IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES : H : NEW DELHI

BEFORE DR. BRR KUMAR, ACCOUNTANT MEMBER
AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No.9749/Del/2019
Assessment Year: 2016-17

Peerless Consultancy Services Pvt. Ltd., Kolkata, C/o RC Rai & Associates, 203, 2nd Floor, Akash Deep Building, 26A, Barakhamba Road, New Delhi. PAN: AACCT0544M	Vs	ACIT, Central Circle-16, New Delhi.

ITA No.9867/Del/2019
Assessment Year: 2016-17

ACIT, Central Circle-16, New Delhi.	Peerless Consultancy Services Pvt. Ltd., Kolkata, C/o RC Rai & Associates, 203, 2nd Floor, Akash Deep Building, 26A, Barakhamba Road, New Delhi. PAN: AACCT0544M

ITA No.9866/Del/2019
Assessment Year : 2016-17

ACIT, Central Circle-16, New Delhi	Gajanand Development Ltd. Kolkata, C/o RC Rai & Associates, 203, 2nd Floor, Akash Deep Building, 26A, Barakhamba Road, New Delhi. PAN: AABCG0151G

ITA No.1255/Del/2022
Assessment Year : 2016-17

DCIT, Central Circle-20, New Delhi.	Vs.	Bhagwati Developers Pvt. Ltd., Kolkata, C/o RC Rai & Associates, 203, 2nd Floor, Akash Deep Building, 26A, Barakhamba Road, New Delhi. PAN: AABCB0305P

ITA No.9869/Del/2019
Assessment Year : 2016-17

DCIT, Central Circle-20, New Delhi		Vijaya Finance Corporation Ltd., Kolkata, C/o RC Rai & Associates, 203, 2nd Floor, Akash Deep Building, 26A, Barakhamba Road, New Delhi. PAN: AABCV8770G
(Appellants)		(Respondents)

Assessee by	:	Shri R.C. Rai, Advocate & Ms Jyotsna, Advocate
Revenue by	:	Shri Waseem Arshad, CIT, DR
Date of Hearing	:	16.11.2023
Date of Pronouncement	:	07.12.2023

ORDER

PER ANUBHAV SHARMA, JM:

The cross appeals in ITA Nos.9749/Del/2019 and 9867/Del/2019 are preferred by the Assessee as well as the Revenue against the order dated 25.10.2019 of the Commissioner of Income Tax (Appeals)-XXVI, New Delhi,

(hereinafter referred as Ld. First Appellate Authority or in short Ld. 'FAA') in appeal No.10248/18-19 arising out of an appeal before it against the order dated 31.12.2018 passed u/s 153A/143(3) of the Income Tax Act, 1961 (hereinafter referred as 'the Act') by the ACIT, CC-16, New Delhi (hereinafter referred to as the Ld. AO); ITA No.9866/Del/2019 is preferred by the Assessee against the order dated 28.10.2019 of the ld. FAA in appeal No.10223/18-19 arising out of an appeal before it against the order dated 31.12.2018 passed u/s 153A/143(3) of the Act by the Ld. AO; ITA No.1255/Del/2022 is preferred by the Assessee against the order dated 11.02.2021 of the ld. FAA in appeal No.10147/19-20 arising out of an appeal before it against the order dated 31.12.2018 passed u/s 153A/143(3) of the Act by the Ld. AO; and ITA No.9869/Del/2019 is preferred by the Assessee against the order dated 28.10.2019 of the ld. FAA in appeal No.10234/18-19 arising out of an appeal before it against the order dated 31.12.2018 passed u/s 153A/143(3) of the Act by the Ld. AO

2. Since the issues involved in the cases of all these assessees arise out of common set of facts with the background that a search and seizure operation u/s 132 of the Act was conducted at the business and residential premises of Paras Mal Lodha Group on 28.06.2016, during the course of which certain documents allegedly belonging to the assessees were also seized and were made basis for addition. These appeals are being taken up together for determination and the findings in the appeal for AY 2016-17 in the case of Peerless Consultancy

Services Pvt. Ltd. (ITA No.9749/Del/2019) shall apply *mutatis mutandis* to the other assessees also.

3. The brief facts are that the ld. AO had questioned the assessee on the basis of a pen drive extract of Himadri Sekhar Sain allegedly recovered at the time of search and considering the same to be seized incriminating material, questioned the assessee. This alleged incriminating material was said to be related to transaction of purchase of 78000 sq. yards property at 274, Kanjur Marg (E), Mumbai. The assessee submitted that it is a dumb document and no such purchase of property was made. The ld. AO, however, concluded that the assessee had failed to discharge the onus and made addition observing that:

> *"….. Since the assessee has not bothered to explain anything, to protect the interest of revenue 10% of the value of transaction is added to the income divided among 4 assessee against which the warrant was executed in AY 2016-17 as date mentioned in the seized material is 16.4.2015. Hence, an amount of Rs.2,55,00,000/- (2.5% of total value of transaction) is added to the income of assessee as unexplained money u/s 69A rws 115BBE of the Act.*
>
> *I am satisfied that assessee has undisclosed income. Penalty proceedings u/s 271AAB is being initiated for undisclosed income of the assessee."*

4. Further, in the case of Peerless Consultancy Services Pvt. Ltd. (ITA No.9749/Del/2019), the AO examined another piece of alleged incriminating material containing ledger for AYs 2012-13 to 2017-18 in which a total of Rs.11,51,04,331.44 was booked in the name of the assessee. The ld. AO made

the addition u/s 69C r.w.s. 115BBE of the Act with the following relevant findings:-

> *"Actually those are the personal expenses of Sh. Paras Mal Lodha and his family members / business associates. The assessee was asked vide show cause notice u/s 142(1) dated 13.12.2018 to explain the same and no explanation was submitted. The assessee was again show caused to explain why the expense should not be disallowed? In reply the assessee submitted that it is for business purpose. However, the assessee failed to substantiate and discharge the onus to claim the expense. The assessee company's main business is earning income from investment. Also, on perusal of P&L A/c of AY 2015-16 and AY 2013-14, it is seen that this expense is not debited in P&L A/c. Although the assessee has debited some amount under the head 'Travelling & Conveyance' but the bifurcation is not provided. On perusal of seized material the payment is being made by the assessee. Hence, the expenditure remains unexplained and the assessee has failed to furnish the source of expenditure incurred in this regard. The assessee has failed to prove that expense for stay of Sh. Paras Mal Lodha and his family members in lavish hotel is for wholly and exclusively for business purpose. Hence, Rs.4,94,761/- is disallowed u/s 69C rws 115BBE of the Act and added back to the income of assessee.*
>
> *I am satisfied that assessee has undisclosed income. Penalty proceedings u/s 271AAB is being initiated for undisclosed income."*

5. The ld. CIT(A) deleted the addition on account of alleged purchase of the property with the following relevant findings in Peerless Consultancy Services Pvt. Ltd. (ITA No.9749/Del/2019):-

> *"Certain document placed at page no. 11 & 12 of Annexure PCS 24 were found from the premises 48, S. N. Roy Road, Kolkata, occupied by four entities of the group and the appellant is one of them. The AO calculated the income component/10% of total value mentioned in documents and further distributed the 10% income component in four assessee equally making an addition of Rs.2,55,00,000/- in the four entities including the appellant. Basic issue for consideration is whether in case of search assessment addition can be made on estimate basis or ad hoc basis. The AO has not given any proper rationale for such estimation whereas the addition basis seized material cannot be on estimated or ad hoc basis. The subsequent apportionment among four entities is also without any basis. The action of AO is not corroborated with any direct or indirect*

evidences/material on record. The head note of the seized document start with "we intend to purchase 78000 sq yards property at 274, Kanjur Marg, Mumbai" further it mention "step to be taken" and "to examine". However it do not contain the name of assessee, nor it bear any date or signature of any person. The documents was recovered from pen drive in possession of one Sh. Himadri Sekhar Sain, whose statement was also recorded u/s 132(4) of the Income Tax Act, 1961 on 28.06.2016 during the search operations, wherein in reply of question no. 14, he stated that the documents was prepared for purchase of Kanjur Property but it did not materialize. A plain look of the document makes it clear that these documents contain mere proposal for purchase of property. The AO has failed to bring on record any cogent evidence to establish the transaction having indeed taken place both during the assessment proceedings as also the remand proceeding. During the search operation also, except this document nothing else to lead the conclusion drawn by the AO was found and seized. The AO could not relate the document with any assessee, he opted to estimate the income and distributed equally in four different assessee on estimate basis which is no sustainable as per law laid down by Hon'ble High Court Delhi in the case of S.M. Aggarwal supra and Jaipal Aggarwal supra and Hon'ble Supreme Court of India in the case of Common Cause ln view of above facts the action by the AO cannot be sustained. The addition is directed to be deleted basis facts as elaborated above.

5.1. He, however, sustained the addition on account of expenses disallowed with the following relevant findings:-

"This ground relates to disallowing expenses of Rs.4,94,761/- incurred exclusively for business purpose of assessee u/s 69C of the Income Tax Act, 1961. The AR of the appellant submitted that the documents on the basis of which addition/ disallowance u/s 69C of the Income Tax Act, 1961 made by Ld. Assessing Officer are duly accounted for in Books of Account, disclosed in the Balance sheet, which is duly accepted in the normal assessment of the appellant. Hence the documents under reference impounded from Hotel Leela Palace do not come under the ambit of incriminating material. In the rejoinder of remand report also Ld AR reiterated his position. I have considered the assessment order and remand report of AO as well as submission and paper book and additional evidences submitted by assessee. The fact of the case reveals that search in this case was conducted on 28.06.2016 and Return of Income for the year under review u/s 139 of the Income Tax Act, 1961 was filed on 17.10.2016, whereas search has taken place on 28.06.2016. In view of above the Return was filed after search and the assessment was pending on the date of search, hence the contention of AR of the appellant

that addition can be made only on the basis of incriminating material is not valid in law. Even the case law viz. Kabul Chawla supra, Meeta gutgutia Supra and Kurle Paper Mills supra applies to the completed assessment as on date of search. Accordingly the AO is free to examine the documents on the basis of scrutiny assessment. Further, on the merit of addition, it is observed that documents were found and impounded from Hotel Leela Palace is in the name of the appellant. The aggregate amount relates to the year under review is Rs.4,94,761/-. The AR of the appellant have extensively argued that the amount mentioned in the documents relates to business of the appellant and payment was made through proper banking channel. But the appellant failed to file any bills and justify business connection with such expenses. As transpires for the impounded documents it relates to room rent for occupying of room by Mr. Paras Mal Lodha and his family members, hence this is a personal expense of the director."

6. Heard and perused. As regards the appeals of the Revenue, the ld. DR had made oral arguments which he also supplemented with written submissions and we consider it appropriate to reproduce the same herein below:-

"Final Matrix

A - DPB - 32 - AO page 5 to 6.

"The warrant to search the premise 48, S.N. Roy Road, Kolkatta was executed in the name Bagwati Developers Pvt. Ltd., Peerless Consultancy Services Pvt. Ltd., Gajanand Developers Pvt. Ltd., and Vijaya Finance Corporation Ltd."

B - DPB Statement of Shri Himadri Sekar Sain, Son of -A.B. Sain, resident of 116/4/1 K.P. Mukherjee Road, Kolkatta - 700008 - 132(4) - 28.06.2016
Ans. to Qs. 1, "I, Himadari Sekhar Saini, aged about 44 years, I have been working for M/s Peerless Consultancy Services Pvt. Ltd., from 2007 as executive Assessment.

Ans. to Qs. 4 - DPB – 50

"Ply source of income is salary of 35,000 per month from M/s Peerless Consultancy Services Pvt. Ltd., since 2007......"

Ans. to Qs. 7 - "I am looking after and helping our legal consultant Mr. J.M. Sharma in the legal matters of the company M/s Peerless Consultancy Services Pvt. Ltd......." I also disburse salary of the staff.

Ans. to Qs. 8 -

As regards mode of disbursement of salary ..” I have sent the salary details to our Director Mrs. Madhu Lodha and she send the cash accordingly i.e. 1,81,000 per month.

Ans. to Qs. No. 1 –

In regards, to his salary.......” This salary is received in cash and is not mentioned in the books of account of the company.......”

Qs. no. 12:

During the search, we have found cheques of Rs. 5,50,00,000/- Rs. 1,00,00,000 and Rs.1,00, 00,000/- please explain.

Ans. I am not in a position to give reply of the above question.

Qs. no. 14:

During the search we have found a copy of property deed/ MOU situated at Kanjur marg, Mumbai Rs. 51,00,00,000/- please explain.

Ans.: As per my knowledge deed for purchase of Kanjur Marg property was made but it could not materialize.

Qs. no, 16

I am showing you page 8 of Annexure PCS - 25 that was seized from your Pen Drive found in this office - please explain.

Ans. I don’t have any idea about the matter. Mrs. Lodha has dictated me and I typed and gave him a Print-out.

From 14, and 18, it is EVIDENT that the contents of pen-drive could not possibly be related to Qs no. 14 - property although at Kanjur Marg for 50 crores , since deed did not materialize and Don’t have any idea are distinct.

C - Remand Report: dated 6.09.2019 sought by CIT(A) para 6, is exclusively confined to the merits of the addition.

The remand report does not allude to any factual determination of whether the agreement mentioned at pages 11-12, Annexure - PCS-24 recovered from premises 48, S.N. Roy..... “it was seen that there was a transaction related to purchase of 78000 sq yards property at 274, Kanjur Marg(E) Mumbai.....”

- Appellants contention was only that it was a dumb document that did not belong to him and further raised the legal contention that placed reliance on P.R. Metrani SC 287 ITR 209 (SC) that the presumption of 132(4) statement was confined to search proceeding only and that the presumption did not apply to assessment consequent to search.

There is nothing in the remand report either at the assessee's instance or delineation of the scope of the Remand proceedings by the CIT(A) included in its ambit any factual determination as regards whether the MOU or agreement was actually acted upon or not.

THE REMAND REPORTS by AO - STATES DPB - 35 IN LIGHT OF SUCH PRESUMPTION ASSESSEE OUGHT TO HAVE PRODUCED OTHER DOCUMENTS TO DISPROVE ENTRIES MADE IN THE SEIZED DOCUMENT WHICH IT FAILED TO DO SO........."

THUS, the A.O. himself ALLUDES TO LACK OF ANY EVIDENCE THAT WOULD STATE THE AGREEMENT WAS NOT ACTED UPON TO DISPROVE ENTRIES AS PER PCS-24 PAGES 12.THE CIT(A) DISREGARDS MATERIAL EVIDENCE AND IS THEREFORE PERVERSE.

D - Pages 30, 31 CIT(A) - as regards documents pages 11, 12 of annexure PCS - 24,

Basic issue for consideration is whether in case of search assessment addition can be made on AD-HOC basis or estimate basis. The A.O. has not given any proper rationale for such estimation whereas the addition basics of seized material cannot be on estimation or ad hoc basis. The apportionment among four entities is also without any basis. The action of AO is not CORROBORATED........"

D1 - THE DELINEATION OF THE ISSUE BY CIT(A) DOES NOT INCUDE WITHIN ITS AMBIT THE MATERIAL FACT OF THE AGREEMENT OR MOU NOT BEING ACTED UPON AS A FACT.

D2 - CIT(A) - PAGE 31 - "The document was recorded from pen drive in possession of Himadri Sekhar Sain, whose statement was also recorded u/s 132(4) of the Income Tax Act, 1961 on 28.06.2016 during the search operations, wherein in reply to Qs. no. 14, he stated that the document was prepared for purchase of kanjur property but it did not materialize.

Please refer to Qs. no. 14 and Qs. no. 16 of statement DPB - 50, wherein Qs. no. 16 is the pertinent question and Qs. no. 14 has no correlation to PCS 24, the seized document.

This is a wrongful and erroneous assumption of a material fact - CIT(A) perverse.

D3 - CIT(A) paged 31 - " A PLAIN LOOK OF THE DOCUMENT MAKES IT CLEAR THAT THESE DOCUMENTS CONTAIN MERE PROPOSAL FOR PURCHASE OF PROPERTY. "

D3 - THE CIT(A) - RELIES UPON PLAIN LOOK on the MATERIAL rather THAN ON A DETERMINATION OF FACT THAT THE AGREEMENT WAS NOT ACTED UPON - EVEN THE REMAND REPORT - DOES NOT SEEK

ANY FACTUAL DETERMINATION THAT THE AGREEMENT WAS NOT ACTED UPON. THE FINDING OF THE CIT(A) IS WITHOUT A DETERMINATION OR DELINEATON OF PRIMARY FACTS AND THEREFORE WITHOUT ANY FACTUAL FOUNDATION. HENCE PERVERSE.

The CIT(A) vested with all the powers of the AO, neither required the AO to undertake the required enquiry or carry out the enquiry on his own.

Accordingly matter maybe set aside.

D4 - The CIT(A) did not consider the evidence on page 3,4, of AO hence, CIT(A) is perverse.

D4-1 AO PAGES 3,4 "The property has not been mutated as yet (in Mumbai it is called 7/12). The mutation officer is demanding through Mr. Joshi 1.5cr which we have agreed to pay "

The inference is that the agreement has been executed and all that remains is the registration in the survey record as would confer "TITLE".

TITLE AND EXECUTION OF AGREEMENT ARE DISTINCT AND MERE NON REGISTRATION OF TITLE IS NO IMPEDIMENT TO TRANSFER OF PROPERTY AND ASSERTION AND ENJOYMENT OF RIGHTS CONSEQUENT THERETO.

D4-2 2. On April l6, 2015, Joshi will show us the record completed in the mutation officer. Once satisfied we shall handover 1.5cr in cash and pay order of 13.50 crores.

INFERENCE Dated 16.04.2015 falls within the relevant assessment year 2016-17
- *Alternative modes of payments are contemplated within the same assessment years.*
- *Non - encashment of 5 cheques is therefore not material.*

D4-3 AO page4 of 7

(e) we are ready to pay the interest @ 15 p.a. for delaying the balance payments after 6 months duration.

Reference to balance payments alludes to certain payments already made.

The CIT(A) - is against evidence that the agreement was acted upon.

-ANTECEDENT BUT RELEVANT FACT. Joshi of GOA Gutkha Group was also searched since, he was to be paid 50 crore for the deal the collateral fact was required to be ascertained.

The order of CIT(A) maybe set aside and file restored back for a fresh adjudication upon ascertainment of material fact.

Further vide A-K
Law;- Delhi High Court Order in Sonal Constructions vs. CIT. ITA No. 1132 of 2007 dated 21/08/2012

FACT

Appreciation of evidence

P.R. Metrani no longer good laws

A. On a careful consideration of the rival contentions and on a fair reading of the order of the Tribunal, we are of the view that its order cannot be sustained. While cancelling the entire addition of Rs.3,69,27,587/- the Tribunal found fault with the Assessing Officer for not carrying out certain procedural steps which according to the Tribunal were vital for validity of the additions. Further, the Tribunal has also held that the presumption about the genuineness and truth of the contents of the documents seized, as provided in Section 132(4A), was not available to the Assessing Officer in the assessment proceedings. The judgment of the Supreme Court in the case of P.R. Metrani (supra), no doubt held that the presumption was not available to the Assessing Officer while completing the assessment and that it was limited to the prior proceedings in connection with the search. However, there was a later statutory amendment; Section 292C was introduced by the Finance Act, 2007 with retrospective effect from 1.10.1975. Sub-section (1), which is relevant for our purpose, reads as follows:-

"292C. Presumption as to assets, books of account, etc.- (1) Where any books of account, other documents, money, bullion, jewellery or other valuable article or thing are or is found in the possession or control of any person in the course of a search under section 132 or survey under section 133A, it may, in any proceeding under this Act, be presumed--

(i) that such books of account, other documents, money, bullion, jewellery or other valuable article or thing belong or belongs to such person;

B. The Tribunal has reasoned that the seized papers are loose papers and not books of accounts. We are unable to appreciate the significance or sequitur of the statement made by the Tribunal. It is not necessary that the seized documents should be in the form of proper books of accounts so that they can be relied upon for the purpose of making additions. They could be in any form, including loose papers on which notings or scribblings have been made. While commenting on the seized documents, the Tribunal contradicted itself by first observing that it cannot be stated that the figures in the papers were the actual investment or the actual sale proceeds and thereafter, in the very next sentence, stating that the seized documents "did give out certain figures regarding the four projects that the assessee had undertaken in the course of his business." If the seized papers did in fact contain figures relating to the four projects which were admittedly undertaken by the assessee, we do not see how the Tribunal could hold that the Revenue could not rely on the correlation between the

position shown by the seized documents and what has been recorded by the assessee in its books of account.

C. The Tribunal held on the basis of the judgment of the Supreme Court in the case of P.R. Metrani (supra) that the presumption about the truth and genuineness of the contents of the seized documents and its handwriting was not available to the Assessing Officer in the course of the assessment proceedings. This position has now been nullified by the retrospective amendment which we have already referred to. Even otherwise, we do not find any merit in the conclusion of the Tribunal that the correlation between the seized material and the books of account, on which reliance was placed by the Assessing Officer, was not sufficient for the purpose of making the additions.

D. V.K. Narang, from whose possession the documents were recovered, was a partner of the assessee - firm and the Tribunal itself observes in paragraph 22 of its order that "it is no doubt true that recovery of document pertaining to the firm from the possession of the partner of a firm is a vital piece of evidence against the firm". Notwithstanding this observation, the Tribunal proceeded to attach weight to the denial by Narang about any knowledge of the seized documents. It is strange that the Tribunal accepted Narang"s denial as credible, observing at the same time that recovery of documents pertaining to the firm from the possession of the partner of the firm is a vital piece of evidence against the firm. A firm is merely a compendious name given to the partners collectively and when we say that the firm is carrying on the business, what we really mean is that the partners are carrying on the business. The firm and the partners are one and the firm does not have a separate or a distinct personality or existence apart from its partners, except for certain very limited purposes, such as an assessment to income tax or for the purposes of Order XXX Rule 1 of the Code of Civil Procedure.

E. As to the corroboration sought by the Tribunal in support of the seized documents, it is not an inviolable rule applicable to all situations and to all cases that every seized document should be corroborated before any addition can be made based on it. If calculations and computations have been made in the seized documents in such a manner that its probative value and genuineness cannot be doubted, nothing prevents the Assessing Officer from making additions on the basis of such documents despite the absence of any corroboration. It must be remembered that in such cases it is difficult to obtain corroboration, particularly of the type contemplated by the Tribunal. The Tribunal observed that corroboration could have come in the form of a valuation of the property by the Departmental Valuation Officer or from the purchasers of the property who could have said that they did pay consideration over and above what has been recorded by the assessee in the books of accounts. The valuation of properties can at best be only an estimate. It may not be practical to expect the purchasers of the property to depose against the seller since both of them are party to the same transaction in which on- money is allegedly involved. When documents which are not meant for the eyes of the Revenue are unearthed after undertaking an exercise which involves an intrusion into the privacy of the assessee, it is not permissible to discount the veracity, genuineness and truthfulness of the contents therein for the flimsiest of

reasons. It would be proper to insist upon strong evidence in rebuttal of the contents of the documents, particularly after the introduction of Section 292C with retrospective effect from 1.10.1975.

F. The problem lies in the approach of the Tribunal, as we have pointed out, to the evidence unearthed during the search. It failed to note while arriving at its decision that procedural irregularities committed by the Assessing Officer do not invalidate the additions; if necessary, the proceedings have to be directed to be completed over again after curing the lapses, provided they are not lapses of jurisdiction. Non-examination of Sodhi or Narang during the assessment proceedings, or lack of opportunity given to Narang to cross-examine Sodhi are all procedural irregularities which can be cured by remitting the matter over again to the Assessing Officer, a step which the Tribunal ought to have taken. The Tribunal has found fault with the Assessing Officer for having made the additions on the basis of the statements made by Sodhi and Narang in pre-assessment proceedings i.e. during the search and the consequent investigation proceedings, without asking them to explain those statements during the assessment proceedings. If the Tribunal was of the view that this was a serious lapse on the part of the Assessing Officer, it would have been well-advised to remit the matter to the Assessing Officer to enable him to examine those persons with reference to their statements made prior to the assessment proceedings in an attempt to elicit the truth. It was not open to the Tribunal to cancel the additions in such circumstances.

ONUS ON ASSESSEE

CIT vs. Chetan Das Lachman Das dated 07.08.2012 Delhi High Court

13. Coming to the order of the Tribunal, we are of the view that the reasons given by it to distinguish the judgment of the Supreme Court cited (supra) are not sound. Firstly, there was seized material in the present case to show that the assessee has been indulging in off-record transactions. The observation of the Tribunal that no evidence was found to show that the actual turnover of the assessee was more than the declared turnover is hair splitting. The Tribunal lost sight of the fact that all was not well with the books of account maintained by the assessee and it has been keeping away its income from the books. That should have been sufficient for the Tribunal to examine the estimate made by the Assessing Officer, having regard to the principles laid down in the judgment of the Supreme Court (supra). The Tribunal also failed to note the difference between Section 158BB appearing in the Chapter-XIVB and the assessment made by virtue of the provisions of Section 153A of the Act. Secondly, the Tribunal expects the purchasers from the assessee to come forward and declare that they have paid more than what was appearing in the sale bills issued to them and has commented upon the lack of any inquiry from the purchasers on this line. Suffice to say that this throws an impossible burden on the Assessing Officer, having regard to the observations of the Supreme Court that the assessee cannot be permitted to take advantage of his own illegal acts, that it was his duty to place all facts truthfully before the assessing authority, that if he fails to do his duty he cannot be allowed to say that assessing authority failed to establish suppression of income, that the facts are within his personal

knowledge and therefore it was the burden of the assessee to prove that there was no suppression. Thirdly, the Tribunal has stated that there was no corroborative material to substantiate the contents of the loose papers found during the search. We are not impressed by this reason at all. The papers are not denied or disputed by the assessee. The CIT (Appeals) has found that the partners of the assessee firm had admitted to the practice of suppressing the profits. The papers themselves show two different rates, one higher and the other lower and on comparison with the sale bills it has been found that the sale bills show the lower rate and these findings have not been denied by the assessee. The Tribunal, therefore, erred in looking for some other corroboration to substantiate the contents of the loose papers, overlooking that the loose papers needed no further corroboration and the sale bills compared with the seized papers themselves corroborated the suppression of income. Fourthly, the Tribunal has relied on the observations of the CIT (Appeals) that no serious consideration can be given to the loose papers and has held that this shows that there is "nothing more in Revenue's kitty apart from those said loose papers pertaining to November, 2005 (financial year 2005-06) to support suppression of sales receipts on the part of the assessee firm". The Tribunal, with respect, has misread the observations of the CIT (Appeals) and has relied on a single observation without reading the order of the CIT (Appeals) as a whole. Moreover, in such cases, it is expected of the Tribunal to also independently examine the decision of the CIT (Appeals) which is impugned before it. In such cases it would be more appropriate to find out or ascertain whether there is any positive material which is in support of the assessee's case or anything upon which the assessee can rely in order to discharge the burden placed upon him in the light of the judgment of the Supreme Court in H M Esufali H. M. Abdulali (supra). Mere negative findings should not be made use of to throw out the case of the department. Lastly, the reliance placed by the Tribunal on the judgment of this Court in CIT v. Anand Kumar Deepak Kumar, (2007) 294 ITR 497 does not seem appropriate. There it was held that there was no presumption that unaccounted sales in the pre-search period would continue in the post search period also. This judgment has no application to the present case because the search took place on 13.12.2005 which falls in the year relevant to the assessment year 2006-07. The assessments under Section 153A of the Act have been completed up to and including the assessment year 2006-07. Even if there can be no presumption that after 13.12.2005 there could have been unaccounted sales of Hing or compound Hing, it is hardly material since only a period of 3½ months were left after the date of search till the end of the previous year i.e. 31.03.2006.

CIT vs. Harjeev Aggarwal Del High Court

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

20. In our view, a plain reading of Section 158BB(1) of the Act does not contemplate computing of undisclosed income solely on the basis of a statement recorded during the search. The words "evidence found as a result of search"

would not take within its sweep statements recorded during search and seizure operations. However, the statements recorded would certainly constitute information and if such information is relatable to the evidence or material found during search, the same could certainly be used in evidence in any proceedings under the Act as expressly mandated by virtue of the explanation to Section 132(4) of the Act. However, such statements on a standalone basis without reference to any other material discovered during search and seizure operations would not empower the AO to make a block assessment merely because any admission was made by the Assessee during search operation.

21. A plain reading of Section 132 (4) of the Act indicates that the authorized officer is empowered to examine on oath any person who is found in possession or control of any books of accounts, documents, money, bullion, jewellery or any other valuable article or thing. The explanation to Section 132 (4), which was inserted by the Direct Tax Laws (Amendment) Act, 1987 w.e.f. 1st April, 1989, further clarifies that a person may be examined not only in respect of the books of accounts or other documents found as a result of search but also in respect of all matters relevant for the purposes of any investigation connected with any proceeding under the Act. However, as stated earlier, a statement on oath can only be recorded of a person who is found in possession of books of accounts, documents, assets, etc. Plainly, the intention of the Parliament is to permit such examination only where the books of accounts, documents and assets possessed by a person are relevant for the purposes of the investigation being undertaken. Now, if the provisions of Section 132(4) of the Act are read in the context of Section 158BB(1) read with Section 158B(b) of the Act, it is at once clear that a statement recorded under Section 132(4) of the Act can be used in evidence for making a block assessment only if the said statement is made in the context of other evidence or material discovered during the search. A statement of a person, which is not relatable to any incriminating document or material found during search and seizure operation cannot, by itself, trigger a block assessment. The undisclosed income of an Assessee has to be computed on the basis of evidence and material found during search. The statement recorded under Section 132(4) of the Act may also be used for making the assessment, but only to the extent it is relatable to the incriminating evidence/material unearthed or found during search. In other words, there must be a nexus between the statement recorded and the evidence/material found during search in order to for an assessment to be based on the statement recorded.

J - Vide ITAT Order for earlier year "{ita9747,9750/del/2019 AYR 2015-16 , 2017-18 peerless consultancy services ltd} para 16, rebuttable presumption under sec 292C discharged vide evidence of cancellation of MOU. Relevant test not applied by cit(a).

K-I.T. SEARCH ON GOA GUTKHA GROUP ,JOSHIS

During the search action, IT officials seized cash of Rs 13 lakh and jewellery amounting to Rs. 7 crore which was found to have been put under prohibitory orders. Prohibitory orders have also been placed on 16 lockers and on 11 premises belonging to the group by the department

The income tax (I-T) department on Monday said that unaccounted transactions of around Rs.1,500 crore have been found in their six-day-long major search operation carried out at various premises linked to gutkha baron JM Joshi and his son, actor Sachiin Joshi, who is presently under arrest by the Enforcement Directorate in connection with a money laundering case

The income tax (I-T) department on Monday said that unaccounted transactions of around Rs.1,500 crore have been found in their six-day-long major search operation carried out at various premises linked to gutkha baron JM Joshi and his son, actor Sachiin Joshi, who is presently under arrest by the Enforcement Directorate in connection with a money laundering case.

During the search operation, Rs.13 lakh and jewellery worth around Rs.7 crore was seized and has been put under prohibitory orders. Prohibitory orders have also been placed on 16 lockers and 11 premises, I-T officials said.

The I-T searches and survey operations started in Mumbai on February 8, 2021. The JMJ Group, of which Joshi is the chairman, is mainly engaged in manufacturing of gutkha, pan masala and related products, and also has a presence in the hospitality sector. The I-T department in a statement issued on Monday said the search and seizure actions have led to the detection of foreign assets lying with a company registered in the British Virgin Islands (BVI), with an office in Dubai. The company is allegedly controlled and managed by Joshi.

"The net worth of the BVI company is Rs.830 crore, which was created by siphoning funds from India, These funds have been round-tripped to India in the form of share premiums amounting to Rs.638 crore in the flagship companies of the group," reads a statement released by Surbhi Ahluwalia, public relation officer, I-T department

One of the employees, who was also a shareholder in the BVI company, was identified and cross-examined along with a company promoter. The employee was not aware of being a shareholder in the company and had signed papers on the instruction of the company's main promoter, investigations have revealed.

During the searches, I-T sleuths secured various digital evidence and further forensic analysis has yielded email communications, establishing control and management of the company with the promoter of JMJ Group.

The I-T probe also revealed that the group availed bogus deduction under section 80IC of the Income Tax Act, 1961, to the extent of Rs.398 crore. "The group set up two entities in Himachal Pradesh and was found to indulge in sham transactions in order to claim the aforesaid false deduction," the press release stated.

Tax officials also discovered that unaccounted production of pan masala worth Rs.247 crore at two factory premises of the group."

7. On the other hand, the ld. AR relied on the order of the ld.CIT(A) with regard to the deletion and relied on the order of the coordinate Bench in the case of the assessee for AY 2015-16 and 2017-18, where additions sustained by ld. CIT(A) were deleted.

8. We have given thoughtful consideration to the matter on record and the submissions.

9. As with regard to the challenge of the Revenue of the deletion in the hands of the four assessees, we are of the considered view that the ld. DR has stressed on the basis of the statement of Himadri Sekar Sain and certain clauses of the alleged agreement but same has no substratum. In his statement, Himadri Sekar Sain has not made any statement in absolute term about stating that the sale was complete or consideration or any expenses were actually incurred. Rather there should have been specific questions to him in that regard. Further, such a statement cannot be considered to be incriminating at all qua the assessee companies, as incriminating evidence of an accomplice if confessional in nature should be absolute and if it was of a witness then there is nothing to who that the assessee were given opportunity to cross examine the said person whose statement AO was relying.

9.1 Then the ld. DR admitted that alleged five cheques of Rs.13.5 crores were never encashed and were in fact, found at the time of search itself. That was the

only payment shown to have made at the time of this alleged agreement. Thus when no consideration is proved to have passed then alleging assessee had purchased or agreed to have purchased the said land cannot be sustained.

9.2 The ld. DR has alleged about the expenses which are proposed to be made to fortify the deal. However, no evidence at all was with the AO. Once the assessee had made a submission that the document alleged to be agreement was a dumb document, the onus was on the AO to establish the content of the alleged agreement with general corroboration, if not of material particulars. However, none of the alleged recitals of the alleged agreement were enquired into in any form independently by the AO.

9.3 At the same time, we appreciate the conclusion of the ld.CIT(A) that the contents of this alleged incriminating document, which the ld. DR has pressed to be an agreement was, in fact, not an agreement at all. In this regard we find that this extract from pen drive only appears to be a form of some draft of a mandate given to Mr. Vinay Joshi who was stated to be the arranger of the deal. No particulars of the owners of the property is disclosed in this alleged agreement. It only mentions that certain person not identified in any form intend to purchase 78000 sq. yards of property at 274, Kanjur Marg (E), Mumbai. There is not even evidence about the existence of this property with any such dimensions. This alleged agreement mentions that the consideration is to be paid to five different persons, who are owners and agreement holders.

However, no details of those persons who are owners or agreement holders is mentioned.

9.4 Then there is no mutuality coming up from this document to show that the alleged owners and agreement holders had entered into any transactions in those capacities with any one on behalf of any of the assessee companies. Rather, Clause 3 (v) of this extract, as reproduced in the assessment order, mentions that : *"since the agreement was not signed by all the parties, we had written to them not to submit the cheques until it is signed by them (letter to bank is annexed here)."* This, in fact, shows that this alleged agreement has no reciprocation from affected parties. Such a document has rightly been considered by the ld.CIT(A) to be a document containing mere proposal for purchase of property. The ld.CIT(A) was correct to hold that there is no evidence from AO that it was ever acted upon.

9.5 The ld. DR had stressed for setting aside the order of the ld.CIT(A) and to require the CIT(A) to make an inquiry into those aspect. However, there is no specific ground in that regard that ld. CIT(A) has erred in law or on facts in not making an inquiry or not relying on any evidence of the AO, the grounds raised are very general in nature. The Ld. DR cannot take a plea that CIT(A) has failed to exercise its power to make further enquiry having co-terminus powers without first establishing that Ld. AO had conducted certain enquiries and collected some evidence. Then plenary, co-extensive or co-terminus powers are

supplemental in nature for benefit of the assessee and only in case of enhancement, and after due notice to assessee, such powers can be used for benefit of the Revenue. In no case this Bench can direct the CIT(A) to exercise the co-terminus powers and provide the Revenue Authorities, with a second opportunity of further improving or strengthening the case at first appellate level.

9.6 Rescue of Revenue to section 292C cannot be sustained in such circumstances because the presumption u/s 292C is rebuttable presumption and the document has to be considered considering the totality of the facts of the case. The deeming provision cannot be applied mechanically ignoring that the document is a dumb one.

9.7 We also fail to appreciate the ingenuity of the Ld. AO making addition by splitting the alleged investment upon group entities without any assertion of the basis for such attribution. Ld. AO observed "*to protect the interest of the revenue 10% of the value of transaction is added to the income divided among 4 assessee against which the warrant was executed.*" Ld. AO himself seems to have not been sure of the alleged transaction and how the group concern can be connected to the same so he makes creates this arbitrary design to spilt the additions which were not rightly sustained by Ld. CIT(A). Thus, there is no

error in the findings of the ld.CIT(A) and **appeals of Revenue have no substance.**

10. Now as with regard to disallowance of expenditure, as challenged by Peerless Consultancy Services Pvt. Ltd. (ITA No.9749/Del/2019), after considering the manner in which the ld. AO had made the addition and the ld.CIT(A) has sustained the same, we are of the view that both have fallen in error in making an addition u/s 69C r.w.s. 115BBE of the Act in regard to certain expenditures which were made from the account of the assessee, Peerless Consultancy Services Pvt. Ltd. The question of expediency attached to the expenditures has to be examined with the scope of section 37 of the Act. However, instead of mentioning that the assessee has failed to prove that the expenditures were wholly and exclusively for the purpose of business, AO considered the expenditure to be an undisclosed income. The Revenue cannot take shelter by arguing that even if wrong section is quoted that does not make the addition invalid. What is material in the present facts and circumstances is that mutually contradictory reasons have been given by the AO and the same have been sustained by the ld.CIT(A) by the comment, 'the expenses have been found to be incurred from the books of the company' and by alleging the same to be 'undisclosed income.' In other words, considered the expenses to be genuine being debited in the P&L Account under the head 'Travelling & conveyance', but, doubted if the same were wholly and exclusively incurred for

business purpose, but added as one from undisclosed income. Thus, we are inclined to allow the ground raised in the appeal of the assessee.

11. As a consequence of the above discussions, **the appeals of the Revenue are dismissed and the appeal of the assessee stands allowed**.

Order pronounced in the open court on 07.12.2023.

Sd/-	Sd/-
(DR. BRR KUMAR) ACCOUNTANT MEMBER	(ANUBHAV SHARMA) JUDICIAL MEMBER

Dated: 07th December, 2023.

dk

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi