

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 Nos. 179 to 181/JP/2022  
निर्धारण वर्ष / Assessment Years : 2016-17 to 2018-19

Shri Virendra Singh Ratnawat, 53, Golimar Garden, Sahkar Marg, Jaipur	बनाम Vs.	Asstt. Commissioner of Income-Tax, Central Circle-02, Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ACGPR 0733 D		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Sh. S. R. Sharma (CA) &  
Sh. R. K. Bhatra (CA)  
राजस्व की ओर से / Revenue by : Sh. Ajay Malik (CIT)

सुनवाई की तारीख / Date of Hearing : 04/10/2023  
उदघोषणा की तारीख / Date of Pronouncement: 01/01/2024

आदेश / ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

These three separate appeals filed by the assessee and are arising out of the order of the Commissioner of Income Tax (Appeals)-4, Jaipur dated 30/03/2022 [here in after (CIT(A))] for assessment years 2016-17 to 2018-19 which in turn arise from the order dated 26.12.2019 passed under section 143(3) r.w.s 153A of the Income Tax Act, by ACIT, Central Circle-02, Jaipur.

2. Since the issues involved in the assessee's appeal for 3 different years are almost identical and are almost common, except the difference in figure of additions disputed, therefore, these appeals were heard together with the agreement of both the parties and are being disposed off by this consolidated order.

3. At the outset, the Id. AR has submitted that the matter in ITA no. 179/JP/2022 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. ITA No. 179/JP/2022 is taken as a lead case. Based on the above arguments we have also seen that for both the appeals grounds are similar, facts are similar and arguments were similar and therefore, were heard together and are disposed by taking lead case facts, grounds, and arguments from the folder in ITA No. 179/JP/2022.

4. Before moving towards the facts of the case we would like to mention that the assessee has assailed the appeal in ITA No. 179/JP/2022 on the following grounds;

*“1. That on the facts and in the circumstances of the case the Ld. CIT(A) is wrong, unjust and has erred in law in confirming finding recorded by the Ld. AO that whatsapp messages contained in the mobile phone found from the appellant during the course of search relates to alleged transactions undertaken and that those transactions relates to and or carried by him.*

*2. That without prejudice to the ground No. (1) above on the facts and in the circumstances of the case the Ld. CIT(A) is wrong, unjust and has erred in law in confirming addition of Rs. 2420366 made by the Ld. AO to the income of the appellant u/s 69A of the IT. Act, 1961 on the basis of whatsapp messages referred to in ground No. (1) above.*

*3. That the appellant craves the permission to add to or amend to any of the above grounds of appeal or to withdraw any of them.”*

5. The fact as culled out from the records is that a search and seizure action u/s 132 of the Income Tax Act, 1961 and/or survey action u/s 133A of the Act was carried out by the Income Tax Department on the members of Kiran Fine Jewellers Group on 02.08.2017 of which the Assessee is one of the members. The jurisdiction over the case was assigned to Central Circle-2, Jaipur by the Pr. Commissioner of Income Tax, Jaipur-III, Jaipur by means of an order u/s 127 of the Act circulated vide Pr. CIT-3/ITO(Hqr)/JPR/2018-19/2749 dated 01-02-2019. Notice under section 153A of the Act dated 18.02.2019 was issued and served upon the Assessee by speed post on 20.02.2019 requiring it to file a true and correct

return of income as prescribed under Rule 12 of the Income Tax Rules, 1961 within 15 days of the service of the said notice.

5.1 In response to the said notice(s) a return declaring an income of Rs. 13,42,940/- was filed by the assessee on 02.03.2019, which is at the same income declared in the original return of income filed by the assessee. The source of income of the assessee is salary and income from other sources.

5.2 During the course of search operation, whatsapp message from Mobile No. 99502 00007 were retrieved and printouts were taken and inventorised as Annexure AS, Exhibit -3 page no. 1 to 31. Based on that print out of the whatsapp chat / image the Id. AO issued a query letter cum show cause notice [ SCN ] to the assessee vide letter dated 04.09.2019 to explain the nature and source of such transactions. In response to the said SCN, the assessee submitted that whatsapp message in the mobile no. of a person does not mean that the said message pertains to the assessee as phone may be used by other person in the absence of owner. The assessee further contended that noting in the message are deaf and dump. The Id. AO considered the reply of the assessee but as the same was considered as general and no specific explanation was offered and

therefore, the same was not found tenable and made the addition of Rs. 24,20,366/- under section 69 of the IT Act, 1961 based on the Whatsapp messages contained in the Mobile No. 99502 00007.

6. Aggrieved with the order of the Id. AO passed u/s 143(3) r.w.s 153A of the Act, assessee preferred an appeal before Id. CIT(A). Apropos to the grounds so raised by the assessee, the relevant finding of the Id. CIT(A) is as under:-

“(vii) As regards the addition of Rs. 24,20,366/- made by the AO, it is observed that the whatsapp chat refers to total dollar 21051 cash Rs. 10,31,000/-. Since the value of one US Dollar was equivalent to Indian Rs. 66/- on the date of search, therefore the total value was worked out at Rs. 13,89,366/- by the AO. Apart from the above as per the whatsapp chat there is a noting of Rs. 10,31,000/- and therefore the contention of the appellant that the value of total US Dollar mentioned in the chat was at Rs. 10,31,000/- is not correct. I find the AO has rightly made the addition of Rs. 24,20,366/- and in no case it can be considered that the double addition has been made by the AO. Accordingly, the addition of Rs. 24,20,356/- is sustained and the Ground of Appeal No. 1 and 2 are dismissed.

5. Ground No. 3 relates to objecting the action of AO in holding that the above said additions will be chargeable to tax at the rate of 30% as provided in Sec. 115BBE of the Act.

5.1 The submissions of the appellant as per the statement of facts enclosed with Form No. 35 and reiterated during the appellate proceedings are summarized as under:

*5. The ground no. 3 of appeal is challenging the charging of income-tax by invoking the provisions of section 1158BE of the I.T. Act, 1961. In this connection it is submitted that as no income assessable under section 68 of the IT Act and accordingly the provisions of section 11588E was not applicable. Further, the section 11588E was brought on Statute Book with effect from 01.04.2017 and*

*accordingly the said section was not in existence in the assessment year 2016-17. Thus the charging of tax under section 115BBE is other wise wrong and bad in law.*

5.2 I have considered the facts of the case and written submissions of the appellant as against the observations/findings of the AO in the assessment order for the year under consideration. The contentions/submissions of the appellant are being discussed and decided as under:

(i) The Ld. A/R has challenged the invocation of provisions of section 115BBE by stating that no income in the case of the appellant was assessable u/s 69A of the Act and therefore the provisions of section 115BBE were not applicable in the case of the appellant.

(ii) I have considered the submissions of the Ld. A/R of the appellant and it is observed that section 115BBE was first introduced in the Income Tax Act, 1961 by the Finance Act, 2012 which was designed to impose higher tax burden on the assessee's who failed to explain the nature of source of their income, expenditure, investments etc. with the object to curb the black money and penalize the assesses for evasion of tax. Subsequently, amendment in the said section was brought by the Taxation Laws (Second Amendment) Act, 2016 to clearly tax the income at a higher rate in all the cases where the income is assessable under sections 68, 69, 69A, 69B, 69C or 69D of the Act whether the income is offered by the assessee itself in its return under any of these six sections or the assessment is made by the AO under these sections.

(iii) Further, as per the provisions of section 115BBE, the income in nature of incomes prescribed u/s 68 to 69D shall be subject to higher tax rate @ 30% u/s 115BBE upto the AY 2016-17 and would be subject to higher tax rate @ 60% u/s 115BBE from 01.04.2017 onwards, Infact under the IT Act, when omission to record any entry has itself been defined to be deemed as an attempt to evade tax/penalty/interest, then non-recording or incorrect recording of any entry in books of accounts, for the purposes of section 68 to 69D, also needs to be understood in the same manner, as attempt to evade tax/penalty/ interest etc. Therefore, a conjoint reading of section 115BBE with section 68/69A and explanation to section 276C, would reveal that even in case where assessee discloses some unrecorded incomes subsequently in statements u/s 132(4)/131(1) or in ROI u/s 139/148/153A or application filed before ITSC u/s 245C(1), which otherwise was assessable under the deeming provisions as being nor recorded in books or incorrectly recorded, it does not take away such disclosed

incomes from being in the nature of income assessable u/s 68 to 69D and consequently shall not escape the rigors of applicability of section 115BBE.

(iv) Since the addition of Rs. 24,20,366/- has been made by the AO u/s 69A of the Act respectively, therefore the contention of the appellant that the provision of section 115BBE is not applicable is found not acceptable. Infact the addition has been made u/s 69A of the Act and therefore the provisions of section 115BBE are found applicable in the instant case of the appellant. In view of the above legal position, I find that the AO was justified in taxing such undisclosed income at the higher tax rate at 30% u/s 115BBE of the Act on the amount of Rs. 24,20,366/-. Thus, the levy of higher rate of tax at 30% u/s 115BBE on the aforesaid amount is confirmed and the Ground of Appeal No. 3 is dismissed.”

7. As the assessee did not find any favour from the appeal so filed with the Id. CIT(A), the assessee preferred the present appeal on the ground as reproduced hereinabove. To support the various grounds so raised by the Id. AR of the assessee, he has filed the written submissions and the same is reproduced herein below:

“In the matter of above appeal, we have been directed to submit as follows:-

1. The grounds of appeal taken against the order passed by the Id. AO and confirmed by the Id. CIT (A) are as follows:-

1. That on the facts and in the circumstances of the case the Id. CIT (A) is wrong, unjust and has erred in law in confirming finding recorded by the Id. AO that whatsapp messages contained in the mobile phone found from the appellant during the course of search relates to alleged transactions undertaken and that those transactions relates to and or carried him.
2. That without prejudice to the ground No. (1) above on the facts and in the circumstances of the case the Id. CIT (A) is wrong, unjust and has erred in law in confirming addition of Rs. 24,20,366/- made by the Id. AO to the income of the appellant u/s 69A of the IT Act, 1961 on the basis of whatsapp messages referred to in ground No. 1 above.

3. That the appellant craves the permission to add to or amend to any of the above grounds of appeal or to withdraw any of them.

**1. Brief facts of the case:**

A search and seizure action was carried out by the Income Tax Department under section 132 of the I.T. Act, 1961 on 28.08.2017. During the course of search no incriminating documents were found or seized by the Department except Whatsapp chattings and images of the same were taken by the search party during the course of search. The Id. AO made the addition of Rs. 24,20,366/- under section 69 of the IT Act, 1961 on account of Whatsapp messages contained in the Mobile No. 99502 00007. During the course of assessment proceedings, the appellant challenged the said addition legally as well as factual on merits. But the Id. AO after summarily rejecting the submissions and facts of the case, made the addition of Rs. 24,20,366/- without bringing on record any corroborative supporting evidence and making any enquiry.

**2. Action of the Id. CIT (Appeals):**

The appellant challenged the said addition made by the Id. AO legally as well as on facts and merits before the Ld. CIT(A) but the Ld. CIT (A) vide para 4.2 of her impugned order relying on the judgment of the Hon'ble Supreme Court in the case of Amba Lal Sarabhai Enterprises Ltd. vs. KS Infraspace Ltd. confirmed the addition made by the Id. AO. The appellant has challenged the said addition sustained by the Id. CIT (A) before your Honours by raising the grounds of appeal supra.

**3. SUBMISSION OF APPELLANT:**

(i) It is evident and verifiable from the order of the Id. AO that the impugned addition is made placing reliance on the provisions of section 132(4A) of the IT Act, 1961. In this connection for ready reference and for sake of convenience, the provisions of section 132(4A) are reproduced herein below:-

132(4A): 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, it may 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;
- (ii) That the contents of such books of account and other documents are true; and
- (iii) That the signature and every other part of such books of account and other documents which purport to be in the handwriting of any particular person or which may reasonably be assumed to have been signed by, or to be in

the handwriting of, any particular person, are in that person's handwriting, and in the case of a document stamped, executed or attested, that it was duly stamped and executed or attested by the person by whom it purports to have been so executed or attested.

It is evident from the above said provisions that the proviso is applicable to the books of accounts, other documents, money, bullion, jewellery or other valuable article or thing belongs to such person. In this connection it is submitted that the whatsapp chattings are neither books of accounts nor any valuable document etc. Further, it is submitted that the words in sub-section (4A) are "may be presumed". The presumption under sub-section (4A) is a rebuttable presumption and accordingly the presumption under that sub-section would not be available for the purpose of framing a regular assessment. Kindly refer the judgment in case of P.R. Mitrani vs. CIT, 157 taxman 325. Further now it is a well settled legal position that a non speaking document without any corroborative documentary evidence on record and findings that such document has materialized into transaction giving rise to the income of the assessee had not been disclosed to the department by such assessee has to be disregarded for the purpose of assessment to be framed pursuant to search and seizure action. From the search and seizure perspective such non speaking documents are referred to as the dumb document. In this connection it is also submitted that a fictional receipt cannot be deemed to be a receipt in the absence of any cogent material to support the factum of actual receipt. Refer K.P. Verghese vs. ITO, 131 ITR 597 (SC). Further, the Hon'ble Delhi High Court in case of CIT vs. D.K. Gupta (2008) 174 taxman 476 held as under :-

"4. Consequently, the tribunal upheld the findings of the Commissioner of Income-tax (Appeals) and agreed with the view taken by the latter that the assessee was liable to tax only on those receipts which had been proved to be income in the hands of the recipient. As a result thereof, the Tribunal found no reason to interfere with the findings recorded by the Commissioner of Income-tax (Appeals) on the ground that the same were based on valid and cogent materials placed on record and also produced before the Assessing Officer during the course of assessment proceedings. The Tribunal also noted that all the evidences, materials, explanations were furnished before the Assessing Officer and it is on the basis of such material that the Commissioner of Income-tax (Appeals) had arrived at the conclusion that no addition was warranted on the basis of the seized diaries.

