आयकरअपीलीयअधिकरण,इंदौरन्यायपीठ,इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

ITA No.793 to 799/Ind/2019 (AY:2009-10 to 2015-16)
ITA No.800 to 805/Ind/2019 (AY:2009-10 to 2014-15)

ACIT, Central-1, Indore	बनाम/ Vs.	M/s Prakash Asphaltings & Toll Highways (India) Ltd., 76, Mall Road, Mhow, District - Indore (PAN:AABCP0398N)
(Appellant/Revenue)		(Respondent/Assessee)

Assessee by	Shri Anup Garg & Shri Vikas Guru, CAs & Ld. ARs
Revenue by	Shri Ashish Porwal, Sr. DR

Date of Hearing	23.01.2024
Date of Pronouncement	31.01.2024

आदेश/O R D E R

Per Bench:

Feeling aggrieved by a consolidated appeal-order dated 31.05.2019 passed by learned Commissioner of Income-tax (Appeals)-3, Bhopal ["CIT(A)"], which in turn arise out of respective penalty-orders dated 28.03.2018 passed by Joint Commissioner of Income-tax (Central), Indore u/s 271D & 271E of Income-tax Act, 1961 ["the Act"], the revenue has filed the captioned thirteen (13) appeals for different Assessment-Years ["AY"] 2009-10 to 2015-16. These are two sets of appeals, ITA No. 793 to 799/Ind/2019 are qua the penalties u/s 271D and ITA No. 800 to 805/Ind/2019 are qua the penalties u/s 271E.

ITA No. 793/Ind/2019 for A.Y. 2009-10 in the matter of Penalty u/s 271D:

1) *On the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the penalty of Rs. 8,98,85,000/- levied by the JCIT (Central), Indore, u/s 271D on account of violating the provisions of section 269SS of the Income-tax Act, 1961.*

2) *On the facts and in the circumstances of the case, the Ld. CIT(A) erred in holding that the penalty was imposed on the basis of dumb documents despite the fact that the data on the said documents was duly corroborated as per the findings in the penalty order.*

ITA No. 794/Ind/2019 for A.Y. 2010-11 in the matter of Penalty u/s 271D:

1) *On the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the penalty of Rs. 54,65,000/- levied by the JCIT (Central), Indore, u/s 271D on account of violating the provisions of section 269SS of the Income-tax Act, 1961.*

2) *On the facts and in the circumstances of the case, the Ld. CIT(A) erred in holding that the penalty was imposed on the basis of dumb documents despite the fact that the data on the said documents was duly corroborated as per the findings in the penalty order.*

ITA No. 795/Ind/2019 for A.Y. 2011-12 in the matter of Penalty u/s 271D:

1) *On the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the penalty of Rs. 2,55,00,000/- levied by the JCIT (Central), Indore, u/s 271D on account of violating the provisions of section 269SS of the Income-tax Act, 1961.*

2) *On the facts and in the circumstances of the case, the Ld. CIT(A) erred in holding that the penalty was imposed on the basis of dumb documents despite the fact that the data on the said documents was duly corroborated as per the findings in the penalty order.*

ITA No. 796/Ind/2019 for A.Y. 2012-13 in the matter of Penalty u/s 271D:

1) *On the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the penalty of Rs. 1,30,00,000/- levied by the JCIT (Central), Indore, u/s 271D on account of violating the provisions of section 269SS of the Income-tax Act, 1961.*

2) *On the facts and in the circumstances of the case, the Ld. CIT(A) erred in holding that the penalty was imposed on the basis of dumb documents despite the fact that the data on the said documents was duly corroborated as per the findings in the penalty order.*

ITA No. 797/Ind/2019 for A.Y. 2013-14 in the matter of Penalty u/s 271D:

1) *On the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the penalty of Rs. 4,83,00,000/- levied by the JCIT (Central), Indore, u/s 271D on account of violating the provisions of section 269SS of the Income-tax Act, 1961.*

2) *On the facts and in the circumstances of the case, the Ld. CIT(A) erred in holding that the penalty was imposed on the basis of dumb documents despite the fact that the data on the said documents was duly corroborated as per the findings in the penalty order.*

ITA No. 798/Ind/2019 for A.Y. 2014-15 in the matter of Penalty u/s 271D:

1) *On the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the penalty of Rs. 2,83,00,000/- levied by the JCIT (Central), Indore, u/s 271D on account of violating the provisions of section 269SS of the Income-tax Act, 1961.*

2) *On the facts and in the circumstances of the case, the Ld. CIT(A) erred in holding that the penalty was imposed on the basis of dumb documents despite the fact that the data on the said documents was duly corroborated as per the findings in the penalty order.*

ITA No. 799/Ind/2019 for A.Y. 2015-16 in the matter of Penalty u/s 271D:

1) *On the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the penalty of Rs. 55,00,000/- levied by the JCIT (Central), Indore, u/s 271D on account of violating the provisions of section 269SS of the Income-tax Act, 1961.*

2) *On the facts and in the circumstances of the case, the Ld. CIT(A) erred in holding that the penalty was imposed on the basis of dumb documents despite the fact that the data on the said documents was duly corroborated as per the findings in the penalty order.*

ITA No. 800/Ind/2019 for A.Y. 2009-10 in the matter of Penalty u/s 271E:

1) *On the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the penalty of Rs. 1,64,00,000/- levied by the JCIT (Central), Indore, u/s 271E on account of violating the provisions of section 269T of the Income-tax Act, 1961.*

2) *On the facts and in the circumstances of the case, the Ld. CIT(A) erred in holding that the penalty was imposed on the basis of dumb documents despite the fact that the data on the said documents was duly corroborated as per the findings in the penalty order.*

ITA No. 801/Ind/2019 for A.Y. 2010-11 in the matter of Penalty u/s 271E:

1) *On the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the penalty of Rs. 2,55,10,000/- levied by the JCIT (Central), Indore, u/s 271E on account of violating the provisions of section 269T of the Income-tax Act, 1961.*

2) *On the facts and in the circumstances of the case, the Ld. CIT(A) erred in holding that the penalty was imposed on the basis of dumb documents despite the fact that the data on the said documents was duly corroborated as per the findings in the penalty order.*

ITA No. 802/Ind/2019 for A.Y. 2011-12 in the matter of Penalty u/s 271E:

1) *On the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the penalty of Rs. 1,35,00,000/- levied by the JCIT (Central), Indore, u/s 271E on account of violating the provisions of section 269T of the Income-tax Act, 1961.*

2) *On the facts and in the circumstances of the case, the Ld. CIT(A) erred in holding that the penalty was imposed on the basis of dumb documents despite the fact that the data on the said documents was duly corroborated as per the findings in the penalty order.*

ITA No. 803/Ind/2019 for A.Y. 2012-13 in the matter of Penalty u/s 271E:

1) *On the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the penalty of Rs. 1,05,00,000/- levied by the JCIT (Central), Indore, u/s 271E on account of violating the provisions of section 269T of the Income-tax Act, 1961.*

2) *On the facts and in the circumstances of the case, the Ld. CIT(A) erred in holding that the penalty was imposed on the basis of dumb documents despite the fact that the data on the said documents was duly corroborated as per the findings in the penalty order.*

ITA No. 804/Ind/2019 for A.Y. 2013-14 in the matter of Penalty u/s 271E:

1) *On the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the penalty of Rs. 2,35,00,000/- levied by the JCIT (Central), Indore, u/s 271E on account of violating the provisions of section 269T of the Income-tax Act, 1961.*

2) *On the facts and in the circumstances of the case, the Ld. CIT(A) erred in holding that the penalty was imposed on the basis of dumb documents despite the fact that the data on the said documents was duly corroborated as per the findings in the penalty order.*

ITA No. 805/Ind/2019 for A.Y. 2014-15 in the matter of Penalty u/s 271E:

1) *On the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the penalty of Rs. 85,00,000/- levied by the JCIT (Central), Indore, u/s 271E on account of violating the provisions of section 269T of the Income-tax Act, 1961.*

2) *On the facts and in the circumstances of the case, the Ld. CIT(A) erred in holding that the penalty was imposed on the basis of dumb documents despite the fact that the data on the said documents was duly corroborated as per the findings in the penalty order.*

2. Since these appeals arise from common order of lower-authorities and involve issues of common nature; they were heard together at the request of parties and are being disposed of by this common order for the sake of convenience and clarity.

3. The background facts leading to present appeals are such that the assessee is a company. A search u/s 132 of the Act was conducted in case of one "PATH Group" including assessee on 27.08.2014. Pursuant to search, the assessments of assessee were completed u/s 153A/143(3) for AY 2009-10 to 2015-16. During search, the authorities seized a laptop from premise of assessee and took Tally data from laptop in the name of XYZ 0809-2. The search-team also seized loose papers marked as LPS-1 to 8 from the premise of one Shri G.C. Patidar, an employee of assessee. The statements of Shri G.C. Patidar were also recorded u/s 132(4) wherein he stated that unsecured loans were taken from various people which were out of books. During assessments proceedings, the assessing authority observed that the assessee has taken loans in cash and also made repayments in cash. Considering such act of assessee as a default committed in violation of section 269SS & 269T of the Act, the assessing authority referred matter to

Joint Commissioner of Income-tax (Central), Indore ["JCIT"] for taking action 271D & 271E. Accordingly, the JCIT show-caused assessee in response to which the assessee made a detailed submission including denial of any cash loan having been taken/repaid. However, the JCIT rejected assessee's submission and imposed following penalties:

AY	Penalty u/s 271D for alleged cash loans taken	Penalty u/s 271E for alleged cash repayment of loans
2009-10	8,98,85,000	1,64,00,000
2010-11	54,65,000	2,55,10,000
2011-12	2,55,00,000	1,35,00,000
2012-13	1,30,00,000	1,05,00,000
2013-14	4,83,00,000	2,35,00,000
2014-15	2,83,00,000	85,00,000
2015-16	55,00,000	--

Aggrieved, the assessee carried matter in first-appeal. The CIT(A), after due consideration, deleted the penalties imposed by JCIT. Now, the revenue has come in next appeal assailing the orders of CIT(A).

4. Before us, Ld. AR for assessee took liberty to make arguments first which was allowed after taking consent from Ld. DR for revenue. Then, Ld. AR carried us to Para No. 3 of penalty-order passed by JCIT involved in ITA 793/Ind/2019 and demonstrated that the JCIT has imposed the impugned penalties on the basis of four (4) documents seized during search as

mentioned in last column of the Table. Out of those four documents, first three are (i) Page No. 25-26 of LPS-1, (ii) Tally file XYZ 0809 2 recovered from Laptop and (iii) BS-4. Further, on Page No. 14-18 of penalty-order, the JCIT also relied upon statements of Shri G.C. Patidar. Having shown this, Ld. AR made a pointed submission that all these materials, namely (i) Page No. 25-26 of LPS-1, (ii) Tally file XYZ 0809 2 recovered from Laptop, (iii) BS-4, and (iv) Statements of Shri G.C. Patidar were duly analysed by first appellate authority in quantum-appeals of assessee itself for AYs 2009-10 & 2010-11 and after due consideration, the first appellate authority did not favour the observations/inferences/conclusions drawn by assessing authority. Thereafter, the revenue went in next appeals to ***ITAT in IT(SS)A No. 32 & 33/Ind/2021*** whereupon, vide order dated 13.12.2023, the ITAT, Indore Bench dismissed revenue's appeals and thus upheld the orders of first appellate authority. Furthermore, in the present appeals also, the first appellate authority i.e. CIT(A) has deleted the penalties imposed by JCIT on the basis of very same material. Since the present appeals being contested by revenue do not have any new material or fact, the impugned orders of CIT(A) deleting the penalties are in order and must be upheld having regard to the order passed by ITAT in ***IT(SS)A No. 32 & 33/Ind/2021 (supra)***.

5. The fourth document considered by JCIT is "Page 21-24 of LPS-1" seized from office of M/s Agroh Infrastructure Developers Pvt. Ltd. This document is a basis for penalties to the extent of Rs. 3,66,25,000/- u/s 271D and Rs. 1,15,00,000/- u/s 271E in AY 2009-10 only *(For the sake of*

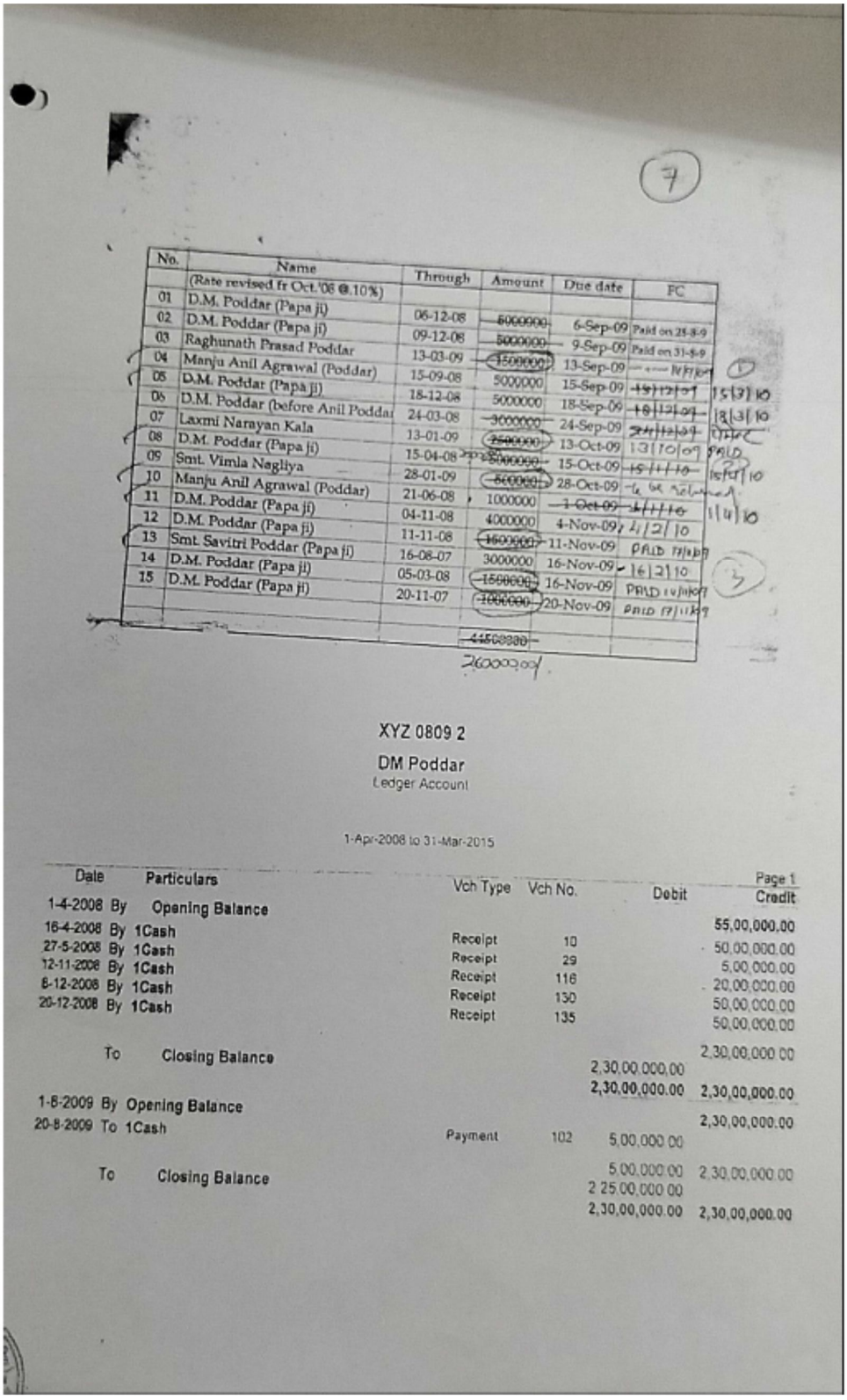
clarity, these penalties are already included in overall penalties of Rs. 8,98,85,000/- u/s 271D and Rs. 1,64,00,000/- u/s 271E imposed by JCIT) in respect of cash loans taken/cash repayments alleged to have been made by assessee from/to M/s Agroh Infrastructure Developers Pvt. Ltd. The JCIT has discussed this issue at length in Para 6 / Page 19-23 of penalty-order. In this regard, Ld. AR submitted that the said material, namely "Page 21-24 of LPS-1" was duly analysed by first appellate authority in quantum-appeal of assessee itself for AY 2009-10 and after due consideration, the first appellate authority did not favour the observations/inferences/conclusions drawn by assessing authority. Thereafter, the revenue went in next appeals to *ITAT in IT(SS)A No. 32/Ind/2021* whereupon, vide a consolidated order dated 10.01.2023 in ***IT(SS)A No. 32 to 34/Ind/2021***, the ITAT, Indore Bench dismissed revenue's ground and thus upheld the orders of first appellate authority. Furthermore, in the present appeals also, the first appellate authority i.e. CIT(A) has deleted the penalties imposed by JCIT on the basis of very same material. Since the present appeals being contested by revenue do not have any new material or fact, the impugned orders of CIT(A) deleting the penalties are in order and must be upheld having regard to the order passed by ITAT in ***IT(SS)A No. 32 to 34/Ind/2021 (supra)***.

6. Ld. DR for revenue, though dutifully supported the orders of AO and opposed the impugned orders of CIT(A), yet fairly agreed that in present appeals, the material relied upon by JCIT as basis for imposition of penalties is same as was there in quantum-appeals ***IT(SS)A No. 32 & 33/Ind/2021***

(supra) and IT(SS)A No. 32 to 34/Ind/2021 (supra). Ld. DR further submitted that the Bench may take a call.

7. We have considered submissions of both sides and perused the orders of lower authorities. At first, we would like to extract the operative part of order passed by ITAT in ***IT(SS)A No. 32 & 33/Ind/2021 (supra)*** as under:

> *"7. We have considered rival submissions as well as relevant material on record. The AO has made the addition on account of unexplained interest payment in respect of unaccounted cash loan on the basis of the loose paper seized from the premises of Shri G.C. Patidar an employee of the assessee as well as the tally account in the name of XYZ 0809-2 taken from laptop. The details of the seized document are reproduced by the AO in assessment order in para 7 & 8 as under:*



No.	Name (Rate revised fr Oct.'06 @.10%)	Through	Amount	Due date	FC
01	D.M. Poddar (Papa ji)	06-12-08	6000000	6-Sep-09	Paid on 25-8-9
02	D.M. Poddar (Papa ji)	09-12-08	5000000	9-Sep-09	Paid on 31-8-9
03	Raghunath Prasad Poddar	13-03-09	1500000	13-Sep-09	
04	Manju Anil Agrawal (Poddar)	15-09-08	5000000	15-Sep-09	
05	D.M. Poddar (Papa ji)	18-12-08	5000000	18-Sep-09	
06	D.M. Poddar (before Anil Poddar	24-03-08	3000000	24-Sep-09	
07	Laxmi Narayan Kala	13-01-09	2500000	13-Oct-09	
08	D.M. Poddar (Papa ji)	15-04-08	5000000	15-Oct-09	
09	Smt. Vimla Nagliya	28-01-09	500000	28-Oct-09	
10	Manju Anil Agrawal (Poddar)	21-06-08	1000000	1-Oct-09	
11	D.M. Poddar (Papa ji)	04-11-08	4000000	4-Nov-09	
12	D.M. Poddar (Papa ji)	11-11-08	1600000	11-Nov-09	
13	Smt. Savitri Poddar (Papa ji)	16-08-07	3000000	16-Nov-09	
14	D.M. Poddar (Papa ji)	05-03-08	1500000	16-Nov-09	
15	D.M. Poddar (Papa ji)	20-11-07	1000000	20-Nov-09	
			44500000		

XYZ 0809 2

DM Poddar

Ledger Account

1-Apr-2008 to 31-Mar-2015

Page 1

Date	Particulars	Vch Type	Vch No.	Debit	Credit
1-4-2008	By Opening Balance				55,00,000.00
16-4-2008	By 1Cash	Receipt	10		50,00,000.00
27-5-2008	By 1Cash	Receipt	29		5,00,000.00
12-11-2008	By 1Cash	Receipt	116		20,00,000.00
8-12-2008	By 1Cash	Receipt	130		50,00,000.00
20-12-2008	By 1Cash	Receipt	135		50,00,000.00
	To Closing Balance			2,30,00,000.00	2,30,00,000.00
				2,30,00,000.00	2,30,00,000.00
1-8-2009	By Opening Balance				2,30,00,000.00
20-8-2009	To 1Cash	Payment	102	5,00,000.00	
	To Closing Balance			5,00,000.00	2,30,00,000.00
				2,25,00,000.00	
				2,30,00,000.00	2,30,00,000.00

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XYZ 0809 2

RP Poddar

Ledger Account

1-Apr-2008 to 31-Mar-2015

Date	Particulars	Vch Type	Vch No	Debit	Credit
1-4-2008	By Opening Balance				80,00,000.00
6-10-2008	By 1Cash	Receipt	98		10,00,000.00
	To 1Cash	Payment	99	25,00,000.00	
4-11-2008	By 1Cash	Receipt	111		40,00,000.00
14-3-2009	By 1Cash	Receipt	164		15,00,000.00
	To Closing Balance			25,00,000.00	1,45,00,000.00
				1,20,00,000.00	
				1,45,00,000.00	1,45,00,000.00
1-4-2009	By Opening Balance				1,20,00,000.00
13-4-2009	By 1Cash	Receipt	10		20,00,000.00
13-7-2009	To 1Cash	Payment	76	20,00,000.00	
20-8-2009	To 1Cash	Payment	102	25,00,000.00	
14-9-2009	To 1Cash	Payment	119	15,00,000.00	
14-11-2009	To 1Cash	Payment	159	15,00,000.00	
	To Closing Balance			75,00,000.00	1,40,00,000.00
				65,00,000.00	
				1,40,00,000.00	1,40,00,000.00

8. An extract of the transaction recorded in the tally data is being reproduced as under:

In Recovered Data				In regular books of		
Date	**Head**	**Amount**	**Receipt/ Paid**	**Name of Party**	**Date**	**Amount**
02.04.08	RS Modi	1000000	Recd			
	Nitin Barua AE	15000	Recd	Nitin Barua	01.04.08	15000
	NS Barua AE	110000	Recd			
02.04.08	Puneet Agrawal MG	200000	Paid			
	Nitin Agrawal	200000	Paid			
	Finance Charges Satish Mewara	70000	Paid			
	Mobile Recharge	461	Paid	PATH India	01.04.08	461
	Finance Charges RS Agrawal	120000	Paid			
	Sanjay Mehta & Associates	100000	Paid			
	Printing & Stationery	45	Paid	PATH India	01.04.08	45
	Repairs & Maintenance	1685	Paid	PATH India	01.04.08	1685
	Staff Exp.	2000	Paid			
	NS Barua E	10000	Paid			

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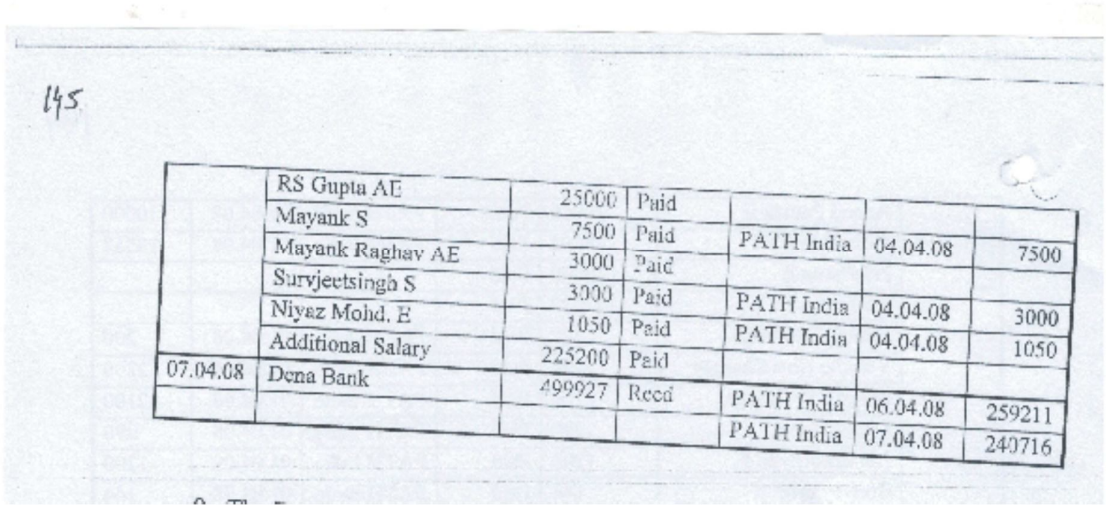
	Anand Pathak E	10000	Paid	PATH India	01.04.08	10000
	Nitin Barua E	18582	Paid	PATH India	01.04.08	18582
	NS Barua E	50000	Paid			
	NS Barua E	122337	Paid			
	Mobile Recharge	200	Paid	PATH India	01.04.08	200
	Vehicle Hire Charges	2200	Paid	PATH India	01.04.08	2200
	Freight & Cartage	2100	Paid	PATH India	01.04.08	2100
	Conveyance	290	Paid	PATH India	01.04.08	290
	AK Shrotriyaji E	1200	Paid	PATH India	01.04.08	1200
	Conveyance	144	Paid	PATH India	01.04.08	144
	Pol Exp.	2800	Paid	PATH India	01.04.08	2800
	Conveyance	150	Paid	PATH India	01.04.08	150
	Mg Road Labour Dept.	3000	Paid			
03.04.08	Puneet Agrawal MG	100000	Paid			
	Satya Narayan Mukati L	8400	Paid			
	Marriage Gift	2800	Paid	PATH India	03.04.08	2800
	AK Shrotriyaji Salary	70000	Paid			
	Conveyance	200	Paid	PATH India	03.04.08	200
	Vehicle Hire Charges	1200	Paid	PATH India	03.04.08	1200
	NS Barua AE	50000	Paid			
	Puneet Agrawal	200000	Paid			
	Mess Exp.	8415	Paid	PATH India	03.04.08	8415
	Donation	1100	Paid	PATH India	03.04.08	1100
	Conveyance	628	Paid	PATH India	03.04.08	628
	Pol Exp.	1716	Paid	PATH India	03.04.08	1716
	Office Exp.	70	Paid	PATH India	03.04.08	70
	Piyusha Mantri	185	Paid			
	Ajaysinghchouhan AE	1000	Paid			
05.04.08	Dena Bank	511867	Recd	PATH India	03.04.08	251651
				PATH India	04.04.08	100000
				PATH India	05.04.08	260216
05.04.08	Puneet Agrawal MG	200000	Paid			
	NS Barua AE	100000	Paid			
	SD Agrawal PF E	51096	Paid			
	SD Agrawal Crusher E	31710	Paid	PATH India	04.04.08	31710
	Neeraj Barua E	22000	Paid			
	Harish Mishra	11596	Paid	PATH India	04.04.08	11596
	Dhanjilal E	15845	Paid	PATH India	04.04.08	15845
	AS Tomar E	6965	Paid	PATH India	04.04.08	6965
	Asad Qureshi E	8733	Paid	PATH India	04.04.08	8733



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	RS Gupta AE	25000	Paid			
	Mayank S	7500	Paid	PATH India	04.04.08	7500
	Mayank Raghav AE	3000	Paid			
	Suryjeetsingh S	3000	Paid	PATH India	04.04.08	3000
	Niyaz Mohd. E	1050	Paid	PATH India	04.04.08	1050
	Additional Salary	225200	Paid			
07.04.08	Dena Bank	499927	Recd	PATH India	06.04.08	259211
				PATH India	07.04.08	240716

7.1 The AO then proceeded to conclude that the transactions in the tally account of XYZ 0809-2 are corroborated by the transactions recorded in the loose paper seized from the premises of Shri G.C. Patidar and held that the transactions to the tune of Rs.5,32,60,000/- are cash loan received by the assessee out of book for A.Y.2009-10 on which the AO has computed the interest expenses of Rs.82,03,684/-. Similarly for A.Y.2010-11 the AO taken loan of Rs.54,65,000/- and interest expenses of Rs.58,55,122/-. The details of these amounts have been given by the AO in para 11 as under:

Name of Transaction	Period	Amount received	Amount paid
Loan availed by PATH	FY 08-09	5,32,60,000	49,00,000
	FY 09-10	54,65,000	2,55,10,000
Interest Expenses paid by PATH	FY 08-09		82,03,684
	FY 09-10		58,55,122
Cash transaction of PATH with directors & Relatives	FY 08-09	2,85,25,021	5,52,49,940
	FY 09-10	1,46,61,842	5,37,00,603

7.2 All these figures as given by the AO are based on the assumption of the AO that the transactions recorded in the loose paper against the name of these persons are cash loan taken by the assessee on interest @ 10%. There is nothing in the loose paper to show that the interest is payable annually or monthly or only at the time of repayment of loan. The AO has computed the repayment as it appears in the loose paper marked as LPS-1. It is also pertinent to note that in the Tally account found in the laptop as well as loose paper seized from the possession of Shri G.C. Patidar do not reveal any transaction of payment of any interest by the assessee. Therefore, the AO has presumed the payment of interest on these transactions without any supporting evidence to substantiate the said presumption of the AO. Further the AO has relied upon the statement of Shri G.C. Patidar recorded u/s 132(4) of the Act which was subsequently retracted by filing an affidavit by Shri G.C. Patidar dated 28.12.2016. The AO has not made any comments on the said

affidavit filed by the G.C. Patidar retracting earlier statement and has stated that contents of the statement recorded u/s 132(4) on 27th August 2014 were either not stated by him or which were not factually correct. He has given illustration of question no.14 of the said statement and stated that he never stated in replied to the said question 14 that the assessee has taken cash loan from market. Therefore, there is nothing recorded either in the tally account in laptop or in the loose paper seized from the possession of Shri G.C. Patidar that the assessee has paid interest in cash towards alleged cash loan taken from parties as mentioned in the loose papers. Further the AO has given only two ledger accounts as found in the laptop seized from the premises of the assessee but there is no entry regarding the payment of interest. Thus, even by considering the documents marked as LPS-1 and tally account found in the laptop would not lead to the conclusion that the assesse has paid interest on the alleged loan as there is nothing to reveal the payment of interest by the assesse. The entries as found in the account XYZ 0809-2 are regarding the credit and debit of the amounts which are all in round figures and do not represent any interest payment. Therefore, without going into the merits of the alleged transactions of cash loan taken by the assessee the documents relied upon by the AO itself do not reveal any payment of interest except the statement of Shri G.C. Patidar who has mentioned interest rate only and not the payment of interest during the year under consideration. We further note that the AO in para 13.3.5 rejected the contention of the assessee by considering the signature on the loose sheet on cutting and correction as signature of Shri Puneet Agrawal as under:

> *"13.3.5 The contention of assessee is incorrect, important evidence seized from premise of Shri G.C Patidar is serial of 19 of page no.14 of LPS-1 seized from residence of Patidar it consist of signature of Shri Puneet Agrawal clearly meaning that he has approved the transactions."*

7.3 *This observation of the AO is contrary to the statement of Shri G.C. Patidar recorded u/s 132(4) of the Act and question no.31 and answer to the same are reproduced as page no.93 of the assessment year as under:*

"प्रश्न 31 कृपया दस्तावेज LPS-1 के पृष्ठ क्रमांक 14 की सिरियल नं. 19 का अवलोकन करे एक हस्ताक्षर दिखाई दे रहे है यह किस व्यक्ति का हस्ताक्षर है और क्यों है?

उत्तर :उपरोक्त प्रविष्टि में हस्ताक्षर शायद आफिस के कर्मचारी न्याज मोहम्मद के हो सकते है। क्याकि इस entry में कुछ संशोधन हुआ होगा इसलिए उसने इसentry को verify करके sign किया।

7.4 *Thus, it is clear that Shri G.C. Patidar has stated in the statement that the signature on the loose sheet may be of Mr. NayazAhmmad from the office. Therefore, the observation of the AO is contrary to the record itself and the addition made by the AO on account of alleged payment of interest on the cash loans is only on the basis of the presumption of the AO and not on the basis of any material or evidence. The statement of Shri G.C. Patidar recorded*

u/s 132(4) also cannot be considered as incriminating material in the proceedings u/s 153A of the Act once the assessee has denied the transactions of any cash loan allegedly recorded in the LPS-1 as well as in the tally account found in the laptop. Once the assesse denied the alleged loan taken or payment of interest the AO was required to ascertain the truth by conducting a proper inquiry and at least by examining the parties from whom the alleged loan is found to be taken by the assesse. It is also relevant to consider whether any addition in the hands of the lenders of the cash loan to the assessee has been made or not. The AO did not take the pain to verify the status of any assessment of the lenders or status of their confirmation of the transactions allegedly found in the LPS-1 & laptop. The assessee has explained the circumstances leading to the dummy accounts in the laptop and being used by a trainee of accounting and therefore, the assessee claimed that all these transactions found in the laptop of employee are fictitious transactions recorded during the training of the said employee. The AO has not taken any step to verify this explanation of the assessee by conducting any inquiry. There is no dispute that the laptop found during the search was not in use for a long time and it was claimed to be a laptop of one of the deceased employee of the assessee. The affidavit of Shri G.C. Patidar has neither been considered nor rejected by the AO while passing assessment order. The CIT(A) has analysed all these documents in para 4.2.2 to 4.2.10 as under:

> *"4.2.2 I have considered the facts of the case, plea raised by the appellant and findings of the AO. Admittedly, the sole basis of such huge addition is one the tally data recovered from laptop of old employee and loose papers sheets seized vide LPS-1 to 8 from premises of Shri G C Patidar. During the course of search, statement of Shri GC Patidar was recorded on oath which has been retracted vide affidavit dated 28.12.2016. Since, the statement given during search has been retracted, therefore, the same cannot be relied upon. As a matter of fact the appellant before, AO as well as before me has stated that the entries in respect of laptop data which has been seized from the office of the company was used by one of its employee Mr. Nilesh Tawrech who was taking tally accounting training under Shri G.C. Patidar, who used to provide him hypothetical entries for learning purpose for that reason and for learning purpose name of the company was taken as 'XYZ'. The appellant has claimed not having any knowledge of company 'XYZ' which has also been stated by appellant during the course of assessment proceedings. The appellant after the search proceedings enquired from his staff member regarding the impugned printouts. Mr G.C. Patidar, who worked as an accountant usually comes to office and worked for others and uses the printer installed at the premises of the appellant, informed that he has opened this account on tally to train his junior Mr. Nilesh Tawrech and most of the figures are imaginary and few of the figures were copied from the data of appellant. The appellant in support has filed affidavit of Shri G.C. Patidar regarding the same.*

4.2.3 After considering the entire factual matrix and evidence/material on record inter alia written submissions filed, I reach to conclusion that impugned additions have been made on the basis of assumption and presumption which neither sustainable on facts nor in law. The AO has reached to conclusion that few of the entries in printouts and books of appellant are matching, therefore, the same represents correct picture of books of accounts of the appellant and subsequent addition was made to the income of the appellant. On perusal of copy of affidavit filed by Shri G.C. Patidar, it is observed that the said tally dummy company has been created on his instruction in order to train his junior Mr. Nilesh Tawrech. He further submitted that no firm in the name of XYZ exists and neither PATH company i.e. Appellant Company has taken or repaid any loan in cash nor any loan was provided to the directors of the appellant company. The seized data is haphazard and un-systematic. The Data shows that the appellant company has borrowed the money in cash and paid to the Directors Shri Punit Agrawal and Shri Nitin Agrawal. No company takes the cash borrowing from the market and transfer it to the directors when Directors are having very good goodwill in the market to borrow directly in their own name. Therefore, the loose paper sheets and laptop entries cannot be considered as a relevant evidence for making such huge additions. Also, the AO ought to have considered this very simple fact the learning tally accounts does not reflect true & real business transactions.These documents have been scanned on page 81 to 86 of the assessment order. On a plain and cursory look would make it amply clear that this paper is relating to "some tally account in the name of XYZ 0809 2 from 01.04.2008 to 31.03.2009 & 01.04.2009 to 31.03.2010". Appellant has strongly contended that the said printouts were taken by Shri G.C. Patidar and does not belong to him. The owner and creator of the documents have admitted that the said impunged printouts have been made by his ex-employee who is no more and had also explained the reason for preparing such documents. Shri G.C. Patidar has clearly stated that the tally accounts have been prepared for training purpose only and the data are picked from different sources which also includes random data of appellant. The AO failed to consider that neither the appellant nor his accountant has stated that any such firm actually exists and the transactions as mentioned in the seized printouts have been executed. The additions have been imposed on sheer presumption and assumption basis. Further, the AO did not even bother to carry out independent enquiries from the person whose names are mentioned on LPS-1 & LPS 8 which Was seized from the premises of G C Patidar. The trainee junior Nilesh Tawarech has untimely passed away. Therefore, it is impossible for the appellant to bring Shri Nilesh Tawarech in person for examination on oath. It is pertinent to mention that no incriminating material was found during search having sole direct nexus with any of the impuged cash loan transaction. Furthermore, neither the AO call any of the person whose names were mentioned on loose paper for examination nor any person whose name were mentioned on loose paper turned out to AO and has admitted that any such transaction has taken place. Therefore, in absence of any cogent evidence having

direct nexus with the impugned transactions, the said impugned papers and tally data account cannot be used against the appellant. The AO has also alleged that some of the data is accounted and some of the data is unaccounted in books of accounts, however, has failed to explain that the unaccounted data. Also, the data found from the premises of Shri G.C. Patidar was not matching with the data found from the office premises of the appellant in the seized impunged tally data. The AO has also compared data found from premises of Shri GC Patidar and impunged tally account of DM Poddar. On bare reading one could easily establish that the entries mentioned in the ledger account of D.M Poddar does not matches with the jottings of the loose paper seized from premises of Shri GC Patidar. Similarly the ledger account of R.P. Poddar is also not matching with the other account as mentioned in the loose paper sheets. The AO has also reproduced the accounts of various persons as "In Recovered Data" and "In Regular Books of' and has tried to establish a nexus between seized tally data and books of account of the appellant. While analysing the comparative chart, the data as mentioned "In Recovered Data" and "In Regular Books of' are not matching. Here is important to keep in mind that Shri GC Patidar has admitted that the trainee was provided with mixed random data of various concerns. Therefore, there may be some instance where the said amount gets tallied with the training tally data. However, for the other unmatched data the onus lies on AO to prove that the said transaction was fully materialised with each and every detail of the transaction with supportive evidences. No positive independent evidences has been brought on record by the AO. Therefore, it is proved beyond doubt that the seized tally accounts do not form part of regular books of account. Most importantly, the AO himself has admitted that the data is getting partially corroborated.

4.2.4 Further, the AO on the basis of one loose sheet which is page No. 21 of LPS-1 and reproduced at page 100 of the Order and on the basis of page No. 23 of LPS-1 and placing reliance on second table has reached to a inference that during financial year 2008, the Appellant - PATH has received a cash loan of Rs. 115 Lakhs in cash from Agroh (in short AIDPL) and in next financial year the appellant has accepted the cash loan of Rs. 3,66,25,000/- from M/s Agroh Infrastructure Developers Pvt. Ltd (In short AIDPL) and on other hand accepts the same to be cash- buyback of shares. The AO has also held that interest amounting to Rs. 14,83,394/- was charged by AIDPL. Whereas the said document only records some purported cash received and cash paid but nowhere the name of PATH is reflected. Even on second table at page 99, the name of PATH is not reflected therefore to attribute these transactions to PATH is fallacious. The said loose sheet was subject to varying interpretation in the year AY 2008-09 and is a non-speaking/ dumb document. The director of Agroh cannot give any satisfactory reply during the statement recorded at the time of search however during the course of their assessment admitted that they have given loan to PATH. The statement of the Director wherein they

admitted giving loan to PATH has not been provided nor the opportunity to cross examination was made available.

It is important to mention that the buy-back of shares is duly accounted in audited books of account of appellant and the impugned loose papers were not found from premises of the appellant. Therefore, the AO is not justified in presuming buyback of shares as cash loan and interest on a loan was equally hypothetical. The statement given which has to be used against the assesse has to be confronted and opportunity to cross examine has to be provided, which squarely apply in relation to loose paper seized from the premises of Agroh where the statement was taken behind the back.

4.2.5 Another reasoning provided by the AO in support of his allegation that one BS-4 was found during the course of search which contain names of certain persons who are invitees to the party. The AO has applied all possible guess work in support of his allegation and stated that the name of the person whose names are written on BS-04 are known to appellan and in all probability will give loan to appellant. Even if the perusal of the contents of the BS 4 is made, there is only a single name matching with the name from whom loans are allegedly borrowed in cash, which is as under:-

Sl.	*Name of the alleged lenders on the basis of tally data/loose sheets*	*Name as per BS-4 who are invites to the party*
1.	*Anil Poddar*	*Name not found*
2	*DD Singhal*	*Name not found*
3	*Dev Modi*	*Name not found*
4	*DM Poddar*	*Name not found*
5	*Dr. Modi*	*Name not found*
6	*G.L. Modi*	*Name not found*
7	*Kailash Agrawal*	*Name not found*
8	*Kavita Nagliya*	*Name not found*
9	*Manju Anil Modi*	*Name not found*
10	*Mishraji*	*Name not found*
11	*Narendra Kala*	*Name not found*
12	*Neeaj Modi*	*Name not found*
13	*Nitin Goyal*	*Name not found*
14	*R.P. Poddar*	*Name not found*
15	*R.S. Modi*	*Name not found*
16	*Santosh vrindavanagrawal*	*Name not found*
17	*Satish Mewada*	*Name found*
18	*SavitriPoddar*	*Name not found*
19	*Sunil Modi*	*Name not found*

The data in the form of loose sheet gathered from the premises of GC Patidar which is a print out of excel sheet cannot be relied upon in the absence of any corresponding entry being made of the loan given by the counter party in his books. It is the stand of the AO that some of the Modi family member has given loan to PATH by cheque, therefore the entries in the loose sheet / tally data can be assumed to be true. The proof of actual transaction taken place cannot be substituted from the presumption howsoever strong it may be it cannot take the place of an evidence. It is onus on the AO to prove that actual transaction of cash i.e. movement of cash actually taken place with the help of documentary evidence. The assessment order does not discuss any such attempt by the department to conclusively establish that the transaction whereby debtor creditor relationship has been created between the two parties. None of the parties from whom the loans are allegedly taken by Assessee Company in cash were examined for the truth of the happening of such transactions. If the alleged cash loans are taken by the assessee company is taken to be true on the fact of it, then there arises a corresponding liability of income tax on such undisclosed income in the hands of giver of the cash loan. In none of the cases, the reciprocity which is a fundamental necessity of existence of transaction was ever proved or attempted by the department. In two cases reopened by the Department of Mr. Anil Poddar and Mr. Raghunath Poddar of which the Assessee Company has been informed, the reason to believe that cash loans were advanced by those person to assessee company was found unsupported and therefore such doubt has no legs to stand upon. Thus, in entirety the seized loose paper and tally data is dumb document/data and does not reflect any exchange of money by/to appellant.

4.2.6 This is settled legal position that any 'dumb document' cannot be used as an evidence to draw an adverse inference against the assessee. Case laws supporting this proposition are as under:-

ACIT Vs. Satyapal Wassan (2007) 295 ITR (AT) 352 (Jabalpur)

Held that:

"the crux of these decisions is that a document found during the course of search must be a speaking one and without any second interpretation, must reflect all the details about the transactions of the assessee in the relevant assessment year. Any gap in the various components as mentioned in section 4 of the Income Tax Act must be filled up by the Assessing Officer through investigations and correlations with the other material found either during the course of the search or on the investigation. As a result, we hold that document No.7 is a non- speaking document."

Most important ratio laid down in the said judgment is that "impugned document" must be speaking one and without any second interpretation and must reflect all the details about transactions of the assessee. In the instant case, the dummy tally account was created for training purposes by Shri G.C. Patidar but taking data from different sources including that of appellant. It would not be out of world to point out that the AO has never asked/enquired from the persons whose names are mentioned on the loose papers. The AO also did not enquired from Shri G.C. Patidar who has admitted to have been owner and creator of the tally account and subsequently retracted by filing affidavit dated 28.12.2016. Absence of these vital details is making the loose paper under consideration as "deaf & dumb document". The onus was solely on the AO to fill such vital gaps by bringing positive evidence on record and prove the allegation about alleged cash loans by the assessee, which he utterly failed to do so.

CBI vs VC Shukla 3 SCC 410

The Hon'ble Supreme Court has held that loose sheets of paper cannot be termed as 'book' within the meaning of s. 34 of Evidence Act. It has also been held therein by the Hon'ble Supreme Court that even correct and authentic entries in books of account cannot, without independent evidence of their trustworthiness, fix a liability upon a person. The Hon'ble Supreme Court also observed that even assuming that the entries in loose sheets are admissible under s. 9 of the Evidence Act to support an inference about correctness of the entries still those entries would not be sufficient without supportive independent evidence.

Rakesh Goyal Vs. ACIT (2004) 87 TTJ (Del) 151 -

The findings of Hon'ble Tribunal was as under:-

"20.1 After perusing the findings of the CIT(A) and the submissions of both the parties, we do not find any infirmity in these findings. Firstly the finding of the CIT(A) has not been controverted by the learned Departmental Representative by filing any positive evidence. The copies of the pages found from the possession of the assessee are placed in the paper book and after going through these papers, we find that these are simply deaf and dumb documents and they cannot be considered for making any addition. This is a settled principle of law that any document or entry recorded in those documents should be corroborated with positive evidence. Here in the present case nothing has been corroborated or proved that assessee was dealing in money lending business."

Mohan Foods Ltd Vs. DCIT (2010) 123 ITD 590 (Del) –

Held that-although the contents of the relevant seized documents show that the amounts mentioned therein relate to some expenditure, in the absence of any other evidence found during the course of search or brought on record by the AO to show that the said expenditure was actually incurred by the assessee, the same cannot be added to the undisclosed income of the assessee by invoking the provisions of s. 69C- Assessee explained that the said entries represented estimates made by its employees in respect of proposed expenditure-There is no evidence on record to rebut/controvert the said explanation- Additions not sustainable

CIT Vs. S M Agarwal (2007) 293 ITR 43 (Del) –

Held that –

"In this case the department seized documents "Annexure A-28 p. 15, - gives the details of certain handwritten monetary transactions which shows that the assessee had given a loan of Rs. 22.5 lacs on interest and eamed interest income of Rs. 3.55 lacs on it. The Tribunal hold this document as dumb document.

The relevant findings of the Tribunal as mentioned in the above order is as under:-

"We have ourselves examined the contents of the document and are unable to draw any clear and positive conclusion on the basis of figures noted on it. The letters 'H.S.', 'T.2' and 'D-Shop' cannot be explained and no material has been collected to explain the same. Likewise, the figures too are totally unexplained and on the basis of notings and jottings, it cannot be said that these are the transactions carried out by the assessee for advancing money or for taking money. Thus, in our opinion. this is a dumb document." Hon'ble High Court confirmed the findings of the Tribunal and relevant findings was as under:-

"12. It is well settled that the only person competent to give evidence on the truthfulness of the contents of the document is the writer thereof. So, unless and until the contents of the document are proved against a person, the possession of the document or handwriting of that person, on such document by itself cannot prove the contents of the document. These are the findings of fact recorded by both the authorities i.e. CIT(A) and the Tribunal."

"15. Similarly, in the present case, as already held above, the documents recovered during the course of search from the assessee are dumb documents and there are concurrent findings of CIT(A) and the Tribunal to this effect. Since the conclusions are essentially factual, no substantial question of law arises for consideration".

Jayantilal Patel Vs. ACIT &Ors (1998) 233 ITR 588 (Raj) -

Held that -

"During search at the residence of Dr.Tomar, the Department official found a slip containing some figures. This piece of paper claimed to have been recovered at the time of search contains figures under two columns. In one column, the total of these figures comes to Rs. 17,25,000 from 31st May, 1989, to 8th Dec., 1989, and in the other column, the total of these figures comes to Rs, 22, 12,500. An addition of Rs. 22, 12,500 on the basis of figures on a small piece of paper in respect of purchase of Plot No. B-4, Govind Marg, Jaipur was made by the AO. This plot B-4, Govind Marg, Jaipur, has been purchased jointly by Dr.Tomar, Dr. Mrs. Tomar and B.S. Tomar, HUF.

Held that no addition on account of entries on a piece of paperwhich is claimed to have been found at the time of search, can be made treating the figures as investment for purchase of plot No. B-4, Govind Marg, Jaipur in the hands of Dr.Tomar, Dr. Mrs. Tomar and B.S. Tomar HUF."

NK Malhan Vs. DCIT (2004) 91 TTJ (Del) 938 -

Held that -

"We have perused the aforesaid explanation and the seized document placed at assessee's paper book-I pp. 48 and 50. The document does not state of any date or the year against the entries written therein. It does not show whether the assessee has made or received any payment. It also cannot be deciphered from the said documents that the entries therein pertain to the block period. The AO also did not bring on record any material to show that any investment has been made by the assessee in any chit fund company or otherwise. The document found and seized might raise strong suspicion, but it could not be held as conclusive evidence without bringing some corroborative material on record. The document contained only the rough calculations and was silent about any investment. On the basis of such a dumb document, it cannot be said that there were investments made in fact by the assessee. Heavy onus lay upon the Revenue to prove that the document gives rise to undisclosed investment by the assessee. This onus has not been discharged. Accordingly no addition of undisclosed income could be made on the basis of such a document. Such a view has also been entertained by the Hon'ble Allahabad High Court in CIT vs. Dayachand Jain Vaidya (1975) 98 ITR 280 (All). The addition so made, therefore, is directed to be deleted."

Stanam Singh Chhabra vs. Dy. CIT (2002) 74 TTJ (Lucknow) 976:

None of the loose papers seized are in the hand writing of the assessee. There is some jotting by pencil in some coded form on the loose papers made by the surveyed person or some other person. Moreover, no entries are supported by any corroborative evidence; such loose papers cannot be called even the documents as they are simply the rough

papers to be thrown in the waste paper basket. In this connection, the assessee relies upon the court decisions.

CIT Vs. Chandra Chemouse P. Ltd. (2008) 298 ITR 98 (Raj.):

it is held that -

(i) Additions can be made only when evidence is available as a result of search or a requisition of books of accounts or documents and other material. However additions cannot be made on the basis of inferences. (ii) No facts were available to AO after search and inference of AO did not fall within the scope of Section 158BB. (iii) Deletion of additions made by Tribunal of assumed undeclared payments made for purchase of property was on basis of facts. Ashwani Kumar V. ITO (1991) 39 ITD 183 (Del) and Daya Chand V. CIT (2001) 250 ITR 327 (Del) and S.P. Goel V. DCIT (2002) 82 ITD 85 (Mum.):

Nine out of 19 slips found were without any name or amount and therefore were dumb documents and no adverse inference could be drawn.

Common Cause (A Registered Society) Vs. Union of India - 30 ITJ 197 (SC):

In this case, the Hon'ble Court held that without any independent evidence or corroborative material, no addition is permissible on the basis of loose paper jottings &notings. The relevant paras of the order are as under :-

6. With respect to the kind of materials which have been placed on record, this Court in V.C. Shukla's case (supra) has dealt with the matter though at the stage of discharge when investigation had been completed but same is relevant for the purpose of decision of this case also. This Court has considered the entries in Jain Hawala diaries, note books and file containing loose sheets of papers not in the form of "Books of Accounts" and has held that such entries in loose papers/sheets are irrelevant and not admissible under Section 34 of the Evidence Act, and that only where the entries are in the books of accounts regularly kept, depending on the nature of occupation, that those are admissible

17. It has further been laid down in V.C. Shukla (Supra) as to the value of entries in the books of account, that such statement shall not alone be sufficient evidence to charge any person with liability, even if they are relevant and admissible, and that they are only corroborative evidence. It has been held even then independent evidence is necessary as to trustworthiness of those entries which is a requirement to fasten the liability.

18. This Court has further laid down in V.C. Shukla (Supra) that meaning of account book would be spiral note book/pad but not loose sheets. The following extract being relevant is quoted hereinbelow :-

"14. In setting aside the order of the trial court, the High Court accepted the contention of the respondents that the documents were not admissible in evidence under Section 34 with the following words:

"An account presupposes the existence of two persons such as a seller and a purchaser, creditor and debtor. Admittedly, the alleged diaries in the present case are not records of the entries arising out of a contract. They do not contain the debits and credits. They can at the most be described as a memorandum kept by a person for his own benefit which will enable him to look into the same whenever the need arises to do so for his future purpose. Admittedly the said diaries were not being maintained on day-to-day basis in the course of business. There is no mention of the dates on which the alleged payments were made. In fact the entries there in are on monthly basis. Even the names of the persons whom the alleged payments were made do not find a mention in full. They have been shown in abbreviated form. Only certain 'letters' have been written against their names which are within the knowledge of only the scribe of the said diaries as to what they stand for and whom they refer to."

19. With respect to evidentiary value of regular account book, this Court has laid down inV.C. Shukla, thus;

"37. In Beni v. Bisan Dayal it was observed that entries in books of account are not by themselves sufficient to charge any person with liability, the reason being that a man cannot be allowed to make evidence for himself by what he chooses to write in his own books behind the back of the parties. There must be independent evidence of the transaction to which the entries relate and in absence of such evidence no relief can be given to the party who relies upon such entries to support his claim against another. In Hira Lal v. Ram Rakha the High Court, while negativing a contention that it having been proved that the books of account were regularly kept in the ordinary course of business and that, therefore, all entries therein should be considered to be relevant and to have been proved, said that the rule as laid down in Section 34 of the Act that entries in the books of account regularly kept in the course of business are relevant whenever they refer to a matter in which the Court has to enquire was subject to the salient proviso that such entries shall not alone be sufficient evidence to charge any person with liability. It is not, therefore, enough merely to prove that the books have been regularly kept in the course of business and the entries therein are correct. It is further incumbent upon the person relying upon those entries to prove that they were in accordance with facts."

20. It is apparent from the aforesaid discussion that loose sheets of papers are wholly irrelevant as evidence being not admissible under

Section 34 so as to constitute evidence with respect to the transactions mentioned therein being of no evidentiary value. The entire prosecution based upon such entries which led to the investigation was quashed by this Court.

4.2.7 Further, in numerous other case laws courts have consistently upheld the view that no addition and penalty could be imposed in the hands of the assessee on the basis of the dumb loose papers seized during search, absence of any corroborative material to show undisclosed cash loa given/taken by the appellant. Some of the case laws are as under:-

(i) MM Financiers (P) Ltd Vs. DCIT (2007) 107 TTJ (Chennai) 2000 Held that "no addition could be made in the hands of assessee on the basis of the dumb loose slips seized from his residence, in the absence of any corroborative material to show payment of any undisclosed consideration by the assessee towards purchase of land".

(ii)Monga Metals (P) Ltd Vs. ACIT 67 TTJ 247 (All. Trib)-

Holding that Revenue has to discharge its burden of proof that the figures appearing in the loose papers found from assessee's possession constitute undisclosed income. [In the present case, loose papers were not even seized from assessee's possession].

(iii)Pooja Bhatt Vs. ACIT (2000) 73 ITD 205 (Mum. Trib) –

Held that where document seized during search was merely a rough noting and not any evidence found that actual expenditures were not recorded in books of account, additions not justified. [In the instant case, similarly no other corroborative evidence was found in search to prove that details/figures mentioned in notings on page 117 to 119 of A/1 represent 'on money' payments by the assessee).

(iv) Atual Kumar Jain Vs. DCIT (2000) 64 TTJ (Del.Trib) 786- Held that additions based on chit of paper, surmises, conjectures etc could not be sustained in the absence of any corroborative evidence supporting it. [Similarly in present case, neither either parties have admitted payment/receipt of 'on money' nor any corroborative evidence was seized to support the findings of the AO].

SK Gupta Vs. DCIT (1999) 63 TTJ (Del.Trib) 532 - Held that

"that additions made on the basis of torn papers and loose sheets cannot be sustained as same do not indicate that any transaction ever took place and does not contain any information in relation to the nature and party to the transaction in question."

(vi) Jagdamba Rice Mills Vs. ACIT (2000) 67 TTJ (Chd) 838

Held that

"No addition can be made on dump documents".

(vii) In the latest decision of the Hon'ble M.P. High Court, Indore Bench in the case of the PCIT-1 v/s Shri Pukhraj Soni (2019) 34 ITJ 489 (MP) has held as under;

"On the basis of search re-assessment additions were made - Appeal allowed by CIT(A), which was confirmed by ITAT ITAT held that CIT(A) was justified in allowing the appeal as AO has done the addition on the basis of notings found in the books of third person - Revenue filed appeal against the order of ITAT - HELD – In the case of Common Cause (A Registered Society) v. Union of India, (2017) 30 ITJ 197 (SC). the Supreme Court held that incriminating materials in form of random sheets, loose papers, computer prints, hard disk and pen drive etc. and has held that that are inadmissible in evidence, as they are in the form of loose papers In the present case also entries found during search and seizure which are on loose papers are being made the basis to add income of respondent-appellant -In the light of the Supreme Court judgments, no case for interference is made out with the order passed by ITAT - Moreover no substantial question of law arise in the present appeal is dismissed"

It is settled legal position that onus of proof is on the person who makes any allegation and not on the person who has to defend. As per legal maxim "affairmanti non neganti incumbit probation" means burden of proof lies upon him who affirms and not upon him who denies. Similarly as per doctrine of common law "incumbit probation qui digit non qui negat" i.e. burden lies upon one who alleges and not upon one who deny the existence of the fact. The AO has failed to discharge his onus of proof especially when penalty has been imposed under "deeming fiction". In view of this lacune on the part of AO, the penalty imposed is legally not sustainable. As held in the case of CIT v/s KP Varghese 131 ITR 574 (SC) by Hon'ble Apex Court in absence of evidence that actually assessee paid more amount than declared in registered deed, no addition can be made. In the case of Bansal Strips (P) Ltd &Ors Vs. ACIT (2006) 99 ITD 177 (Del) it has been held that :-

"If an income not admitted by assessee is to be assessed in the hands of the assessee, the burden to establish the such income is chargeable to tax is on the AO. In the absence of adequate material as to nature and ownership of the transactions, undisclosed income cannot be assessed in the hands of the assessee merely by arithmetically totally various figures jotted down on loosed document".

4.2.8 It is settled law that AO cannot make any addition merely on basis of suspicion, however strong it may be. The AO is not justified in presuming certain facts without having anything to corroborate. Hon'ble Supreme Court in the case of Dhakeshwari Cotton Mills Ltd. v/s CIT

(1954) 26 ITR 775 (SC) has held that although strict rules of evidence Act do not apply to income tax proceedings, still assessment cannot be made on the basis of imagination and guess work. It has been held in the case of UmacharanSaha& Bros co. v/s CIT 37 ITR 21 (SC) that suspicion, however strong cannot take place of evidence. Similar views have been expressed by Apex court in the case of Dhiraj Lal Girdharilal v / s CIT (1954) 26 ITR 736 (SC).

4.2.9 Despite the request of the Appellant, during the course of Assessment proceeding and also during the course of Penalty proceedings, the department despite having several weapons in its armory, like giving of summon, survey, search and seizure, re-assessment, revision etc could not establish as to whether the alleged person from whom it is alleged that the appellant has taken huge loan in cash are really existing person or imaginary person. Nothing has been brought on record to suggest any enquiry has been conducted about the alleged lenders. No statement were recorded of the so called lenders by issuing summon, if there be any belief or doubt as to taking of loan in cash, if harbored by the department. Even if some statements were recorded they are not shared nor there was opportunity given to cross examine the person from whom it is alleged that Appellant has taken loan in cash. Further, the theory of huge cash loan being taken by Appellant, which has been built upon the loose sheet and laptop, a presumption u/s. 132 (4A) was available in the statute book but it has been duly rebutted by the Appellant with cogent and germane explanations, which cannot be disbelieved.

Hon. ITAT Indore Bench in the case of Dr.Yogiraj Sharma Vs. asstt CIT (2015) 25 ITJ 105 (Indore Tribunal); [2016] 69 taxmann.com 366 (Indore - Trib.)/[2015] 169 TTJ 547 (Indore - Trib.) categorically held that department has to bring cogent evidence to prove that transaction has actually taken place and inference cannot take the place of actuality. The relevant para is reproduced as under,

"In this case also we noted that the revenue authorities tried to co-relate these figures with the various supplies made to M.P Health Dept. but AO did not call any of the parties or if called for has not brought statement of any of the parties, if recorded, on record to prove whether these parties have paid any commission to the Assessee. Even no information was supplied or given to us or brought on records what happened in the case of these parties. Inference was simply drawn on the basis of the interpretation given to the various figures appearing in the loose papers. Inference, as we have already held, whatsoever strong, cannot take the place of actuality. We have gone through the various decisions as has been relied."

Hon. Supreme Court in the context of sec. 69C in the case of Pr. CIT Central III Vs. Lavnya Land Pvt Ltd [2019] 103 Taxmann.com 9 (SC)/ [2019] 261 Taxmann 454 (SC) dismissed the SLP arising out of the

Judgment CIT Vs. Lavnya Land Pvt Ltd [2017] 83 Taxmann.com 161 (Bom). The issue decided in favor of assessee as under,

"Whether since seized document did not belong to Assessee but seized from residential premises of one DD who had later retracted his statement, no action Under section 153C could have been undertaken in respect of Assessee, Held Yes. Whether further since entire decision was based on seized document and there was no material to conclusively show that huge amount revealed from seized document were actually transferred from one side to another, addition under section 69C were not sustainable.

Hon'ble Supreme Court in the case of Pr. CIT Vs. Vinita Chaurasia [2018] 98 Taxman.com 468 (SC) arising out of Order of HC in CIT Vs.VinitaChaurasia [2017] 82 Taxmann.com 153 dismissed the departmental SLP and affirm the very principle again that when a addition was made to the assessee income by invoking 153C on the basis of document seized in the course of search carried out in the case of L and later L retracted his statement that said document belong to Assessee and moreover there were various internal inconsistencies and contradictions in document in question, impugned addition was to be set aside.

In the case of CIT Vs. World wide Township Project Ltd (2014) 106 DTR Del 139 it was held that -

A plain reading of the aforesaid Section indicates that (the import of the above provision is limited) it applies to a transaction where a deposit or a loan is accepted by an assessee, otherwise than by an account payee cheque or an account payee draft. The ambit of the Section is clearly restricted to transaction involving acceptance of money and not intended to affect cases where a debt or a liability arises on account of book entries. The object of the Section is to prevent transactions in currency. This is also clearly explicit from clause (iii) of the explanation to Section 269SS of the Act which defines loan or deposit to mean "loan or deposit of money". The liability recorded in the books of accounts by way of journal entries, i.e. crediting the account of a party to whom monies are payable or debiting the account of a party from whom monies are receivable in the books of accounts, is clearly outside the ambit of the provision of Section 269SS of the Act, because passing such entries does not involve acceptance of any loan or deposit of money. In the present case, admittedly no money was transacted other than through banking channels. M/s PACL India Ltd. made certain payments through banking channels to land owners. This payment made on behalf of the assessee was recorded by the assessee in its books by crediting the account of M/s PACL India Ltd. In view of this admitted position, no infringement of Section 269SS of the Act is made out.

In the present case, the entries during the course of training in a dummy Company XYZ found in one Laptop and some loose sheets found at the premises of G.C. Patidar are the sole basis. Neither there is any payment or receipt of money nor these entries have established any Debtor Creditor relationship. The taking or accepting a loan is a bilateral action but there is nothing on record to suggest such essential bilateral character which is vital to constitute a transaction of loan or deposit. Any person of ordinary prudence, giving loan in cash would ask for security such as post dated cheque, collateral guarantee etc or at least a promissory note to secure his lending. Nothing has been found during the course of search to justify the huge alleged cash borrowings. Further, as per the own averment of the Learned AO, subsequent to the Financial Year 2008-09 and 2009-10, such entries were not found carried out in the subsequent years. If these entries represent actual state of financial affairs i.e. loan taken or given in cash, they are invariably required to be carried forward to next year as is the practice strictly followed in book keeping and accounts.

4.2.10 Even if the legislative presumption under section 132(4A) is available in the statute of income tax, yet the ingredient of default has to be established by the Department. In the case of Ushakant N Patel vs CIT (2006) 6 ITJ 312 (Gujrat HC) it has been held that un-disclosed investment under Sec.69, the question was whether even if presumption under 132(4A) is established, yet prerequisite of sec. 69 has to be complied with. It was held that even if the presumption available u/s. 132(4A) can be raised against assessee, the ingredient by way of prerequisite condition of 69 of the Act has to be satisfied and cannot be presumed to have been established on the basis of 132(4A) of the Act. Section 69 opens with the word "where any financial year immediately preceding the Assessment year, the Assessee has made investment ..." Therefore it was incumbent upon the authority to establish that such investment had been made in a financial year immediately preceding the assessment year in question. In the case in hand, despite presumption, the ingredient of default i.e. actually taking or repaying loan or interest payment or giving loan to directors in cash is to be established by the Authority, with necessary enquires conducted in the case of alleged lenders by summoning them, recording their evidence, giving cross examination to Appellant, exercising recourse to 153C or 147 to bring undisclosed income in the form of cash loan, which in our considered opinion, the authority failed to do. Therefore, Loan or Deposit of Money actually taken by appellant is to be established by independent and direct evidence and not with the help of Laptop data or jottings. The Burden is heavy on the person who allege, once the initial presumption is rebutted with sound explanations."

7.5 *The CIT(A) has considered the tally account as dummy one created for training purpose incorporating the data from different sources including that of assessee and therefore, the Tally account found in the laptop as well as loose paper were held to be having no evidentiary value being dump documents.*

The CIT(A) has also given more emphasize on the retraction of the statement by Shri G.C. Patidar by filing the affidavit and non-consideration of the same by the AO or examination of the said affidavit as well as Shri G.C. Patidar to ascertain the correct facts is a serious laps on the part of the AO while making addition. Despite the fact that the affidavit has been duly considered by the CIT(A) there is no rebuttal on the part of the AO. The AO has not even raised any question about the said affidavit in the grounds of appeal before us. Therefore, in absence of any denial on the part of the AO the only inference can be drawn that the AO has nothing to say about the affidavit filed by Shri G.C. Patidar retracting his earlier statement recorded u/s 132(4) of the Act.

7.6 Since the AO has relied upon the statement of Shri G.C. Patidar recorded u/s 132(4) which was subsequently retracted by filing the affidavit therefore, the veracity of the statement of Shri G.C. Patidar becomes questionable. The AO ought to have examined to Shri G.C. Patidar to find out the correct facts as he has made two versions of the statement one u/s 132(4) and another in affidavit filed before the AO. Further when the statement of Shri G.C. Patidar was relied upon by the AO as basis of the addition made in the assessment then it is incumbent upon the AO to give an opportunity to the assessee to cross examine Shri G.C. Patidar. The Hon'ble jurisdictional High Court in case of Prakash Chand Nahata vs. CIT 301 ITR 134 has held in para 19 to 20 as under:

> *"19. In the case at hand Mohd. Rashid was summoned and his statement was recorded. A request was made by the assessee to cross-examine him. The same was not allowed. On a perusal of the assessment order it is perceivable that the Assessing Officer has heavily relied upon the statement of Mohd. Rashid. The Assessing Officer has expressed the opinion that there could not have been any transaction between M/s. Rashid and Co., as it was a small firm and not assessed to income-tax.*
>
> *20. In the obtaining factual matrix the seminal question is whether the said statement of Mohd Rashid could have been utilised against the assessee without calling him for cross-examination. It is of immense significance that Mohd. Rashid has filed an affidavit in variance of his original statement. That apart, the Assessing Officer has ignored the affidavit and ascribed reasons how the transaction with the said Mohd. Rashid was not worth giving credence. The genuineness of bills produced by the assessee has not been accepted exclusively on the basis that the said Mohd. Rashid was a small businessman and was not assessed to income-tax. The aforesaid circumstances eloquently speak that the addition in the order of assessment has been made on the basis of the statement made by Mohd. Rashid. There is no cavil that a prayer was made under Section 131 of the Act to summon the said Mohd. Rashid for cross-examination. That has not been done. The language employed under Section 131 of the Act empowers the Assessing Officer to ensure the attendance of any person. When the statement of Mohd. Rashid was used against the assessee and an affidavit was filed controverting the same, we are disposed to think, it*

was obligatory on the part of the Assessing Officer to allow the prayer for cross-examination. That would have been in the fitness of things and in compliance with the principles of natural justice.

21. In view of the aforesaid we answer the reference holding that as the Assessing Officer had not summoned Mohd. Rashid, the proprietor of M/s. Rashid and Co., Jabalpur, in spite of the request made under Section 131 of the Act, the evidence of the said Mohd. Rashid could not have been used against the assessee and in the absence of affording a reasonable opportunity of being heard by summoning the said witness the assessment order is vitiated and cannot be saved as the addition has been made on the foundation of his deposition."

7.7 Thus, statement and witness cannot be used against the assessee without affording reasonable a opportunity of being heard as well as giving the assessee an opportunity for cross examination of the witnesses. Similarly in case of *Vetrivel Minerals vs. ACIT 437 ITR 179 (Mad)* the Hon'ble Madras High Court had held in para 22 & 23 as under:

"22.On the next issue of refusal of cross examination of the persons whose statements were recorded during the time of search under Section 132(4) of the Income Tax Act, it is trite law that the person against whom a statement is used, should be given opportunity to counter and contest the same. I am unable to accept the contention of the learned Senior Counsel that since the statements recorded were of persons who were employees of the assessee and therefore the assessee cannot seek for cross examination of them. The basic principles of jurisprudence governing the law of evidence can in no way interfered and could not be by the Income Tax Act provisions and neither the authorities functioning under the Income Tax Act has any discretion in such matters. The Supreme Court in the judgment KishanChadnChellaram reported in 125 ITR 713 at page 720 which is also followed in the judgments cited by the petitioner in the case of Deputy Commissioner of Income Tax vs. M/s.Roger Enterprises (P) Ltd., reported in 2012 SCC Online ITAT 11821 and in the case of Brij Bhushan Singal vs. Assistant Commissioner of Income Tax reported in 2018 SCC Online ITAT 2891, held as follows:-

"It is true that the proceedings under the Income Tax Act law are not governed by the strict rules of evidence and therefore, it may be said that even without calling the Manager of the bank in evidence to prove this letter, it could be taken into account as evidence. But before the Income Tax authorities could rely upon it, they were bound to produce it before the assessee so that the assessee could controvert the statements contained in it by asking for the opportunity to cross examine the Manager of the bank with reference to the statement made by him. ...."

23.The counsel for the petitioners also placed the recent judgment of the Supreme Court in the case of ICDS Ltd., reported in 2020 10 SCC 529, wherein, the Apex Court has remanded back the matter on account of the assessee being deprived of cross examination. Therefore, the respondent either should not have relied on the statements recorded under Section 132(4) or in case, if they want to rely on the same, they should not have denied the opportunity to the petitioners when they demanded of cross examining the persons who gave the statement. When the department has taken a stand that there are two groups which were searched by a single warrant and that the companies of one group should not be given to another, as rightly pointed out by the learned counsel for the petitioners, the assessing officer should not have discussed the statement of the other group for framing the assessment of the petitioners. This completely vitiates the entire assessment proceedings."

7.8 The Hon'ble Jurisdictional High Court has reiterated its view in case *Prestige Foods vs. CIT 20 ITJ 1* had held in para 6 as under:

"6. Re questions No.1 and 2:-

On going through the order passed by the CIT(A) and the Tribunal, we find that the CIT(A) has recorded the finding against the Assessee on the basis of the survey report of the Insurance Company. The said survey report was received by the Assessing Officer behind the back of the Assessee. No opportunity was ever given by the CIT(A) to the Assessee to dispute the correctness of the said survey report which formed the basis of recording of findings against the Assessee. We find that even copy of the same was not supplied to the Assessee. The CIT(A) and the Tribunal have considered the said survey report without showing it to the Assessee and without giving opportunity to the Assessee to furnish its explanation about it by observing that the same is confidential in nature. They held that the report was available on record of the Assessing Officer which can be looked by any judicial authority in confidence, if need so arise. Having regard to this undisputedly the findings have been recorded by the CIT(A) and the Tribunal on the basis of the survey report which was never supplied to the Assessee.

It has now been well settled that the Income Tax Officer though not bound to rely on evidence produced by the Assessee as he considers to be false, yet if he proposes to make an estimate in disregard of that evidence he should in fairness disclose to the Assessee the material on which he is going to found that estimate; and that in case he proposes to use against the Assessee the result of any private inquiries made by him, he must communicate to the Assessee the substance of the information so proposed to be utilized to such an extent as to put the Assessee in possession of full particulars of the case he is expected to meet and that he should further give him an ample opportunity to meet it. The Income Tax Officer is not bound by any technical rules of the law

of evidence. It is open to him to collect materials to facilitate assessment even by private enquiry. But if he desires to use the material so collected, the Assessee must be informed of the material and must be given an adequate opportunity to explain it and controvert the contents of it. (emphasis supplied) [See Dhakeshwari Cotton Mills Ltd. v. Commissioner of Income Tax, (1954) 26 ITR 775 (SC); C. Vasantial and Co. v. Commissioner of Income Tax, Bombay City, (1962) 45 ITR 206 (SC) and KishinchandChellaram v. Commissioner of Income Tax, Bombay City (1980) 125 ITR 713 (SC): (1980) 19 CTR 360: (1980) 4 Taxman 29]. In view of this legal position, in our considered view the orders of the CIT(A) and the Tribunal are in violation of principles of the natural justice. The Assessee has been deprived of fair opportunity to object and challenge the correctness of the survey report on the basis of which opinion has been formed by the CIT(A) and the Tribunal against the Assessee. In all fairness the said survey report should have been disclosed to the Assessee and the Assessee should have been provided opportunity to explain and object the findings recorded in it before forming any opinion adverse to it. In this view of the matter the question No.2 is decided in favour of the Assessee by holding that the finding that the expenditure of Rs. 16,47,766/- is capital in nature is vitiated as it is based upon the material not disclosed to the Assessee. Having regard to this opinion about question No.2, we do not feel it necessary to answer question No.1."

7.9 Therefore, it is settled preposition of law that if any evidence or statement is made the basis of the assessment order without allowing the assesse to cross examine the witness or to rebut the evidence then it would amount to violation of principle of natural justice as held by the Hon'ble Supreme Court in case of Andaman Timber Industries vs. Commissioner of Central Excise (supra) in para 6 & 7 as under:

"6. According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for

the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.

7. As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17.03.2005 was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions."

7.10 It is also settled proposition of law that the presumption u/s 132(4A) of the Act is subject to rebut and therefore, the assessee has right to be confronted with the information being used against the assessee. The AO has used the loose paper seized from the premises of Shri G.C. Patidar as well as the statement of Shri G.C. Patidar without giving an opportunity to assessee to cross examine or to substantiate its claim based on the affidavit filed by Shri G.C. Patidar. Accordingly, we are of the considered view that there is a violation of principle of natural justice, so far as the addition is made by the AO on account of alleged unaccounted payment of interest on the basis of the statement of Shri G.C. Patidar and consequently, it renders the assessment order nullity as much as the additions are made by the AO purely on the basis of the statement of Shri G.C. Patidar and loose papers seized from the possession of Shri G.C. Patidar. Further when the assessee has denied the alleged transactions of taking any loan or payment of any interest on the same then it was incumbent on the AO to conduct a further inquiry by examining the person concerns from who alleged loans are stated to be taken. The AO has not even verified stands of those parties about confirming the transactions of the alleged loans and receipt of the interest. In case the assessee has taken this cash loans from these parties then a necessary consequence would be the said transactions to be taken for assessment in the hands of those persons as out of book transactions. The AO has relied upon the statement of Shri G.C. Patidar to consider the contents and transactions in the seized documents as cash loan taken by the assessee therefore, except the statement of Shri G.C. Patidar these documents do not speak themselves about the nature of the transactions. Hence, the non-affording opportunity of cross examination of Shri G.C. Patidar is a gross violation of principle of natural justice rendering the assessment order as nullity. Accordingly in view of the facts and circumstances as well as settled legal proposition as discussed above we do not find any error or illegality in the impugned order of

the CIT(A) qua this issue of addition made on account of unaccounted/unexplained payment of interest on the alleged cash loans."

8. Now, we would like to extract the operative part of order passed by ITAT in ***IT(SS)A No. 32 to 34/Ind/2021 (supra)*** as under:

*"**Ground No. 3 of Revenue's appeal for AY 2009-10 (Rs. 14,83,394):***

20. This ground relates to the addition of unaccounted interest payment on cash-loans.

21. The facts qua this addition are such that during the course of search conducted on one M/s Agroh Infrastructure Developers Pvt. Ltd (AIDPL), the authorities seized a loose paper marked as "LPS-1-Page No. 21 / 23", which contained details of certain financial transactions. The document contained two tables, the upper-table contained the name of assessee and the transactions which were corroborated by the books of assessee. But the lower-table neither contained the name of assesssee nor the transactions mentioned therein were corroborated by assessee's books. However, the Ld. AO attributed the transactions mentioned in the lower-table to the assessee for the reason that the transactions mentioned in the upper-table were corroborated to assessee and hence the document has to be considered in entirety. Based thereon, the Ld. AO framed a view that the assessee has taken a cash loan of Rs. 1,15,00,000/- during 27/03/2008 to 31/03/2008 relevant to AY 2008-09. Further, the Ld. AO also found a transaction captioned as "buy-back of shares" of Rs. 3,66,25,000/- made during the previous year 2008-09 relevant to AY 2009-10 but concluded the same to be a transaction of cash-loan taken by assessee from AIDPL. The Ld. AO also observed that the assessee must have paid an interest of Rs. 14,83,394/- on the aforesaid transactions to AIDPL out of undisclosed sources. When the Ld. AO confronted the assessee in the matter, the assessee submitted that the impugned loose paper was seized from AIDPL in an independent search proceeding conducted upon AIDPL and not from assessee. Hence any presumption u/s 292C should be taken against AIDPL, not against assessee. However, the Ld. AO did not accept the submissions of assessee and made an addition of Rs. 14,83,394/- on account of cash-payment of interest from undisclosed sources in AY 2009-10 vide Para No. 13.4 to 13.4.10 of the assessment-order.

22. During first-appeal, the assessee made a detailed submission to Ld. CIT(A). After considering submission of assessee, the Ld. CIT(A) deleted this addition. The relevant paragraphs of the CIT(A)'s observation are extracted below:

> ***"4.2.4** Further, the AO on the basis of one loose sheet which is page No. 21 of LPS -1 and reproduced at page 100 of the Order and on the basis of page No. 23 of LPS -1 and placing reliance on second table has reached to a inference that during financial year 2008, the Appellant – PATH has received a cash loan of Rs. 115 Lakhs in cash from Agroh (in*

short AIDPL) and in next financial year the appellant has accepted the cash loan of Rs. 3,66,25,000/- from M/s Agroh Infrastructure Developers Pvt. Ltd (In short AIDPL) and on other hand accepts the same to be cash-buyback of shares. The AO has also held that interest amounting to Rs. 14,83,394/- was charged by AIDPL. Whereas the said document only records some purported cash received and cash paid but no where the name of PATH is reflected. Even on second table at page 99, the name of PATH is not reflected therefore to attribute these transactions to PATH is fallacious. The said loose sheet was subject to varying interpretation in the year AY 2008-09 and is a non speaking/ dumb document. The director of Agroh cannot give any satisfactory reply during the statement recorded at the time of search however during the course of their assessment admitted that they have given loan to PATH. The statement of the Director wherein they admitted giving loan to PATH has not been provided nor the opportunity to cross examination was made available.

It is important to mention that the buy back of shares is duly accounted in audited books of account of appellant and the impugned loose papers were not found from premises of the appellant. Therefore, the AO is not justified in presuming buyback of shares as cash loan and interest on a loan was equally hypothetical. The statement given which has to be used against the assesse has to be confronted and opportunity to cross examine has to be provided, which squarely apply in relation to loose paper seized from the premises of Agroh where the statement was taken behind the back.

4.2.11 *Last but not the least, the loose papers relating to alleged loan and interest were found and seized from premises of Agroh Group of Indore located at Aqua Point, Umaria, Mhow as page no 19-23 of LPS-1. As far as legality of the addition, it is settled position of law that no addition/ disallowance can be made to the total income of the appellant in absence of any incriminating documents in the case of non-abate assessment year. Accordingly, the scope of assessment u/s.153A would be restricted to incriminating material found during the course of search from* ***premises of appellant****. In the instant case the loose papers were found and seized from the premises of AIDPL (third party).*

Hon'ble Delhi Tribunal in the case of ***Trilok Chand Chaudhary*** *(2019)* ***33 NYPTTJ 610 (Del-Trib)*** *dt.20-8-19 has held as under:-*

5.4 *...it is evident that the* ***material relied upon for making addition was not found from the premises of the assessee.***

5.5 *We also find that during relevant period, i.e., FY14-15, for using any* ***material found from the premises of the third party*** *during the course of the search in assessment proceeding of the assessee, the* ***AO of the third party was required to record satisfaction as the material belong to the assessee in terms of sec153C*** *and then was required to proceed as per the sec153C. In the instant case, it is evident*

that addition in dispute has been made in the assessment completed u/s153A. The assessee raised this issue before the ld CIT(A), however, the ld CIT(A) rejected the arguments of the assessee observing as under:

"6.3 Another argument of the appellant, if understood correctly, is that in reference to the document u/c, the AO ought to have initiated proceedings u/s153C and that in no case this can be considered u/s153A. This argument has no legs to stand for the simple reason that it is patently absurd. Undisputedly, a ***search u/s132 was conducted in the appellant's case*** *and therefore, the* ***assessment was to be completed u/s153A*** *and the ld AO was under a statutory obligation to consider entire material irrespective of the place from where it was found* ***(i.e. appellant's own place or some other place).*** *There cannot be 2 assessments one u/s153A and other u/s153C. In short, the argument of the appellant that document seized from the premises of Shri Ashok Chaudhary cannot be considered u/s153A is absurd and is accordingly rejected."*

5.6. *In our opinion, the* ***finding of the ld CIT(A) is not based on correct appreciation of law.*** *The reasoning of the ld CIT(A) is that there cannot be 2 simultaneous assessment u/s153A and other u/s153C. This reasoning is faulty. The assessment u/s153C could have been made after completion of the assessment u/s153A. The Act has provided separate provisions for making assessment in case of material found in the course of the search from the premises of the assessee as well as the material found in the course of search at the premises of the third party. The* ***AO is required to follow the procedure laid down in the Act for making the assessment and he cannot devise his own procedure for shortcut methods.*** *In our considered opinion, when the case of the assessee is covered u/s153A and if reliance is placed on the incriminating material* ***found during the course of search of third party, then sec153C would be applicable*** *and have to be adhered to. Thus, in the instant case, the* ***AO was required to first complete the proceedings u/s153A in hand, which were initiated by way of notice dt.30-6-14*** *and thereafter,* ***he was at liberty to take action u/s153C for bringing the material found from the premise of Shri Ashok Choudhary*** *to tax in the hands of the assessee.*

5.7. *In* ***Shivani Mahajan*** *(Del-Trib) dt.19-3-19 ITA No.5585/Del-Trib/2015, identical que was raised before the Tribunal as under:*

"9. *we find that in these appeals, following 2 questions arise for our consideration:*

(i) ***Whether any material found in the search of any other person than the assessee in appeal, can be considered in the assessment u/s153A of the assessee.***

5.8. *The* ***Tribunal*** *after considering arguments of the parties held as under:*

"14. From a reading of the above decisions of Hon'ble jurisdictional HC, it is evident that completed assessment can be interfered with by the AO on the basis of any incriminating material unearthed during the course of search. If in relation to any AY no incriminating material is found, no addition or disallowance can be made in relation to that year in exercise of power u/s153A. Obviously, the reference to the incriminating material in the above decisions of Hon'ble Jurisdictional HC is in regard to ***incriminating material found as a result of search of the assessee's premises and not of any other assessee****. The* ***legislature has provided sec153C by invoking the same the Revenue can utilise the incriminating material found in the case of search of any other person to the different assessee****. Sec153C is reproduced below for ready reference:**

15. *Thus, when during the course of search of an assessee any books, document or money, bullion, jewellery etc. is found which relates to a person other than the person searched, then the AO of the person searched* ***shall hand over such*** *books of account, documents, or valuables* ***to the AO of such other person*** *and thereafter, the AO of such other person can proceed against such other person. However, in the case under appeal before us, admittedly,* ***sec153C is not invoked*** *in the case of the assessee and the assessment is framed u/s153A. We, respectfully following the above decisions of Hon'ble jurisdictional HC, hold that* ***during the course of assessment u/s153A, the incriminating material, if any, found during the course of search of the assessee only can be utilised and not the material found in the search of any other person."***

5.9 *...in the instant case,* ***separate search warrant has been issued*** *in the case of the assessee as well in the case of Shri Ashok Chowdhary and the* ***AO has used the material found in the course of search at the premise of Shri Ashok Chowdhary, which is not permitted*** *in view of the* ***express provision of the law****.*

5.10 *The addition made by the AO* ***in violation of the procedure provided in the Act is bad in law and void ab initio and cannot be sustained.*** *Accordingly, the addition of Rs.3.3 crores, made* ***protectively*** *on the basis of the* ***documents found from the premises of the third party,*** *by the AO and upheld by the ld CIT(A) on substantive basis, is deleted. The ground No.6.2 is accordingly allowed.*

Further Hon'ble Kolkata Tribunal in the case ***Krishna Kumar Singhania (2018) 168 ITD 271 (Kol-Trib)*** *dt.6-12-17, where in Para 10 it was held as under:*

"10. *We find that it is not in dispute that there were* ***no documents that were seized from the premises of the assessee*** *except loose sheets vide seized document reference KKS/1 comprising of 8 pages, for which satisfactory Explanation has been given by the assessee and no addition was made by the Id AO on this seized document. The* ***seized document used by the Id AO*** *for making the addition in sec153A assessment is CG/1 to 11 and CG/HD/1 which were* ***seized only from the office premises of 'Cygnus group' of companies in which assessee is a director.*** *In this regard, it would be pertinent to note that as per* ***sec292C,*** *there is a* ***presumption*** ***that the documents, assets, books of accounts etc found at the time of search in the premises of a person is always presumed to be belonging to him/them unless proved otherwise.*** *This goes to prove that the presumption derived is a rebuttable presumption. Then in such a scenario, the person on whom presumption is drawn, has got every right to state that the said documents does not belong to him/ them. The Id AO if he is satisfied with such Explanation, has got recourse to proceed on such other person (i.e., the person to whom the said documents actually belong to)* ***in terms of sec153C by recording satisfaction to that effect by way of transfer of those materials to the AO*** *assessing the such other person. This is the mandate provided in sec153C.*

In the instant case, if at all, the seized documents referred to in CG/1 to 11 and CG/HD/1 is stated to be belonging to assessee herein, then the only legal recourse available to the deptt is to proceed on the assessee herein in terms of sec153C. In this regard, we would like to place reliance on ***Pinaki Misra & Sangeeta Misra (2017) (Del HC) dt.3-3-17****, wherein it was held that,* ***no addition could be made on the basis of evidence gathered from extraneous source*** *and on the basis of statement or document received subsequent to search. Hence,* ***we hold that the said materials cannot be used in sec153A against the assessee.*** *This opinion is given without going into the merits and veracity of the said seized documents implicating the assessee herein.****"***

In view of the above, it is clear that the impunged loose papers and documents were found from third party premises and therefore, presumption u/s 292C will apply to AIDPL only and not to the assessee. Thus, the AO was not justified in making addition u/s 153A of the Act.

4.2.12 *In view of the above discussion ... The loose sheet which has been obtained from office of Agroh (Third person) also cannot be relied upon as true state of cash loan and nor the interest attributable thereon can be said to be a real transaction..... Therefore, additions made by the AO amounting to Rs. 14,83,394/- on account of unaccounted interest paid to AIDPL (Para 13.4.10 of assessement order),.....are* ***Deleted.*** *Therefore appeal on these grounds is* ***Allowed."***

23. Before us, the Ld. DR relied upon the assessment-order and Ld. AR relied upon the order of first-appeal.

24. We have considered rival submissions of both sides and perused the orders of lower authorities. On a careful consideration, we agree with the observations made by Ld. CIT(A) that the impugned seized document which is the basis of making addition in the hands of assessee, was in fact seized from the premise of AIDPL and not from assessee, hence no presumption u/s 292C can be drawn against assessee; (ii) no addition can be made on the assessee u/s 153A on the basis of document found during search conducted upon someone else, particularly because the AY 2009-10 under consideration is a non-abated assessment-year; and (iii) the Ld. AO has not provided any opportunity of cross-examination of AIDPL to the assesssee before relying upon the document found in possession of AIDPL. Thus, keeping in view these serious infirmities, the Ld. AO is not justified in using the impugned document against assessee for drawing adverse inferences and making any addition. Being so, we are in agreement with the Ld. CIT(A) that the addition of Rs. 14,83,394/- is not sustainable. We, therefore, approve the action of Ld. CIT(A). This ground is, thus, dismissed."

9. We find that both sides are *ad idem* to the point that the material on the basis of which the JCIT imposed penalties u/s 271D and 271E are same as in case of quantum-appeals of assessee in ***IT(SS)A No. 32 & 33/Ind/2021 (supra)*** and ***IT(SS)A No. 32 to 34/Ind/2021 (supra).*** We further note that in those quantum-appeals, the first appellate authority as well as ITAT have concurrently disagreed and rejected the observations/ inferences/conclusions drawn by assessing authority. Since there is nothing new to be considered or analyed in present appeals, we adopt the same reasoning and same view as taken by ITAT in ***IT(SS)A No. 32 & 33/Ind/2021 (supra)*** and ***IT(SS)A No. 32 to 34/Ind/2021 (supra).*** Accordingly, we hold that the orders passed by CIT(A) in present appeals deleting the penalties are in order and do not require any interference from our side.

10. We would also like to emphasize one more point noted by Ld. CIT(A) on Page No. 74-75 of order which reads thus:

> *"From the above, it is crystal clear that to bring into the effect of penalty provision us 271D or 271E, it has to be established with independent evidence and not merely corroborative evidence (i.e. book entries) that Assessee has actually committed the default contemplated in section 269SS or 269T i.e. it has taken loan in cash or it has repaid the loan in cash exceeding Rs. 20,000. The explanation below 269SS defines the "Loans or deposits MEANS Loans or deposits of money. The use of word "Means" by legislature in the Explanation below Section 269SS or 269T is with a purpose and it is to restrict the meaning to only Loan of "Money". The use of Word "Means" indicates that definition is hard and fast and no other meaning can be assigned to the expression that is put down in definition [P.Kasilingham vs. PSG College of Technology AIR 1995 SC 1395]. The expression "money"means currency/cash. Therefore, very essential ingredient to constitute a default within the meaning of 269SS or 269T is that whether there is movement of money. Mere book entries alone, during the course of training, cannot entail a default of taking or repaying the loan in cash, unless it is established that Moneys moved from one person to another person, which is in the nature of loans or deposits"*

Thus, the CIT(A) means to say that if the factum of taking or repaying loan is itself disputed, there cannot be any default as contemplated u/s 269SS or 269T. In simpler words, section 269SS or 269T has no application when the transactions itself are disputed, those sections can only apply to un-disputed transactions or the existence of the transactions attained finality. We also find merit in this observation/conclusion made by Ld. CIT(A).

11. The above discussions and the reasoning mentioned therein brings us to conclude that the penalties imposed by AO in present cases are not sustainable. Consequently, we are deleting the same. The revenues' grounds are dismissed.

12. Resultantly, all these appeals are dismissed.

Order pronounced in open court on 31.01.2024.

Sd/-	sd/-
(VIJAY PAL RAO)	(B.M. BIYANI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Indore
दिनांक/Dated :31.01.2024

CPU/Sr. PS

Copies to: (1) The appellant
(2) The respondent
(3) CIT
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

By order
Assistant Registrar
Income Tax Appellate Tribunal
Indore Bench, Indore