.

2.6 Here the fundamental question that arises for consideration is where cash has been found deposited in the bank accounts maintained by the assessee, the onus to prove that cash belongs to the assessee or to someone else lies on whom- on the assessee or on the Revenue. In this regard, we refer to the decision of **Hon'ble Supreme Court in case of Chuharmal vs CIT (1988) 172 ITR 0250** wherein the Hon'ble Supreme Court has laid down the following proposition in law:

*"The High Court in its order noted that the raiding party by virtue of the search entered into the bedroom of the assessee on 12th May, 1973, and seized the watches. A panchnama was prepared. The Department found that the assessee was the owner. Sec. 110 of the Evidence Act is material in this respect and the High Court relied on the same which stipulates that when the question is whether any person is owner of any-thing of which he is shown to be in possession, the onus of proving that he is not the owner is on the person who affirms that he is not the owner. In other words, it follows from the well-settled principle of law that normally, unless the contrary is established, title always follows possession. In the facts of this case, indubitably, possession of the wrist-watches was found with the petitioner. The petitioner did not adduce any evidence, far less discharge the onus of proving that the wrist-watches in question did not belong to the petitioner. Hence, the High Court held, and in our opinion rightly, that the value of the wrist-watches is the income of the assessee. In this connection, reference may be made to the views expressed by Justice Tulzapurkar, as his Lordship then was, of the Bombay High Court in the case of J.S. Parkar vs. V.B. Palekar (1974) 94 ITR 616 (Bom) : TC42R.1775, where, on a difference of opinion between Justice Deshpande and Justice Mukhi, Justice Tulzapurkar agreed with Justice Deshpande and held on the question whether the evidence established that the petitioner was the owner of the gold seized, though there was no direct evidence placed before the taxing authorities to prove that the petitioner had actually invested moneys for purchasing the gold in question, the inference of the ownership of the gold in the petitioner in that case rested upon circumstantial evidence. There also gold was seized from a motor launch belonging to the*

*petitioner in that case. There, a contention was raised that the provision in s. 110 of the Evidence Act where a person was found in possession of anything, the onus of proving that he was not the owner was on the person who affirmed that he was not the owner, was incorrect and inapplicable to taxation proceedings. This contention was rejected. The High Court of Bombay held that what was meant by saying that the Evidence Act did not apply to the proceedings under the Act was that the rigour of the rules of evidence contained in the Evidence Act was not applicable but that did not mean that when the taxing authorities were desirous of invoking the principles of the Act in proceedings before them, they were prevented from doing so. Secondly, all that s. 110 of the Evidence Act does is that it embodies a salutary principle of common law jurisprudence which could be attracted to a set of circumstances that satisfy its conditions." (Emphasis supplied )*

2.7 *In light of above, it is crystal clear that where the cash is found in possession of the assessee by virtue of deposits in her bank accounts maintained and operated by her, the onus is on the assessee to discharge the burden that cash doesn't belong to her and belong to the marble traders. Further, the assessee has to adduce necessary evidence to substantiate her claim.*

2.8 *The next question that arises for consideration is whether in the instant case, the assessee has discharged her onus in terms of explaining the nature and source of deposits and withdrawals in various bank accounts throughout the year. The assessee has stated in her statement recorded during the course of survey that she has given the particulars of the depositors and the beneficiaries to the investigation wing. Admittedly, the assessee was therefore having knowledge and access to the information/data in terms of various depositors and the beneficiaries. The assessee could have submitted the said information/data to the AO during the course of assessment proceedings. There is nothing on record to suggest that the assessee was not having access to the said information or was prevented by sufficient cause from sharing these information with the AO. It is not the plea of the assessee all these documents were seized during the course of survey and she was not having access to all these documents which were admittedly maintained by her while transacting through her bank accounts. In our view it is for the assessee in whose bank accounts the money has been found deposited to explain the nature and source of such deposits and it is in respect of every such transaction, the assessee has to provide the necessary explanation to the AO. Similarly, the claim of the assessee that the money was withdrawn and given to the various beneficiaries has to be explained for each of the transactions and the necessary linkage/nexus has to be established by the assessee. The same is in conformity with the proposition of law laid down by the **Hon'ble Rajasthan High Court** in the case of **R.S. Rathore 212 ITR 350 (Raj.)**. In that case, even though the decision were rendered in the context of section 68, to our mind the same is equally relevant for facts under consideration even though the assessee has not maintained books of accounts and the AO has not invoked section 68 specifically in the instant case. The Hon'ble High Court has observed as under:*

*“Sec. 68 refers to cash credits which are found in the books of the assessee. If the explanation offered by the assessee is not satisfactory, then the sum so credited may be charged to income-tax as income of the assessee in the previous year. The burden, therefore, is on the assessee to explain satisfactorily with regard to the amounts which have been credited in the books of account by the assessee. The source and the nature of the receipt has to be proved by the assessee, and if he fails to prove satisfactorily the source and nature of the amount received, the assessing authority is entitled to draw an inference that the receipt is assessable income of the assessee. The Tribunal has cast doubts with regard to the investments and has even observed that some of them are not even genuine. A duty was cast on the Tribunal to have either remitted the matter to the CIT(A) or to the assessing authority to find out the correct position. There may be a number of creditors of similar nature, but the assessee has to discharge his burden in respect of all of them. The burden was to be discharged by the assessee and all the creditors were not produced, their addresses were not given and cogent reasons were given by the ITO. When the Tribunal was of the view that some of the investments were not genuine it should not have upheld the order of the CIT(A) and the proper course was to set aside the order of the CIT(A) with a direction to either allow such amounts for which the assessee has been able to prove satisfactorily the investment or to give him the opportunity to prove such unexplained investments. The observations of the Tribunal makes it clear that the Tribunal itself was in doubt about the correctness of its own conclusion when it observed that some of the cash credits were not genuine. Thus, the finding recorded by the Tribunal that some of the cash credits were not genuine vitiates the order passed by it. The burden to be discharged by the assessee has not been discharged and the order of the CIT(A) could have been confirmed only if the Tribunal was satisfied that all the investments were satisfactorily explained. The Tribunal itself was not in a position to feel satisfied with regard to the explanation submitted and observed that some of the investments were not genuine. It was not justified on the part of the Tribunal in such a case to uphold the order of the CIT(A). While explaining the various credits and investments, it may be possible that the assessee may be successful in explaining some of them, but that does not by itself mean that the entire investments have to be considered as explained. Even lapse of time or inability of the assessee would not make the unexplained investment an explained one. It is each and individual entry on which the mind has to be applied by the taxing authority when an explanation is offered by the assessee. If no explanation has been offered in respect of a particular entry, the taxing authority will be justified in coming to the conclusion that the said investment is unexplained. It is not the totality of the credit entries which are to be allowed or to be disallowed. This work has to be done on the basis of the explanation offered for different entries and if the explanation of the assessee is acceptable on the basis of the evidence produced before the taxing authority, the Tribunal can come to the conclusion that such investment is fully explained. In these circumstances, the Tribunal was not justified in confirming the order of the CIT(A) and there is contradiction in its decision in holding that all investments cannot be treated as unexplained though some of them are certainly not genuine.*

*The matter is remitted back to the Tribunal to consider each individual investment for which an explanation has been given. If the Tribunal is satisfied with the explanation submitted by the assessee, then the investment to that extent has to be allowed and the entire sum cannot be allowed in general.” (Emphasis supplied)*

2.9 *In our view, merely by making a statement before the Assessing officer that the details of the depositors and the beneficiaries were submitted to the investigation wing, the onus cast on the assessee is not discharged. It is for the assessee to explain each and every entry of deposit and withdrawal in the bank accounts and corroborate it with the details mentioned in the notebooks and other loose papers found during the course of survey. There is nothing on record to suggest that any such explanation and reconciliation of various transactions were submitted either during the course of survey or during the assessment proceedings or even during the appellate proceedings. Once the said exercise has been undertaken and examined, the question of looking at the circumstantial evidences or the theory of probability as to whether the assessee has the necessary infrastructure to undertake marble trading can be looked at. Where the transaction details are available, the same should take precedence over the circumstantial evidence. The Assessing officer thereafter has to apply his discretion and see whether he is comfortable with the explanation of the assessee or not and then take a final view in the matter.*

