आयकर अपीलीय अधिकरण, चण्डीगढ़ न्यायपीठ "ए" , चण्डीगढ़
IN THE INCOME TAX APPELLATE TRIBUNAL, CHANDIGARH BENCH "A", CHANDIGARH

HEARING THROUGH: VIRTUAL MODE

श्री आकाश दीप जैन, उपाध्यक्ष एवं श्री विक्रम सिंह यादव, लेखा सदस्य
BEFORE: SHRI. AAKASH DEEP JAIN, VP & SHRI. VIKRAM SINGH YADAV, AM

आयकर अपील सं./ ITA NO. 452/Chd/2022
निर्धारण वर्ष / Assessment Year : 2012-13

M/s Ganesh Builders, C/o Parikshit Aggarwal, C.A H.No. 3035, Sector 27D, Chandigarh-160019	बनाम	The DCIT Central Circle-1 Chandigarh
स्थायी लेखा सं./PAN NO: AAHFG2780N		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ ITA NO. 451/Chd/2022
निर्धारण वर्ष / Assessment Year : 2012-13

M/s Luxmi Builders, C/o Parikshit Aggarwal, C.A H.No. 3035, Sector 27D, Chandigarh-160019	बनाम	The DCIT Central Circle-1 Chandigarh
स्थायी लेखा सं./PAN NO: AACFL8700A		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

STAY APPLICATION NO. 16/Chd/2022
(आयकर अपील सं./ ITA NO. 452/Chd/2022)
(निर्धारण वर्ष / Assessment Year : 2012-13)

M/s Ganesh Builders, C/o Parikshit Aggarwal, C.A H.No. 1238, Sector 22B, Chandigarh	बनाम	The DCIT Central Circle-1 Chandigarh
स्थायी लेखा सं./PAN NO: AAHFG2780N		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

STAY APPLICATION NO. 15/Chd/2022
(आयकर अपील सं./ ITA NO. 451/Chd/2022)
(निर्धारण वर्ष / Assessment Year : 2012-13)

M/s Luxmi Builders, C/o Parikshit Aggarwal, C.A H.No. 1238, Sector 22B, Chandigarh	बनाम	The DCIT Central Circle-1 Chandigarh
स्थायी लेखा सं./PAN NO: AACFL8700A		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/Assessee by : Shri Parikshit Aggarwal, C.A
राजस्व की ओर से/ Revenue by : Shri Rohit Sharma, CIT DR &
Smt. Amanpreet Kaur, Sr. DR

सुनवाई की तारीख/Date of Hearing : 19/02/2024
उदघोषणा की तारीख/Date of Pronouncement : 16/05/2024

आदेश/Order

PER VIKRAM SINGH YADAV, A.M. :

These are two appeals filed by the respective assessee firms against the separate order passed by the Ld. CIT(A), Gurgaon-3 dt. 30/03/2022 pertaining to A.Y 2012-13.

2. Since common issues are involved, both these appeals were heard together and are being disposed off by this consolidated order. With the consent of both the parties, the case of the assessee firm in ITA No. 452/Chd/2022 in case of M/s Ganesh Builders was taken as a lead case wherein the assessee firm has taken the following grounds of appeal:

"*1. That on the facts, circumstances and legal position of the case, the Worthy CIT(A), Gurgaon-3 in Appeal No. CIT (A), Gurgaon-3/ 10254/2018-19 dated 30.03.2022 has erred in passing that order in contravention of the provisions of S. 250(6) of the Income Tax Act, 1961.*

2. That on facts, circumstances and legal position of the case, the Worthy CIT(A)has erred in not quashing the impugned assessment framed u/s 153A even when the relevant papers on the basis of which entire addition has been made were not found from the premises of the appellant and also when the procedure mandated u/s 153C was not followed by the Ld. AO in the case of the appellant.

3. That on facts, circumstances and legal position of the case, the Worthy CIT(A) has erred in confirming the addition of Rs. 2,65,06,482/- on account of alleged suppressed sale of 54 plots by extrapolating the figures.

4. That on facts, circumstances and legal position of the case, the Worthy CIT(A) has erred in confirming the addition of Rs. 2,65,06,482/- on account of alleged suppressed sale of the plots in the order passed u/s 153A even when no incriminating material qua the year in question was found during the course of search u/s 132 on the appellant and the assessment for the year in question was a completed assessment and hence no addition could be made in absence of incriminating material.

5. That on facts, circumstances and legal position of the case, the Worthy CIT(A)has erred in not quashing the impugned assessment order since the stated and purported approval u/s 153D is without due application of mind and merely in ritualistic manner.

6. That on facts, circumstances and legal position of the case, the Worthy CIT(A) has erred in enhancing the income of the assessee by Rs. 7,03,17,753/- by illegally assuming power of enhancement u/s 251(1) on

account of alleged suppressed sale of 128 plots by extrapolating the figures and that too when no material was available against the appellant for those 128 plots for the year in question.

7. That on facts, circumstances and legal position of the case, the Worthy CIT(A) has erred in assuming the power of enhancement u/s 251 even when he lacked such power in the present case and further when the statutory procedure mandated u/s 251 for enhancement has not been followed.

8. That on facts, circumstances and legal position of the case, the Worthy CIT(A) has erred in initiating the penalty proceedings u/s 271(l)(c) in respect of income enhanced by him in the appellate order.

9. That the appellant craves leave for any addition, deletion or amendment in the grounds of appeal on or before the disposal of the same."

3. During the course of hearing, the ld AR submitted that the assessee firm has also moved an application for admission of additional ground of appeal which reads as under:

"That on facts, circumstances and legal position of the case, the impugned assessment order passed u/s 153A deserves to be quashed since no search u/s 132 was carried out on the appellant and only a survey u/s 133A was carried out."

4. The Ld. AR submitted that the additional ground of appeal is purely a legal ground of appeal and goes to the root of the matter and to decide the said ground, no new facts are required to be gone into. Further reliance was placed on the decision of Hon'ble Supreme Court in case of National Thermal Power Co. Ltd. Vs. CIT reported in 229 ITR 383. It was submitted that the said additional ground of appeal may accordingly be allowed to be admitted.

5. Per contra, the Ld. CIT DR challenged the admission of the additional ground of appeal and it was submitted that the said ground of appeal has been raised for the first time before the Tribunal and the said ground was neither raised either before the AO or before the Ld. CIT(A). It was accordingly submitted that at this stage, the said additional ground therefore does not deserves to be admitted.

6. We have heard the rival contentions and purused the material available on record. We find that in the additional ground, the assessee firm has assailed the impugned assessment order passed u/s 153A on the ground that no search u/s 132 was carried out on the assessee firm and only a survey u/s 133A was carried out. We find that the same is purely legal in nature and no new facts are required to be gone into to decide this ground of appeal. Therefore, in accordance with the law laid down by the Hon'ble Supreme Court in case of NTPC *(Supra),* the additional ground raised by the appellant is hereby admitted for adjudication on merits.

7. Before we advert to rival contentions in respect of various grounds of appeal, including the additional ground of appeal taken by the assessee firm, it would be relevant to refer to the facts of the case, the submissions made by the assessee firm during the course of assessment and appellate proceedings, and the findings of the AO and that of the ld CIT(A) which have now been challenged before us.

8. Briefly the facts of the case are that the assessee firm is a partnership firm and it filed its return of income originally under section 139(1) on 22/09/2012 which was processed under section 143(1) on 17/02/2013 and thereafter selected for scrutiny and thereafter the assessment was completed under section 143(3) dt. 09/02/2015. Subsequently, a search and seizure operation under section 132(1) was carried out on 13/07/2016 at the business and residential premises of M/s Barnala Group of cases and as a part of the said search and seizure operations, the search and seizure operations were also conducted at the residence of Shri Ramesh Garg at House No. 834, Sector-21, Panchkula, who is one of the partners in the assessee's firm. During the course of search, documents as per Annexure A-1 to A-3 were found and seized from the premises of the assessee.

8.1 Thereafter, notice under section 153A was issued on 09/08/2018 and in response to notice under section 153A, the assessee firm submitted its return of

income on 06/10/2018 and thereafter through its Counsel's letter dt. 11/10/2010 claimed that no incriminating documents have been found during the course of search, hence the return has been filed under protest. The AO disposed off the said objection by giving detailed reasons vide his office letter dt. 20/11/2018.

8.2 During the course of assessment proceedings, the AO observed that on perusal of the page no. 188 of Annexure A-1 of the seized documents, the sale price of the plot as per registry comes to Rs. 1227/ Sq. Yards, however, the actual working of sale per square yard of the plot sold by the assessee firm is mentioned at Rs. 6500 per sq. yard and Rs. 7000 per sq. yard which is clear from the backside of page no. 178 of Annexure A-1 seized from the residential premises of the partner of the assessee firm Shri Ramesh Garg. During the course of assessment proceedings, the assessee firm vide Questionnaire dt. 09/10/2018 was asked to explain with evidence the nature of documents and whether the transaction recorded in these documents have been recorded in the regular books of accounts. Thereafter, a show cause was issued to the assessee firm on 20/11/2018 and in response, the assessee firm submitted that it has sold plots on the basis of agreement and on giving possession of plot with the option of executing the sale deed immediately or at latest stage as per the buyer's convenience either in his / her own name or in the name of any other name. It was submitted that the colony is jointly developed by Ganesh Builders and Luxmi Builders and all the expenses and income earned is divided equally between them. It was submitted that during the year under consideration, both firms have effected total sales turnover of Rs. 5,17,10,072/- and 50% share which comes to Rs. 2,58,55,036/- is accounted for in the books of Luxmi Builders and remaining 50% share is accounted for in the books of Ganesh Builders and complete details of plot wise sales accounted for in the books of the assessee firm were submitted. It was stated that no addition should be made on this count.

8.3 Thereafter, another show cause dt. 29/11/2018 was issued to the assessee firm wherein referring to the ongoing proceeding, it was stated that as per document A-1 (Allotment Letters issued by your firm) seized from your premises, it contains the details of different size of plot sold by you. The details of these plots have been given in the excel sheet which has been prepared from the seized documents and as per these documents, the sale price of the plots is Rs. 1227 per sq. yard which is matching with the information furnished by you and has been shown in the ITR filed. However, these plots have been sold @ 7000 per sq. yard which is clear from the calculation made at back side of page no. 178 of the seized document as per Annexure A-1. It was stated by the AO that based on the above facts, the actual sale price of the plot mentioned in the seized documents is taken at Rs. 10,40,71,590/- as against the sale of Rs. 2,58,55,036/- shown by you in your return of income and therefore, the assessee firm has suppressed the sale of Rs. 2,65,06,482/- which is proposed to be added to its income.

8.4 Thereafter, in response to the show cause, the assessee firm vide its submission dt. 14/12/2018 submitted that the rate of sale of plot @ 7000 per sq. yard as against declared by the assessee firm in the range of Rs. 1200 – 1950 per sq. yard is solely based on a noting on the back side of a receipt found from the premises of the assessee firm. Referring to the content of the said noting, it was submitted that the noting on the back side of the receipt is not at all in the handwriting of the assessee firm or any of its partners or employees. Even the handwriting & pen used at the backside of the receipt is altogether different from the handwriting & pen used on front side of the receipt. It was submitted that the system in this concern regarding sale of plot is that the buyer books the plot and pays the initial amount and then makes the full payment before issue of allotment letter. It is written in the allotment letter that the allottee can get the registration of plot done in the name of himself or any other person as he desires. If he wants to resale the plot, the original allotment letter / receipt is tendered back to the assessee firm. In case payment is received in favour of the assesse

from the re-allottee, then the amount is refunded back to the original allottee at it is.

8.5 In the cases in question, 4 plots numbers 10,11, 168 & 169 were sold initially to Shri Kashmiri Lal who paid the amount and receipts were issued to him all dated 28/12/2010 and subsequent payments were received at the time of issue of allotment letter. Copy of the receipt, allotment letter, ledger account in the books of the assessee firm evidencing sale of plot to Mr. Kashmiri Lal was also submitted as part of the assessee's submission. It was further stated that Mr. Kashmiri Lal came back to the assessee firm after re-sale of allotted plots tendered his receipts and all other documents to the assessee firm. The amount was paid back to him vide cheque which was received from re-allottee in respect of plot No. 168. In respect of other three Plot Nos. 10,11 & 169, the amount was directly received by the allottee Mr. Kashmiri Lal with no involvement of the assessee firm at all. Copy of bank statement & ledger account showing refund of money to Mr. Kashmiri Lal in respect of Plot No. 168 was submitted for necessary examination by the AO.

8.6 It was further submitted that noting at the back side of this receipt could be some calculation carried out by Shri Kashmiri Lal as the original documents remained in his possession from the date of issue i.e 28/12/2010 till these were returned to the assessee firm for subsequent re-allotment. It was submitted that there is every possibility that some noting may have been made by the original allottee on the back side of the alleged receipt. However it does not pertain or belong to the assessee firm and has not been recorded by or under the instruction of the assessee firm. Therefore this rate cannot be applied across the table to entire sales.

8.7 It was further submitted that the sale deed have been executed in favour of re-allottee as per instruction of the original allottee i.e; Mr. Kashmiri Lal. Even the sale consideration mentioned in the sale deed executed at the instance of original allottee i.e; Mr. Kashmiri Lal was never received by the assessee firm in

respect of Plot no. 10,11,169. Sale consideration mentioned in respect of Plot No. 168 was received on behalf of the original allottee and refunded to him by way of cheque and copies of sale deed were also submitted for necessary examination.

8.8 It was further submitted that except the noting for plot no. 10,11,169, no other incriminating material for any other plot was fond. In absence of incriminating material for any other plot, sale rate for some rough noting by Shri Kashmiri Lal for four plots cannot be applied across the table for entire sales. This amounts to extrapolation and working on presumptions and assumptions without having any incriminating material specific to the relevant plot against the assessee firm and which is impermissible in law. It was submitted that in respect of plots other than plot no. 10,11,168 and 169, there is no incriminating material on record and that the sale deeds have been executed for said plots at declared price. It is a settled law that in absence of any incriminating material, sale deed will prevail and reliance was placed on the decision of Hon'ble Punjab & Haryana High Court in case of Paramjit Singh vs. ITO(2010) 323 ITR 0588.

9. The submission so filed by the assessee firm were considered but not found acceptable to the AO.

9.1 As per the AO, the assessee firm has disregarded the presumption under section 132(4A) that contents of the seized document is presumed to be true and the document is presumed to be in the handwriting of the person who had been found to be in possession of such document. The assessee firm has not been able to discharge its onus successfully that the contents of the said document are not true. Merely the fact that one of the partners of the assessee firm i.e; Shri Ramesh Garg who in his statement recorded under section 132(4) has stated that the same is not in his handwriting, the same cannot be taken as successful discharge of the onus placed on the assessee firm.

9.2 Regarding contentions of the assessee firm that the working at the back side of the sized page no. 178 has been done by Shri Kashmiri Lal and these papers were in his possession, the AO stated that the said contention is not supported by any evidence. It was held by the AO that no evidence has been furnished that the documents were in possession of Shri Kashmiri Lal during the aforesaid period as no confirmation from Shri Kashmiri Lal has been submitted let alone the sworn affidavit. As per the AO, the assessee firm itself has admitted that it had no role in resale of the three plots. And if it is the case and all documents were handed over to Shri Kashmiri Lal, the receipt issued to him for Rs. 12,300/- on 28/12/2010 for initial booking amount for plot no. 10 & 11 and receipt issued to him for Rs. 15,000/- on 28/12/2010 for plot no. 169 should not have been in possession of the assessee firm as these were of no use in resale of the plot of the land but all these receipts have been seized vide page no. 177, 178 and 179 of the seized documents.

9.3 Further referring to the contents at the back side of page 178, it was stated by the AO that the entire transaction with Shri Kashmiri Lal has been done in a consolidated manner. The size of plot no. 10 and 11 is 36 ft * 74.6 ft and the same has been mentioned in the top left hand side of the paper, the multiplication results in 2685. Sq. ft for one plot. So size of both the plots will be 5371.2 sq. ft and if it divided by 9 to convert it into yards, it will show result of 596 yards. This figure mentioned in the middle top of the page. The actual rate of Rs. 6500 per sq. yard is applied and figure of Rs. 38,74,000/- is worked out. Similarly, size of plot no. 168 and 169 is 72ft*34.3ft. The size is not mentioned in the above seized paper but it is mentioned in seized page no. 176 which is original allotment letter of plot no. 169 which has been cancelled on 26/05/2015 after registry. Multiplication of 72 and 34.3 yields 2469.6 and division of 9 will produce a figure of 274 sq. yards. Since working has been done for both the plots, multiplication by 2 will give a figure of 548 yards. In the seized paper, the size has been mentioned as 538 sq. yrds and the minor difference of 10 sq. yrds may be because of clerical error or because of the possible reason that size of plot no.

168 might be 10 sq. yards less. And the rate of Rs. 7000 has been applied on 538 sq. yards and resultant figure is Rs. 37,66,000/-. The total of Rs. 38,74,000/- and 37,66,000/- given a figure of Rs. 76,40,000/-. It seems that the assessee firm had also got Rs. 73,00,000/- therefore after deducting this figure, balance of Rs. 3,40,000/- has been arrived at. It has been stated by the AO that the date of receipt of this amount has not been specified in this page, therefore in view of the refusal of the explanation of the contents by the assessee firm, it is assumed that the said receipt was made in the year under consideration at the time of allotment. There are net expenses of Rs. 65,800 and working of the same is given and the same has been arrived at after deducting Rs. 76,400 from Rs. 1,42,200. Alphabet 'R' is written against 1,42,200 which seems to be the expenses on registration charges. Net expenses of Rs. 65,800/- are deducted from Rs. 3,40,000 and resultant figure to be received by the assessee firm is Rs. 2,74,200/-. It was held by the AO that the above analysis makes it clear that content of the above page depict the true transaction details and actual rates in the year under consideration varied from Rs. 6500 per sq.yards to Rs. 7000 per sq. yards.