5. We have examined the impugned order in detail and have also heard the counsel for the parties and we find that the issues sought to be raised before us are purely issues of fact. The Tribunal, being the final fact finding authority, has returned a certain set of facts. We find no perversity in such

findings and consequently, no question of law, what to speak of a substantial question of law, arises for our consideration.

The appeal is dismissed.”

On similar lines, the Hon'ble Delhi ITAT in case of Ashwini Kumar v. ITO (1991) 39 ITD 183 held that in the case of dumb document, revenue should collect necessary evidence to prove that the figures represent incomes earned by the assessee.

In view of the above settled law on the issue, the action of the Id. AO in the provisions of section 132(4A) is grossly wrong and bad in law.

3(ii) Computer record cannot be relied without ensuring its source and authenticity.

It is further submitted that assessing officer has not recorded any satisfaction that all the requisite steps were taken to ensure that data output of Pen Drives / computer records seized during the search were analysed on as it is basis and has not been tampered by anyone. In Anvar P.V. v. P.K. Basheer [2014] SSC Online SC 732 (SC), Hon'ble Supreme Court held that in case of electronic devices, such as CD, VCD, chip, when produced as digital evidence, the same is required to be accompanied by certificate in terms of Section 65B of Evidence Act at time of taking document. If that certificate is not produced, secondary evidence pertaining to electronic record is inadmissible. The court observed *“Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65A, can be proved only in accordance with the procedure prescribed Under Section 65B. Section 65B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the Section starts with a non obstante clause. Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned Under Sub-section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document, i.e. electronic record which is called as computer output, depends on the satisfaction of the four conditions Under Section 65B (2).”* [Emphasis Supplied].

Hon'ble Apex Court held that these safeguards are taken to ensure the 'source and authenticity', which are “the two hallmarks pertaining to electronic record sought to be used as evidence; The importance of following this procedure was emphasized by the fact that electronic records are more susceptible to tampering, alteration, transposition, excision, etc. and in absence of these safeguards, the whole trial based on proof of electronic records can lead to “travesty of justice”.

*“Only if the electronic record is duly produced in terms of Section 65B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation, resort can be made to Section 45A – opinion of examiner of electronic evidence. The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements Under Section 65B of the Evidence At are not complied with, as the law now stands in India.”*

Further recently, in ACIT vs. Katrina Rosemary Turcotte [ITA Nos. 3092/Mum./2015 to 3097/Mum./2015, decided on 11.10.2017] The Hon'ble ITAT Mumbai held that addition made on the basis of a print out taken from the computer of a third party without there being no other corroborative evidence brought on record to prove the fact that the payment mentioned in the seized material was actually received by the assessee, not sustainable.

4(i) The assessee also challenges the applicability of provisions of Section 69A, as applied by the Id. AO in making the impugned addition of Rs. 24,20,366/- as follows:-

(a) The provisions of section 69A are reproduced herein below :-

“Sec. 69A. Where in any financial year the assessee is found to be the owner of any money, bullion, jewellery or other valuable article and such money, bullion, jewellery or valuable article is not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of acquisition of the money, bullion, jewellery or other valuable article, or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the money and the value of the bullion, jewellery or other valuable article may be deemed to be the income of the assessee for such financial year.”

As per above provisions of section 69A, it is evident that to make any addition under section 69A, the onus is on the department to establish that the assessee is found to be owner of the money, bullion, jewellery or other valuable article and such money, bullion, jewellery or other valuable article is not recorded in the books of account, if any, maintained by him and assessee offers no explanation about the nature and source of acquisition of the said items or the explanation offered by him is not, in the opinion of the AO, found satisfactory.

4(ii) The assessee during the course of assessment proceedings, regarding the whatsapp chattings submitted as follows:-

A. It is a well known fact regarding whatsapp messages that the messages in the mobile phone of a person does not mean that the said message(s) pertains to him and no adverse inference can legally be drawn against the owner of the mobile phone. This is because of the facts that sometimes messages are being forwarded/shared in a group and the phone may be used by some

known person(s), friend(s) and/or some other person in the absence of the owner of mobile phone. Thus generally only on the basis of messages in the mobile phone or a whatsapp call know adverse inference legally can be drawn against the owner of the phone without any supporting corroborative evidence tenable in the eyes of law. In assessee's case the above submitted basic principal/theory is applicable as it is. The submissions are driving support from the alleged print out of the whatsapp message, copy of which supplied by the I.T. department to assessee that the noting in the messages are deaf and dumb. As now it is a settled position of law on the issue that tax can be levied on the basis of document found and seized during the course of search only when the document is a speaking one. The document should speak either out of itself or in the company or other material found on investigation. The document should be clear and unambiguous in respect of all the four components of the charge of tax. If it is not so the document is only a dumb document. No charge can be levied on the basis of a dumb document. Thus a document found during the course of a search must be a speaking one and without any second interpretation, must reflect all the details about the transaction of the assessee in the relevant assessment year. Any gap in the various components for the charge of tax must be filled up by the Assessing Officer through investigations, correlations, independent third party enquiries with other material found either during the course of search or on investigations. Further, the Id. AO should also brought on record the supporting corroborative evidences i.e. evidences collected in making third party/independent enquiries. In case of non-conducting the said enquiries and without any supporting corroborative material on record no addition can be made on the basis of dumb document.

5. With reference to above submitted legal position, the assessee submits ground-wise submissions as follows:-

5(a) The First and Second Ground of appeal, challenge the action of the Id. AO in holding that whatsapp messages contained in the Mobile No. 99502 00007 found from the assessee relating to alleged transactions are of the appellant and are real transaction.

(b) Facts of the case :

During the course of search proceedings, the Mobile No. 9950200007 of the assessee was seized and the print out of Whatsapp chattings were taken by the search team and on the basis of said whatsapp chattings, the Id. AO made addition of Rs. 24,20,366/- to the declared income of the assessee. The details/narration of the said chatting/messages are as follows:-

4(ii)(a) Annexure AS, Exhibit 3 page 11 “ Total Dollar 21051 cash Rs. 10.31, Ok dear.” The Department calculated total amount Rs. 13,89,366/- i.e. US \$ 21051 @ Rs. 66/- perUS \$ on account of the said message.

(c) Action of the A.O.

The AO in his impugned order held that in case of said whatsapp chattings provisions of section 132(4A) are applicable and accordingly he is of the opinion that the whatsapp messages are true and correct. The AO has considered every message as a separate message and interpreted the chattings as favourable to him without considering the fact that some messages are co-related (duplicate of each other). For ready reference, sake of convenience and better understanding and explaining the issue involved, the said messages and finding of the Id. AO are reproduced herein below :-

“1.5. Annexure AS, Exhibit-3 Page No. 11.

The Page contains whatsapp chat wherein assessee replied “Total dollar 27051 cash rs. 10.31”, perusal of this message and previous message shows that assessee has made payment of USD 21051 and Rs. 10,31,000 to someone at Orchard Park Suites, Orchard Turn Behind Takasimaya. The recipient also affirmed to the above message by replying “Ok dear”. Since, 1 USD was equivalent to INR 66, total USD 21051 will be INR 13,89,366. Apart from dollar there is reference of Rs. 10,31,000. Thus total of cash transaction comes to Rs. 24,20,366/-. Further, the source of Rs. 24,30,366/- transferred was not found recorded in books of account furnished by the assessee.

From the entirety of circumstances and factual matrix of the case it is clearly evident that Rs. 24,20,366/- is transferred out of unexplained money and thus the same is liable to be taxed in terms of the provisions of section 69A of the Act.”

As per above particulars of the whatsapp message, it was for US \$ 21051 equivalent to Indian currency amounting to Rs. 10.31 lacs i.e. only for one transaction and not of two as interpreted by the Id. AO. After that the message is “OK dear”. The place of transaction is Orchard Park Suites, Orchard Turn Behind Takasimaya.

The Id. AO drawn inference that the assessee has paid US \$ 21051 equivalent to Indian Rs. 13,89,366/- and he also drawn inference that besides US \$ an amount of Rs. 10,31,000/- was also paid by the assessee. Accordingly, he made total addition of ( Rs. 13,89,366 + Rs. 10,31,000) Rs. 24,20,366/- on account of the above said whatsapp message to the declared income of the assessee.

c(i) In this connection the assessee further submits that the action of the Id. AO is

grossly wrong and bad in law, as he made the impugned addition without any supporting corroborative evidences and enquiry from the concerned person, as the Mobile number of the other person was available with the said whatsapp message. As per above facts, it is apparent and evident that the Id. AO made the impugned addition on the basis of presumption, surmises and conjectures. In this regard it is further submitted that now it is a settled position of law that no addition can be made on the basis of presumption only. The assessee relies on the following decisions:-

a. Principal CIT Central-1 vs. Hasan Ali

Khan(2021) 124 taxmann.com 209 (SC)

“Section 132 of the Income-tax Act, 1961 – Search and seizure – General (documents seized in search) – Assessment year 2000-01 – Pursuant to search at assessee’s residence addition of Rs. 793 lakhs was made on account of certain undisclosed payment made by assessee – Tribunal deleted addition stating that payment by assessee of amount of Rs. 793 lakhs had not been established – High Court by impugned order dismissed appeal, holding that entire issue being based on appreciation of evidence on record, no question of law arose for consideration – Whether Special Leave Petition against said impugned order was to be dismissed – Held, yes (para 2)(in favour of assessee)”

b. Commissioner of Income-tax vs. Jeet Construction

Company(2021) 124 taxmann.com 527 (SC)

“Section 69A, read with sections 158BC and 158BD, of the Income-tax Act, 1961 – Unexplained money (Search) – Block period 1997-98 to 2003-04 – Assessee was a partnership firm engaged in business of civil construction – Pursuant to search at residential premises of working partner of firm and at business premises of firm Assessing Officer made additions to income of assessee – Tribunal had recorded a finding in regard to additions made by Assessing Officer which was confirmed by Commissioner (Appeals), which was based only on mere assumption and not on any material recovered during search and seizure – High Court by impugned order held that in absence of supporting evidence, additions based merely on presumption that assessee had earned undisclosed income and incurred expenses outside books of account would not be sustainable – Whether Special Leave Petition against said impugned order was to be dismissed – Held, yes (para 2) (in favour of assessee).”

c. 278 Taxman 293 (SC)

It is evident that the assessee’s case is completely covered by the issue decided by the Hon’ble Apex Court in the above said cases. The assessee further submits that he made no alleged payment of dollars to any person(s). It is, therefore again

requested that the impugned addition made by the Id. AO is wrong, bad in law and deserves to be deleted.

Without prejudice to above, the assessee also submits (though he does not accept for a moment) that the working of addition of Rs. 24,20,366/- is also not correct. The correct amount works out to Rs. 10,31,000 = \$ 21051. But the Id. AO in his assessment order has added Indian Rs. 10,31,000/- mentioned in the message and also worked out the value of \$21051 by applying the Indian currency rate of Rs. 66/- per US Dollar on date of search and again made an addition of Rs. 13,89,366/- totaling Rs. 24,20,366/-. Thus he has made double addition for one transaction i.e. one for Indian rupees calculated by the assessee as per message and another on account of US Dollar. Therefore the addition of Rs. 13,89,366/- is apparently a duplicate addition which is wrong and unwarranted.

In view of the above facts, the addition, if any, to be made works out to Rs. 10,31,000/-. The facts are also evident and verifiable from the assessment order itself. Vide para 105 page 6 of his order, the AO has only drawn the inference that “apparent from the dollar there is reference of Rs. 10,31,000/-. Thus the cash transaction comes to Rs. 24,20,366/-.” The above said findings of the AO confirms the assessee’s version that the transaction was only for \$ 21051 equivalent to Rs. 10,31,000/-. It is, therefore, requested that the duplicate addition made by the AO is wrong and bad in law.

The assessee prays to your good-self for relief accordingly.”

8. To support the various contentions so raised the Id. AR of the assessee also submitted following judgment :

S. No.	Name of Case	Name of Court	Date of order	Page No.
1	ACIT, Central Circle-1, vs. Shri Manchukonda Shyam Prop. Manchukonda Shyam	ITAT Visakhapatnam Bench	23-09-2020	1-15
2	Mr. A. Johnkumar vs. DCIT, Central Circle-1(4), Chennai	ITAT Chennai Bench	13-05-2022	16-45
3	Atul Tantia vs. DCIT, Central Circle-3(1), Kolkata	ITAT Kolkata Bench	28-03-2023	46-57

8.1 The Id. AR of the assessee in addition to the above written submission submitted that the assessee is a individual and earning as employee of the bank. He has not maintained any books of account. Pursuant to the search at Kiran Fine Jeweler group the assessee was covered. The Id. AR submitted that in the search no incriminating material or cash found only the whatsapp chat recovered from the mobile phone no. 99502 00007 belonging to him. The decision relied upon by the Id. CIT(A) in the case of Ambalal Sarabhai in fact used against the assessee but it is in fact favours the assessee. The Id. AR of the assessee submitted the page wise explanation furnished to the Id. AO and requested to consider the same so as to decide the issue. The page wise explanation furnished is also reiterated here in below :

Page S.No	Particulars	Explanation
1 and 3	Travelling details of Mr. Sawan Kumar	Particulars does not pertain to the assessee, neither bear name of the assessee nor any other details regarding assessee. It is verifiable from the search record that Mr. Swan Kumar is neither a relative nor a employee of the assessee or the Ratnawat group of the assessee. Thus neither an income nor any expenditure or investment of him.
2 & 19	Message – Swati jija	Dumb paper. Does not represent any income, expenditure and/or investment of the assessee.
4	Message Pertains to Manish Rastogi	Does not pertain to assessee. Neither in favour of assessee or his business concerns. Does not represent any income, expenditure and/or investment of the assessee. Does not represent any income, expenditure and/or investment of the assessee.
5 to 7	Messages pertains to Deilip Bana	Does not pertain to assessee. Neither in favour of assessee or his business concerns. Does not represent any income, expenditure and/or investment of the assessee. Does not represent any income, expenditure and/or investment of the assessee.
8 & 9	Messages pertain to Dipendra Ban	Does not pertain to assessee. Neither in favour of assessee or his business concerns. Does not represent any income, expenditure and/or investment of the assessee.
10	Messages pertain to Kukra Khuri	Does not pertain to assessee. Neither in favour of assessee or his business concerns. Does not represent any income, expenditure and/or investment of the assessee.
11	Messages pertain to Mukesh Bharulal	Does not pertain to assessee. Neither in favour of assessee or his business concerns. Does not represent

	Naraniya	any income, expenditure and/or investment of the assessee.
12 to 18	Messages pertain to Avinash ji Joshi	Does not pertain to assessee. Neither in favour of assessee or his business concerns. Does not represent any income, expenditure and/or investment of the assessee.
20 to 31	Messages pertain to Harsh Dubai	Does not pertain to assessee. Neither in favour of assessee or his business concerns. Does not represent any income, expenditure and/or investment of the assessee.

9. The Id DR is heard who has relied on the findings of the lower authorities. The Id.DR further submitted that the records are the electronic records and there cannot be watertight evidence then the evidence found from the persona mobile whatsapp chat. It is not under dispute that the print out were taken from the whatsapp image and that was confronted before the assessee. The case law cited are on difference facts and are not directly applicable to the facts of the case on hand. Considering the provision of the Information Technology Act the evidence are incriminating in nature and the assessee explanation which are verified with the record are not subject matter of dispute and the addition made are those chats which are not properly explained by the assessee and are related to the hawala transaction done by the assessee for which no proper explanation furnished by the assessee. All the papers based on which the additions were made are clinching evidence are clearly of the nature of unrecorded and undisclosed transactions and the explanation are cryptic. Even the assessee on these charts given the acknowledgment and in that situation how can it be considered dump documents. All the person with whom the charts are found are known to the assessee and he has not denied to any of the transaction so confronted to the assessee and the Id. AO was fair to

considered which are recorded and found in the bank statement placed on record and the addition is made only for those chats which are not clearly explained by the assessee. Since all the chats are related to speaking and live transaction and no where the assessee denied having the chart not a live and even those transactions explained were not disputed by the Id. AO. On all the transation the Id. AO has considered the explanation of the assessee partly only on the issue which are not explained has been added as income of the assessee. Based on these arguments the Id. DR prayed to sustain the addition as there is no merits on the explanation furnished by the assessee.

10. We have heard the rival contentions and perused the material placed on record. The brief facts of the case is that the assessee was considered as the members of Kiran Fine Jewellers Group upon which search was conducted on 02.08.2017. While in search proceeding WhatsApp message from Mobile No. 99502 00007 were retrieved and printouts were taken and inventorised as Annexure AS, Exhibit -3 page no. 1 to 31. Based on the print out of the WhatsApp chat / image the Id. AO issued a query letter cum show cause notice [ SCN ] to the assessee vide letter dated 04.09.2019 to explain the nature and source of such transactions. In response to the said SCN, the assessee submitted that

WhatsApp message in the mobile no. of a person does not mean that the said message pertains to the assessee as phone may be used by other person in the absence of owner. The assessee further contended that noting in the message are deaf and dump. The Id. AO considered the reply of the assessee partly and to the extent where no specific explanation was offered were considered as unexplained and thus made an addition of Rs. 24,20,366/- under section 69 of the IT Act, 1961 based on the Whatsapp messages contained in the Mobile No. 99502 00007. The amount of 24,20,366/- consist of 21051 dollar [  $21051 * 66 = 13,89,366$  ] plus Rs. 10,31,000/- written as cash thus become Rs. 24,20,366/- [ 13,89,366 plus 10,31,000/- ]. The Id. AR of the assessee submitted that neither this chat pertain to the assessee nor to his business concerns. There is no expenditure or investment from the side of the assessee. The Id. AR of the assessee contended that it may a case that 10,31,000 is the rupee price of the dollar exchanged to some of the group relative travelers. The Id. AO did and that of the Id. CIT(A) did not appreciate that which there are not two figure first of all and other part is that it neither the investment nor expenditure it is not seems to be the helping the guest in getting the foreign currency exchanged. The Id. AO contended that in the chat message the recipient confirmed to have that transaction saying "ok dear" based on that

Id. AO considered as unexplained money. In fact, the assessee in the search was not found any of the foreign currency or alleged cash in Indian rupee therefore, adding the same in hands of the assessee as unexplained cash is not only incorrect and but duplicate. Even at the time of search neither foreign currency nor the cash found in possession of the assessee and the revenue did not challenge these basic facts in this case. The Id. CIT(A) noted that the WhatsApp message was found in the mobile of the assessee. When questioned in the statement u/s. 132(4), the assessee has accepted that details of his conversation recorded in WhatsApp chat if unable to explain satisfactory then in that case that amount can be added to his income. Since the assessee has given statement and he has not denied the notings in his WhatsApp messages but has imply stated that he does not remember anything at the moment and would get it verified in due course. Considering that aspect of the matter the Id. CIT(A) hold that this noting is not deaf and dump and he confirmed the action of the Id. AO. The bench noted from the records that the Id. AO made the addition for Rs. 24,20,366/- consist of 21051 dollar [  $21051 * 66 = 13,89,366$  ] plus Rs. 10,31,000/- written as cash thus it added and made at Rs. 24,20,366/- [  $13,89,366$  plus  $10,31,000/-$  ]. The bench also noted that the Id. AO made an addition for this amount u/s. 69A of the Act and the Id. CIT(A) confirmed

the action of the Id. AO. The provision of section 69A of the Act empowers the Id. AO make addition of any money, bullion, jewellery or other valuable articles and such money, bullion, jewellery or valuable article is not recorded in the books of accounts maintained. Here the issue is that the money so recorded in the Whatsapp not found at the time of search in the possession of the assessee. Not only that the contention of the assessee that there is a double addition for one transaction i.e. one for Indian Rupee and another on account dollar and thus the addition of the double the amount. We found force in the argument advanced that there is no investment or expenditure on the part of the assessee found have been recorded in the search proceeding. It is also found that cash in Indian rupee or dollar have been found physically at the time of search. Based on these non-disputed facts before us we are of the considered view that there is no merits in the reasoning advanced by the revenue and therefore, we vacate the addition of Rs. 24,20,366/-. In terms of these observations the ground no. 1 & 2 raised by the assessee is allowed. Ground no. 3 being general in nature does not require any adjudication.

In terms of these observations, the appeal of the assessee in ITA no. 179/JP/2022 is allowed.

11. The fact of the case in ITA Nos. 180 & 181-JP-2022 is similar to the case in ITA No. 179-JP-2022 and we have heard both the parties and persuaded the materials available on record. The bench has noticed that the issues raised by the assessee in this appeal No. ITA Nos. 180 & 181-JP-2022 is equally similar on set of facts and grounds. Therefore, it is not imperative to repeat the facts and various grounds raised by both the parties. Hence, the bench feels that the decision taken by us in ITA No. 179/JP/2022 for the Assessment Year 2016-17 shall apply mutatis mutandis in the case of Virendra Singh Ratnawat in ITA Nos. 180 & 181-JP-2022 for the Assessment Years 2017-18 & 2018-19.

In the result, three appeals of the assessee are allowed.

Order pronounced in the open court on 01/01/2024.

Sd/-

Sd/-

( संदीप गोसाई )

(Sandeep Gosain)

न्यायिक सदस्य / Judicial Member

( राठौड कमलेश जयंतभाई )

(Rathod Kamlesh Jayantbhai)

लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 01/01/2024

\*Ganesh Kumar, PS

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

1. The Appellant- Sh.Virendra Singh Ratnawat, Jaipur
2. प्रत्यर्थी / The Respondent- ACIT, Central Circle-02, Jaipur
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. 179 to 181 /JP/2022)

आदेशानुसार/ By order,

सहायक पंजीकार/Asst. Registrar