2.10 *Having said that, we are also intrigued by the inaction on the part of the Revenue and in particular the AO whereby he has failed to consider the details of the depositors and beneficiaries as claimed to be submitted by the assessee during the course of survey. Ideally, the AO should have confronted the assessee with the details found during the survey and sought an explanation regarding various deposits and withdrawals in respect of various bank accounts maintained by the assessee, the details in respect of which has been obtained by the AO by issuing notices calling for the information from the various banks. It seems to us that the reason for inaction on the part of the AO is account of AO not having necessary records of survey maintained by the Investigation Wing. There thus seems to be a clear lack of co-ordination between the Investigation wing and the Assessing Officer handling the assessment. We do not see a justifiable reason especially where the case of the assessee alongwith other similar assesses were centralized before a single assessing authority, why the survey records cannot be shared with the said authority so that the efforts initiated through survey can lead to a logical conclusion by arriving at the appropriate assessment in the hands of right persons. The fact is that huge cash has been found deposited in the bank accounts maintained by the assessee and it is the assessee's plea that money does not belong to her and it belongs to some other beneficiaries. The money therefore belongs to someone who should be brought to tax as per law where the plea of the assessee is accepted.*

2.11 *Now looking at the order of the Id CIT(A), we find that even Id CIT(A) has merely gone through the survey reports and the statements recorded during the course of survey. However, as we have noted above, with a view to arrive at a*

*definitive finding, there is a necessity to corroborate the said statements given by the assessee in terms of acting as facility providers. And for that, information relating to party-wise details of deposits made in all the bank accounts as well as names and addresses of all the beneficiaries/marble traders to whom the cash was withdrawn and handed over by the assessee is required to be examined. It is for the assessee to explain each and every entry of deposit and withdrawal in the bank accounts and corroborate it with the details mentioned in the notebooks and other loose papers found during the course of survey and the necessary linkage/nexus has to be established by the assessee. There is nothing on record to suggest that any such explanation and reconciliation of various transactions were submitted during the appellate proceedings or examined by the Id CIT(A).*

*2.12 In our view, the matter requires a deeper and a coordinated examination by the authorities at the higher level to bring the correct facts on record which should conclusively establish that either the assessee is the owner of the money found deposited in her bank accounts as claimed by the AO or the assessee is merely a facilitator and earns commission income as claimed by the assessee. Accordingly, we set-aside the matter to the file of the Id CIT(A) to examine the matter afresh with the following directions:*

*(1) the assessee shall provide all the requisite details in terms of names and address and other requisite particulars of the depositors as well as of the beneficiaries;*

*(2) the assessee has to explain the nature and source of the transactions in terms of deposits and establish the necessary linkage between the deposits and the subsequent withdrawals to various individual beneficiaries;*

*(3) The Id CIT(A) shall call for the records maintained by the Investigation Wing in respect of the survey proceedings and confront the same to the assessee to provide her a suitable opportunity;*

*(4) The beneficiaries to be confronted with the details submitted by the assessee and call for their confirmation and/or personal appearances and/or coordinate with their respective CITs/Assessing officers; and*

*(5) Needless to say, both the parties shall be provided suitable opportunity and they shall equally cooperate and shall submit necessary explanation/information/documents as available and required by the Id CIT(A).*

*2.13 With the above directions, we set-aside the matter to the file of the Id CIT(A) for a fresh examination and the appeal of the Revenue is allowed for statistical purposes.*

*2.14 In ITA No. 943-945/JP/15 in case of Smt Kusumdevi Vijayvargia, ITA No. 932-935/JP/15 in case of Smt Sudarshna Somani and ITA No. 940-941/JP/15 in case of Shri Naresh Kumar Agarwal, both parties agreed that the facts are pari-materia and similar grounds of appeal have been raised by the Revenue as in ITA*

*No. 942/JP/15 decided supra. In view of the same, our observations and decision in ITA No. 942/JP/15 shall apply mutatis-mutandis to these appeals as well.*

8. Feeling dissatisfied with the above finding of the Income Tax Appellate Tribunal, the assessee preferred an appeal before the Hon'ble Rajasthan High Court. The dictum of the jurisdiction high court in all these group of cases is reproduced here in below :

“1. Since in all these appeals, common question of law and facts are involved, they are decided by this common judgment.

2. This court while admitting the appeals on different dates has framed the following substantial questions of law:-

(i) Whether on the facts and material available on record and in law the Id. ITAT was correct in law in remanding the matter back to the Id. CIT(A) when the same was neither proposed by the Id. AO/Ld. Departmental Representative before the Id. ITAT?

(ii) Whether on the facts and material available on record and in law the Id. ITAT was justified in remanding back the matter to the Id. CIT(A) to verify the same facts which in fact already formed the basis of its decisions?”

3. We have heard the counsel for the parties.

4. Before proceeding with the matter, we suggested both the side that documents are available in the tribunal and it was the duty of the tribunal to consider the same. In that view of the matter, the order of the tribunal remanding back the matter to the authority is required to be quashed and set aside to which the agreed.

5. We have not examined the matter on merits but in view of the fact that factual matrix is to be examined by the tribunal, we remit back the matter to the tribunal with the specific directions that the documents which are already on record and if either side make an application under Rule 29, if so desires, after following the procedure, well hear the matter afresh.

6. We make it clear that the tribunal will not influenced effected by the order of this court and will appreciate the facts independently and after hearing the parties to decide the matters, afresh after following the procedure. It is made clear that the tribunal will consider all the issues which are raised before it.

7. The appeals stand disposed of the above terms.”

9. Now, as per the direction of the Hon'ble High Court these appeals were again fixed for hearing and the same has been heard on its merits. Before us the rival parties supported the orders of the lower authority which are favorable to them.

10. Before the bench proceed to decide the issue afresh based on the material available on record, submissions made, and arguments advanced it is worthwhile to recapitulate the relevant finding of the Id. CIT(A) and the same is reiterated here in below :

“6.I have considered the assessment orders, the arguments and written submissions of the appellant, the remand reports alongwith all the supporting paper submitted by the AO and the most of the survey reports and statements of the appellants of Madan Gunj, Kishan Garh.

6.1 From the perusal of the reasons for reopening of the assessment that has been enclosed with the remand report the undisputed fact at a glance is that the action u/s 148 was taken for assessing the commission income from the transactions facilitated by the appellant *"Money withdrawn by taxpayers was given in cash to Marble traders and which is against the provision of income tax Act. 1961.....*

*.... and looking to this extra income tax can be recovered"*

This is also an admitted fact by the AO and the relevant part of the remand report No. DCIT/CC/AJM/2015-16/ Dated: 09-03-2015 read as under:

*"6. Reasons for reopening assessments were recorded for escapement of income on account of commission on amount of unaccounted sale consideration of beneficiaries received in their bank account."*

6.2 The intentions of assessing the commission income from the transactions facilitated by the appellant like persons is established from the fact that only commission income was taxed in cases of the Shri Prakash Chand Vijayvargiya and Shri Manoj Kumar Agarwal AY 2009-10 and that action of the AO was ratified by Pr. CIT (Central) in rejecting the reopening proposal submitted in March 2015. The relevant part of the remand report No. DCIT/CC/AJM/2015-16/451 Dated: 07-08 2015 read as under:

*3. Further, it was submitted to your goodself in the previous letter No. 2419 dated 09.03.2015 by the then AO that the information with regard to approval to issue notice u/s 148 in the cases of Shri Prakash Chand Vijayvargiya for the A.Y. 2009-10 and Shri Manoj Kumar Agarwal for the A.Y. 2009-10 will be intimated to you. In this connection, it is submitted that the Worthy Principal Commissioner of Income tax (central), Jaipur vide her office letter dated 12.03.2015 has not approve the proposal u/s 148 for reopening the cases of Shri Prakash Chand Vijayvargiya and Shri Manoj Kumar Agarwal,"*

6.3 The appellant relied on the decision of the Hon'ble Apex Court in the case of Sun Engineering reported at 198 ITR 297 (SC) for proposition that only the reasons recorded are to be considered. With all due respect to above decision, if some other concealed income is noticed during the proceeding for the re-assessment, there is no bar to take cognizance of the same. However, the finding to that effect must be clinching.

6.3.1 In the instant case the proceeding starts with taxation of commission income in the transactions facilitated by the appellant for the marble traders of Kishan Garh, the entire reassessment proceeding did not turn out with even iota of evidence for the theory canvassed by the AO that the appellant was in fact marble trader and GP at the prevalent rate on the transactions facilitated by the appellant should be taxed. The basis for coming out with this theory is nothing but an excuse namely, when AO told to produce the actual beneficiaries at the fag end of the reassessment proceeding, the appellant, a person of no means and intrinsically and/or an established entry provider of Madan Gunj, Kishan Garh, has failed to do so. This could not be basis to swing in the position from taxing mere commission income on the transactions facilitated by the appellant to estimating GP on the same transactions facilitated by the appellant by treating the appellant as marble trader, In fact none of the corroborating factors that were inquired into through remand report proceeding support such imaginary decision of the AO. The remand report of the AO unequivocally admits that the appellant neither have establishment nor infrastructure to conduct business of marble trader as argued in para 5.3. This is also an admitted fact by the AO and the relevant part of the remand report No. DCIT/CC/AJM/2015-16/ Dated: 09-03-2015 read as under:

"7. In the first part of assessment order, assesseees are termed as facility provider on the basis of their submission. They claimed that they were

getting commission on the amount of deposits made by the customers of beneficiaries Kishangarh in their bank accounts and handed over amount after making withdrawal to the beneficiaries. In the later part of assessment order they were treated as marble traders as gross profit on turnover in their bank accounts was applied for the reasons that they have not made available details as discussed in the fore going para-6.

Smt. Kusum Devi Vijayvargiya-

- a) Assessee is not registered with sales tax department and not filed Sales tax return.
- b) Assessee is not registered with Central Excise and not filed excise Return.
- c) Assessee has not shown Debtors and creditors.
- d) Assessee has no Purchase and Sales account.
- e) Assessee has no depreciable assets.
- f) No books of accounts maintained.
- g) Assessee has no SSI registration number.
- h) Assessee has no power connection.

6.3.2 The swing in the position from taxing mere commission income on the transactions facilitated by the appellant to estimating GP on the same transactions taken by the AO is also altogether contrary to the background facts found during the survey which has been reported by the AO in para 5 on page 3 & 4 of the assessment orders which has been reported in Para 2.2 above.

6.4 From the undisputed facts found in preceding paragraphs, the inescapable conclusion is that the action of the AO in estimating GP on the same Transactions facilitated by the appellant for marble traders of Kishan Garh can neither approved in toto nor be sustained in any alternative way as it militate against existing evidences and the findings on records. Rather, under the facts and circumstance of facilitators, entry providers, the right approach is to tax only commission income as it was done in cases of the Shri Prakash Chand Vijayvargiya and Shri Manoj Kumar Agarwal AY 2009-10 mentioned in para 6.2 above with a small refinement discussed as follows.

6.5 From the perusal of most of the survey reports and statements recorded of facilitators of Madan Gunj, Kishan Garh, predominant view could be form that these facilitators were given about Rs. 300 per Rs. 1 Lac or we can say alternatively 0.3 Paise per Rs. 100/-. The rate of commission Rs. 300 per Rs. 1 Lac or we can say alternatively 0.3 Paise per Rs. 100/- seems to be reasonable considering their limited role of allowing cash deposit in the bank A/c of facilitator and withdrawal of cash by beneficiaries without any dependence of beneficiary on them in future for follow-up record keeping, verification of documents, backing up for investigation unlike the cases of other entry providers who do charge 0.5

Paise per Rs. 100/- as seen in the cases of in case of Manoj Agarwal reported at 117 TTJ (Del SB) 145 as discussed in para 5.4 above.

6.6 Moreover, from the perusal of most of the survey reports and statements recorded of facilitators of Madan Gunj, Kishan Garh, it is also observed that expenses have been claimed out of this commission income of Rs. 300 per Rs. 1 Lac. However, the range is so wide from Rs. 100 per Rs. 1 Lac of transaction facilitated to Rs. 250 per Rs. 1 Lac of transaction facilitated. And therefore it can not be accepted in toto. Here, taking the cue from the cases of Manoj Agarwal reported at 117 TTJ (Del SB) 145 and Sanjay Kumar Garg reported at 114 TTJ 77 (Del) where in as much as 20% to 30% of the commission income is allowed as expenses, I think it would be close to justice if an expenses of 25% of commission income is allowed. In other words expenses of Rs. 75 per Rs. 1 Lac of transaction facilitated could be allowed.

6.7 The combined finding of above para 6.5 and 6.6 is that a net commission of Rs. 225 per Rs. 1 Lac of transaction facilitated could be taxed on the bank deposits taken by the AO as turnover on page 11/12 of last sub-para of para 6 of the assessment order as under:

AY	the bank deposits taken by AO as turnover on page 10 of last sub-para of para 6
2008-2009	Rs. 1,97,17,470/-
2009-2010	Rs. 11,37,60,458/-
2010-2011	Rs. 17,89,78,405/-
2011-2012	Rs. 18,28,77,979/-

“With the above finding, the GP addition made by the AO on transaction facilitated by appellant is modified for upholding only net commission income as concluded in para 6.7. Thus, these grounds are treated as partly allowed.

7. The ground no. 4 of these appeals is general nature and need not be adjudicated. According the same is treated as dismissed.

8. As a result, the appeal is partly allowed.”

11. The revenue in support of the various grounds so raised the Id. DR relied upon the following written submissions:

“Respected sirs,

A summary of the appeals/filed by Revenue in the case of ITA No. 907/JP/2015, 908/JP/2015 D Vs. Sh. Prakash Chand Vijayvargiya, ITA No. 909/JP/2015 to 912/JP, Sh. Manish Kumar Singhal, 927/JP/2015 to 928/JP/2015 D Vs Sh. Abhishek Kumawat,

933/JP/2015 to 935/JP/2015 D Vs Sh. Sudarshan Somani, 944/JP/2015 to 945/JP/2015 D Vs Smt. Kusum Devi Vijayvargiya, 949/JP/2015 to 951/JP/2015 D Vs Sh. Vasudev Somani, 954/JP/2015 to 955/JP/2015 D Vs Sh. Govind Narain, 507/JP/2015 D Vs Sh. Raju for A.Y. 2008-09 to A.Y. 2011-12. In all these cases the grounds of appeal are same as well as the facts of the case.

Background: Earlier Department aggrieved by the order of Ld. CIT(A) preferred appeal before the Hon'ble Bench. The Hon'ble Bench vide its separate orders dated 20/10/2016 set aside the matter in all the cases to the file of CIT(A) to examine the matter afresh(copy enclosed) directed the Hon'ble Bench to relook into the matter. Further, aggrieved by this order of Hon'ble Tribunal, the assessee filed an appeal before the jurisdictional High Court, The Hon'ble High Court appeal no. 58/2017 (copy enclosed ) directed the Hon'ble bench to relook into the matter.

BRIEF FACTS OF THE CASE: A survey operation u/s 133A was carried out by Investigation wing on the basis of information by FIU-IND suspicious transaction the business cum residential premises of the assessee and statements were also recorded u/s 131. During the survey operation, it was found that assessee maintains bank accounts in different branches of Kishangarh and desposited money below the threshold limit.

As the facts and grounds are same in all the cases, the case of Smt. Kusum Devi Vijayvargiya is taken up for argument.

Facts:- The AO has made addition of Rs.1,47,88,860/- treating that the assessee is engaged in the business of marble trading and the deposits in bank accounts on different dates represent the sale proceeds.

The assessee has deposited a sum of Rs. 11,37,60,458/- in several bank accounts. It is further noticed that the deposits as well as withdrawals appearing in bank accounts have not been considered in return of income by the assessee. During the assessment proceedings the assessee vide letter dated 03.03.2014 was asked as to why gross profit on undisclosed turnover to the tune of Rs.11,37,60,458/- should not be added to the total income. The assessee has not furnished any explanation or clarification. It is to mention that she gets only commission of Rs. 100/- to Rs. 300/- pm Rs. 1 lac of cash received in the bank account maintained for the purpose of bringing unaccounted receipt against sales made by the beneficiaries and deposited by the customers located in different part of the country. The contention of the assessee that she received commission of Rs. 100 tp Rs. 300 pm Rs. 1 lac can only be considered if complete details of cash deposits and withdrawals alongwith exact names and addresses of depositors and beneficiaries to whom payments were submitted to the AO. But, the assessee has failed and expressed her inability to provide names and addresses of all the beneficiaries and to produce them for identification and confirmation. Therefore, it is confirmed that the assessee is engaged in the business of Marble Trading and the deposits in bank accounts on different dates represent the sale proceeds and hence, GP @ of 13% on turnover of Rs.11,37,60.458/- was applied and addition of Rs.1,47,88,860/- was made by the AO.

The Ld. CIT(A)-2, Udaipur treated the assessee as facility provider and not marble trader, stating that AO told to produce the actual beneficiaries at the fag end of the reassessment

proceedings, the assessee, a person of no means and intrinsically and an established entry provider of Madan Gunj, Kishan Garh has failed to do so. This could not be basis to swing in the position from taxing mere commission income on the transactions facilitated by the assessee by treating the assessee as marble trader. In fact non of the corroborating factors that were inquired into, through remand remand report proceeding, support such imaginary decision of the AO. The remand report of the AO unequivocally admits that the assessee neither have establishment nor infrastructure to conduct business of marble trader. Therefore, the Ld. CIT(A)-2, Udaipur held that the GP addition made by the AO on turnover of Rs. 11,37,60,458/- is modified for upholding only net commission income of Rs.225/- per Rs.1 lac on transaction facilitated by the assessee on bank deposits.

The decision of the CIT(A) is not acceptable because assessee has done unaccounted and undisclosed business transactions which was identified during the survey operation carried out by Investigation Wing. During the assessment proceedings the assessee has submitted neither bank account statements nor names and addresses of the beneficiaries with details of deposits party wise and assessment year wise to the AO. The assessee has also failed to produce the beneficiaries for confirmation the genuineness of transactions.

Since the assessee could not produce the beneficiaries it is still a disputed matter that who is the owner of this money. The Ld. CIT(A) has not given any specific findings on this issue. Hence, she was not justified in deleting the addition.”

11.1 The ld. DR also relied upon the following case laws in support of the various contentions raised in the written submissions:

S. No.	Description of the case	Page No.
1	[1963] 49 ITR 112 (SC) Sreelekhaj3anerjee Vs CIT	1-10
2	[2012] 20 <a href="http://taxmann.com">taxmann.com</a> 462 (Punj. & Har.) Zaveri Diamonds v. CIT, Ludhiana	11-20
3	[2012] 25 <a href="http://taxmann.com">taxmann.com</a> 552 (SC) Zaveri Diamonds Vs CIT	21-22
4	[2016] 69 <a href="http://taxmann.com">taxmann.com</a> 219 (SC) Sudhir Kumar Sharma (HUF) Vs CIT	23-24
5	[2020] 118 <a href="http://taxmann.com">taxmann.com</a> 166 (Delhi) Ravinder Kumar Vs ITO	25-30
6	[1963] 50 ITR 1 (SC) Kale Khan Mohammad Hanifv.Comnmissioner of Income-tax	31-37

11.2 The ld. DR vehemently relying on the finding of the ld. AO submitted that had the assessee furnished the names and address of depositors as well as beneficiaries to whom payments were made, the assessee's claim could be accepted that she was just a broker earning commission but in the

absence of these important evidence the story advanced by the assessee is not acceptable and the same is advanced just to avoid the offering of the profit earned on the unaccounted transaction of purchase and sale of marble done by the assessee. The Id. DR further relying on the order of the ITAT in the earlier round of litigation submitted that the bench has directed the assessee to submit the following documents for examination :

*2.12 In our view, the matter requires a deeper and a coordinated examination by the authorities at the higher level to bring the correct facts on record which should conclusively establish that either the assessee is the owner of the money found deposited in her bank accounts as claimed by the AO or the assessee is merely a facilitator and earns commission income as claimed by the assessee. Accordingly, we set-aside the matter to the file of the Id CIT(A) to examine the matter afresh with the following directions:*

*(1) the assessee shall provide all the requisite details in terms of names and address and other requisite particulars of the depositors as well as of the beneficiaries;*

*(2) the assessee has to explain the nature and source of the transactions in terms of deposits and establish the necessary linkage between the deposits and the subsequent withdrawals to various individual beneficiaries;*

*(3) The Id CIT(A) shall call for the records maintained by the Investigation Wing in respect of the survey proceedings and confront the same to the assessee to provide her a suitable opportunity;*

*(4) The beneficiaries to be confronted with the details submitted by the assessee and call for their confirmation and/or personal appearances and/or coordinate with their respective CITs/Assessing officers; and*

*(5) Needless to say, both the parties shall be provided suitable opportunity and they shall equally cooperate and shall submit necessary explanation/information/documents as available and required by the Id CIT(A).*

The assessee has already submitted in the submission that as per the direction of the jurisdictional high court the assessee is not going to supply

any details. Even the bank statement is not placed on record. Thus, in the absence of the evidences the finding of the AO be confirmed and that of the Id. CIT(A) be reversed as the same is without any supporting evidence on record.

12. Per contra, the Id. AR of the assessee, relied upon the order of the Id. CIT(A) and also placed his written submission which is extracted here in below;

“Deptt. GOA 1-3: CIT(A) was Right in Assessing of Commission Income Instead of Applying of GP Rate on the Bank Deposit.

Brief Facts: In this case, the survey was carried out at the residential premises of the several persons including that of assessee on dt.6-1-2011 and in the course of survey statements u/s 133A were also recorded by the survey team including of Shri Prakash Chand Vijayvargiya, husband of the assessee, who was managing the complete affairs of the assessee. The assessee was found to be operating various bank accounts from its residential premises and unaccounted bank transactions were alleged to have taken place for several years. Later on the cases of the assessee were centralized on dt.10-6-2011 from ITO, Kishangarh to ACIT, Central Circle, Ajmer. The case for the year under consideration was reopened by issuing notice u/s 147 on dt.18-3-2013. In response to the notice, the assessee stated on dt.5-4-2013 that the original return filed on dt.29-10-2012 may be treated as the return filed in response to the reassessment notice. For the year under consideration an amount of Rs.178978405/- was determined by the Id. AO as unaccounted bank transactions. During the course of reassessment proceedings, the assessee has repeatedly stated that it has only earned commission income out of the banking transactions. Initially the Id. AO appears to have agreed with the contentions of the assessee that money was deposited and withdrawn on account of beneficiaries as in the entire assessment proceedings, it insisted to disclose the names and addresses of the beneficiary as would be seen from the assessment order. Specifically please refer Page 3 of assessment order wherein mention of two questionnaire dt.17-1-2014 is appearing where the Id. AO enquired about the names and addresses of beneficiaries. But Id. AO changed its stand at the fag end of limitation of framing assessment and it issued show cause notice on dt.3-3-2014 for taxing the amount while applying g.p. rate on the banking

transactions. The assessee maintained its stand that it only earned commission income but the Id. AO rejected the contentions of the assessee on the ground that the assessee has failed to submit the complete names and addresses of the beneficiaries. Accordingly, the assessment was framed while estimating g.p. rate of 16% on the total turnover of Rs.178978405/- which came to Rs.28636545/-. The Id. CIT(A) while considering the facts and circumstances in great details allowed the appeal of the assessee while directing to assess only commission income @Rs.2.25/- per lacs (@Rs.300 per lac less expenses @25%). Now the department is in appeal.

Our Submission:

1.1.1 Statement of the Assessee Clearly Prove that it has Earned only Commission Income: As already stated that during the course of survey statement or the assessee was taken on dt.6-1-2011 of Shri Prakash Chand Vijayvargiya, husband of the assessee, who was managing the complete affairs of the assessee, the copy of which is placed at PB 21-34. In response to question no.3, it was clearly stated that it was earning only commission income but also in response to question no.6, explained the modus-operendi of the commission receipts. It even stated the names of parties from whom the commission have been received. The statement along with other corroborative evidences is a vital proof that no trading in marble took place.

1.1.2 No Lota of Evidence of Trading in Marble during the course of Survey: It is pertinent to note that during the entire survey proceedings no paper/ documents/ note book etc. were found with regard to any sort of trading in marble. Further in the statement, there is not a reference of any single loose slip indicating that the assessee was engaged in any sort of trading in marbles.

From the statement, it would be seen that the assessee has duly explained its stand. The explanation and entries clearly indicated that the assessee was only acting as facility provider and it only received commission from the parties. Not a single rupee was deposited or withdrawn from the bank account on its own account and rather it belongs to the parties who paid commission to the assessee. It is also notable that though various documents were recovered from the assessee but not in a single paper or slip any sort of quantitative or other details were found so as to suggest that the assessee was involved in trading in marble.