9.4 Regarding the contention of the assessee that no incriminating material other than the above material has been seized in order to apply this rate on other transactions, it was held by the AO that it is not expected to find out incriminating material for each and every transactions in a search because no businessman will keep entire records pertaining to on-money in a systematic manner. It is sufficient that credible evidence of receipt of on-money is found and application of that evidence is done in all the similarly placed transactions and not the unrelated transactions. Reliance was placed on the decision of Hon'ble Delhi High Court in case of CIT Vs. Chetan Dass Lachman Das reported in 25 taxmann.com 227 and Hon'ble Kerala High Court in case of Sunny Jacob Jewellers and Wedding Centre Vs. DCIT reported in 48 taxmann.com 347 wherein the High Court has held that there is no bar in applying the finding on the basis of the seized material for a very short period of time even in seven years in the proceedings under section 153A of the Act and in the present case,

the rates are being applied in the same year in the same scheme and therefore the facts of the present case are much stronger.

9.5 Regarding decision of Hon'ble Punjab & Haryana High Court in case of Shri Paramjit Singh Vs. ITO (supra), it was held by the AO that the said decision is not applicable as in that case, no incriminating material was found and assessment was not made on the basis of any material seized during the course of search.

9.6 It was accordingly held by the AO that in view of the facts and circumstances of the case, it can be safely said that the assessee firm was suppressing the sale receipts, that the sale price as per the allotment letter has been accounted for by the assessee firm but the actual sale price as per the seized documents comes to Rs. 5,23,61,518/- being 50% share of the assessee firm. The assessee firm has shown the sale price of the plots during the assessment year under consideration at Rs. 2,58,55,036/- and therefore the difference of Rs. 2,65,06,482/- was added to income of the assessee firm and as against the returned income of Rs. 4,49,810/-, the assessed income was determined at Rs. 2,69,56,290/- vide order dt. 24/12/2018 passed under section 153A r.w.s 143(3) of the Act after seeking approval of the Additional CIT, Range Central, Chandigarh vide order dt. 24/12/2018 under section 153D of the Income Tax Act, 1961.

10. Being aggrieved, the assessee firm carried the matter in appeal before the Ld. CIT(A).

10.1 During the appellate proceedings, it was submitted that the assessee firm is a partnership firm which was constituted in F.Y 2010-11. It was engaged in real estate development activity wherein it had purchased a large chunk of plot of land. It was selling small plots out of the said area of land. No construction activity was involved in the real estate activities being carried on by the assessee firm.

10.2 It was submitted that there is another concern namely M/s Luxmi Builders. The assessee firm and M/s Luxmi Builders had separately purchased identical area of plot and by joining these two identical chunks of plots, both these firms made a colony and were jointly selling the plots and was sharing the sale proceeds, expenses and profitability. It was submitted that a search activity under section 132 of the Act was carried out on 13/07/2016 at various locations of Barnala Builders group of cases. The assessee firm having its place of business at Jakhal Road, Sunam was also covered in this search. It was submitted that in the above search, residential premises of one of the partners Shri Ramesh Garg was also covered wherefrom various documents were found and impounded. It was submitted that these impounded documents contained mainly his own transactions but also included 4 cancelled booking receipts issued to the buyers of the assessee firm. These were four in number and were in respect of plot number 10, 11, 168 and 169. There were certain notings on the backside of these cancelled booking receipts. It was submitted that the assessee firm had sold more than 50 plots during the year in question and the selling price was in the range of Rs. 1200 to 1500 p. sq. yard. However by illogically reading the contents written at the backside of these canceled booking receipts, the AO had held that the assessee firm has sold these 4 plots @ Rs. 7000 per sq. yards and not @ 1200 to 1500 per sq. yards as recorded in its books of accounts. It was further submitted that the AO has held the same rate to not only four plots but also to other plots sold by the assessee firm during the year under consideration.

10.3 It was further submitted that the above referred documents were not found during the course of search from the business premises of the assessee firm. These documents have been found from the residential premises of one of the partners, Shri Ramesh Garg at his residence at House No. 834, Sector 21, Panchkula. No query in regard to relevant document was ever raised by the search party to Shri Ramesh Garg or even by the Ld. AO to Shri Ramesh Garg. The case of Shri Ramesh Garg was also assessed under section 153A by the same Ld. AO at almost the same point in time. It was further submitted that the

relevant documents have been applied in this assessment u/s 153A and no notice under section 153C was ever issued and the procedure maintained under section 153C was never followed by the AO.

10.4 Further, the submission made before the AO were reiterated and it was submitted that the addition so made by the AO is absolutely illegal and deserves to be deleted.

10.5 It was submitted that firstly, the relevant documents have not been found from the premises of the assessee firm, it was found from the premises of Shri Ramesh Garg. Though he is a partner of assessee firm and the firm as well as the partners, both were covered under the same search but both have separate addresses and have separate business locations. For applying the documents found from Shri Ramesh Garg in the assessment of assessee firm, firstly the explanation from Shri Ramesh Garg must have been sought and then due procedure under section 153C must have been followed. It was submitted that having not followed the entire procedure and still applying the documents in the assessment of the assessee firm, the action of the AO is absolutely illegal and the addition deserves to be deleted.

10.6 It was further submitted that in the entire search at the premises of the assessee firm, no incriminating material for the year in question was found. It was submitted that on the date of search on 13/07/2016, the assessment for the year under consideration was already completed vide order under section 143(3) dt. 09/02/2015 and therefore in the absence of any incriminating material for the year in question and the fact that the assessment for the year was a completed assessment, no addition was warranted.

10.7 As regard the contents of the documents in question, it was submitted that these were cancelled / transferred plots and the data written at the back of receipt appears to be some working done by the original allottee. It nowhere leads to the fact that the assessee firm was selling the plots @ Rs. 7000 per sq.

yards. It was submitted that the assessee firm has clearly stated that working at the back of the cancelled receipts appears to be in the handwriting of original allottee. The Ld. AO never called for an independent explanation from these original allottees when the address were available with him and still applying these documents in the hands of the assessee firm is absolutely illegal and the addition deserves to be deleted.

10.8 It was further submitted that looking at the contents of these documents, it is absolutely clear that these are dumb documents. It was submitted that during the course of search or during post search enquiries or during assessment proceedings, not even single material or evidence was found by the department which could corroborate the findings of the Ld. AO that the assessee firm was selling the plots @ Rs. 7000 per sq. yards. It was submitted that in absence of corroborative material or evidence, making of addition on the basis of dumb documents or loose paper which was not in the handwriting of partner of the assessee firm and have not been found from the business premises of the assessee firm is absolutely illegal and addition deserves to be deleted.

10.9 It was further submitted that it is a settled preposition of law that noting on a document does not amount to unexplained income. It is the corroborative asset or investment found which can lead to making of the addition. In the present case the AO has failed to find out this corroborative material and the addition therefore deserves to be deleted.

10.10 It was further submitted that the assessee firm sold various plots in this colony throughout the entire block period of A.Y. 2011-12 to 2017-18. All those sales during the entire block period were actually made and disclosed by the assessee firm @ Rs. 1200 to 1500 per sq. yards. In assessment for A.Y 2011-12, 2013-14 to 2017-18, the AO has accepted sale at sale rate and no addition was made in the assessment framed under section 153A by the same Ld. AO at same point of time. However the assessment for the year in question i.e; A.Y.

2012-13 on the basis of noting at the back side of the cancelled booking receipts, the addition has been made applying the sale rate @ Rs. 7000 per sq. yards which is absolutely incorrect, unjustified and arbitrary. It was submitted that in the assessment order, the AO not only held that the four plots for which the relevant documents were found to have been sold @ Rs. 7000 per sq. yards but has also held that the other 50 plots must also have been sold @ Rs. 7000/- per sq. yard. It was submitted that it is an undisputed fact that no document qua the sale of these 50 plots were found during the course of the search from the premises of the assessee firm or other person. Further the sale deeds of these plots have been executed at prices much above the collector rate prevailing. The matter was never referred to DVO. No enquiry was conducted about the rates from any third party or from the buyers of these plots. It was accordingly submitted that no effort was made by the Ld. AO to find any corroborative material. This amounted to impermissible application of extrapolation without even having any adverse material against the assessee and therefore the impugned addition in respect of other 50 plots deserves to be deleted.

10.11 It was further submitted that during the year in question, the assessee firm sold 54 plots. The sale deeds have been executed and prices as per the sale deed have been duly recognised by the assessee firm in its books of account in respect of four plots. There was no incriminating material against the assessee firm so as to justify the sale rate of Rs. 7000/- per sq. yards. In respect of other 50 plots, there was absolutely no material at all which could justify the sale rate of Rs. 7000 per sq. yards. It was submitted that it is a settled preposition of law the sale deed as well as the values as per the sale deeds are the primary documents prevailing over all other information and the said sale deed cannot be discarded unless strong adverse material is found.

10.12 It was further submitted that it is apparent from the relevant documents that the slips primarily pertain to F.Y 2010-11 and the year in question is F.Y 2011-12. If the booking receipts was issued in F.Y. 2010-11 the AO failed to point out

as to how and why the alleged on-money can be said to have been received and become income of the assessee firm for the year in question i.e; 2011-12. It was accordingly submitted that the transaction in question do not pertain to year in question and hence the addition has been illegally made which deserves to be deleted.

11. The submissions so made by the assessee were considered by the ld CIT (A) and it would be relevant to refer to his findings as so recorded in the impugned order.

11.1. It was stated by the ld CIT(A) that the assessee firm during the year along with M/s Luxmi Builders has developed a township and has sold plots. During the year, total of 128 plots have been sold by the assessee firm and M/s Luxmi Builders as evident from the submission of the Ld. AR against total sale consideration of Rs. 5,17,10,070/- with share of assessee firm as reflected in the books of account at Rs. 2,58,55,036/-. The average rate of sale as per books of account has been in the range of Rs. 1200-1250 per sq. yard. On perusal of seized document (back side of page no. 178 of annexure A1), it was found that the assessee firm has sold plot no's 10, 11, 168 and 169 @ of Rs. 6500- Rs. 7000 per sq yard during the FY 2011-12.

11.2 On going through the record, the ld CIT(A) stated that it is found that Sh. Kashmiri Lai has booked plot no. 10,11,168 and 169 on 28.12.2010 by making initial booking amount of Rs. 12,300/-, 12,300/-, 15,000/- and 15,000/- for each plot respectively with the assessee firm. Subsequently, he has made the remaining payments during the year under consideration against sale consideration of Rs. 4,02,300/- (298 sq. yard), Rs. 4,02,300/- (298 sq. yard), Rs. 3,56,400/- (264 sq. yard) and Rs. 3,69,900/- (274 sq. yard) as per books of account. After making the full payments as per books of account, the assessee firm issued allotment letters in respect of said plots to Sh. Kashmiri Lai 12.3.2012/16.3.2012/ 18.3.2012. Therefore, the assessee firm has booked the sale of plots by the corresponding amounts as mentioned above in its books of

account during the year under consideration. In this context, it is important to examine the implication of contents recorded in relevant seized document re-produced as above. From the careful perusal of the same, it is noted that the sizes and dimensions in respect of plot no 10,11, 168 and 169 have been accurately mentioned in the said seized document. Therefore, it cannot be treated as a dumb paper particularly, when transactions in respect of these 04 plots have been recorded and are part of books of account of the assessee firm and the document has been found and seized from the possession of the assessee firm (partners of the assessee firm).

11.3 The ld CIT(A) referred to the provisions of section 132 (4A)/ 292C of the Act which states that where any books of account, other documents etc are found in possession or control of any person during the course of search, it may be presumed that the said books of accounts, other documents etc belong to such person and contents thereof are true. There is no denying of the fact that the relevant seized document has been found in possession of Sh. Ramesh Garg, partner of the assessee firm which contained transactions recorded for sale of plot by the assessee firm during the year under consideration. In the circumstances, it is presumed that the said document belongs to the assessee firm and its contents are true until the said presumption is rebutted by the assessee firm duly supported with satisfactory evidences. The assessee firm has merely stated that the said document does not belong to it rather it belongs to Sh. Kashmiri Lai who might have recorded certain transactions at the back side of page no. 178 and the said transactions did not belong to it. The said submission has not been supported with any supporting evidence. Any confirmation from Sh. Kashmiri Lai or any sworn affidavit has not been furnished to this effect. The explanation furnished by the assessee firm was based upon presumptions which were not supported by any evidence. On perusal of the contents recorded in the said page, it is evident that these 04 plots have been sold for consideration of Rs. 76,40,000/- @ Rs. 6500- Rs. 7000 per sq. yard. Further, there is no merit in the submission of the assessee firm that the said document

was never confronted to Sh. Ramesh Garg during the search proceedings. On going through the statement of Sh. Ramesh Garg recorded u/s 132 (4} of the Act on 13.7.2016 during the course of search proceedings, it is noted that the said page was confronted to him vide question no. 27. In response to the same, he only stated that the said document was not in his handwriting and he was not aware of aforesaid transaction. He never stated that the said document belong to Sh. Kashmiri Lal.

11.4 Further, the ld CIT(A) referred to the submissions made during the assessment proceedings and the appellate proceedings that Sh. Kashmiri Lai at the stage of booking itself and without making full payment to the assessee firm had sold these 04 plots onwards to other buyers and the assessee firm was not aware at what price these plots might have been sold by him further to other buyers, but he approached the assessee firm to transfer the bookings in the names of new buyers and accordingly, they received booking slips in original and issued fresh booking slips to new allottees and during the time when booking slips were in custody of Sh. Kashmiri Lai, he might have written something in the booking slips. Further, Ld. AR relied upon the copies of booking slips (as reproduced by the AO) in the assessment order) wherein at the bottom of booking slips alphabet 'R' has been written which as per assessee firm means re-allotment. It was also explained by the Ld. AR that when the original allottee sells the allotment to new buyer and in case new buyer makes the original allotted amount to the assessee firm, the assessee firm further refunds the same amount to the original allottee and in one case of re-allotment, the new buyer made payment of Rs. 4,76,000 to the assessee firm which was subsequently refunded back to Sh. Kashmiri Lai on 23.2.2016.

11.5 Referring to the above submission of the assessee firm, the ld CIT(A) stated that it is found that Sh. Kashmiri Lal has made full payment in respect of sale amount of above referred 04 plots during the FY 2011-12 itself as discussed above and accordingly allotment letters were issued by the assessee firm in his

name on 12.3.2012, 12.3.2012 18.3.2012 as placed on page no. 7 to 10 of the paper book. Therefore, the above submission of the appellant has been found factually incorrect that Sh. Kashmiri Lal at the stage of booking itself without making full payment to the assessee firm had sold these plots onwards to another buyer. Further, the letter 'R' as appearing on the booking slips reproduced by the AO in the assessment order are in context of registration and not for re-submit as explained by the assessee firm. It is corroborated from the record that conveyance deed in respect of plot no. 10 was executed on 6.8.2014, This date is found mentioned on seized page no. 178 (page no 4 of the assessment order] against letter 'R' and in the said page the word registration against 'R' is clearly mentioned. Therefore, there is no merit in said submission of the assessee firm that Sh. Kashmiri Lai approached the assessee firm to transfer the allotment in the name of new buyers and that is why, the assessee firm received booking slips in original and re-issued fresh booking slips in the name of new allottees. It is evident that no fresh booking slips were issued to new allottees. It is clear from the booking slips reproduced on page no- 14,15,16 of the assessment order that the booking slips in the name of Sh. Kashmiri Lal were never received back to be cancelled and fresh booking slips to be issued in the name of new allottees. From the perusal of booking slips in the respect of plots no. 10,11 and 169 (as reproduced page no 14-16 assessment order), it is evident that booking slips were in the name of Sh. Kashmiri Lai till the date of registration (26.5.2015, 6.8.2014, 6.8.2014). Merely the fact that the plots were initially booked in the name of Sh. Kashmiri Lai which were finally got registered in some different names, it would not automatic inference that notings at the back side of the relevant seized document were made by Sh. Kashmiri Lal.

11.6 The submission of the assessee firm that no enquiries have been made from Sh. Kashmiri Lai by the AO is also without any merit. As discussed above, the onus was upon the assessee firm in terms of provisions of section 132 (4A)/ 292C of the Act and not upon the AO to rebut the presumption. In the circumstances, it is found that the explanation furnished by the assessee firm has been found

contradictory and hence unsatisfactory. Thus, the assessee firm has failed to rebut the presumption as casted upon it in terms of provision of section 132 (4A)/ 292C of the Act.

11.7 The ld CIT(A) accordingly held that it is thus, established that the assessee firm has sold plot no. 10,11, 168 and 169 @ Rs. 6500-7000 per sq yard during the year under consideration. It is also logical to infer that when the consideration as per books of account (part of sales) has been paid during the year under consideration, the remaining consideration outside books of account has also been paid during the year under consideration. Based upon the findings made as above, it is found that the assessee firm has sold above plots during the year under consideration @ Rs. 6500-7000 per sq yard.

11.8 The ld CIT(A) further held that based upon the principle of pre-ponderance of probability, it is logically inferred that all the plots sold during the year (similar time frame) which were located in the same township , situated in similar location therefore, would have been sold at the same rate. The assessee firm has disclosed the selling rate in the range of 1200-1500 per sq yard in the books of account. On going through the assessment order and other relevant record, it is found that the assessee firm has sold 128 plots during the year along-with M/s Luxmi Builders for total consideration of Rs. 5,17,10,070/-(35051.22 sq. yards) as recorded in their books of account. On such facts, the AO in the assessment order applied rate of Rs. 7000 in respect of 54 plots (151 67 sq. yards). It is not clear on what basis the AO applied the selling rate of Rs. 7000 per sq yard only in respect of 54 plots and not in respect of entire 128 plots sold during the year. Logically, if the assessee firm has sold 04 plots as per the seized documents @ of Rs. 6500-7000 per sq yard during the year then rate of Rs. 7000 should have been applied in respect of all the similar 128 plots sold during the year within the same year in order to compute the actual sale consideration received by the assessee firm from M/s Luxmi Builders from sale of plots and not just in respect of 54 plots. Keeping in view of the facts and discussion, the

assessee firm was required by the ld CIT(A) vide letter no 495-496 dated 29.10.2021 to explain why actual sale consideration in respect of entire sale of 128 plots sold during the year should not be worked out by applying rate of Rs. 7000 per sq. yard and to explain why the income in this case should not be enhanced accordingly by using the provision of Section 251 of the Act.

11.9 In this respect, the assessee firm vide submission dated 14.3.2022 stated that the addition made by the AO deserves to be deleted. In the said letter, the arguments made earlier were reiterated. It was argued that it is a settled preposition of law that the power of the CIT (A) to enhance an assessment is not unbridled in as much as the said powers cannot be used in assessment of a new source of income and the CIT [A) cannot enhance the assessment in respect of an issue which has not been looked from the point of taxability by the AO during the assessment proceedings. It was further argued that the powers of the CIT [A] to enhance the income is confined only in respect of an issue where the AO has made addition / disallowance by dealing with the same in the body of the assessment order by under-assessing the same and as the same was the subject matter before him i.e. matter which are emanating from the assessment order. The CIT (A) can neither be allowed to step into the shoes of the AO where income escaped assessment could have been taxed u/s 147 nor the Principal Commissioner of Income Tax where powers u/s 263 of the Act can be exercised where he finds that the order of .the AO is erroneous and prejudicial to the interest of Revenue. It was further, stated that power to enhance is prohibited for the issue which has not been looked into by the AO at all during the assessment proceedings. In the present case it was explained that the AO did not look at all into the sale of remaining74 plots from the point of taxability. It was pointed out that the AO has considered to apply rate of Rs. 7000/- in respect of only 54 plots.

11.10 The Ld. AR placed reliance upon the decision of Hon'ble Bombay High Court in the case of CIT vs Narrondas Manordas (Bom) 31 ITR 909, Hon'ble Delhi

High Court in the case of CIT vs Gurinder Mohan Singh Nindrajog (2012J 348 ITR 170 (Del), Hon'ble Delhi High Court in the case of CIT vs Union Tyres (1999) 240 ITR 556 (Del), Hon'ble Delhi High Court in the case of CIT vs Sardari Lai and Co. [2001] 251 ITR 864 (Delhi) (FB) in his favour on the issue of powers of the CIT (A) to make enhancement u/s 251 of the Act.

11.11 On consideration of the above submission of the assessee firm, the ld CIT(A) stated that as per the provision of section 251 (1) (a) of the Act, the CIT (A) has the powers to confirm, reduce, enhance or annul the assessment. It is further provided in the explanation to the said section that the CIT (A) while disposing off an appeal may consider and decide any matter arising out of the proceedings in which the order appealed against was passed, notwithstanding that such matter was not raised before the CIT (A) by the assessee firm. It is evident from the facts of the case as discussed above that the subject matter of show cause dated 29.10.2021 u/s 251 of the Act, emanates out of the proceedings in which order appealed was passed. The assessee firm has filed an appeal against order of the AO in which the AO has applied sale rate of Rs. 7000 in respect of 54 plots sold during the year on the basis of evidence found in respect of 04 plots on the ground that all such plots were sold within the same year, were part of the same project of the assessee firm and thus were similarly placed transactions. It is observed from page no 06 of the assessment order that the AO has considered 54 plots on the basis of plots sold in respect of which allotment letters were part of seized documents, whereas the AO while making computation at page no 09 of the assessment order has made further mistake. The AO has worked out actual sale consideration of 54 plots @ Rs. 7000 at Rs. 10,40,71,590/- as against sale consideration of Rs. 2,01,22,715/- resulting into suppressed sale consideration of Rs. 8,39,48,875/-. The assessee firm was having 50 % shares in such 54 plots, accordingly, the suppressed sale consideration in the case of the assessee firm would work out at Rs. 4,19,74,438/- and not Rs. 2,65,06,482/- as worked out by the AO. in fact the AO has considered sale consideration of Rs. 2,58,55,036/- as reflected in the books of account;

corresponding-to sale of 54 plots, whereas the same was in respect of 128 plots. Further, the AO vide para 18 (page no 18 of the assessment order) has inferred that rates as per credible evidence of on-money found during the search should be applied in respect of all similarly placed transactions. Thus, the AO intended to apply rate of Rs. 7000 in respect of all the 128 plots sold during the year which were similarly placed transactions. Thus, it is inferred that the AO has dealt with the issue in the body of the assessment order by making addition but while making the addition he has under assessed the income. Therefore, in the show cause notice dated 29.10.2021 for enhancement u/s 251, no new source of income has been considered. In the said show cause, rate of Rs. 7000 has been proposed to be applied in respect of all the similarly placed 128 plots sold during the year, based upon the findings as recorded by the AO in the assessment which is a subject matter of appeal. The show cause u/s 251 (supra) is arising out of the proceedings in which the order appeal against was passed. Thus, no new source of income has been proposed to be considered and decided in the show cause notice u/s 251 of the Act (supra) as the proposed addition germinates from the order of the AO itself. Powers for enhancement is not confirmed to the subject matter of appeal but to the subject matter of assessment There is enough material emanating from the assessment order to show that the AO has examined the issue of suppression of sale consideration in respect of similarly placed sale of plots which was the source of income for the assessee firm for the year under consideration. Therefore, the AO has examined the sales of plots for the point of view of taxability and thus, no new source of income has been proposed to be enhanced in the show cause issued to the assessee firm. The issue for the enhancement is arising out of the ITR, assessment order and assessment record the same has been considered by the AO from point of view of the taxability. On such facts it is noted that the ratio of case laws relied by the Ld. AR is not applicable to the facts of the present case. Further, reliance is place upon the decision of Hon'ble Supreme Court in the case of C1T vs Nirbheram Daluram (1997) 224 ITR 610 where it is held that the

Appellate Assistant Commissioner was having jurisdiction u/s 251 of the Act to consider new entries which were not considered at all by the ITO. Further, reliance is placed upon the decision of Hon'ble Allahabad High Court in the case of SD Traders vs CIT, Income tax Appeal no. 159/2016 delivered on 3.9.2019 where it was held that the CIT (A) has power of enhancement u/s 251 of the Act to consider new source of income which was not dealt by the AO in the assessment order. It is further, mentioned here that power of the CIT (A) are co-terminus with the AO and it has been held by Hon'ble Supreme Court in the case of Kanpur Coal Syndicate 53 ITR 225 that the Appellate Assistant Commissioner has, therefore, plenary powers in disposing of an appeal, the scope of his power is conterminous with that of the income-tax Officer and he can do what the Income-tax Officer can do and also direct him to do what her has failed to do so. In view of these facts, it is held that there is no merit in the submission of the assessee firm filed in response to show cause notice issued to the assessee firm (supra) u/s 25 l of the Act.

11.12 It has been further argued by the assessee firm that it has sold the plots from *AY* 2011-12 to AY 2017-18 where the sale prices were in the range of Rs. 1200-1500 per sq yard and the AO has made assessments u/s 153A of the Act for different AYs where no adverse findings have been made and assessments attained finality. Therefore, no such addition could be made for the year under consideration. However, the said submission of the assessee firm were found to be without any merit. In this respect it was held by Ld. CIT(A) that under the IT Act every year is a different AY and principle of res judicata does not apply in respect of such proceedings under the IT Act The addition for the year under consideration has been made on the basis of evidence found and seized relatable to year under consideration. Therefore, the addition has been made for AY 2012-13 on the basis of such evidence.

11.13 The assessee firm has further argued, without prejudice, that in the case of on-money, entire on-money could not be held as income of the assessee firm

only the reasonable profit out of the same could have been added as income. However, the said submission of the assessee firm was again found without any merit. The assessee firm has already debited all the expenses in the books of account which have been claimed and allowed by the AO. The on-money received from the sale of plots has resulted into suppression of sale consideration. Therefore, on such facts there is no logic to apply profit rate on the amount of suppressed sale consideration.

11.14 Further, Ld. CIT(A) stated that if the explanation of the assessee firm is accepted that Sh. Kashmiri Lai has sold these plots independently at the rates mentioned in the referred seized documents @ Rs. 6500-7000 per sq yard, even this finding is important to be considered when the assessee firm is selling the same plots during the year under consideration in the range of Rs. 1200-1500 per sq yard whereas the plots in reference are similarly placed. The seized material thus, reflects the correct market rates of the plots sold by the assessee firm. This observation also substantiates the findings of the AO that the assessee firm has suppressed the sale consideration in the books of account. The assessee firm has raised the issue that no undisclosed assets have been found or seized during the search proceedings in order to corroborate the findings of the AO that the assessee firm has earned extra profit by suppressing the sale consideration. On this account it is stated that there is no onus upon the Revenue to reconcile the undisclosed profit earned with the detection of corresponding undisclosed assets.

11.15 Further, Ld. CIT(A) stated that during the course of search & seizure proceedings in the case of the partner of the assessee firm, incriminating documents as discussed in the above paras reflecting unaccounted sale consideration in respect of sale of plots have been found and seized. On the basis of such findings, documents/ evidences seized and modus-operandi adopted by the assessee firm, it was revealed that the assessee firm has suppressed the sale consideration in the books of account in respect of flats sold during the year. For this purpose reliance is hereby placed on the decision of

Hon'ble Delhi High Court in the case of Smt. Dayawanti Gupta Vs C1T 390 ITR 496 (Del). It has been held in the said decision that one habitually concealing income or indulging in clandestine operations can hardly be expected to maintain meticulous record and all probability be anxious to do away with such evidence at the shortest possibility, in such cases the assessing authority have to draw inferences by applying element of guess work by having reasonable nexus with the document seized and statement recorded. Further, reliance is placed upon the decision of Hon'ble Delhi High Court in the case of C1T vs Chelan Das Lachman Das, 254 CTR 392 where it has been held that seized material can also be relied upon to draw inference that there can be similar transactions covered u/s 153A. The AO has also dealt with such objections of the assessee firm vide letter dated 20.11.2018. Therefore, the ratio of Hon'ble Delhi High Court in the case of Kabul Chawla is not applicable to the facts of the present case.

11.16 Further, Ld. CIT(A) stated that there is no merit in the argument raised by the assessee firm that the documents seized from the partner of the assessee firm could have been used only u/s 153C of the Act. Though the firm is a legal entity but is represented by the partners and has no separate existence. Partners and the firm are the same in the eyes of the law and for the purpose of income tax proceedings. Both the assessee firm and the partner have been covered u/s 132 the Act in this case. There is no dispute that the relevant seized documents belong to the assessee firm only. It is quite logical that the document of the firm would be found only in the possession of the partners. Thus, no distinction can be made between the partner and the firm in the eyes of law. Further, the facts of the case of Anand Kumar Jain, HUF as relied by the assessee firm are found to be different from the facts of the present case. Moreover, SLP against the decision of the Hon'ble Delhi High Court in this case has been admitted by the Hon'ble Supreme Court.

11.17 It was further stated by Ld. CIT(A) that in terms of provision of 153A (l)(b), the AO was required to assess/reassess the total income for the year under consideration. It has been held by the Hon'ble Kerala High Court in the case of CIT vs KP Ummer that when a notice u/s 153A is issued, it enables the

Department to carry out assessment/re-assessment with respect to 06 immediate prior years and this does not require any incriminating material recovered during search relating to those prior years in which there is no time left on the date of search for an assessment u/s 143 [3]. The same view has been up-held by the Hon'ble Allahabad High Court in the case of Rajkumar Arora 367 1TR 517, Hon'ble Kerala High Court in the case of EN Gopa kumar vs CIT (2016) 75 taxman.com 215, Hon'ble Allahabad High Court in the case of CIT vs Kesarwani Zarda Bhandar (2016), ITA no, 270/2014. Keeping in view the provisions of the Act and ratio of decisions mentioned as above it is observed that the AO was having jurisdiction to assess/ re-assess the income of the assessee firm on the basis of material available at the time of assessment and was not to restrict the additions subject to incriminating material found during the course of search.

11.18 Keeping in view above facts and discussions, following the principle of pre ponderance of probability as laid down by the Hon'ble Supreme Court in the case of the CIT vs Sumati Dayal 214 ITR 82 (SC), it was held that the AO has made the addition u/s 153A in this case based upon the incriminating documents and in accordance with the provisions of the Act.

11.19 Keeping in view the above facts and discussion, the total sale consideration in respect of 128 plots in this case (35051.22 sq yard sold during the year) was worked out at Rs. 24,53,85,540/- as against actual sale consideration recorded in the bocks of account for Rs. 5,17,10,070/- resulting into suppressed sale consideration of Rs. 19.36.48,470/- out of the same the suppressed sale consideration attributable to the assessee firm comes to Rs 9,68,24,235/- out of which the AO has already made addition of Rs. 2,65,06,482/- (though should have been worked out at Rs. 4,19,74,438/- as discussed vide para 5.3.7). Accordingly, income was further enhanced by Rs. 7,03,17,753/- for A.Y. 2012-13.

11.20 Regarding the additional ground of appeal and related contention advanced during the appellate proceedings that the approval u/s 153D has

been given by the Addl. CIT without application of mind and in mechanical manner as only the assessment record was forwarded by the AO to the Addl. CIT and no seized record was ever forwarded, that he never approved any questionnaire, show cause notice or never officially inspected the assessment records, that the draft assessment order was forwarded to him only on 24.12.2018, which was granted approval on the same day, the ld CIT(A) held that it is a matter of record that the AO has forwarded the draft assessment order to the Addl. CIT 24.12.2018 vide letter no 2360 to seek the approval u/s 153D of the Act which was accorded on 24.12.2018. From the perusal of contents of the letter of the AO sent to the Addl.CIT, it is observed that the AO has proposed to make assessment in respect of income on account of undisclosed sale consideration in respect of sale of plots and has forwarded the assessment record with the same. The seized record is also a part of assessment record for the purpose of assessment proceedings. The Addl. CIT has considered the issue involved in the draft assessment order in the light of the relevant seized documents and made the perusal of assessment record. The allegation of the appellant that the action of the Addl. CIT, Chandigarh granting approval was a mere mechanical exercise without any independent application of mind is without any basis. It is stated that in the Central Charges, only few group cases where search u/s 132 of the Act conducted, are centralized. The Addl. CIT as Range Head is actively involved in assessment of all such cases from beginning and at all stages of search and seizure assessment, the Assessing Officer discusses and seeks his guidance. In this regard it is worthwhile to reproduce certain paras of the guidelines for assessments in search and seizure cases issued by the CBDT vide F.No. 286/161/2006-IT (Inv.-II) dated 22.12.2006 which highlight the consultative approach between the Assessing Officer and the Range Head in search and seizure assessments.

> *"Para 1.3 On receipt of the appraisal report and seized material, the Assessing Officer and Range Head should jointly scrutinize the appraisal report and seized material and prepare an Examination Note to decide....*

Para 2.2 If considered necessary, issue of directions u/s 144 A of the Act should be given by the Range Head.

Para 3.2 ..... The final show cause notice should be prepared in consultation with the Addl. CIT."

11.21 The Ld. CIT(A) accordingly held that the allegation of the appellant that the approval was a mechanical exercise without application of mind on his part is not correct as in Central Charges all search and seizure assessments are regularly supervised and monitored by the Range Heads. The AO and the Range Head both have followed the instructions /guidelines of the Board for completion of the search and seizure assessments and the assessment order was finalized by the AO after obtaining approval u/s 153D of the Act from the Range Head. It is also noted that the impugned assessment order involved one issue only as discussed above. The relevant seized record has been reproduced in the draft assessment order and moreover, the seized record is also a part of assessment record for the purpose of assessment proceedings. The approval u/s 153D was accorded after due examination of the relevant records and verification by the Range Head. Therefore, the allegation of the appellant that the approval was granted in a mechanical manner is without any substance. Without prejudice to the above, the approval granted by the Addl. CIT is in the nature of administrative power. The Range Head while examining the matter u/s 153D does not examine or adjudicate upon the rights or obligations of the assessee firm, but only considers whether the Assessing Officer has fulfilled the requirements of section 153A. Reliance is placed on the judgment of Hon'ble Karnataka High Court in the case of Rishabhchand Bhansali v. DCIT, 267 ITR 577, wherein it is held as under:

"4.2 .....thirdly the order passed by the Joint Commissioner granting previous approval under the proviso to section 158BG is in exercise of administrative power on being satisfied that the order of assessment has been made in accordance with the provisions of Chapter XIV-B. The previous approval is purely an internal matter and it does not decide upon ahy rights of the assessee. The Joint Commissioner, while examining the matter under the proviso to section 158BG does not examine or adjudicate upon the rights or obligations of the assessee, but only considers whether the Assessing Officer has fulfilled the requirements of Chapter XIV".

11.22 It was held by Ld. CIT(A) that the allegation of the appellant that the Addl. CIT, Chandigarh has granted the approval u/s 153D in mechanical manner and without application of mind has no meaning as the approval is an administrative action which is required to be based on existence of set of circumstances and on subjective satisfaction as per the provisions of the Act. Further, approval u/s 153D being an official act provided under the statute, it is to be presumed that before according approval, the Range Head has looked into the records, applied his mind and he did not find any reason to disapprove the order passed by the Assessing Authority and thereafter he has accorded approval. In the given facts of the case, it can be said that the Addl. CIT has applied his mind on the issue involved and has accorded his approval in accordance with the provisions of the Act. Such approval cannot be said as mechanical and without application of mind and the additional ground of appeal so raised by the assessee was dismissed.

12. Against the aforesaid findings and directions of the ld CIT(A), the assessee firm has filed the present appeal wherein it has raised various grounds of appeal.

13. Ground No. 1 is general in nature and does not require any specific adjudication.

14. The assessee firm vide additional ground of appeal has agitated against initiation and conclusion of assessment framed u/s 153A claiming that no search u/s 132 was carried out on assessee firm and only survey u/s 133A was carried out at its business premises.

14.1 During the course of hearing, the ld AR contended that only survey u/s 133A was conducted at the business premises of the assessee firm at Maya Garden Enclave, Jakhal Road, Sunam and our reference was drawn to copy of the survey authorization at APB Vol-II Pg.456. Regarding search u/s 132 at H.No. 834, the ld AR stated that the authorization mentions the name of Mr. Ramesh Garg, M/s Ganesh Builder and M/s Luxmi Builders and our reference was drawn

to copy of search warrant in Form 45 at Pg. 1017 of APB. The AR further stated that the next step taken by the search party was to appoint witnesses to search as is mandated u/r 112(6) of Income Tax Rules, 1962. Copies of the orders under Rule 112(6) appointing the two witnesses, who were residents of H.No. 817 & H.No. 836, Sec. 21, Panchkula dtd. 13.07.2016 is placed at APB Pg. 1019-1020. Referring to the above orders appointing the witnesses, the AR contended that there is no mention of the name of the assessee firm and it is only for Mr. Ramesh Garg that the witnesses were appointed. Then the ld referred to the Panchnama drawn for the searched premises which is at APB Pg. 411 and referring to the contents of the Panchnama, the AR contended that this also does not contain or mention the name of the assessee firm and it only states the name of Ramesh Garg as the person who has been searched and also the person from whom the documents have been impounded. Based on above survey authorization u/s 133A for business premises of the assessee firm, search warrant/ authorization for H.No. 834, Sec 21, order appointing the witnesses and Panchnama drawn for H.No. 834, Sec 21, the ld AR has contended before us that though search was authorized in the case of the assessee firm for H.No. 834, Sec 21 but witnesses having not been appointed for the assessee firm and more so when the Panchnama also does not name the assessee firm, it is a case where search was actually not initiated and conducted on the assessee firm and it remained only a case of survey u/s 133A on its business premises at Maya Garden Enclave, Jakhal Road, Sunam. He contended that appointment of witnesses which mentions the name of one of the searched person, the non-mentioning of other names means that witnesses were not appointed for those other persons including the assessee firm and once the witnesses were not appointed, the search cannot be said to have been initiated. Further, the signature of witnesses on warrant can only be said to be for the searched person for whom they were served order u/r 112(6) and not for all persons mentioned in the warrant and if it is meant otherwise, it would render the requirement of preparing and serving the order u/r 112(6) as redundant/ otiose.

Based on this, he contended that once it was a case of survey u/s 133A, the Ld. AO lacked powers to frame assessment u/s 153A since assessment u/s 153A is specific to search actions having been initiated. For this proposition, he relied upon the decision of the Hon'ble Bombay High Court in CIT vs. M/s. Balaji Yarn Ltd *(ITA No. 230/2014 dtd. 22.08.2016)*.

14.2 He further submitted that mere authorization of search is not enough to assume jurisdiction to frame assessment u/s 153A and it is the actual initiation of search that the Ld. AO assumes valid power to assume such jurisdiction. For the proposition that authorization of search through search warrant and initiation of search are two different events and what is contemplated u/s 153A is initiation of search and not just authorization of search, he drew our attention to a decision of Hon'ble Karnataka High Court in case of CIT vs. Wipro Finance Ltd [2010] 323 ITR 467 (Kar), though in the context of Section 158BC under old Block assessment scheme.

14.3 It was further submitted that if the above were to be held as a clerical mistake, it could have been at one place, but non-mentioning of the name of assessee firm in the witnesses appointment order and the panchnama means that it was a decision of the authorised officer to not initiate search on the assessee firm at this premise since assessee firm's business premises are at some other location and that other location is in any way being covered separately under survey u/s 133A.

14.4 It was further submitted that Panchnama is an important document to substantiate that any search proceeding was carried out by the department which is completely absent in the present case. He relied upon a decision of Mumbai Bench of the Tribunal in Unique Star Developers vs. DCIT [2017] 83 Taxmann.com 83 that no proceedings u/s 153A can be initiated on the assessee firm where no panchnama was drawn up in its name. He argued that authorisation/ warrant in the name of assessee firm was not executed by the search authority and only executed on one of the partners of the assessee firm

i.e Sh. Ramesh Garg. Sh. Ramesh Garg and assessee firm are separate persons as per the provisions of the Act. Therefore, no search having been initiated on the assessee firm but only survey u/s 133A having been conducted on it, proceedings u/s 153A could not have been initiated on the assessee firm.

14.5 The Ld. CIT/DR contented that the authorisation/ warrant was acknowledged and signed by Sh. Ramesh Garg who is also a partner in the assessee firm. The firm is filing ITRs mentioning this very address as its registered address in its ITRs. Once the partner of the assessee firm had signed the authorization, it is deemed that he had signed the said authorization in the capacity of partner of the assessee firm and also for himself. He also contended that the search action is premises specific and not person specific. For this, he emphasized on the language of Rule 112(6)/(7). Based on this argument that the search is premises specific, he contended that the non-mentioning of the name of the assessee firm in witnesses appointment order and Panchnama drawn is inconsequential. Finally, he contended that once the partner has signed the search warrant when the searched party entered the premises, it amounted to initiation of search and therefore, the AO has assumed valid jurisdiction to pass order u/s 153A of the Act.

14.6 Against the above contention of the Ld. CIT/DR, the Ld. AR relied upon decision of Hon'ble Gujarat High Court in Zinzuwadia and sons vs. DCIT (2019) 419 ITR 169 wherein it was held that the search under Section 132 in accordance with Rule 112 is not just location/premises specific but is also person specific. Finally, he contended that in present case, order u/s 112(6) having not been issued in the name of the assessee firm, the contention of the ld CIT/DR that the mentioning of the address in the order u/s 112 appointing witnesses, wherein name of only Ramesh Garg is mentioned and the search warrant where the name of Ramesh Garg and assessee firm both have been mentioned is sufficient, is illegal as per this decision of the Hon'ble Gujarat High Court. Therefore, no search u/s 132 was initiated on the assessee firm and the Ld. AO

could not have assumed jurisdiction to frame assessment u/s 153A and therefore, the impugned assessment order deserves to be quashed.

14.7 We have heard the rival contentions and purused the material available on record. In the instant case, a joint search warrant has been issued in the name of Shri Ramesh Garg, one of the partner's of the assessee firm, the assessee firm M/s Ganesh Builders and another sister concern, M/s Luxmi Builders and the premises to be covered in the search has been stated as House no. 834, Sector 21, Panchkula. It is also an undisputed fact that House no. 834, Sector 21, Panchkula is the residential premises of one of the partner's of the assessee firm, Shri Ramesh Garg and the said premises has also been stated to be registered office address of the assessee's firm as per its past and current tax filings with the Revenue authorities. Therefore, the fact that the said premises were used for residential purposes and also as a registered office of the assessee firm is not in dispute. The person occupying the premises, Shri Ramesh Garg, wears a dual hat as occupant of the premises in his individual and personal capacity as well as partner of the assessee firm having its registered address at the same premises is also not in dispute. In such circumstances, where the search warrant has been served on Sh. Ramesh Garg who was physically present at the premises and he has duly authenticated the same by signing the search warrant, as can be seen from the copy of the search warrant placed on record, we find that the search warrant has been rightly executed on the assessee firm at its registered office address. In terms of appointment of independent witnesses, we have gone through the orders of the appointment of two witnesses and find that it talks about search in case of Ramesh Garg and House no 834, Sector 21, Panchkula. Even though the appointment order doesn't specifically carry the name of the assessee firm but the fact that the premises address which happens to be registered address of the assessee firm has been clearly stated, we find that the search has been duly authorised and initiated in case of the assessee firm at its business premises. Further, in terms of contents of the pachnama, we find that certain loose papers, relating to business

dealings/transactions of the assessee firm and its sister concern, have been found and inventoried and therefore, merely the fact that the panchnama carries the name of Shri Ramesh Garg and not that of the assessee firm doesn't make any difference as the pachnama equally carries the business address of assessee firm i.e, House no 834, Sector 21, Panchkula. The documents thus have been found and seized from the business premises of the assessee firm and the panchnama has been drawn accordingly. We are therefore of the considered view that the search has been duly authorised, initiated and conducted at the business premises of the assessee firm. As far as survey operations u/s 133A is concerned we find that the same has been carried at Maya Garden Enclave, Jakhal Road, Sunam on 13/07/2016 which is the site office of the assessee firm and its sister concern. The fact that the survey operations have been simultaneously carried at the site office, besides the search proceedings u/s 132 at its business premises, doesn't vitiate the assumption of jurisdiction by the Assessing officer u/s 153A and the consequent proceedings therein. In light of the aforesaid discussions, we are unable to accede to the various contentions so raised by the ld AR. Further, the various authorities quoted by the ld AR not doubt hold their respective field but we find that in the facts of the present case, they are clearly distinguishable and none of the authorities support and aid the case of the assessee firm. In the result, the additional ground of appeal so raised by the assessee firm is hereby dismissed.

15. In Ground No. 2, the assessee firm has challenged the validity of assessment proceedings u/s 153A without following the mandatory procedure u/s 153C of the Act.

15.1 In this regard, during the course of hearing, the Ld. AR contended that the panchnama drawn on completion of search was issued in the name of Sh. Ramesh Garg and not in the name of the assessee firm. Sh. Ramesh Garg, therefore, is the searched person whose assessments were required to be framed u/s 153A/143(3). At the same time, the material belonging or pertaining

to the assessee firm was allegedly found from the premises of Sh. Ramesh Garg and therefore, the assessee firm became another person as referred to in Section 153C.

15.2 It was submitted that when entire information and material was gathered during the course of search u/s 132 on another person though he happens to be the Partner of the assessee firm, the right course of action would have been to invoke the provisions of Section 153C instead of directly using that material in the ongoing assessment u/s 153A in case of the assessee firm. It was submitted that the only addition made in this case is based on a single piece of document found during search at the premises of Sh. Ramesh Garg. Therefore, the assessment framed by the Ld. AO u/s 153A for the year under consideration is void ab initio as the same has been framed without following the mandatory provisions of Section 153C. In the present case, the Ld. AO has overlooked the provisions of proviso to s. 153C, not issued any notice u/s 153C and did not record the mandatory satisfaction before initiating proceedings and which has rendered the entire impugned assessment framed u/s 153A as illegal.

15.3 In support, he relied upon the decision of Hon'ble Gujarat HC in the case of PCIT vs. Hitesh Ashok Vaswani [SCA No. 11998/2023 dtd. 02.11.2023] wherein it was held that material found/seized from the premises of some other assessee firm could not be used against the assessee firm without invoking s. 153C even when search was carried out simultaneously or even if the assessee firm was of same group. In the present case, it was submitted that the assessee firm was not even part of search carried out and therefore, the consequential assessment order passed u/s 143(3) r.w.s.153(A) deserves to be quashed.

15.4 The Ld. CIT/DR relied upon his contentions made earlier in context of the additional ground of appeal that a search u/s 132 has clearly been conducted on the assessee firm itself and therefore, the material has been found from the premises of the assessee firm. He also stressed on the point that mere non-mentioning of the name of the assessee firm in the Panchnama is not fatal and

therefore, the Ld. AO has rightly framed assessment u/s 153A and there was no requirement to follow any procedure u/s 153C or to pass order u/s 153C of the Act.

15.5 We have heard the rival contentions and purused the material available on record. As we have held above, the search has been conducted at the business premises of the assessee firm and certain loose papers, relating to business dealings/transactions of the assessee firm have been found and seized and therefore, in such circumstances, where the AO basis such documentation has initiated and completed the assessment proceedings and passed the assessment order u/s 153A, we do not see any infirmity therein. In particular, in facts of the present case, where the person searched and the person assessed is one and the same, there is no requirement to follow the procedure as prescribed u/s 153C which is in context of person other than person searched and where the AO has framed the assessment u/s 153A, we do not see how there could be any legal infirmity therein on the said ground. We are therefore unable to accede to the contentions so advanced by the ld AR and agree with the ld CIT/DR in this regard and in the result, the ground of appeal is dismissed.

16. In Ground No. 5, the assessee firm has challenged the validity of assessment order passed u/s 153A since approval u/s 153D has been granted by the Additional CIT without due application mind and merely in ritualistic manner.

16.1. In this regard, the ld AR firstly submitted that the seized record was never shown to the Addl. CIT while seeking his approval u/s 153D. It was submitted that the seized record also contained one of the most important document which was an affidavit dtd. 26.05.2015 submitted by Shri Kashmiri Lal for plot No. 169, stating that he has sold his plot to some third party for a consideration of Rs. 5,50,000/- which amounts to Rs. 2000/-(approx.) per Sq. Yds. The Ld. AR then also drew our attention to another affidavit, found and seized in the search, from Shri Kashmiri Lal for Plot Nos. 10 &11 where he admitted of having sold these plots to some third party.

16.2 It was further submitted that the AO sought approval u/s 153D from the Addl. CIT through a letter which was received by Addl. CIT on 24.12.2018 and the Addl.CIT granted approval on same date on 24.12.2018. It has been mentioned by the Addl. CIT in approval granting letter that only assessment record has been perused and there is no mention of perusal of the seized records. He also argued that on perusal of approval granting order u/s 153D, it is apparent that no words have been written, except that approval is being granted, to show that there has been due application of mind by the approving authority.

16.3 In his submissions, Ld. CIT/DR argued that the seized record is a very sensitive data and its custodian is only the Assessing officer and therefore, it cannot even travel to the approving authority. Therefore, the Ld. AO has rightly not shown the seized record to the approving authority. However, at the same time, the assessments in Central charges are framed wherein the AOs as well as Addl. CIT (approving authority) work in tandem and the approving authority is always kept apprised of the developments in the case. Therefore, he argued that, to say that the approving authority never saw the seized record is incorrect. At the same time, the Ld. CIT/DR submitted that the entire case was based on 2-3 loose sheets and notings on back side of receipt and these were part of assessment folder and was also pasted in the body of the draft assessment order. The Ld. CIT/DR submitted his written submission on this issue, the relevant extract wherefrom is reproduced as under:

> *"The request for approval was sent by the Assessing Officer on 23.12.2018 alongwith complete Assessment record and the approval was granted on 24.12.2018 by the Addl. CIT, Range Central, Chandigarh. The assessment order is not very big order and only one issue is involved, based on 2-3 loose sheets, which as stated are part of Assessment order/ record. Therefore, in view of these facts and all other submissions in aforesaid Paras, it can be concluded that the approving authority i.e. the Addl. CIT, Range Central, Chandigarh had sufficient time as well as all relevant material to apply his mind and grant approval. Thus, it is prayed that the ground of appeal by the assessee may kindly be dismissed and appeal be decided on merit."*

16.4 On this aspect, the Ld. AR contended that the relevant affidavits of Shri Kashmiri Lal in that very seized record was not shown to the Addl. CIT. Further, that very seized record had huge number of other documents also, which contained series of affidavits and return back of allotment letters/ booking slips issued to other customers also. These were stated to be for 54 plots. It is based on these documents for 54 plots that the Ld. AO had made addition for 54 plots. The Ld. AR, based on this, contended that when addition is based on documents of 54 plots, the argument of the Revenue, that the AO was only required to show relevant noting of Shri Kashmiri Lal only and that was rightly shown, is absolutely incorrect. He also argued that what is to be shown and what not was decided by the Ld. AO himself and not by the approving authority and therefore the approving authority had outsourced his part of application of mind to the Ld. AO and on top of this, the approval was sought and granted on same date of 24.12.2018.

16.5 It was further submitted that the Revenue has admitted that relevant papers were only the handwritten noting on the backside of booking slip and that was the only document which was shown as part of assessment folder. The affidavit of Shri Kashmiri Lal, which was there in the same seized record and had different figures, was not shown. There were similar documents regarding various other plots. All these including documents of Shri Kashmiri Lal in the seized record were regarding those plots which had been re-sold by the original allottees and therefore, there was a purpose behind the finding of these allotment letters/ affidavits/ sale deeds from the partner. All these facts were neither presented to the Addl. CIT nor he himself looked into these on his own and when complete seized record was not shown to him, the decision making was made by the Ld. AO and not by Addl. CIT. Infact, while granting approval u/s 153D, what is to be shown and what not, was decided by the Ld. AO himself and not by the approving authority. The approval u/s 153D is not only for the benefit of Revenue to collect right tax but is also a safeguard for the assessee firm that the assessment order is passed after looking into all records, facts and surrounding

circumstances. Since, this was totally missing in the present case, the approval u/s 153D was mechanical and ritualistic. Further, ld. AR relied upon decision in Akshata Realtors Pvt. Ltd. Vs ACIT (ITAT Raipur) (IT(SS)A No.09/RPR/2018 dtd. 27.03.2023) wherein it was held that approval granted under section 153D on 'presumption' basis is invalid.

16.6 It was further submitted by the ld AR that the approval in this case was sought and granted on the same day. In such limited time, granting approval on same day, when it contained complex seized record and the issue of framing of assessment u/s 153A vs. 153C vs. 143(3)/148, the approving authority was not given reasonable time to grant approval and it was in extreme hurry and hence, without application of mind that the approving authority granted this approval.

16.7 It was further submitted that the assessee firm had been selling plots of the same colony for last 2 years, during the year and next years. The entire block of 7 years was assessed. The sale rate declared in books by the assessee firm, during the block period, ranges from Rs. 1200 to 2000 per sq yards. In all other years, the Ld. AO as well as approving authority accepted this rate and only for the year in question, sale rate of Rs. 7000 per sq yards has been applied. The reason for adoption of such huge difference in rate in same block period was never looked into by the Addl. CIT, while granting approval u/s 153D at almost same time for the entire block period and hence, the approval was mechanical.

16.8 It was further submitted that the assessee firm's business premise was covered in survey u/s 133A. The residence of its partner was covered in search. The panchnama of residence mentions the name of the partner only. In this situation, whether the case of firm should have been assessed u/s 153A or 143(3) or u/s 153C was never looked into by the Addl. CIT. Further, whether the material impounded from the partner can be directly applied u/s 153A or procedure u/s 153C is to be followed was never looked into. Hence, the approval is ritualistic.

16.9 It was further submitted that while framing assessment, Ld. AO did not adduce any reason as to why he is applying extra-polation to 54 plots even when the assessee firm had sold 128 plots during the year. The other plots for which booking slips were found did not contain any single loose paper or noting. But no reason was adduced as to why extra-polation @ Rs. 7000 p. sq. yard was applied to only 54 plots. Further, the loose noting of Shri Kashmiri Lal was for plot nos. 10, 11, 168 & 169. However, addition was made for 3 plots leaving plot no. 168 even when this rate was applied to other plots also. This shows that the Ld. AO was not applying his mind while doing assessment and the same fact was not even verified by the approving authority and he also granted approval u/s 153D on the same day in a mechanical manner.

16.10 It was further submitted that no corroborative material even regarding plots sold to Shri Kashmiri Lal was found during search or even during assessment proceedings. No effort was even made to find out any such corroborative material. Still addition was made not only on plots sold to Shri Kashmiri Lal but also to other 51 plots for which not even a single material was found. This was not looked into by the Ld. AO and then also not by the Addl. CIT. Hence, the approval u/s 153D was mechanical.

16.11 The Ld. AR relied upon the decision of Hon'ble Orissa High Court in case of ACIT vs. M/s Serajuddin& Co. Kolkata [(2012) 210 Taxman 0084] wherein it was held that CBDT Circular No. 3 of 2008 dtd. 12.03.2008 in context of approval u/s 158BG under old scheme of block assessment will equally apply u/s 153D also. Therefore, the approving authority must grant hearing to the assessee firm, the AO should place draft order atleast one month in advance of time barring date and only then final order can be passed. It was submitted that in the instant case, no hearing was granted by Addl. CIT, the AO sent draft order on 24.12.2018 and approving authority granted approval u/s 153D on 24.12.2018 itself when time barring date was 31.12.2018. Hence, the approval does not

meet the basic standards laid down by CBDT itself and as discussed in above decision of Hon'ble Orissa High Court. Further, the Ld. AR also stressed on another ratio in the said decision that order of approving authority u/s 153D must contain reasons so as to demonstrate that he had applied his mind before granting approval. However, the same is missing even in the present case as can be seen from the approval order u/s 153D.

16.12 It was further submitted that there were number of calculation errors made by Ld. AO while computing the addition. Like addition for Plot No. 168 sold to Shri Kashmiri Lal not made even when that in itself was the basis for making addition in other plot sales. Further, the assessed turnover of 54 plots was computed by the Ld. AO and therefrom he reduced the declared turnover of 54 plots to arrive at the quantum of addition. However, he reduced the turnover of entire 128 plots declared by the assessee firm in P&L A/c. This shows total non-application of mind and the same was approved as it is by the Addl. CIT. These were subsequently noted and corrected by the CIT(A) and he has made a remark in this regard at Para 5.3.7 at Page 64 of his order.

16.13 To support his contentions, the Ld. AR relied upon the ratio of following judgements:

- *PCIT vs Shreelekha Damani (307 CTR 218) (2019) (Bom. HC)*
- *Inder International vs ACIT (ITA No. 1573/Chd/2018) dtd. 07.06.2021 (ITAT Chd.)*
- *ACIT vs. M/s Serajuddin& Co. Kolkata (ITA Nos. 39 to 45 of 2022) dtd. 15.03.2023 (Orissa HC).*
- *In PCIT vs. Siddarth Gupta [(2023) 450 ITR 534] (All. HC).*

16.14 It was further submitted that it is also evident from the assessment order as well as from the assessment record that none of the questionnaire was ever approved by the Addl. CIT and never ever the assessment record and seized record were examined officially by the Ld. Addl. CIT during the conduct of assessment proceedings. There is no such noting in the order sheet entries by the

Ld. AO or by the Worthy Addl. CIT. For all these propositions, he relied upon the ratio of following judgements:

- *ACIT vs. Dilip Constructions Pvt. Ltd (ITA No. 22 of 2020) (Orissa HC) dtd. 28.06.2023*
- *PCIT vs. M/s Shilpa Seema Construction Pvt. Ltd. (ITA No. 31 of 2020) (Orissa HC) dtd. 28.06.2023*
- *Sanjay Duggal vs ACIT (ITA No. 1813/Del/2019) dtd. 19.01.2021 (ITAT Del.)*

16.15 In his submissions, the ld CIT/DR contended that calculation errors highlighted by the AR are just clerical in nature. The Addl. CIT was not required to check each and every calculation made by the Ld. AO. Further, loose papers and noting on the backside of the booking receipt, being the relevant material, which was required to be brought to the knowledge of Addl. CIT and the said loose papers and noting on receipt was part of draft assessment order and was presented before the Addl. CIT. Further, he also contended that, throughout the assessment proceedings, Ld. AO must have discussed case with the Addl. CIT on regular basis, though orally. In such circumstances, Ld. Addl. CIT had complete knowledge of the case and also of the seized record. Further, the draft assessment order was forwarded on 24.12.2018 and Ld. Addl. CIT had sufficient time to go through the facts as the time barring date was 31.12.2018 and the entire case was based on only 3 loose papers. The Ld. CIT/DR also contended that the facts of the case law referred and relied upon by the Ld. AR are completely different from the present case.

16.16 We have heard the rival contentions and purused the material available on record. During the course of search at the business premises of the assessee firm, various documents were found and impounded namely Annexures A1, A2 and A3. The Annexure A-1 contain copies of certain booking receipts issued by the assessee firm regarding some of the plots sold, sale deeds and affidavits of the buyers stating that they have further/ onwards sold the plot to some other third party. These booking slips were for 54 plots including Plot Nos. 10, 11 & 169 which were sold to Sh. Kashmiri Lal. From the record, it is clear that only 4

booking receipts, for which material was found, was forwarded to the Addl. CIT for approval u/s 153D, as part of the assessment record and draft assessment order, even though addition was made by the Ld. AO on 54 plots for which documents were found during the search. The Ld. AR highlighted the affidavit from Shri Kashmiri Lal which is also part of seized record in respect of those 4 plots which affidavit contained completely different facts from that in the noting on the backside of the receipts. It is not the choice of the AO to decide what is to be shared and shown to the approving authority for seeking the latter's approval. The whole of the seized record and assessment record constitute the relevant material and the same is required to be shared with the approving authority for his consideration and necessary approval. We are not in agreement with the contention of the Ld. CIT/DR that the approving authorities are always in discussion with the AOs and therefore, he must have seen all the documents. If this argument is accepted without any evidence on record, it would render the entire procedure for seeking approval as a mere formality and ritual which is not what has been contemplated in the statue. Further, Ld. AR also pointed out certain critical mistakes in assessment order which was not even noticed by the Addl. CIT. Further, Addl. CIT did not even question why the addition was made only for 54 plots when total number of plots sold were 128. The basis of extrapolation and how the rate per sq yards has been derived for the year under consideration where the stated rate per sq yard as per books of accounts for the other years was accepted and besides the noting, the necessity for corroborative evidence to be brought on record. The above facts highlighted by the Ld. AR clearly establish that the approval given by the approving authority is without application of mind and was mechanical.

16.17 Further, Ld. AR relied upon decision of Hon'ble Orissa High Court in the case of ACIT vs. M/s Serajuddin & Co. Kolkata *(Supra)* which has now been affirmed by Hon'ble Supreme Court in SLP(C) Diary No(s). 44989/2023 dtd. 28.11.2023. In this decision of the Hon'ble Orissa High Court, it was held that requirement of prior approval of the superior officer before an order of

assessment or reassessment is passed pursuant to a search operation is a mandatory requirement of Section 153D of the Act and that such approval is not meant to be given mechanically. Further, it was also held that the approving authority must grant hearing to the assessee, the AO should place draft order atleast one month in advance of time barring date and only then final order can be passed. Further, it was also laid down that the approving order u/s 153D must contain reasons which are missing in the present case also. The relevant findings from this decision read as under:

> *"22. As rightly pointed out by learned counsel for the Assessee there is not even a token mention of the draft orders having been perused by the Additional CIT. The letter simply grants an approval. In other words, even the bare minimum requirement of the approving authority having to indicate what the thought process involved was is missing in the aforementioned approval order. While elaborate reasons need not be given, there has to be some indication that the approving authority has examined the draft orders and finds that it meets the requirement of the law. As explained in the above cases, the mere repeating of the words of the statute, or mere "rubberstamping" of the letter seeking sanction by using similar words like 'see' or 'approved' will not satisfy the requirement of the law. This is where the Technical Manual of Office Procedure becomes important. Although, it was in the context of Section 158BG of the Act, it would equally apply to Section 153D of the Act. There are three or four requirements that are mandated therein, (i) the AO should submit the draft assessment order "well in time". Here it was submitted just two days prior to the deadline thereby putting the approving authority under great pressure and not giving him sufficient time to apply his mind; (ii) the final approval must be in writing; (iii) The fact that approval has been obtained, should be mentioned in the body of the assessment order.*
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> *23. In the present case, it is an admitted position that the assessment orders are totally silent about the AO having written to the Additional CIT seeking his approval or of the Additional CIT having granted such approval. Interestingly, the assessment orders were passed on 30th December 2010 without mentioning the above fact. These two orders were therefore not in compliance with the requirement spelt out in para 9 of the Manual of Official Procedure.*
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> *24. The above manual is meant as a guideline to the AOs. Since it was issued by the CBDT, the powers for issuing such guidelines can be traced to Section 119 of the Act. It has been held in a series of judgments that the instructions under Section 119 of the Act are certainly binding on the Department. In Commissioner of Customs v. Indian Oil Corporation Ltd. 2004 (165) E.L.T. 257 (S.C.) the Supreme Court observed as under:*
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> *"Despite the categorical language of the clarification by the Constitution Bench, the issue was again sought to be raised before a Bench of three Judges in Central Board of Central Excise, Vadodara v. Dhiren Chemicals Industries: 2002 (143) ELT 19 where the view of the Constitution Bench regarding the binding nature of circulars issued under Section 37B of the Central Excise Act, 1944 was*

reiterated after it was drawn to the attention of the Court by the Revenue that there were in fact circulars issued by the Central Board of Excise and Customs which gave a different interpretation to the phrase as interpreted by the Constitution Bench. The same view has also been taken in Simplex Castings Ltd. v. Commissioner of Customs, Vishakhapatnam 2003 (5)SCC 528. The principles laid down by all these decisions are: (1) Although a circular is not binding on a Court or an assessee, it is not open to the Revenue to raise the contention that is contrary to a binding circular by the Board. When a circular remains in operation, the Revenue is bound by it and cannot be allowed to plead that it is not valid nor that it is contrary to the terms of the statute.

(2) Despite the decision of this Court, the Department cannot be permitted to take a stand contrary to the instructions issued by the Board.

(3) A show cause notice and demand contrary to existing circulars of the Board are ab initio bad (4) It is not open to the Revenue to advance an argument or file an appeal contrary to the circulars."

25. For all of the aforementioned reasons, the Court finds that the ITAT has correctly set out the legal position while holding that the requirement of prior approval of the superior officer before an order of assessment or reassessment is passed pursuant to a search operation is a mandatory requirement of Section 153D of the Act and that such approval is not meant to be given mechanically. The Court also concurs with the finding of the ITAT that in the present cases such approval was granted mechanically without application of mind by the Additional CIT resulting in vitiating the assessment orders themselves."

16.18 Further, Ld. AR relied upon decision of the Coordinate Cuttack Benches in the case Dilip Construction Pvt. Ltd. vs. ACIT (Supra) wherein the approval u/s 153D was given without going through the seized records. Based on this, the Coordinate Bench held that approval granted u/s 153D is mechanical and without application of mind and consequential order passed thereon was held to be void and bad-in-law. The said decision has since been affirmed by the Hon'ble Orissa High Court in ITA No. 22/2020 dtd. 28.06.2023. The relevant findings from the decision of the Coordinate Cuttack Bench is reproduced as under:

"38. Further, in our considered view, the approval u/s.153D of the Act cannot be treated as an official formality but the provision has been inserted by the legislature with some specific and useful purpose. It is apparent that the purpose behind enactment of the said provision in the Statute by the legislature are of two folds viz (i) before approval, the Sr. Authority will ensure that the assessee should be protected against undue or irrelevant addition & disallowances in the assessment and (ii) the approving granting authority will also ensure that proper enquiry or investigations are carried out by the Assessing Officer on all the relevant materials including material in hands of the department at the time of

initiating search proceedings, material or documents found and seized during search operation and materials found and unearthed during post search investigations and enquiries. Therefore, said provision provides and requires application of mind by the approving authority of the department which, in turn, provides safeguard to the both the parties i.e. revenue and the assessee. Therefore, the provisions of section 153D of the Act cannot be treated as a mere formality and mandate therein required to be followed by the approving authority in a judicious manner by due application of mind in a manner of cautious judicious or quasi judicial authority. This view has also been expressed by Pune Bench of the ITAT in the case of Akil Gulamali somji, in ITA Nos.455 to 458(Pune) of 2010 vide order dated 30.3.2012, wherein, it was held that when the approval was granted without proper application of mind, the order of assessment will be bad in law. We also take respectful cognizance of the fact that the Hon'ble Bombay High Court in the case of Akil Gulamali Somji (supra) has concurred with the said findings and view taken by the Pune Tribunal that not following the provisions of section 153D of the Act will render the related order of assessment void.

39. In view of foregoing discussion, we reach to a logical conclusion that it is the duty of the approving authority to act in accordance with the mandate and provisions of law while granting approval and discharging statutory function lay on his shoulders by following proper procedure and also by applying his judicious and cautious mind to the relevant assessment folders/files and draft assessment orders while granting approval u/s.153D of the Act. This is not a formality but a statutory duty of the approving authority with a corresponding obligation on him to examine relevant record and assessment orders and thereafter grant the approval. We are cautious about that the reasons for granting approval may not be a subject matter of challenge or are not required to be mentioned in the order of approval but the manner and the material on the basis of which approval has been granted can be challenged by the assessee and following proper procedure and application of mind by the approving authority should be discernible from the order of approval. No other evidence or documents is required to be considered or appreciated as the approval should be self-speaking that it has been granted by the ld JCIT by following due procedure and due application of mind to the relevant records and orders. The scope and issue agitated by the assessee by way of legal ground in the present case is not that of grant of hearing or representation to the assessee at the time of granting approval but the main grievance and legal objection of the assessee is that the approving authority has granted approval without application of mind and without looking into the seized materials and investigation report and draft assessment/reassessment orders and this fact should be clearly discernible from the approval order and no other extraneous material/document can be seen in this regard.

40. In view of above, we are inclined to hold that if an approval has been granted by the approving authority in a mechanical manner without application of mind then the very purpose of obtaining of approval u/s.153D and mandate of enactment by the legislature will be defeated. In the present case, the approving authority, the ld JCIT got five days time but from the order of approval, we are unable to see any exercise by the approving authority and even in the approval orders (supra), he has not mentioned that the relevant appeal folders/files along with assessments/reassessment orders have been perused or any discussion or consultation has been made with the AO prior to granting of approval u/s.153D of the Act. Accordingly, we are compelled to

hold that the approval granted by the ld JCIT in the appeals under consideration has been granted in a mechanical manner without application of mind and that the assessments/reassessment orders passed by the AO on such approval are declared to be void and bad in law. We hold so.

41. In view of aforesaid discussion, we clearly find that approving authority has not applied his mind to the relevant assessment records and draft assessment orders prior to granting approval to the Assessing officer for passing assessment orders u/s.153A/143(3) of the Act. Therefore, the contention of ld A.R. of the assessee is justified and sustainable that the approval was granted in most mechanical manner without application of mind and respectfully following the proposition rendered by Hon'ble Bombay High Court in the case of Smt. Shreelakha Damani (supra), the order of ITAT Delhi Bench in the case of M3M India Holdings (supra) and decision of ITAT Cuttack Bench in the case of Geetarani Panda (supra), we hold that no valid approval has been sanctioned or accorded by the ld JCIT before allowing the AO to pass the relevant assessment orders. From the relevant approval orders dated 23.11.2017, it is vivid that ld JCIT has not mentioned in the approval orders that he has gone through the relevant assessment records/files/folders and draft assessment orders for granting approval. These facts clearly show that the approval had been granted in a mechanical manner without application of mind and, thus, no valid approval has been granted by the ld JCIT before authorizing the AO to pass assessment orders u/s.153A of the Act. Accordingly, all assessment orders are vitiated and thus same are void being bad in law. The requirement of mandate of section 153D of the Act has not been satisfied in both the cases and accordingly we hold that the all assessment orders are vitiated and thus same are void being bad in law. We, accordingly set aside the impugned orders of lower authorities and quash the assessment orders by allowing additional ground of the assessees in all appeals filed by both the assessees having identical and similar facts and circumstances."

16.19 Based on the above decisions and other relevant decisions relied upon by the Ld. AR, prior approval u/s 153D must have been granted after proper, judicious and cautions application of mind and after duly examining the seized record, assessee's submissions and other relevant records. But in the present case, Addl. CIT granted the prior approval u/s 153D without going through the seized record as all the relevant material was not forwarded to the Addl. CIT and which were thus not considered before he granted the approval. The same is also evident from the fact that the ld CIT(A) has to exercise his enhancement powers. Had the relevant material being brought to the notice of the Add. CIT, it is likely that he would have instructed the AO appropriately and the assessment order would have been passed taking into consideration all relevant material and documents available on record. Accordingly, we are compelled to hold that the approval by the approving authority u/s 153D has been granted

in a mechanical manner and without application of mind and consequentially the assessment order passed by the AO on such approval deserve to be set-aside as not passed in accordance with the mandate of the statue and laid down jurisprudence. The ground of appeal so taken by the assessee firm is thus allowed.

17. In Ground No. 4, the assessee firm has challenged that when no incriminating material, for the year in question, was found during search and year in question was a case of unabated/completed assessment, no further addition could have been made in search based assessment framed u/s 153A, as held by the Hon'ble Supreme Court in PCIT vs. Abhisar Buildwell Pvt. Ltd (2023) 454 ITR 0212 (SC).

17.1 In this regard, the Ld. AR submitted that the search having been conducted on 13.07.2016 and that the assessment for the year in question was already completed u/s 143(3) on 09.02.2015. It was submitted that the only alleged incriminating material during the entire search is a handwritten noting at the backside of booking slip of Plot No. 10 available at APB pages 215 -216. He submitted that the handwritten noting at the backside does not contain any date. Further, the front side contain 2 dates i.e. 28.12.2010 which fall under AY 2011-12 and another date i.e. 06.08.2014 which fall under AY 2015-16. Therefore, both these dates do not pertain to the year in question and hence, the so called incriminating material in form of above handwritten document does not pertain to the year in question. He argued that if this document is taken away from the assessment for the year in question, there is not even a single incriminating material on which Revenue is relying upon. In this situation, in absence of incriminating material qua the year in question, the addition made deserve to be deleted.

17.2 In his rival submissions, Ld. CIT/DR argued that though the dates on the documents in question may not pertain to the year in question but since the turnover for the plot sold to Shri Kashmiri Lal for the disclosed portion has been

booked by the assessee firm in the year in question, the AO has rightly made addition for even the undisclosed portion in the assessment for the year in question.

17.3 We have heard the rival contentions and purused the material available on record. We have recently dealt with a similar issue in case of Ashish Jain & others (ITA NO. 352/Chd/2023 & others dated 23/01/2024) where the various authorities including those quoted at the Bar have been examined and we would deem it appropriate to refer to the same and which reads as under:

> *"12. We have heard the rival contentions and perused the material available on the record. In case of **Pr. CIT Vs. Abhisar Buildwell (P) Ltd.** (supra), the question for consideration before the **Hon'ble Supreme Court** was whether in respect of completed / unabated assessment, any addition can be made by the AO in absence of any incriminating material found during the course of search under section 132 or requisition under section 132A or not. The relevant discussions and the legal preposition so laid down by the Hon'ble Supreme Court are contained in para 5 to 14 of its judgment which read as under:*
>
> *"**5**. We have heard learned counsel for the respective parties at length.*
>
> *The question which is posed for consideration in the present set of appeals is, as to whether in respect of completed assessments/unabated assessments, whether the jurisdiction of AO to make assessment is confined to incriminating material found during the course of search under section 132 or requisition under section 132A or not, i.e., whether any addition can be made by the AO in absence of any incriminating material found during the course of search under section 132 or requisition under section 132 A of the Act, 1961 or not.*
>
> ***6.** It is the case on behalf of the Revenue that once upon the search under section 132 or requisition under section 132A, the assessment has to be done under section 153A of the Act, 1961 and the AO thereafter has the jurisdiction to pass assessment orders and to assess the 'total income' taking into consideration other material, though no incriminating material is found during the search even in respect of completed/unabated assessments.*
>
> ***7.** At the outset, it is required to be noted that as such various High Courts, namely, Delhi High Court, Gujarat High Court, Bombay High Court, Karnataka High Court, Orissa High Court, Calcutta High Court, Rajasthan High Court and the Kerala High Court have taken the view that no addition can be made in respect of completed/unabated assessments in absence of any incriminating material. The lead judgment is by the Delhi High Court in the case of Kabul Chawla (supra), which has been subsequently followed and approved by the other High Courts, referred to hereinabove. One another lead judgment on the issue is the decision of the Gujarat High Court in the case of Saumya Construction (supra), which has been followed by the Gujarat High Court in the subsequent decisions, referred to hereinabove. Only the Allahabad High Court in the case of Pr. CIT v. Mehndipur Balaji [2022] 447 ITR 517 has taken a contrary view.*

7.1 *In the case of Kabul Chawla (supra), the Delhi High Court, while considering the very issue and on interpretation of section 153A of the Act, 1961, has summarised the legal position as under:*

Summary of the legal position

38. On a conspectus of section 153A(1) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:

i. Once a search takes place under section 132 of the Act, notice under section 153A(1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.

ii. Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise.

iii. The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. In other words, there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".

iv. Although Section 153 A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."

v. In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is relatable to abated proceedings (i.e., those pending on the date of search) and the word 'reassess' to completed assessment proceedings.

vi. Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.

vii. Completed assessments can be interfered with by the AO while making the assessment under section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment."

7.2 *Thereafter in the case of Saumya Construction (supra), the Gujarat High Court, while referring the decision of the Delhi High Court in the case of Kabul Chawla (supra) and after considering the entire scheme of block assessment under section 153A of the Act, 1961, had held that in case of completed assessment/unabated assessment, in absence of any incriminating material, no additional can be made by the AO and the AO has no jurisdiction to re-open the completed assessment. In paragraphs 15 & 16, it is held as under:*

"15.On a plain reading of section 153A of the Act, it is evident that the trigger point for exercise of powers thereunder is a search under section 132 or a requisition under section 132A of the Act. Once a search or requisition is made, a mandate is cast upon the Assessing Officer to issue notice under section 153A of the Act to the person requiring him to furnish the return of income in respect of each assessment year falling within six assessment years immediately preceding the' assessment year relevant to the previous year in which such search is conducted or requisition is made and assess or reassess the same. Since the assessment under section 153A of the Act is linked with search and requisition under sections 132 and 132A of the Act, it is evident that the object of the section is to bring to tax the undisclosed income which is found during the course of or pursuant to the search or requisition. However, instead of the earlier regime of block assessment whereby; it was only the undisclosed income of the block period that was assessed, section 153A of the Act seeks to assess the total income for the assessment year, which is clear from the first proviso thereto which provides that the Assessing Officer shall assess or reassess the total income in respect of each assessment year, falling within such six assessment years. The second proviso makes the intention of the Legislature clear as the same provides that assessment or reassessment, if any, relating to the six assessment years referred to in the sub-section pending on the date of initiation of search under section 132 or requisition under section 132A, as the case may be, shall abate. Sub-section (2) of section 153A of the Act provides that if any proceeding or any order of assessment or reassessment made under sub-section (1) is annulled in appeal or any other legal provision, then the assessment or reassessment relating to any assessment year which had abated under the second proviso would stand revived. The proviso thereto says, that such revival shall cease to have effect if such order of annulment is set aside. Thus, any proceeding of assessment or reassessment falling within the, six assessment years prior to the search or requisition stands abated and the total income of the assessee is required to be determined under section 153A, of the Act. Similarly, sub-section (2) provides for revival of any assessment or reassessment which stood abated, if any proceeding or any order of assessment or reassessment made under section 153A of, the Act is annulled in appeal or any other proceeding.

16. Section 153A bears the heading "Assessment in case of search or requisition". It is well settled as held by the Supreme Court in a catena of decisions that the heading of the, section can be regarded as a key to the interpretation of the operative portion of, the section and if there is no ambiguity in the language or if it is plain and clear, then the heading used in the section strengthens that meaning From the heading of section 153, the intention of the Legislature is clear, viz, to provide for assessment in case of search and requisition. When, the very purpose of the provision is to make assessment in case of search or requisition, it goes without saying that the assessment has to have relation to the search or requisition. In other words, the assessment, should be connected with something found during the search or requisition, viz., incriminating material which reveals undisclosed income. Thus, while in view of the mandate of sub-section (1) of section 153A of the Act, in every case where there is a search or requisition, the Assessing Officer is obliged to issue notice to such person to furnish returns of income for the six years preceding the assessment year relevant to the previous year in which the search is conducted or requisition is made, any addition or disallowance can be made only on the basis of material collected during the search or requisition. In case no incriminating material is found, as held by the Rajasthan High Court in the case of Jai Steel (India) v. Asst. CIT (supra), the earlier assessment would have to be reiterated. In case where pending assessments

have abated, the Assessing Officer can pass assessment orders for each of the six years determining the total income of the assessee which would include income declared in the returns, if any, furnished by the assessee as well as undisclosed income, if any, unearthed during the search or requisition. In case where a pending reassessment under section 147 of the Act has abated, needless to state that the scope and ambit of the assessment would include any order which the Assessing Officer could have passed under section 147 of the Act as well as under section 153A of the Act."

8. *For the reasons stated herein below, we are in complete agreement with the view taken by the Delhi High Court in the case of Kabul Chawla (supra) and the Gujarat High Court in the case of Saumya Construction (supra), taking the view that no addition can be made in respect of completed assessment in absence of any incriminating material.*

9. *While considering the issue involved, one has to consider the object and purpose of insertion of Section 153A in the Act, 1961 and when there shall be a block assessment under section 153A of the Act, 1961.*

9.1 *That prior to insertion of Section 153A in the statute, the relevant provision for block assessment was under section 158BA of the Act, 1961. The erstwhile scheme of block assessment under section 158BA envisaged assessment of 'undisclosed income' for two reasons, firstly that there were two parallel assessments envisaged under the erstwhile regime, i.e., (i) block assessment under section 158BA to assess the 'undisclosed income' and (ii) regular assessment in accordance with the provisions of the Act to make assessment qua income other than undisclosed income. Secondly, that the 'undisclosed income' was chargeable to tax at a special rate of 60% under section 113 whereas income other than 'undisclosed income' was required to be assessed under regular assessment procedure and was taxable at normal rate. Therefore, section 153A came to be inserted and brought on the statute. Under Section 153A regime, the intention of the legislation was to do away with the scheme of two parallel assessments and tax the 'undisclosed' income too at the normal rate of tax as against any special rate. Thus, after introduction of Section 153A and in case of search, there shall be block assessment for six years. Search assessments/block assessments under section 153A are triggered by conducting of a valid search under section 132 of the Act, 1961. The very purpose of search, which is a prerequisite/trigger for invoking the provisions of sections 153A/153C is detection of undisclosed income by undertaking extraordinary power of search and seizure, i.e., the income which cannot be detected in ordinary course of regular assessment. Thus, the foundation for making search assessments under sections 153A/153C can be said to be the existence of incriminating material showing undisclosed income detected as a result of search.*

10. *On a plain reading of Section 153A of the Act, 1961, it is evident that once search or requisition is made, a mandate is cast upon the AO to issue notice under section 153 of the Act to the person, requiring him to furnish the return of income in respect of each assessment year falling within six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made and assess or reassess the same. Section 153A of the Act reads as under:*

"153A. Assessment in case of search or requisition - (1) Notwithstanding anything contained in Section 139, Section 147, Section 148, Section 149, Section 151 and Section 153, in the case of a person where a search is initiated under section 132

or books of account, other documents or any assets are requisitioned under section 132-A after the 31st day of May, 2003, the Assessing Officer shall—

(a) issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years referred to in clause (b), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139;

b) assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made:

Provided that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years:

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

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

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

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

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

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

***11.** As per the provisions of Section 153A, in case of a search under section 132 or requisition under section 132A, the AO gets the jurisdiction to assess or reassess the 'total income' in respect of each assessment year falling within six assessment years. However, it is required to be noted that as per the second proviso to Section 153A, the assessment or re-assessment, if any, relating to any assessment year falling within the period of six assessment years pending on the date of initiation of the search under section 132 or making of requisition under section 132A, as the case may be, shall abate. As per sub-section (2) of Section 153A, if any proceeding initiated or any order of assessment or reassessment made under sub-section (1) has been annulled in appeal or any other legal proceeding, then, notwithstanding anything contained in sub-section (1) or section 153, the assessment or reassessment relating to any assessment year which has abated under the second proviso to sub-section (1), shall stand revived with effect from the date of receipt of the order of such annulment by the Commissioner. Therefore, the intention of the legislation seems to be that in case of search only*

the pending assessment/reassessment proceedings shall abate and the AO would assume the jurisdiction to assess or reassess the 'total income' for the entire six years period/block assessment period. The intention does not seem to be to re-open the completed/unabated assessments, unless any incriminating material is found with respect to concerned assessment year falling within last six years preceding the search. Therefore, on true interpretation of Section 153A of the Act, 1961, in case of a search under section 132 or requisition under section 132A and during the search any incriminating material is found, even in case of unabated/completed assessment, the AO would have the jurisdiction to assess or reassess the 'total income' taking into consideration the incriminating material collected during the search and other material which would include income declared in the returns, if any, furnished by the assessee as well as the undisclosed income. However, in case during the search no incriminating material is found, in case of completed/unabated assessment, the only remedy available to the Revenue would be to initiate the reassessment proceedings under sections 147/48 of the Act, subject to fulfillment of the conditions mentioned in sections 147/148, as in such a situation, the Revenue cannot be left with no remedy. Therefore, even in case of block assessment under section 153A and in case of unabated/completed assessment and in case no incriminating material is found during the search, the power of the Revenue to have the reassessment under sections 147/148 of the Act has to be saved, otherwise the Revenue would be left without remedy.

12. *If the submission on behalf of the Revenue that in case of search even where no incriminating material is found during the course of search, even in case of unabated/completed assessment, the AO can assess or reassess the income/total income taking into consideration the other material is accepted, in that case, there will be two assessment orders, which shall not be permissible under the law. At the cost of repetition, it is observed that the assessment under section 153A of the Act is linked with the search and requisition under sections 132 and 132A of the Act. The object of Section 153A is to bring under tax the undisclosed income which is found during the course of search or pursuant to search or requisition. Therefore, only in a case where the undisclosed income is found on the basis of incriminating material, the AO would assume the jurisdiction to assess or reassess the total income for the entire six years block assessment period even in case of completed/unabated assessment. As per the second proviso to Section 153A, only pending assessment/reassessment shall stand abated and the AO would assume the jurisdiction with respect to such abated assessments. It does not provide that all completed/unabated assessments shall abate. If the submission on behalf of the Revenue is accepted, in that case, second proviso to section 153A and sub-section (2) of Section 153A would be redundant and/or rewriting the said provisions, which is not permissible under the law.*

13. *For the reasons stated hereinabove, we are in complete agreement with the view taken by the Delhi High Court in the case of Kabul Chawla (supra) and the Gujarat High Court in the case of Saumya Construction (supra) and the decisions of the other High Courts taking the view that no addition can be made in respect of the completed assessments in absence of any incriminating material.*

14. *In view of the above and for the reasons stated above, it is concluded as under:*

(i) that in case of search under section 132 or requisition under section 132A, the AO assumes the jurisdiction for block assessment under section 153A;

(ii)all pending assessments/reassessments shall stand abated;

(iii) in case any incriminating material is found/unearthed, even, in case of unabated/completed assessments, the AO would assume the jurisdiction to assess or reassess the 'total income' taking into consideration the incriminating material unearthed during the search and the other material available with the AO including the income declared in the returns; and

(iv)in case no incriminating material is unearthed during the search, the AO cannot assess or reassess taking into consideration the other material in respect of completed assessments/unabated assessments. Meaning thereby, in respect of completed/unabated assessments, no addition can be made by the AO in absence of any incriminating material found during the course of search under section 132 or requisition under section 132A of the Act, 1961. However, the completed/unabated assessments can be re-opened by the AO in exercise of powers under sections 147/148 of the Act, subject to fulfilment of the conditions as envisaged/mentioned under sections 147/148 of the Act and those powers are saved.

The question involved in the present set of appeals and review petition is answered accordingly in terms of the above and the appeals and review petition preferred by the Revenue are hereby dismissed. No costs."

13. The Hon'ble Supreme Court in the aforesaid decision has held that the assessment under Section 153A of the Act is linked with the search and requisition under Sections 132 and 132A of the Act and thus, the object of Section 153A is to bring under tax the undisclosed income which is found during the course of search or pursuant to search or requisition. Therefore, only in a case where the undisclosed income is found on the basis of incriminating material unearthed during the course of search, the AO would assume the jurisdiction to assess or reassess the total income in case of completed/unabated assessment taking into consideration the incriminating material unearthed during the search and the other material available with the AO including the income declared in the return. In case, no incriminating material is unearthed during the search, the AO cannot assess or reassess taking into consideration the other material in respect of completed assessments/unabated assessments and has upheld the decisions of Hon'ble Delhi High Court in case of CIT Vs. Kabul Chawla [2016] 380 ITR 573 and Hon'ble Gujarat High Court in case of Pr. CIT Vs. Saumya Construction (P.) Ltd. [2016] 387 ITR 529.

*14. As to what constitute incriminating material found/unearthed during the course of search, the **Hon'ble Delhi High Court** in case of **Kabul Chawla** (Supra) held that completed assessment can be interfered with by the AO while making the assessment under section 153A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment. The Hon'ble Delhi High Court in the said decision referred to the decision of **Hon'ble Bombay High Court** in case of **CIT Vs. Continental Warehousing Corporation (Nhava Sheva) Ltd.** [2015] 374 ITR 645 wherein the question for consideration was whether the scope of assessment under section 153A encompasses addition not based on any incriminating material found during the course of search. It was held by the Bombay High Court that no*

addition can be made in respect of the assessment that has become final in the absence of incriminating material found during the course of search. The Bombay High Court referred to its earlier decision in case of ***CIT Vs. Murli Agro Products Ltd.*** *(ITA No. 36 of 2009 dated 29/10/2010) and expressed its agreement with the earlier decision holding that the crucial words "search" and "requisition" appear in substantive provisions of section 153A and that would through light on the applicability of the provisions which is being enacted to a search or requisition and that its construction has to be read and understood accordingly. The Hon'ble Bombay High Court further affirmed the decision of the* ***Special Bench of the Tribunal*** *in* ***All Cargo Global Logistics Ltd. Vs. DCIT*** *[2012] 18 ITR (Trib) 106 (Mumbai) wherein it was held that the "incriminating material" in the context of the relevant provision means books of account, other documents found in the course of search but not produced in the course of original proceedings and secondly, the undisclosed income or property discovered in the course of search.*

15. We deem it appropriate to reproduce the findings of the ***Hon'ble Bombay High Court*** *in case of* ***Continental Warehousing Corporation*** *(supra) and the same read as under:*

"30. Even otherwise, we agree with the Division Bench when it observes as above with regard to the ambit and scope of the powers conferred under section 153A of the Act. Since we are not required to trace out the history and we can do nothing better than to reproduce the observations and conclusions as above that we are not repeating the same. Even if the exercise of power under section 153A is permissible still the provision cannot be read in the manner suggested by Mr. Pinto. Not only the finalised assessment cannot be touched by resorting to those provisions, but even while exercising the power can be exercised where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after 31st March, 2003. There is a mandate to issue notices under section 153(1)(a) and assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made. Thus, the crucial words "search" and "requisition" appear in the substantive provision and the provisos. That would throw light on the issue of applicability of the provision. It being enacted to a search or requisition that its construction would have to be accordingly. That is the conclusion reached by the Division Bench in Murli Agro Products Ltd. (supra) with which we respectfully agree. These are the conclusions which can be reached and upon reading of the legal provisions in question.

31. We, therefore, hold that the Special Bench's understanding of the legal provision is not perverse nor does it suffer from any error of law apparent on the face of the record. The Special Bench in that regard held as under :

"48. The provision under section 153A is applicable where a search or requisition is initiated after 31.5.2003. In such a case the AO is obliged to issue notice u/s 153A in respect of 6 preceding years, preceding the year in which search etc. has been initiated. Thereafter he has to assess or reassess the total income of these six years. It is obligatory on the part of the AO to assess or reassess total income of the six years as provided in section 153A(1)(b) and reiterated in the 1st proviso to this section. The second proviso states that the assessment or reassessment pending on the date of initiation of the search or requisition shall abate. We find that there is no divergence of views in so far as the provision contained in section 153A till the 1st proviso. The divergence starts from the second proviso which states that pending assessment or reassessment on the date of initiation of search shall abate. This means that an assessment or reassessment pending on the date

of initiation of search shall cease to exist and no further action shall be taken thereon. The assessment shall now be made u/s 153A. The case of Ld. Counsel for the assessee is that necessary corollary to this provision is that completed assessment shall not abate. These assessments become final except in so far and to the extent as undisclosed income is found in the course of search. On the other hand, it has been argued by the Ld. Standing Counsel that abatement of pending assessment is only for the purpose of avoiding two assessments for the same year, one being regular assessment and the other being assessment u/s 153A. In other words these two assessments coalesce into one assessment. The second proviso does not contain any word or words to the effect that no reassessment shall be made in respect of a completed assessment. The language is clear in this behalf and therefore literal interpretation should be followed. Such interpretation does not produce manifestly absurd or unjust results as section 153A (i)(b) and the first proviso clearly provide for assessment or reassessment of all six years. It may cause hardship to some assesses where one or more of such assessments has or have been completed before the date of initiation of search. This is hardly of any relevance in view of clear and unambiguous words used by the legislature. This interpretation does not cause any absurd etc. results. There is no casus omissus and supplying any would be against the legislative intent and against the very rule in this behalf that it should be supplied for the purpose of achieving legislative intent. The submissions of the Ld. Counsels are manifold, the foremost being that the provision u/s 153A should be read in conjunction with the provision contained in section 132(1), the reason being that the latter deals with search and seizure and the former deals with assessment in case of search etc, thus, the two are inextricably linked with each other.

49. Before proceeding further, we may now examine the provision contained in sub-section (2) of section 153, which has been dealt with by Ld. Counsel. It provides that if any assessment made under sub-section (1) is annulled in appeal etc., then the abated assessment revives. However, if such annulment is further nullified, the assessment again abates. The case of the Ld. Counsel is that this provision further shows that completed assessments stand on a different footing from the pending assessments because appeals etc. proceedings continue to remain in force in case of completed assessments and their fate depends upon subsequent orders in appeal. On consideration of the provision and the submissions, we find that this provision also makes it clear that the abatement of pending proceedings is not of such permanent nature that they cease to exist for all times to come. The interpretation of the Ld. Counsel, though not specifically stated, would be that on annulment of the assessment made u/s 153(1), the AO gets the jurisdiction to assess the total income which was vested in him earlier independent of the search and which came to an end due to initiation of the search.

50. The provision contained in section 132 (1) empowers the officer to issue a warrant of search of the premises of a person where any one or more of conditions mentioned therein is or are satisfied, i.e. - (a) summons or notice has been issued to produce books of account or other documents but such books of account or documents have not been produced, (b) summons or notice has been or might be issued, he will not produce the books of account or other documents mentioned therein, or (c) he is in possession of any money or bullion etc. which represents wholly or partly the income or property which has not been and which would not be disclosed for the purpose of assessment, called as undisclosed income or property. We find that the provision in section 132 (1) does not use the word "incriminating document". Clauses (a) and (b) of section 132(1) employ the words "books of account or other documents". For harmonious

interpretation of this provision with provision contained in section 153A, all the three conditions on satisfaction of which a warrant of search can be issued will have to be taken into account.

51. Having held so, an assessment or reassessment u/s 153A arises only when a search has been initiated and conducted. Therefore, such an assessment has a vital link with the initiation and conduct of the search. We have mentioned that a search can be authorised on satisfaction of one of the three conditions enumerated earlier. Therefore, while interpreting the provision contained in section 153A, all these conditions will have to be taken into account. With this, we proceed to literally interpret to provision in 153A as it exists and read it alongside the provision contained in section 132(1).

52. The provision comes into operation if a search or requisition is initiated after 31.5.2003. On satisfaction of this condition, the AO is under obligation to issue notice to the person requiring him to furnish the return of income of six years immediately preceding the year of search. The word used is "shall" and, thus, there is no option but to issue such a notice. Thereafter he has to assess or reassess total income of these six years. In this respect also, the word used is "shall" and, therefore, the AO has no option but to assess or reassess the total income of these six years. The pending proceedings shall abate. This means that out of six years, if any assessment or reassessment is pending on the date of initiation of the search, it shall abate. In other words pending proceedings will not be proceeded with thereafter. The assessment has now to be made u/s 153A (1)(b) and the first proviso. It also means that only one assessment will be made under the aforesaid provisions as the two proceedings i.e. assessment or reassessment proceedings and proceedings under this provision merge into one. If assessment made under sub-section (1) is annulled in appeal or other legal proceedings, then the abated assessment or reassessment shall revive. This means that the assessment or reassessment, which had abated, shall be made, for which extension of time has been provided under section 153B.

53. The question now is - what is the scope of assessment or reassessment of total income u/s 153A (1) (b) and the first proviso ? We are of the view that for answering this question, guidance will have to be sought from section 132(1). If any books of account or other documents relevant to the assessment had not been produced in the course of original assessment and found in the course of search in our humble opinion such books of account or other documents have to be taken into account while making assessment or reassessment of total income under the aforesaid provision. Similar position will obtain in a case where undisclosed income or undisclosed property has been found as a consequence of search. In other words, harmonious interpretation will produce the following results:-

(a) In so far as pending assessments are concerned, the jurisdiction to make original assessment and assessment u/s 153A merge into one and only one assessment for each assessment year shall be made separately on the basis of the findings of the search and any other material existing or brought on the record of the AO,

(b) in respect of non-abated assessments, the assessment will be made on the basis of books of account or other documents not produced in the course of original assessment but found in the course of search, and undisclosed income or undisclosed property discovered in the course of search.

54. It may be mentioned here that Ld. Counsel for All Cargo Global Logistics Ltd. was questioned about the scope of pending assessments as it was his contention that all six assessments are to be made, if necessary, on the basis of undisclosed income discovered in the course of search. He was specifically questioned about the jurisdiction of the AO to make original assessment along with assessment u/s 153A, merging into one. However he took an evasive view submitting that this question need not be decided in his case although the question of jurisdiction u/s 153A was vehemently pressed on account of which ground No.1 in the appeal for assessment year 2004-05 was admitted as additional ground. He also wanted the additional ground to be retained in case of any future contingency."

16. The matter relating to incriminating material coupled with various other issues again came up for consideration before the Hon'ble Bombay High Court recently in case of ***Ashok Commercial Enterprises vs Assistant Commissioner of Income tax*** *(Writ petition no 2595 and others dated 04/09/2023). Referring to the decision of Hon'ble Supreme Court in case of Pr. CIT Vs. Abhisar Buildwell (P) Ltd. (supra), it was held that no addition can be made by the AO in absence of any incriminating material found during the course of search under section 132 or requisition under section 132A of the Act. Referring to the decision of Hon'ble Supreme Court in case of CIT Vs. Sinhgad Technical Education Society 397 ITR 344 (SC), it was held that the incriminating material seized must pertains to assessment year in question and notice issued under section 153C for other assessment years are not sustainable. It was further held by the Hon'ble Bombay High Court that the question whether any material found during the course of proceedings under section 132 is incriminating or otherwise has to be tested based only on the satisfaction note recorded by the AO. It was held that the contents of the said satisfaction note are the only statement/material to be looked at and the Revenue cannot seek the augment, supplement or add to the material recorded to support the claim that the incriminating material has been found and the Revenue cannot refer to any other document or material to establish such a claim and the relevant findings are contained at para 15 (d) page 40 of the judgment which we deem it appropriate to reproduce as under:*

"(d) The question of whether any material found during the course of proceedings under Section 132 of the Act in the case of Hubtown Limited is incriminating or otherwise has to be tested based only on the satisfaction note recorded by the Assessing Officer/s. The contents of the said satisfaction note are the only item/material to be looked at in this regard and respondent cannot seek to augment, supplement or add to materials recorded to support the claim that incriminating material has been found. Further respondent cannot refer to any other documents or material to establish such a claim. We find support in (i) Ananta Landmark Pvt. Ltd. (Supra) and (ii) Jainam Investments (Supra), where the Courts have held that the question of the Assessing Officer's jurisdiction to undertake proceedings has to be tested/examined only on the basis of reasons recorded at the time of issuing a notice under Section 148 of the Act seeking to reopen an assessment. These reasons cannot be improved upon and/or supplemented much less substituted by affidavit and/or oral submission;

(e) In the instant case, the satisfaction note dated 13th July 2021 (common for all Assessment Years) insofar it relates to Assessment Year 2017-2018 only records that:

(i) an account of petitioner in the books of Hubtown Limited was found.

It is important to note that the said account agreed exactly to the account of Hubtown Limited in the books of petitioner, a fact verified during the course of the survey on the day after the search, i.e., 31st July 2019.

(ii) petitioner had entered into transactions of purchase and sale of shares of Hubtown Limited which have been recorded in petitioner's books of accounts and tax paid on the resulting gain.

(iii) reference is made to an alleged re-cast of loan from petitioner to Hubtown Limited into an advance against property during year ended 31st March 2019 and the same is not relevant to Assessment Year 2017-2018.

(f) Accordingly, it is irrefutable that no incriminating material relating to petitioner has been found during proceedings under Section 132 of the Act in the case of Hubtown Limited;"

17. We therefore find that the term "incriminating material" have to be read and understood in the context of one or more of the conditions stipulated in section 132(1) and on satisfaction of which, a search can be authorised and search warrant can be issued. That is, there is information in possession of the competent authority and basis which he has reasons to believe that (a) summons or notice has been issued to produce books of account or other documents but such books of account or documents have not been produced under the erstwhile 1922 Act or under section 142(1) of the present Act, (b) summons or notice has been or might be issued, he will not produce the books of account or other documents mentioned therein, or (c) he is in possession of any money or bullion etc. which represents wholly or partly the income or property which has not been and which would not be disclosed for the purpose of assessment, called as undisclosed income or property. Therefore the information in possession of the competent authority at the time of authorization of search becomes relevant and basis the same, his satisfaction that search action is warranted coupled with material actually found and seized during the course of search which has not been disclosed or produced or submitted in the course of original assessment. More specifically, it refers to the books of account or other documents not produced in the course of original assessment but found in the course of search. It also refers to any money or bullion etc. which represents wholly or partly the income or property which has not been disclosed for the purpose of assessment and discovered in the course of search. It can thus be stated that in case of unabated assessment, the reassessment can be made on the basis of the satisfaction note pursuant to which the search has been initiated and books of account or other documents not produced in the course of original assessment but found in the course of search which indicate undisclosed income or undisclosed property, and secondly, the reassessment can be made on the basis of the undisclosed income or undisclosed property which is physically found and discovered in the course of search.

18. Applying the aforesaid legal proposition in the instant case, we find that it is a case of completed/unabated assessment wherein the original return of income filed on 29/09/2012 stood processed under section 143(1) and accepted in absence of any notice under section 143(2) and statutory period of issuance of such notice stood expired well before the date of search which was conducted on 26/02/2016.

19. As per section 153A of the Act, once a search and seizure action is carried out, the AO has to assess or reassess the total income of the assessee in respect of six years immediately preceding the assessment year relevant to the previous year in which a search is conducted or requisition is made. In case the assessment is pending on the date of search the same shall be abated as per proviso to section 153A(1) of the Act and the AO is free to assess the income of the assessee as regular assessment. However, in case of completed assessment and not abated as on the date of search, as in the instant case, the AO has to reassess the total income of the assessee and the assessment already completed can be tinkered with or distrusted where some incriminating material is found and seized during the course of search indicating undisclosed income of the assessee. Therefore, the AO would assume the jurisdiction to reassess the 'total income' taking into consideration the incriminating material unearthed during the search and the other material available with the AO including the income declared in the return. In case no incriminating material is unearthed during the search, the AO cannot reassess taking into consideration the other material in respect of completed assessments/unabated assessments."

17.4 In the instant case, it is an undisputed fact that as on the date of search, the original assessment proceedings already stood completed. It is also an undisputed fact that only document claimed to be incriminating material by the Revenue is a booking slip and more particularly, noting on the backside of the said booking slip for one of the plots of land. It is noted that handwritten noting at backside of the booking slip for plot no. 10 is undated and date in front side do not pertain to year in question. This clearly proves that the document in question do not pertain to the year in question. Therefore, as per the law laid down by the Hon'ble Supreme Court in case of Abhisar Buildwell Pvt. Ltd. (Supra), the Ld. AO could not have made addition in respect of an already completed assessment when no incriminating material pertaining to the year in question was found and seized during the course of search.

17.5 As regard to the argument of Ld. CIT/DR that when disclosed portion of sale value of plot has been booked as turnover in the year in question, the AO rightly added the undisclosed portion in the year in question, we are of the considered view that this is not correct. As laid down in the case of Ashok Commercial(supra) in case of completed and unabated assessment, for assumption of jurisdiction the incriminating material must pertain to assessment year in question and a reasonable nexus has to be found at the very threshold in

terms of contents of the material so found as pertaining to year in question and the Revenue cannot seek to augment, supplement or add to the material to support the claim that incriminating material has been found for the year in question. The quantification of the addition comes only subsequent to the assumption of valid jurisdiction. The mere fact of offering of sale of disclosed portion as turnover by the assessee firm in its book of the year in question, do not take away the fact that material did not belong to the year in question. In view of law laid down by the Hon'ble Supreme Court in Abhisar Buildwell Pvt. Ltd. (Supra) and Hon'ble Bombay High Court in case of Ashok Commercial (supra) this ground of the appellant is hereby allowed.

18. Now, coming to merits of the case, the assessee firm vide ground nos. 3 and 6 has challenged the addition of Rs. 2,65,06,482/- on extrapolation to 54 units when alleged material was found for 4 units only and further enhancement of addition by the ld CIT(A) to Rs. 7,03,17,753/- by extrapolating to 128 units and also that based on the material on record, no addition could have been made at all.

18.1 During the course of hearing, the ld AR submitted that the assessee firm had been selling plots in its developed colony to the buyers. Based on search, assessment u/s 153A r/w section 143(3) was framed for the block period of AY 2011-12 to 2017-18. During this entire block period, the assessee firm had sold various plots in the range of Rs. 1200 to 2000 per sq. yard. During this block period, the assessee firm had sold 4 plots to Kashmiri lal i.e. number 10, 11, 168 & 169 all @ Rs. 1300 per. Sq. yard (approx.). This amount stands recorded in books of the assessee firm and there is no dispute qua this amount. However, during search, booking slips and allotment letters issued to Kashmiri lal were found from the premises of Sh. Ramesh Garg. There was some handwritten noting at the backside of booking receipt of Plot No. 10. The Ld. AO deciphered this noting and held that these plots have actually been sold by the assessee firm @ Rs. 7000 p. sq. yard. Based on this, he further held that 54 plots, for which booking

slips were found during search on Ramesh Garg, must also have been sold @ Rs. 7000 p. sq. yard and he, therefore, made the addition of undisclosed sale for these 54 plots. At the same time, the assessee firm had actually sold 128 plots during the year but the AO had made addition for 54 plots since booking records for these very 54 plots only was found. During appeal, the ld CIT(A) not only confirmed the addition to 54 plots but also enhanced it to all 128 plots sold during the year. It is against addition for 54 plots made by the Ld. AO that the assessee firm has preferred Ground No. 3 and then against the enhancement made by the ld CIT(A) to 128 plots, that the assessee firm has preferred Ground No. 6.

18.2 It was submitted by the ld AR that the other years involved in the block period were assessed by the same Ld. AO at the same time and approved by the same authority u/s 153D. The assessee firm had sold the plots at almost same rates during those years also. But no addition or extrapolation was made in those years.

18.3 It was further submitted that the entire addition was made on the noting made on the backside of the cancelled booking receipts. The same is neither in the handwriting of any of its partners nor of any of its employees. During the course of hearing, Ld.AR also explained the normal business practice of the assessee firm that once the buyer books the plot, he can get the registration of plot done in his own name or in the name of any other person. If he wants to resale the plot, the original allotment letter is to be tendered back to the assessee firm and in case the payment is received by the assessee firm from the fresh allottee, then the amount is refunded back to the original allottee, else the original allottee receives the amount directly from the new buyer and the assessee firm has to get the sale deed executed in favour of the third party on receiving written request and affidavit from the original allottee. It was submitted that in case of Kashmiri lal, booking receipts were issued to him on 28.12.2010 and subsequently payments were received from him during the year under

consideration and allotment letters were issued in his name on16.03.2012/12.03.2012. Thereafter, he re-sold plot no. 168, amount paid by him was refunded to him by the assessee firm and fresh amount was received by the assessee firm from the new allottee. Further, the amounts in respect of other 3 plots numbered 10, 11, 169 were directly received by Sh. Kashmiri lal who gave affidavit of having directly sold these plots to new buyer and received the full & final amount and requested the assessee firm to get the sale deed executed directly in favour of new buyer. It was also argued that it was explained to the Ld. AO that the booking receipt, on which certain noting was made, were in the possession of Kashmiri lal from the date of issue (28.12.2010) till the same were returned to the assessee firm for subsequent re-allotment(06.08.2014) and it is during that time, he might have done some noting. Further, sale deeds in respect of these 4 plots were executed in favour of re-allottees as per instruction of Sh. Kashmiri lal. It was also argued that the affidavit of Kashmiri lal for Plot No. 10 (AR PB Pg. No. 693) bears the date of 06.08.2014 and same date is at the bottom of booking slip on backside of which handwritten noting was found and also that the sale deed (AR PB Pg. 120-132) executed in favour of third party mentioned in affidavit of Kashmiri lal is also of same date. The same was stated to be the situation in respect of other plots and affidavit of Kashmiri lal. It was also stated before the Ld. AO that besides noting on the backside of one of the booking receipt of Plot No. 10, no other incriminating material was found in respect of any other plot and therefore, the sale rates as per rough notings made by Kashmiri lal cannot be applied just based on presumptions/ assumptions on all other plots.

18.4 It was further submitted that an affidavit dated 26.05.2015 by Kashmiri lal for plot No. 169, stating that he has sold his plot to some third party for a consideration of Rs. 5,50,000/- which amounts to Rs. 2000/-(approx.) per Sq. Yds was also part of seized record. The sale deed for this very plot is at pages 130-132, which is also of same date of 26.05.2015 and is of same consideration of Rs. 5,50,000/- admitted by Kashmiri lal. When Kashmiri lal has admitted to have sold

the plot @ Rs. 2000 during FY 2015-16, there was no reason with Ld. AO to hold the sale of these very plots @ Rs. 7000 during FY 2010-11/ 2011-12.

18.5 It was further submitted that the Ld. AO made the addition in the hands of the assessee firm on the basis of alleged noting but he never made any enquiry from Kashmiri lal or any third party. The entire addition was only on presumption that alleged transaction was made by the assessee firm and that too in the year under consideration only, noting were made by the assessee's partner/employee, transaction were made out of books @6500/7000 per sq yds. Even affidavit of Kashmiri lal which was there in the same seized record was completely ignored wherein values are totally different from alleged noting. These facts show that Ld. AO made entire story in his mind by presuming the fact and alleged noting in his own way and completely ignored the fact stated by the assessee firm and other seized material found during search. The entire addition was made on dumb document which is not supported by any documentary evidence. It is settled law that in the absence of corroborative material or evidence, making of addition on the basis of dumb documents or loose paper which was not in the handwriting of partner of the assessee firm and have not been found from the business premises of the assessee firm, was illegal. For this proposition, reliance was placed in the case of CIT vs. Ved Prakash Chaudhary (305 ITR 245) Del. HC and CIT vs Girish Chaudhary (296 ITR 619) Del. HC. Further, for the proposition that presumption howsoever strong cannot take place of evidence, Ld. AR relied upon the following judgments namely, Dhakeshwari Cotton Mills vs. CIT (1954) (26 ITR 775) (SC), Umacharan Shaw and Bros. vs. CIT (1959) 37 ITR 271 (SC) and CIT vs. Shri Ram Narain Goel, (P&H HC) 224 ITR 180.

18.6 It was further submitted that out of the 4 plots numbered 10, 11, 168 and 169 of Kashmiri lal which formed the base for framing assessment, only 3 plots were included in the list of 54 plots on which the rate of Rs. 7000 was applied by the Ld. AO. Plot No. 168 was not considered for making addition though noting

for the same was there in the above referred handwritten document. This shows total non-application of mind by the Ld. AO. It was further submitted that the handwritten noting was found at the backside of booking slip. This booking slip is dated 28.12.2010 and this date falls in AY 2011-12 whereas the AO had made the addition in AY 2012-13, which is incorrect.

18.7 It was further submitted that without prejudice to the above arguments, even if addition is to be made on the basis of alleged material found during the search, then the said addition at maximum is to be restricted to 4 plots only for which alleged noting was found. In this regard, it was submitted that apart from nothing on backside of one of the booking receipts, no material was found in regard to remaining plots sold. It was submitted that it is an important fact to note that the Ld. AO did not reject the books of the assessee firm u/s 145(3) and accepted the sale price declared by the assessee in its books. But while making addition, he made the addition on 54 plots even when the alleged material was found only for 3 plots out of 54 plots. Thereafter, the ld CIT(A) enhanced the addition by applying rate of Rs. 6500/7000 p. sq. yds. on the entire 128 plots sold.

18.8 The ld AR also relied upon following decisions where assessee were in similar line of business and it was held therein that when material was found for one or more unit, addition is to be restricted to those very units only and addition by extrapolating the material to other units cannot be made:

- *M/S. Mani Square Ltd. Vs. ACIT[(2020) 83 ITR (Trib) 0241 (Kol ITAT)]*
- *Pushkar Infrastructure vs. ACIT [I.T(SS).A.No. 347/Ahd/2019] dtd.11.08.2023(Ahd. ITAT)*
- *Mr. A. Sivashankar vs. DCIT [ITA Nos.617 to 620/Chny/2017](Chny ITAT)*
- *CIT vs. M/s V.M. Spinning Mills [ITA no. 670/2009]P&H HC*

18.9 In his submissions, the ld CIT/DR strongly supported the order and findings of the lower authorities. The ld CIT/DR referred to the noting on the backside of booking receipt. On the basis of this very noting, he contended that the area

measurement mentioned in this noting is clearly matching with plot area mentioned in the booking receipts of these 4 plots. Therefore, the noting at backside of the booking receipt clearly relates to selling of plot of lands at a higher consideration.

18.10 He also contended that in the normal business practice of the assessee firm's business, two booking receipts are prepared at the time of booking payment made by the buyer. One remains with seller and other with the buyer. Therefore, argument of the AR that this receipt was with the buyer during the relevant time period is incorrect. Further, it was also contended that the entire addition was made by the Ld. AO in year under question because more than 95 % of the sale consideration was received in the year in question and these receipts were booked as income in the profit and loss account in the same financial year since the assessee firm is booking revenue in P&L A/c when entire payment is received from buyer and allotment letter is issued. Therefore, addition in this very year has been made logically and fairly. Further, it was also argued by the Ld. CIT/DR that there is no requirement in law to reject books of accounts to doubt the sales made by the assessee firm. The addition in the sales can also be made without rejecting the books of the assessee firm. In support of his claim, he relied upon decision of Hon'ble Kerala HC in the case of CIT vs. Orma Marble Palace (P) Ltd. (Supra) which has been affirmed by Hon'ble Supreme court where it was held that addition, based on incriminating material, can be made without rejecting books of accounts.

18.11 In his rejoinder, the Ld. AR pointed out that in the judgement of Hon'ble Kerala HC in the case of CIT vs. Orma Marble Palace (P) Ltd. (Supra) relied upon by the Ld. CIT/DR, it was held that addition on estimate basis must be in direct correlation to material, transactions or aspects found during the search. In the present case, no material was found to substantiate that assessee firm was suppressing sale price and sold plots on higher prices. It was only presumption which is based on a dumb document and by ignoring the affidavit of Kashmiri

Lal wherein figure mentioned were completely different from the estimation made. Therefore, estimation of sale proceeds made by the Ld. AO did not have any correlation with the material found.

18.12 We have heard the rival contentions and purused the material available on record. The entire assessment proceedings and addition was based on noting on the backside of one of the booking receipt. The Ld. AR explained the normal business practice and contended that the said receipt was in the possession of Kashmiri Lal during the relevant period of time and the noting made on the backside was not in the handwriting of any partner or employee of the Assessee firm. It is also a fact that no material, except above noting on the backside of a booking receipt, was found which can support the alleged undisclosed transaction having been carried out. The AO did not bring on record any evidence to establish as to between which parties these transactions were carried out and also when these transactions were carried out. Rather, there is an Affidavit of Kashmiri Lal as part of seized record wherein he admitted of having sold the plot @ Rs. 2000 p. sq. yrd on 06.08.2014 and 26.05.2020. Then the question arises as to how the appellant could have sold this very plot to Kashmiri lal on 28.12.2010 @ Rs. 6500/7000 p. sq. yrd. Therefore, the entire addition based on that loose noting which infact has not been further corroborated by the Ld. AO is based on assumptions and presumptions and hence the same is liable to be deleted. Further, the AO as well as the ld CIT(A) for making this addition has heavily and solely relied upon the handwritten noting at the backside of relevant booking slip. For deciphering and coming to the conclusion that the assessee firm had sold the plots to Kashmiri lal @ Rs. 7000/6500 p. sq. yrd., they have further relied on Section 292C which reads as under:

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

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

(ii) that the contents of such books of account and other documents are true; and

(iii) that the signature and every other part of such books of account and other documents which purport to be in the handwriting of any particular person or which may reasonably be assumed to have been signed by, or to be in the handwriting of, any particular person, are in that person's handwriting, and in the case of a document stamped, executed or attested, that it was duly stamped and executed or attested by the person by whom it purports to have been so executed or attested."

18.13 The Ld. AR has argued that the protection with the Revenue u/s 292C is only qua the ownership of document, that the contents of the document are true, they are in the handwriting of the particular person and when required to be stamped – it is sufficiently stamped. He argued that firstly as per P.R. Metrani vs. CIT [2006] 287 ITR 209 (SC), Section 292C only gives power of presumption to the revenue and not holds that something becomes direct evidence. He further argued that Section 292C presumption is rebuttable. In the present case, we find that the assessee firm has sufficiently rebutted this presumption by bringing on record contrary material in the form of affidavit of Kashmiri lal, by denying that the document is in its handwriting and by stating from the dates on the booking slip/affidavit/ further sale deed that the booking slip remained with Kashmiri lal for sufficiently long time and that Kashmiri lal might have been selling these plots based on his handwritten noting. Further, the contention of both the lower authorities that Section 292C gives power to the Revenue to presume the contents of a document as the revenue wants and then the appellant has to rebut that kind of presumption drawn is not what has been contemplated in Section 292C. He also argued that Section 292C comes into play only when there is clinching evidence about the contents of the document and when the assessee firm has sufficiently shown that the contents of the document are not clear and there are huge gaps in the story built by the Revenue, Section 292C cannot be applied. He also argued that it is a settled proposition of law that where a section permits to draw presumption, there cannot be further

presumption in an already presumed fact or matter. We are in agreement with these arguments of the Ld. AR. The revenue has wrongly applied the presumption u/s 292C for the document in question. Without having dispelled the rebuttals made by the assessee, still continuing to rely upon presumption u/s 292C and without bringing any other corroborative evidence on record, the AO has erred in making the addition and the Ld. CIT(A) also erred in confirming the said action of the AO.

18.14 Further, Ld. AR relied upon decision of Hon'ble Jurisdictional High Court in the case of VM Spinning Mills *(Supra)* wherein it was held that if certain material was found evidencing the suppressing of sale for part of a financial year, in such case, sales carried out during the rest of the period cannot be doubted and no addition for the period for which no material was found can be made. In this case, the decision of Hon'ble Supreme Court in H.M. Esufali H.M. Abdulali [(1973) 90 ITR 271] was considered and it was held as under:

> *"7. As regards unrecorded sales being made the basis for drawing inference for addition, the Tribunal has clearly recorded a finding of fact that addition beyond unrecorded sales evidenced by 17 sale bills was without any basis. The said finding has not been shown to be perverse.*
>
> *8. Learned counsel for the revenue relies upon the judgment of the Hon'ble Supreme Court in Commissioner of Sales Tax v. H.H. Esufali H.M. Abdulali, 90 ITR 271 to submit that in a proper case, the Assessing Officer could make addition by seeing the pattern of undisclosed income even without material.*
>
> *9. The proposition of law propounded in the judgment of Hon'ble Supreme Court in H.H. Esufali H.M. Abdulali's case (supra) is undisputed. Where an assessee suppresses the particulars of assessable income, appropriate inference can be drawn in a fact situation. It is not always necessary that there should be tangible material. Inference itself can be basis to justify addition. Whether or not a case is made out for addition being a question of fact, the view taken by the Tribunal is a possible view."*

18.15 In light of the aforesaid discussions, we are of the considered view that there is clearly lack of tangible material and evidence on record as well as absence of any corroborative material on the basis of which addition could have been made. The AO was not justified in making addition on presumption and assumption and on estimate merely on the basis of noting on a solitary

booking receipt, ignoring rest all material available on record including the affidavit of Kashmiri Lal and having accepted similar transactions so undertaken by the assessee in other years and that too wrongly, extrapolating to 54 units and the ld CIT(A) enhancing the extrapolation to 128 units. We therefore order the deletion of addition of Rs. 2,65,06,482/- so made by the AO and the enhancement of Rs. 7,03,17,753/- so made by the ld CIT(A) and both the grounds of appeal are allowed.

19. In Ground No. 7, the assessee firm has challenged the action of the ld CIT(A) in assuming the powers of enhancement u/s 251 and carrying out the enhancement of income in the hands of the assessee firm without following the statutory procedure as so mandated under the law.

19.1 In this regard, the Ld. AR submitted that it is very much clear from the above submissions that during the search, only documents related to 54 plots were found. Throughout the assessment proceedings, the AO only focused on the material seized and never doubted the turnover of the assessee firm and had duly accepted the books of the assessee firm. The addition was also made on these 54 plots only which was part of seized record. Further, Ld. AR also contended that entire assessment proceedings were based on seized material and Ld. AO did not travel beyond it. However, during the appellate proceedings, the ld CIT(A) went on a completely different footing whereby he doubted the entire sales booked by the assessee firm and made the addition on all 128 plots sold even when documents related to 74 were not part of the seized record. The above clearly shows that ld CIT(A) travelled beyond the subject matter of assessment while enhancing the assessment within the meaning of Section 251(1)(a) of the Act. It was submitted that the ld CIT(A) was considering a complete new scope of income which was never considered throughout the assessment proceeding by the AO and in these circumstances, the enhancement u/s 251 was not permissible and within in the powers of ld CIT(A) and the said action of the ld CIT(A) therefore deserve to be set-aside.

19.2 The Ld. CIT/DR strongly supported the order and findings of ld CIT(A) and case law relied upon by him and submitted that there is no infirminity in exercise of enhancement of powers by the ld CIT(A) after issuing of show-cause and due opportunity to the assessee and the exercise of such powers is very much arising out of the assessment proceedings and which is within the mandate of the law.

19.3 We have heard the rival contentions and purused the material available on record. From the records, it is clear that ld CIT(A) has issued the show-cause, an opportunity has been provided to the assessee firm to explain its position and enhancement has thereafter been made on matter arising out of the assessment proceedings that is, in respect of sale of the plots of land numbering 128 as against 54 plots of land taken into consideration by the AO and applying the rate of Rs 7000 per sq yards. No new source of income has been brought to tax by the ld CIT(A). In Kanpur Coal Syndicate *(Supra),* it was held by the Hon'ble Supreme Court that the scope of power of the AAC is coterminous with that of the AO and he can do what the AO can do. In light of the same, the contention raised by the Ld. AR that the ld CIT(A) has wrongly assumed jurisdiction to make enhancement of income, in the present facts of the case is not acceptable and the ground of appeal no. 7 so taken by the assessee firm is hereby dismissed.

20. No other grounds of appeal have been argued or pressed during the course of hearing, the same are thus dismissed as infructious.

21. In the result, the appeal of the assessee is partly allowed.

ITA No. 451/CHD/2022

22. In ITA No. 451/CHD/2022, the assessee has taken the following grounds of appeal:

"1. *That on the facts, circumstances and legal position of the case, the Worthy CIT(A), Gurgaon-3 in Appeal No. CIT (A), Gurgaon-3/ 10250/2018-19 dated 30.03.2022 has erred in passing that order in contravention of the provisions of S. 250(6) of the Income Tax Act, 1961.*

2. *That on facts, circumstances and legal position of the case, the Worthy CIT(A)has erred in not quashing the impugned assessment framed u/s 153A even when the relevant papers on the basis of which entire addition has been made were not found from the premises of the appellant and also when the procedure mandated u/s 153C was not followed by the Ld. AO in the case of the appellant.*

3. *That on facts, circumstances and legal position of the case, the Worthy CIT(A) has erred in confirming the addition of Rs. 2,65,06,482/- on account of alleged suppressed sale of 54 plots by extrapolating the figures.*

4. *That on facts, circumstances and legal position of the case, the Worthy CIT(A) has erred in confirming the addition of Rs. 2,65,06,482/- on account of alleged suppressed sale of the plots in the order passed u/s 153A even when no incriminating material qua the year in question was found during the course of search u/s 132 on the appellant and the assessment for the year in question was a completed assessment and hence no addition could be made in absence of incriminating material.*

5. *That on facts, circumstances and legal position of the case, the Worthy CIT(A)has erred in not quashing the impugned assessment order since the stated and purported approval u/s 153D is without due application of mind and merely in ritualistic manner.*

6. *That on facts, circumstances and legal position of the case, the Worthy CIT(A) has erred in enhancing the income of the assessee by Rs. 7,03,17,753/- by illegally assuming power of enhancement u/s 251(1) on account of alleged suppressed sale of 128 plots by extrapolating the figures and that too when no material was available against the appellant for those 128 plots for the year in question.*

7. *That on facts, circumstances and legal position of the case, the Worthy CIT(A) has erred in assuming the power of enhancement u/s 251 even when he lacked such power in the present case and further when the statutory procedure mandated u/s 251 for enhancement has not been followed.*

8. *That on facts, circumstances and legal position of the case, the Worthy CIT(A) has erred in initiating the penalty proceedings u/s 271(l)(c) in respect of income enhanced by him in the appellate order.*

9. *That the appellant craves leave for any addition, deletion or amendment in the grounds of appeal on or before the disposal of the same."*

Assessee has also raised additional ground which read as under:

1. "That on facts, circumstances and legal position of the case, the impugned assessment order passed u/s 153A deserves to be quashed since no search u/s 132 was carried out on the appellant and only a survey u/s 133A was carried out."

23. Both the parties fairly submitted that the facts and circumstances of the case are exactly identical and contentions raised in ITA No. 452/CHD/2022 may be considered in respect of ITA No. 451/CHD/2022. Therefore, taking into considerations the submissions made by both the parties, our findings and directions contained in ITA No. 452/CHD/2022 shall apply mutatis mutandis to these appeal as well and the appeals so filed by the assessee is partly allowed.

Stay Application No. 15&16/Chd/2022

24. In view of the aforesaid, where we have decided both the appeals on merits of the case, the stay applications filed by the respective assessees have become infructious and the same are thus dismissed.

25. In the result, the respective appeals and stay applications are disposed off in light of aforesaid directions.

Order pronounced in the open Court on 16/05/2024

Sd/-	**Sd/-**
आकाश दीप जैन	**विक्रम सिंह यादव**
(AAKASH DEEP JAIN)	**(VIKRAM SINGH YADAV)**
उपाध्यक्ष / VICE PRESIDENT	**लेखा सदस्य/ ACCOUNTANT MEMBER**

AG

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

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त (अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय आधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्ड फाईल/ Guard File

आदेशानुसार/ By order,
सहायक पंजीकार/ Assistant Registrar