1.1.3 Reasons Recorded Itself do Not Suggest any Trading in Marble by the Assessee: Reasons recorded by the Id. AO is appearing at page 10 para 5.2 of CIT(A) order and from the same it will be gathered that the department could not find any evidence or material with regard to trading in marble by the assessee and therefore, very vague reasons were taken by the Id. AO for reopening of assessments. The reasons essentially states that the assessee was in the business of depositing and withdrawing of money from bank account and in the entire reasons there is no mention of any sort of trading in marble by the assessee. It is pertinent to note that the Id. AO itself has stated in the remand

proceedings that initially the reasons were recorded for escapement of commission income and the relevant extract of the same is appearing below:

*"6. Reasons for reopening assessments were recorded for escapement of income on account of commission on amount of unaccounted sale consideration of beneficiaries received in the bank accounts" (PB 5 point no.6 — Remand Report)*

1.1.4 Explanation of the Assessee Not Found False — The AO Could Not Refer a Single Evidence of Trading in Marble: It is further notable that in the entire assessment order there is even no whisper about the statement being incorrect or false and rather the statement is supported with corroborative and circumstantial evidences. Thus the statement given by the assessee has to be accepted as there is no material with the department to disprove the statement of the assessee. There is not a single slip or noting with the department so as to suggest that the assessee was doing any trading in marble.

1.1.5 No Incriminating Material Suggesting Trading in Marble: We may also submit that had the assessee involved in trading, at least some record like quantitative details, weighing details, transportation details, quality details of marble traded, expenses which might have been incurred with regard to trading like salary, staff welfare, conveyance etc. would have found. But there is absolutely nothing on record and the department, neither in the course of survey proceedings nor in entire assessment proceedings which ran for more than two years, could find any evidence supporting its allegation obviously because no trading was done by the assessee.

1.1.6 No Infrastructure for Trading in Marble: It is submitted that there was no business premises or godown with the assessee so has to carry out any sort of marble trading. Even in the remand proceedings the Id. AO itself has stated (PB 3-12) the following.

*" Manish Kumar Singhal*

- a) Assessee is not registered with sale tax department and not filed sale tax return.*
- b) Assessee is not registered with central excise and not filed excise return.*
- c) Assessee has shown debtors and no creditors.*
- d) Assessee has prepared profit and loss account and shown purchase and sales.*
- e) Assessee has no depreciable assets.*
- f) No books of accounts maintained.*
- g) Assessee has no SSI registration number.*

*h) Assessee has no power connection"*

*(See Remand Proceeding Letter of AO at PB 10)*

Now there are really some substantial facts and rather strong corroborative evidences which suggest that trading in marble could not have been done by the assessee.

1.1.7 Reply of the Id. AO Without any Basis: In point no. 8 which is appearing at PB 12, the Id. AO suggested that if someone has intention to make unaccounted transactions then it need not to have the above. We may submit that this observation of the Id. AO is grossly incorrect as the department intended to tax the turnover not in lacs but in several crores. For trading in marble, at least one would need a place where the buyer could choose the marble of their choice, at least it would need bare minimum infrastructure like table, chair etc., at least it would need some account books to enter the quality, quantity or weigh of marble etc., at least it would need some employees, at least it would need some power connection etc. These all were missing in the present case so by no stretch of imagination it could be assumed that the assessee was in the business of trading in marble and therefore, the Id. CIT(A) was right in assessing only the commission income.

1.2.1 The Id AO itself Have Agreed of Prevalent Practices of Facility Provider: it is important to note that the Id AO itself has mentioned at more than one place in the assessment order of such activities of providing bank account facilities to deposit and withdraw the cash by various persons like assessee. At page no. 4 para 2 of the assessment order the Id AO itself has conceded the fact of earning commission while acting as facility provider. Even in para 3 of the same page the Id. AO accepted that the assessee was prima facie was engaged in providing facility to use his bank account for cash transactions. We are reproducing herewith the relevant extract of the same:

*" It is relevant to mention here that the prevailing market practice in the business of marble trading is that there is large scale under invoicing and under billing of sales. Gereally, for obtaining sale consideration of actual transaction from the buyers located outside the home town or through out india, the traders obtain part amount through cheques and for balance amount, they have been using there confidents (facility providers). The confidents are having multiple bank accounts either in their name or in the names of their family members or concerns/firms. Their bank account numbers are intimated to the buyers who deposit the balance amount which is actually on money, in the bank account of the confidents. The buyers deposit amount below Rs.50000/- to avoid mentioning PAN on pay-in-slips. After receipt of amount in bank account, the confidents i.e. Facility providers withdraw the amount of on-money aned handover to the beneficiaries i.e.sellers.the facility providers claim that they receive Rs.200/- to*

*Rs.300/- per Rs.100000/- received in their bank account by way of commission. (page 4 pr.2 of AO)*

*As has been admitted by the assessee during the course of survey U/S 133A, the assessee is also prima facie found engage in providing facility of bringing cash payment of the marble traders by allowing them to use his bank accounts. Also this is in conformity with the prevailing market practice in this business in this region. (page 5 pr.2 of AO)*

Thus the observation of the AO makes it abundantly clear that the alleged bank transactions were related to beneficiaries and the assessee was not involved in trading of marbles.

1.2.2 Change of Stand by the AO at the Fag End of Assessment Without Any Change in Facts & Circumstances: As submitted above that the Id. AO agreed with the contentions of the assessee and it proceeded for the assessment on that basis itself. However at the fag end of limitation it changed the mind and issued show cause notice for applying g.p. rate on the turnover of transactions at the very fag end of limitation i.e. on dt.3-3-2014 (see AO page 8 point no.6). This change of mind was without any basis or change in facts and circumstances. The only reason given by the Id. AO was that the assessee could not provide the names and addresses of all the beneficiaries with party wise amount and also failed to produce them (this is explained in later paras). In fact, similar situation was there in the entire assessment proceedings and therefore, the change of stand was without any logical basis or incremental evidence on record. Therefore, the Id. AO was totally incorrect and unjustified in its approach and as such the conclusion reached by the Id. AO was without any valid basis.

1.3.1 No Ways and Means with the Assessee to Produce the Beneficiaries: The Id AO denied the submission of the assessee only on the ground that it could not produce the beneficiaries or give confirmation from them. In this regard we may submit that what the Id AO was expecting from the assessee was beyond the possibility of fulfilment. The modus operendi itself suggest that the assessee has no control over the beneficiary and the assessee merely was acting as facilitator. After handing over the amount almost same day of deposit there remained no balance with the assessee and therefore it could not have any control on such beneficiaries. Even further there was no other sort of business relationship which could have made any confirmation from such parties possible. Therefore, it is very much unreasonable on the part of the Id AO to have expected from the assessee which was not possible. Still the assessee provided the names and addresses of the beneficiaries as would appearing in later part of the submission.

1.3.2 No Books of Accounts Maintained — Complete Party wise Details Not Possible: It is an admitted fact that the assessee did not maintain any books of accounts and even the Id. AO initiated penalty proceedings u/s 271A for non-maintenance of books of accounts. Thus where the Id. AO itself has agreed that

no books of accounts were maintained then expecting the assessee to produce the complete party wise details was like expecting something not possible.

1.3.3 Assessee Fully Co-operated in Assessment Proceedings: We may submit that the assessee has submitted the complete details to the extent it were available with it and also attended the various hearings and this fact is duly appearing in the assessment order. Thus it was not a case where the assessee was trying from escaping the assessment process or taxing of amount in proper hands though it may have its own limitation as has been discussed elsewhere in the submission.

1.4 Department Initiated Action Against the Beneficiaries: It is also notable that the department has reopened cases of various beneficiaries on the basis of information from the assessee and other persons on whom survey proceedings were undertaken. We are enclosing herewith the copies of communication made by ITO Ward 1 & 2 ITO Ward 2 of Kishangarh to the Id. DCIT, Central Circle, Ajmer in which the summary of such action is given (PB 13-20) . It would be seen from the communication so enclosed with the submission that in various cases even the taxes have been recovered from various beneficiaries. Thus this very well proves the stand of the assessee that it was only earning commission and sale and purchases were related to the beneficiaries

1.5 Case Laws: In Sanjay Kumar Garg vs. ACIT 144 TTJ 77, 134 ITD 82 (Del) it was held that only the commission income could be charged on the turnover made in the bank account and the entire bank deposit could not be considered for making of additions. The fact in the present case is also similar to a great extent.

1.6.1 Commission Rightly Assessed @Rs.225/- per Lac by the Id. CIT(A): In the instant case, survey was carried out at various unrelated parties at the same time. It would be clear from the statement of the assessee that the assessee was earning commission to the tune of Rs.150/- to Rs.300/- per lac. It is pertinent to note that similar statements have been given by several other parties in the course of survey. The Id. CIT(A) has taken the commission at the higher end of such range i.e. @Rs.300/-. Thus the same was taken on the basis of prevalent practices as well as the statement of the assessee.

1.6.2 Expenses @25% out of Commission Rightly Allowed by the Id. CIT(A): It is also submitted that the assessee has also to incur certain expenses like conveyance, telephone, stationary, light, bank charges etc. for follow up, verification, documentation of deposit and withdrawal etc. The Id. CIT(A) has rightly considered all this and allowed @25% of the commission received. This fact of incurring of expenses has been approved in other judicial pronouncements also. Please refer Manoj Aggarwal vs. DCIT 117 TTJ 145, 113 ITD 377 (Del) (SB) & Sanjay Kumar Garg vs. ACIT 144 TTJ 77, 134 ITD 82 (Del) wherein similar allowance for expenses out of commission on accommodation entries have been upheld by the Hon'ble ITAT.

Considering the totality of facts and circumstances of the case, the Id. CIT(A) was fully justified in directing to assess only the commission income instead of applying of g.p. rate and we humbly pray to sustain the order of Id. CIT(A) while rejecting the appeal of the department.”

12.1 In this appeal, the Id. AR of the assessee also submitted a detailed paper book and the content of the documents / decisions / evidence relied upon are as under :

**CONSOLIDATED PAPER BOOK INDEX**

<b>Sr.</b>	<b>Particulars</b>	<b>Pages</b>
1	Copy of combined order of Hon'ble High Court in Smt. Kusumdevi Vijayvargiya & Others	1-3
2	Copy of order of Hon'ble High Court framing the substantial questions of law in Smt. Kusumdevi Vijayvargiya	4
3	Copy of paper book index and brief synopsis submitted before the Hon'ble High Court	5-8
4	Copy of facts and submission and question of law submitted before Hon'ble High Court	9-36
5	Copy of status of appeals before the Hon'ble bench as submitted by the department	37-39
6	Copy of survey report as submitted by the department	39A-39G
7	Copy of order of Hon'ble ITAT in Smt. Kusumdevi Vijayvargiya & Others	40-68
8	Report submitted u/s 250(4) by the Id. DCIT, Central Circle, Ajmer before the Id. CIT(A) on dt. 07-08-2015	69-70
9	Remand report of the Id. DCIT, Central Circle, Ajmer submitted before the Id. CIT(A) on dt. 09-03-2015	71-80
10	Copy of communication from ITO Ward-2 & Ward-1, Kishangarh to the Id. DCIT which was submitted before the Id. CIT(A)	81-87

1. Certified that papers at sr. no. 1,2,3,4 are the copies relating to high court proceedings which are relevant for the disposal of the matter and were not before the Id. AO & CIT(A)
2. Certified that the papers at sr. no.5&6 are the papers as submitted by the department during the course of proceedings in the present matter.
3. Certified that the papers at sr.no.7 is the copy of order of Hon'ble ITAT in the earlier proceedings before the Hon'ble Bench

4. Certified that the papers at sr.no.8-10 were before both the lower authorities.

**CONSOLIDATED PAPER BOOK INDEX**

Sr.	Particulars	Pages
1	Affidavit as per direction of Hon'ble ITAT	39-41

The above affidavit is being submitted as per the direction given by the Hon'ble ITAT

**CONSOLIDATED PAPER BOOK INDEX**

Sr.	Particulars	Pages
1	Report submitted u/s 250(4) by the Id. DCIT, Central Circle, Ajmer before the Id. CIT(A) on dt. 07-08-2015	1-2
2	Remand report of the Id. DCIT, Central Circle, Ajmer submitted before the Id. CIT(A) on dt. 09-03-2015	3-12
3	Copy of communication from ITO Ward-2 & Ward-1, Kishangarh to the Id. DCIT which was submitted before the Id. CIT(A)	13-20
4	Copy of statement of the husband of the assessee taken during the course of survey	21-34
5	Copy of reason recorded	35
6	Copy of assessment order for AY 2009-10	36-38

1. Certified that all the above papers were before both the lower authorities.
2. Papers placed at sr. no. 1-6 were submitted by the Id. AO before the Id. CIT(A) in the course of remand proceedings.

12.2 The Id. AR of the assessee also filed submissions as per the direction of the bench and has clarified the following points which we consider it fit to reiterate here in below:

Reg.: Kishangarh matters as per the list enclosed

Sub.: 1. Submissions as per the direction of Hon'ble Bench

2. Submission on the survey report submitted by the depts. on the direction of Hon'ble Bench through letter dt.10-11-21 (received on mail dt.12-11-21)

Hon'ble Sirs,

During the course of last hearing in the above matters, the Hon'ble Bench has directed the assessee to state on the following:

- a. List of documents filed before the Hon'ble Bench during the course of first proceedings before the Hon'ble Bench
- b. List of documents filed during the course of assessment and appellate proceedings
- c. List of documents which the assessee willing to file as an additional evidence under Rule 29 of ITAT Rules

After discussion with the assessee, we wish to submit as follows:

- a. The assessee has filed the same documents before the Hon'ble ITAT in the previous appellate proceedings before the Hon'ble ITAT. No additional documents has been filed by the assessee in the present proceedings
- b. No other documents or information were filed in the assessment proceedings other than those which are already part of the assessment and appellate order
- c. The assessee do not wish to file any additional evidence before the Hon'ble Bench under Rule 29 of the ITAT Rules

Submission on survey report submitted by the department as per direction of the Hon'ble Bench through letter dt. 10-11-2021

The department has forwarded the submissions which have been made before the Hon'ble Bench with letter dt.10-11-2021 which has been received by us on dt.12-11-2021 through mail.

This contains the survey report no.1313 dt.10-12/1-2011 which has been submitted as per the direction of this Hon'ble Bench. Further a submission has also made that the department do not wish to submit any additional evidence as per Rule 29 of ITAT Rules.

The assessee would be relying on the survey report submitted by the department as above.

The clear and unequivocal facts narrated in the survey report as well as the fact that the department do not wish to submit any further evidence as per Rule 29 of ITAT Rules, fully endorses the findings given by the worthy CIT(A) which has already taken into consideration complete facts which are already on record.

12.3 Since, before the jurisdictional high court, assessee, and revenue both agreed to provide the details so as to decide the issue. So, bench directed the parties to advance the submission or further evidence as per rule 29 of ITAT Rules to decide the appeal read with the direction given by the bench in the earlier order which has been quashed by the High Court. In consequence revenue has relied upon the finding of the assessing officer and has submitted that the assessment has been framed in accordance with the records available and the revenue do not intend to file any further evidence. Whereas the assessee also filed an affidavit. The content of the affidavit reads as follows:

**Affidavit**

Before the Hon'ble Income Tax Appellate Tribunal, Jaipur Bench, Jaipur

1. Kusum Devi Vijayvargiya, daughter of Shri Goverdhanlal Vijayvergia resident of Near Ram Mandir, Chhabra Colony, Madanganj, Kishangarh, Ajmer 305801 aged 57 years do hereby solemnly affirm as under:

1. That my appeal before the Hon'ble ITAT is pending with

i. Appeal No. 944/JP/2015 for AY 2010-11

ii. Appeal No. 945/JP/2015 for AY 2011-12

2. That Hon'ble ITAT has required to furnish an affidavit in terms of order of Hon'ble High Court to allowed submission of any further material by appellant or respondent now I submit as under:

3. That I have submitted a paper book before the Hon'ble bench on dt.31-08-2021

4. That the department is in possession of the impounded papers/documents found during the course of survey

5. That Id. CIT(A) has adjudicated the matter after taking into consideration the remand report of the Id. AO as well as whatever material on record provided by both the parties
6. That I am not submitting any further documents under Rule 29 of Income Tax Appellate Tribunal Rules, 1963
7. That I have understood the contents of above affidavit in Hindi also and submitting the same with full understanding.”

12.4 Thus, relying on the submission and affidavit the Id. AR of the assessee submitted that the case of the assessee was reopened by the revenue to assessee the commission income on the turnover of amount in the bank account which was used to facilitate for the marble traders of Kishangarh. He further submitted that Id. AO cannot change the basis of reopening the assessment. To support this view the Id. AR of the assessee relied upon the decision of apex court in the case of Sun Engineering reported at 198 ITR 297 [ SC ]. The Id. AR of the assessee also submitted that in the similar facts in the group case of Shri Prakash Chand Vijayvargiya and Shri Manoj Kumar Agar for A. Y. 2009-10 only commission income is taxed. The assessee has no establishment, no power, no regular books for the alleged business, no separate registration is obtained. Thus the assessee is not marble trader but in fact a facility provider. As the assessment was reopened to tax commission income but finally the assessment is done considering the business of purchase and

sales and accordingly, gross profit was estimated. Considering this aspect of the matter the Id. CIT(A) has called for the report of the Id. AO wherein Id. AO reported that the assessee neither have any establishment nor infrastructure to conduct business of marble trader. He further confirm that the assessee has no business premises / factory / industrialshed to deal in marble business he further categorically confirmed that the assessee is not having any registration number for small scale industrial unit, sales tax registration, excise department registration and the assessee is not having any power connection for carrying out marble business. The assessee do not own any depreciable asset, no books of accounts are maintained, no details of sale and purchase or details of sundry debtor or credit found at the time of survey. Thus, all these confirmations suggest that assessee has not done any business of marble and therefore, the estimation of profit by the Id. AO was not in accordance with the law and therefore, he supported the order of the Id. CIT(A) who has in consonance with the income estimated in other case and in accordance with the reasons recorded estimated income is required to be sustained and the appeal of the revenue has no merits.

13. We have heard the rival contentions and perused the material placed on record. In these bunch of appeal the Hon'ble Jurisdictional High Court has quashed the order of the ITAT in the first round and directed to decide the issue based on the material available on record. Therefore, both the parties were given sufficient time and opportunity to advanced the evidences or argument in support of their claim. But both the parties though agreed before the High Court to provide the details has not placed on record any further information / evidences and therefore, we do not have any option but to decide the issue based on the material available on record. The bench in the first found given the following directions :

*2.12 In our view, the matter requires a deeper and a coordinated examination by the authorities at the higher level to bring the correct facts on record which should conclusively establish that either the assessee is the owner of the money found deposited in her bank accounts as claimed by the AO or the assessee is merely a facilitator and earns commission income as claimed by the assessee. Accordingly, we set-aside the matter to the file of the Id CIT(A) to examine the matter afresh with the following directions:*

*(1) the assessee shall provide all the requisite details in terms of names and address and other requisite particulars of the depositors as well as of the beneficiaries;*

*(2) the assessee has to explain the nature and source of the transactions in terms of deposits and establish the necessary linkage between the deposits and the subsequent withdrawals to various individual beneficiaries;*

*(3) The Id CIT(A) shall call for the records maintained by the Investigation Wing in respect of the survey proceedings and confront the same to the assessee to provide her a suitable opportunity;*

*(4) The beneficiaries to be confronted with the details submitted by the assessee and call for their confirmation and/or personal appearances and/or coordinate with their respective CITs/Assessing officers; and*

*(5) Needless to say, both the parties shall be provided suitable opportunity and they shall equally cooperate and shall submit necessary explanation/information/documents as available and required by the Id CIT(A).*

13.1 Thus, the bench has set aside the order of the Id. CIT(A) to establish that either the assessee is the owner of the money found deposited in her bank accounts as claimed by the AO or the assessee is merely a facilitator and earns commission income as claimed by the assessee. To decide the said issue based on the material already on record the bench has considered it fit to decide the issue which was sent back for a decision of the Id. AO has not been decided on the basis of the material placed on record and the arguments advanced before us. As argued by the revenue in the earlier round and based on that bench noted that the matter requires a deeper and a coordinated examination by the authorities at the higher level to bring the correct facts on record which should conclusively establish that either the assessee is the owner of the money found deposited in her bank accounts as claimed or the assessee is merely a facilitator and earns commission income. The revenue has not placed on record any subsequent factual report on the action taken after the survey carried out at the premises of the assessee. Therefore, the bench has not reason to look at the arguments of the revenue that the matter requires

further examination. Even the Id. AR of the assessee that based on the survey the revenue has already taken against many of the marble traders and they have surrendered the profit this important information is not shared by the revenue. Thus, this plea of the revenue in absence of the proof has no merits. As the assessment was reopened to tax the commission income as per the reasons record the same is thus now dealt with by the bench based on the further questions / enquiry posed by the bench.

13.2 The earlier question posed and our findings based on the records available before us are as under:

Issue posed.

- (1) “the assessee shall provide all the requisite details in terms of names and address and other requisite particulars of the depositors as well as of the beneficiaries;”

At page 5 of the assessment order in compliance to the notice dated 02.09.2013 the Id. AO recorded that

“In compliance she has stated that complete details of marble traders with address were furnished in the Investigation Wing.”

It is further noticed that the deposits as well as withdrawals appearing in these bank accounts have not been accounted for in the books of account and not been considered in return of income. In the situation,

in order to determine the income attributable to these bank transactions, the assessee vide questionnaire dated 02.09.2013 was asked the following specific questions:-

- i) Party-wise details of deposits made in all the bank accounts with name and address of the beneficiaries.
- ii) Assessment year wise total amount of deposit in each bank account.

In compliance she has stated that complete details of marble traders with addresses were furnished in Investigation Wing. Further, the assessee has submitted neither bank statements nor names and addresses of the beneficiaries with details of deposits party wise and assessment year wise to the undersigned. Therefore, bank statements were called from the bank authorities by issue of notices u/s 133(6) of the I.T. Act and copies of the same were also made available to the assessee.

Thus, bench noted that the revenue could not counter the above submission of the assessee in this proceeding and therefore, we are of the view that what the Id. AR arguing before us that based on the information given by the assessee revenue has already taken action

against the marble traders and therefore, we found force in the arguments that the assessee is merely facility provider and she should be charged for the commission income.

- 2) “explain the nature and source of the transactions in terms of deposits and establish the necessary linkage between the deposits and the subsequent withdrawals to various individual beneficiaries”

As discussed here in above in response to issue no 1 that the assessee has furnished the required information to the investigation wing and this aspect of the fact has not been doubted by the revenue by way of filling any evidence. Thus, we are left with no option but to accept the facts already on record. Thus, we find force in the arguments of the Id. AR that based on the information given by the assessee revenue has already taken action against the marble traders and therefore, we found force in the arguments that the assessee is merely facility provider and she should be charged for the commission income and thus the assessee has provided linkage of sale of marble traders and based on these information some of the

marble traders have surrendered the profit as argued by the Id. AR of the assessee. The revenue could not controvert the averments of the Id. AR of the assessee. Therefore, in the absence of the controverted evidence placed on record by the revenue we accept the averment of the assessee which is also found recorded in the order of the assessment.

Issue posed.

- 3) The Id CIT(A) shall call for the records maintained by the Investigation Wing in respect of the survey proceedings and confront the same to the assessee to provide her a suitable opportunity; &
- 4) The beneficiaries to be confronted with the details submitted by the assessee and call for their confirmation and/or personal appearances and/or coordinate with their respective CITs/Assessing officers;

Even though there was direction of the bench the revenue has not placed on record the report or the records of the investigation wing. Therefore, we believe that the assessee has already provided the information which she possessed and revenue (Investigation wing) was satisfied with the information submitted by the assessee.

Based on the above facts discussed the question framed by the ITAT and the evidence adduced by the both the parties our finding were recorded here in above.

14. Now, since these questions are decided in favour of the assessee. Now we deal with the finding of the Id. CIT(A) to decide whether the grounds so raised by the revenue has any merits or not. All the grounds raised by the revenue are related to the fact whether the assessee is marble trader or not. If she is a marble trader then what is the estimation of the profit done by the Id. AO is correct or not. If the assessee is not a marble trader then the commission income estimated by the Id. CIT(A) is proper or not. In the light of these aspect of the matter we have persuaded the material placed on records and the finding of the Id. CIT(A).

14.1 The finding of the Id. CIT(A) starts with the statement recorded by the survey team where in the assessee has categorically confirmed that her bank accounts were used by marble traders to bring cash against unrecorded sales in their books of accounts. The cash deposited by other parties based in the different parts of the country was withdrawn and

handed over to the marble traders and for this activity they used to pay him commission. The revenue has not placed any contrary material to the finding so recorded which is based on the statement of the assessee. The assessee has argued that she has not maintained any books of accounts and the consequential penalty for non maintenance of books of account has been confirmed to the assessee as emerges from the records. Thus, there is no books of account maintained by the assessee and the finding of the Id. CIT(A) is not controverted. The details of the marble traders were given to the survey team [ investigation wing of the revenue] [ para 2.4 of the Id. CIT(A) ].The Id. AO took cognizance to the details contained in the report which was received from the ADIT/DDIT. As the assessee has already submitted the available and required information the assessee could not furnish the further details which the revenue could not controvert that the assessee has not provided the details to the Investigation wing.

14.2 It is not disputed that the assessment was reopened to tax the commission income on the transactions facilitated by the appellant for the marble traders of Kishangarh. This aspect of the reasons recorded by the revenue has not been controverted. Therefore, considering the decision of the apex court in the case of Sun Engineering [ 198 ITR 97(SC)] while

assessing the income of the assessee reasons recorded are to be considered.

14.3 The bench also noted that in the case of Prakash Chand Vijayvargiya and Shri Manoj Kumar Agarwal for A. Y. 2009-10 the assessment orders has been placed on record wherein the commission income is determined on the same set of facts and Shri Prakash Chand Vijayvargiya is the husband of the assessee. The bench also noted from the order of the Id. CIT(A) that the intention of assessing the commission income from the transactions facilitated by the assessee like persons is established from the fact that only commission income was taxed in case of Shri Prakash Chand Vijayvargiya and Shri Majorkumar Agarwal for A. Y. 2009-10 and that action of the AO was ratified by the PCIT (Central) in rejecting the reopening proposal submitted in March 2015. The relevant part of the remand report is reproduced in the order of the Id. CIT(A) at page 12. Thus, considering the decision of the apex court in the case of Radhasoami Satsang, Saomi ... vs Commissioner Of Income Tax the court has decided as under :

Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all

appropriate to allow the position to be changed in a subsequent year. On these reasonings *in the absence of any material change justifying the Revenue to take a different view of the matter- and if there was not change it was in support of the assessee- we do not think the question should have been reopened and contrary to what had been decided by the Commissioner of Income-Tax in the earlier proceedings*, a different and contradictory stand should have been taken. We are, therefore, of the view that these appeals should be allowed and the question should be answered in the affirmative, namely, that the Tribunal was justified in holding that the income derived by the Radhasoami Satsang was entitled to exemption under [ss. 11](#) and [12](#) of the Income Tax Act of 1961.

Thus, the revenue has not substantiated why the view taken on those cases of the same group should not apply in these cases as there is no change in the fact of those case with that of the case of the assessee.

14.4 The Id. CIT(A) while deciding the appeal of the assessee has dealt with the two-remand report of the assessing officer on of March 2015 and another of August 2015. The non disputed facts emerge that the assessee admitted that bank accounts were opened, wherein different parties at different places deposited the money, in turn at Kishangarh, the money was withdrawn and after charging commission, which was ranging from Rs. 100 to Rs. 300 per lac and the remaining amount was given back to the persons as advised by the depositors. The Id. CIT(A) noted that the assessee reminded that the Id. AO himself agreed to these facts in the first half of the assessment order that the money was deposited by different Marble Traders were given back to them after withdrawing from the bank.

14.5 The Id.CIT(A) noted that there is no basis to swing in the position from taxing commission on the transaction facilitated by the appellant to estimating gross profit as marble trader. The Id. CIT(A) also noted that none of the corroborative factors that were inquired into through remand report proceeding support such imaginary action of the Id. AO. In the remand report the Id. AO admit that the assessee neither have any establishment nor infrastructure to conduct business of marble trading. The relevant part of the remand report is also persuaded and the relevant part is reproduced here in below :

“7. In the first part of assessment order, assessee is termed as facility provider on the basis of their submission. They claimed that they were getting commission on the amount of deposits made by the customers of beneficiaries Kishangarh in their bank accounts and handed over amount after making withdrawal to the beneficiaries. In the later part of assessment order they were treated as marble traders as gross profit on turnover in their bank accounts was applied for the reasons that they have not made available details as discussed in the fore going para-6.

Smt. Kusum Devi Vijayvargiya-

- a) Assessee is not registered with sales tax department and not filed Sales tax return.
- b) Assessee is not registered with Central Excise and not filed excise Return.
- c) Assessee has not shown Debtors and creditors.
- d) Assessee has no Purchase and Sales account.
- e) Assessee has no depreciable assets.
- f) No books of accounts maintained.

- g) Assessee has no SSI registration number.
- h) Assessee has no power connection.”

Thus, considering the above aspect of the matter the swing from charging commission to charge the GP as marble trader has no basis and are contrary to the facts already on record. Considering all these aspects of the case discussed here in above we find no infirmity in the finding of facts that the income of the assessee be taxed on commission, however, as regards the Id. CIT(A) contention of allowing 25 % from the commission income estimated has no basis or proof that has been argued by the Id. AR of the assessee and therefore, we see no reason to consider the claim of the 25 % as allowable and therefore, the same is not be considered as expenses in the absence of any details or evidence.

In terms of this observations the appeal of the revenue in ITA No. 944/JP/2015 stands partly allowed.

15. The fact of the case in ITA Nos. 945/JP/2015, 907 & 908/JP/2015, 933 to 935/JP/2015, 507/JP/2018, 927 & 928/JP/2015, 909 to 912/JP/2015, 949 to 951/JP/2015, 954 & 955/JP/2015 are similar to the case in ITA No. 944/JP/2015 and we have gone through the material placed on record. The

bench noticed that the issues raised by the revenue in this appeal in ITA Nos. 945/JP/2015, 907 & 908/JP/2015, 933 to 935/JP/2015, 507/JP/2018,927 & 928/JP/2015,909 to 912/JP/2015, 949 to 951/JP/2015, 954 & 955/JP/2015 are equally similar on set of facts and grounds that is in ITA No. 944/JP/2015. Therefore, it is not imperative to repeat the facts and various grounds raised by the revenue. Hence, the bench feels that the decision taken by us in ITA No. 944/JP/2015 shall apply mutatis mutandis in the ITA Nos. 945/JP/2015, 907 & 908/JP/2015, 933 to 935/JP/2015,507/JP/2018 ,927 & 928/JP/2015,909 to 912/JP/2015, 949 to 951/JP/2015, 954 & 955/JP/2015. In terms of these observations the appeal in ITA Nos. 945/JP/2015, 907 & 908/JP/2015, 933 to 935/JP/2015, 507/JP/2018,927 & 928/JP/2015,909 to 912/JP/2015, 949 to 951/JP/2015, 954 & 955/JP/2015 stands partly allowed.

Order pronounced in the open court on 30/11/2023.

Sd/-

( संदीप गोसाई )

(Sandeep Gosain)

न्यायिक सदस्य / Judicial Member

Sd/-

( राठौड कमलेश जयंतभाई )

(Rathod Kamlesh Jayantbhai)

लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 30/11/2023

\*Ganesh Kumar, PS/ Santosh

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

1. The Appellant- ACIT, Central Circle, Ajmer  
ITO, Ward-02, Kishangarh

2. प्रत्यर्थी / The Respondent- Smt. Kusum Devi Vijayvargiya, Kishangarh  
Shri Prakash Chand Vijayvargiya, Kishangarh  
Smt. Sudarshna Somani, Kishangarh  
Shri Raju, Kishangarh  
Shri Abhishek Kumawat, Kishangarh  
Shri. Manish Kumar Singhal, Ajmer  
Shri Vasu Dev Somani, Kishangarh  
Shri Govind Narayan Sharma, Kishangarh
3. आयकर आयुक्त / The Id CIT
4. आयकर आयुक्त(अपील) / The Id CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर /DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA Nos. 944& 945/JP/2015, 907 & 908/JP/2015, 933 to 935/JP/2015 ,507/JP/2018 ,927 & 928/JP/2015 ,909 to 912/JP/2015, 949 to 951/JP/2015, 954 & 955/JP/2015).

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar