

IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, MUMBAI

BEFORE SHRI BR BASKARAN, AM AND SHRI ABY T. VARKEY, JM

आयकर अपील सं/ I.T. A. No. 3456/Mum/2023
(निर्धारण वर्ष / Assessment Year: 2013-14)

&

आयकर अपील सं/ I.T. A. No. 3455/Mum/2023
(निर्धारण वर्ष / Assessment Year: 2014-15)

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आयकर अपील सं/ I.T. A. No. 3454/Mum/2023
(निर्धारण वर्ष / Assessment Year: 2015-16)

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आयकर अपील सं/ I.T. A. No. 3453/Mum/2023
(निर्धारण वर्ष / Assessment Year: 2016-17)

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आयकर अपील सं/ I.T. A. No. 3452/Mum/2023
(निर्धारण वर्ष / Assessment Year: 2017-18)

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आयकर अपील सं/ I.T. A. No. 3451/Mum/2023
(निर्धारण वर्ष / Assessment Year: 2019-20)

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आयकर अपील सं/ I.T. A. No. 3450/Mum/2023
(निर्धारण वर्ष / Assessment Year: 2020-21)

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आयकर अपील सं/ I.T. A. No. 3449/Mum/2023
(निर्धारण वर्ष / Assessment Year: 2021-22)

Hilton Infrastructure Ground Floor, Rubberwala House, Dr. A Nair Road, Agripada, Mumbai-400011.	बनाम/ Vs.	DCIT, Central Circle-4(2) 19 th Floor, Air India Building, Nariman Point, Mumbai-400021.
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आयकर अपील सं/ I.T. A. No. 3532/Mum/2023
(निर्धारण वर्ष / Assessment Year: 2013-14)

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आयकर अपील सं/ I.T. A. No. 3534/Mum/2023
(निर्धारण वर्ष / Assessment Year: 2014-15)

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आयकर अपील सं/ I.T. A. No. 3535/Mum/2023
(निर्धारण वर्ष / Assessment Year: 2016-17)

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(निर्धारण वर्ष / Assessment Year: 2017-18)
&
आयकर अपील सं/ I.T. A. No. 3538/Mum/2023
(निर्धारण वर्ष / Assessment Year: 2019-20)
&
आयकर अपील सं/ I.T. A. No. 3539/Mum/2023
(निर्धारण वर्ष / Assessment Year: 2020-21)
&
आयकर अपील सं/ I.T. A. No. 3509/Mum/2023
(निर्धारण वर्ष / Assessment Year: 2021-22)

DCIT, Central Circle-4(2) Room No. 1921, 19 th Floor, Air India Building, Nariman Point, Mumbai-400021.	बनाम / Vs.	Hilton Infrastructure Ground Floor, Rubberwala House, Dr. A Nair Road, Agripada, Mumbai-400011.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACCR7449B		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:	Shri Mani Jain, FCA	
Revenue by:	Smt Sanyogita Nagpal, CIT	

सुनवाई की तारीख / Date of Hearing: 08/04/2024
घोषणा की तारीख /Date of Pronouncement: 07/06/2024

आदेश / ORDER

PER BENCH:

All these appeals preferred by the Revenue and the assessee are against the common order of Learned Commissioner of Income Tax (Appeals) -52, Mumbai [in short 'ld. CIT(A)'] dated 31.07.2023 arising out of the assessment orders passed by Deputy Commissioner of Income-tax, Central Circle 4(2), Mumbai [in short 'AO'] for AYs



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2013-14 to 2021-22. Since the issues involved were common, all the appeals were heard together. Both the parties also argued them together raising similar contentions on these issues. Accordingly, for the sake of brevity, we dispose all the appeals by this consolidated order.

2. Before we advert to the grounds taken in the cross appeals, it would first be relevant to cull out the basic facts of the case and effect of law in brief in respect of certain AYs. Search u/s 132 of the Income Tax Act, 1961 (hereinafter referred to as “the Act”) was conducted against the Rubberwala Group, on 17-03-2021 thereby triggering Section 153A of the Act. Ordinarily, having regard to the date of search, the AO was within his jurisdiction to issue notices u/s 153A of the Act in respect of six assessment years preceding the assessment year of search i.e. in the present case search took place, so, ordinarily the AO was empowered u/s. 153A of the Act to reopen six preceding assessment years preceding the searched assessment year and those AY’s were AYs 2015-16 to 2020-21. The notices u/s 153A of the Act for these six assessment years was issued on 25.10.2021. However, in this case, the AO further in exercise of powers conferred under fourth proviso to Section 153A of the Act, which was inserted by Finance Act 2017 w.e.f. 01.04.2017, also reopened the seventh year, i.e. AYs 2012-13 & 2013-14, which was beyond six assessment years but within ten assessment years. These two notices were issued u/s 153A of the Act on 05.01.2022. It was pointed out that, prior to the date of search, the income-tax assessments for AYs 2013-14 to 2019-20 were either



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completed or the time limit for issuance of notices u/s 143(2) of the Act had expired as on the date of search. Accordingly, the AYs 2013-14 to 2019-20 were unabated AYs. With regards AYs 2020-21 and 2021-22, it was pointed out that these were abated assessments.

3. At the outset, the Ld. AR for the assessee invited our attention to Ground Nos. 1 & 2 taken in the appeals for AYs 2013-14 & 2014-15 in ITA Nos. 3455 & 3456/Mum/2023. It is noted that in these grounds, the assessee had challenged the validity of the jurisdiction assumed by the AO to issue notices u/s 153A of the Act upon the assessee for AYs 2013-14 & 2014-15 in terms of the fourth proviso to Section 153A of the Act, read with Explanation 2 of the Act and has accordingly urged the consequent impugned orders passed u/s 153A/143(3) of the Act for these AYs 2013-14 & 2014-15 ought to be quashed since the reopening of assessments for these AYs were bad in law. Since these grounds goes to the very root of the issue, we first deem it fit to adjudicate this legal plea of the assessee.

3.1 As noted earlier, a search action u/s 132 of the Act was conducted against the Rubberwala Group to which the assessee belongs on 17-03-2021. Having regard to the date of search, the AO had reopened six preceding assessment years preceding the searched year i.e. AYs 2015-16 to 2020-21. Thereafter, by invoking the jurisdiction vested in terms of fourth proviso to Section 153A of the Act, the AO is noted to have also reopened and issued notices u/s 153A of the Act for AYs 2013-14 & 2014-15 which are the seventh



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and eighth assessment year preceding the searched assessment year. Before the AO, the assessee has challenged his usurpation of jurisdiction u/s 153A of the Act for these AYs 2013-14 & 2014-15 by submitting that the essential condition precedent prescribed in the fourth proviso to Section 153A read with Explanation 2 of the Act had not been satisfied. Referring to the fourth proviso to Section 153A of the Act, the Ld. AR had submitted that the notices for re-assessment of AYs 2013-14 & 2014-15 which was beyond the period of six assessment years could have been issued only if the AO had in his possession any incriminating evidence which revealed that income valued Rs. 50 lakhs or more represented in the form of 'asset' had escaped assessment. To this, the AO is noted to have stated that, he was in possession of notings found in loose paper marked at Page No. 52 of Annexure A-1 which showed payment to tenants amounting to Rs.55 lacs on 04.05.2012 and Rs.80 lacs on 10.10.2013. These notings, according to AO, related to payments made for acquiring tenancy rights in FYs 2012-13 and 2013-14 and therefore added the same u/s Section 69 of the Act. Based on the aforesaid seized material, the AO is noted to have usurped jurisdiction under the fourth proviso to Section 153A of the Act and reopened the assessments for AYs 2013-14 & 2014-15. Thereafter, in the course of assessment, the AO went on and made further addition/s by way of receipt of on-monies & unsecured loans.

3.2 The assessee is noted to have contended before the AO that, the above referred evidence/material i.e., Page No. 52 of Annexure A-1,



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did not represent income in the form of 'asset' which had escaped assessment in terms of the fourth proviso to Section 153A of the Act. The assessee referred to the definition of the term 'asset' as defined in Explanation 2 to the fourth proviso to Section 153A of the Act which states to include, (a) immovable property being land or building or both, (b) shares & securities, (c) loans & advances and (d) deposits in bank account. According to assessee, the notings so found at Page No. 52 of Annexure A1 could at the most be inferred as expenditure incurred by the assessee and thus did not fall within the term 'asset' as defined in Explanation 2 to the fourth proviso to Section 153A of the Act. It was therefore the assessee's claim that, in absence of there being any income represented in form of 'asset' valuing more than Rs. 50 lacs, which was a condition precedent to usurp jurisdiction under fourth proviso to Section 153A of the Act, the reopening of assessments of AYs 2013-14 & 2014-15 stood vitiated in law. The AO however is noted to have rejected the aforesaid plea of the assessee and proceeded to complete the assessments for AYs 2013-14 & 2014-15 u/s 153A/143(3) of the Act.

3.3 Being aggrieved by the order of the AO, the assessee had preferred appeal before the Ld. CIT(A). In the appeal, the preliminary plea of the assessee was that, the assessment was invalidly reopened without satisfying the condition precedent in fourth proviso to Section 153A of the Act and therefore the impugned orders for AYs 2013-14 & 2014-15 ought to be quashed. The Ld. CIT(A) is noted to have held that the definition of 'asset' set out in Explanation (2) was inclusive in



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nature and that the notings found at Page No. 52 of Annexure A1 represented amounts which were recoverable by the assessee and that the assessee did not come clean on them. The Ld. CIT(A) thus upheld the validity of reopening of assessments of AYs 2013-14 & 2014-15 under the fourth proviso to Section 153A of the Act. Being aggrieved by this order of Ld. CIT(A), the assessee is now in appeal before us.

3.4 Heard both the parties. In order to adjudicate the legal issue, let us have a look at the law relevant to this issue. It is noted that the fourth proviso of Section 153A of the Act which was inserted by the Finance Act, 2017 with effect from 01.04.2017, enabled an AO of a searched person to issue notices u/s 153A of the Act for '*relevant assessment year or years*' in terms of Explanation 1 of the fourth proviso to Section 153A of the Act i.e. assessment years beyond the six (6) assessment years till tenth (10) assessment year preceding the searched assessment year (i.e. 7th to 10th AY's preceding the searched AY), provided the AO satisfies the essential conditions specified therein. The relevant portion of Section 153A of the Act i.e., fourth proviso to Section 153A of the Act, which has a bearing on the controversy in hand is being reproduced below:

“Provided also that no notice for assessment or reassessment shall be issued by the Assessing Officer for the relevant assessment year or years unless—

(a) the Assessing Officer has in his possession books of account or other documents or evidence which reveal that the income, represented in the form of asset, which has escaped assessment



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amounts to or is likely to amount to fifty lakh rupees or more in the relevant assessment year or in aggregate in the relevant assessment years;

(b) the income referred to in clause (a) or part thereof has escaped assessment for such year or years; and

(c) the search under section 132 is initiated or requisition under section 132A is made on or after the 1st day of April, 2017.”

Explanation 1.- For the purpose of this sub-section, the expression ‘relevant assessment years’ shall mean an assessment year preceding the assessment year relevant to the previous year in which search is conducted or requisition is made which falls beyond six assessment years but not later than ten assessment years from the end of the assessment year relevant to the previous year in which search is conducted or requisition is made.

Explanation 2. – For that purposes of the fourth proviso, ‘asset’ shall include immovable property being land or building or both, shares and securities, loans and advances, deposits in bank account.”

3.5 From a reading of the aforesaid fourth proviso to Section 153A of the Act, it can be seen that the expression used by the Parliament, while enlarging the power of the AO to extend the jurisdiction u/s 153A of the Act from seventh to tenth AY is, first of all prohibiting the AO to issue the notice u/s 153A of the Act, unless the condition precedent therein is satisfied. The expression used is “*no notice for*



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assessment or reassessment shall be issued by the AO for the relevant AY/AY's"; and the relevant AY/AY's has been explained by the aid of Explanation 1 appended to it. Therefore, it is noteworthy that the fourth proviso to section 153A bars the AO to issue notice u/s. 153A of the Act for the assessment or reassessment of the 7th – 10th AY's unless he has in his possession evidence/material which revealed that income represented in the form of asset valued Rs. 50 lakhs or more has escaped assessment. So, the AO, in order to assume jurisdiction for the extended period i.e. 7th to 10th AY preceding the searched year, should have in his possession income represented in the form of 'asset' valued Rs. 50 Lakhs or more which has escaped assessment, which is the 'jurisdictional fact', which if present/or in possession of AO will only enable the AO to assume jurisdiction u/s. 153A of the Act to issue notice for these extended AYs'. According to Ld. AR, this jurisdictional fact was absent in the given facts of the present case and hence, the action of AO reopening the assessments for AYs 2013-14 & 2014-15 u/s 153A of the Act was bad in law for want of jurisdiction.

3.6 So, the issue to be examined first in the present case is whether the AO was in possession of this jurisdictional fact prior to issuance of notices u/s. 153A for AYs 2013-14 & 2014-15 i.e., *existence/possession of undisclosed/unaccounted assets valued at Rs. 50 lakhs or more as defined in Explanation 2 to fourth proviso of Section 153A qua the assessee qua the 7th to 10th AY un-earthed from search*, without which the AO cannot issue notice u/s 153A of the Act for these extended AY's. For this, we gainfully refer to the following



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findings of this Tribunal at Guwahati in the case of **ACIT Vs Goldstone Cements Ltd** in **ITA Nos.126-131/Gau/2020** dated **10.12.2021** wherein the meaning of the term '*asset*' as defined in Explanation 2 to fourth proviso of Section 153A of the Act has been explained as follows :-

“8.11. Having held so, let us examine the next argument of Shri Dudhwewala that, the Parliament by specifying the jurisdictional fact as undisclosed asset valued Rs. 50 Lakhs or more, has impliedly excluded other items of income viz., liabilities/credit, unexplained expenditure etc. A reading of the fourth proviso to section 153A of the Act and Explanation (2) to fourth proviso to section 153A of the Act which defines ‘Asset’ for the purpose of fourth proviso to section 153A of the Act, clarify the intention of the Parliament to permit the AO to enlarge the assessment u/s. 153A after search u/s. 132 of the Act beyond six assessment years to ten assessment years preceding the searched assessment year, provided the AO has in his possession the essential jurisdictional fact i.e. “undisclosed/unaccounted asset” valued Rs 50 lakhs or more of the assessee discovered during search pertaining to 7th to 10th Assessment Year preceding the searched assessment year. Since the Parliament has used the expression ‘income in the form of asset’ and the definition of asset has been spelled out in the fourth proviso, this itself necessarily implies that the liability/items falling in the left side of the Balance Sheet stands excluded. For this view of ours, we rely on the legal Maxim for interpretation “*Expressio Unius Est Exclutio Alterius*” which principle states that, express mention of one is the exclusion of other and this maxim has been accepted by the



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Hon'ble Supreme Court in GVK Industries Ltd. Vs. ITO [197 Taxman 337] (Constitution bench of 5 Supreme Court Judges). By express mention of 'Assets' and definition given to it specifically, it is implied that the Parliament silently excluded the items of 'revenue', 'expenditure' & 'liabilities' from its jurisdictional fact for invoking/assumption/usurpation of jurisdiction u/s. 153A of the Act for the seventh to tenth assessment year preceding the searched assessment year.

8.12 It is a rudimentary accounting concept, that "debit" denotes "asset" and "credit" denotes "liability". An asset represents an economic resource, either immovable or movable, having value, such as immovable property viz., land or building, investment held in shares and securities, loans & advances given and deposits in bank account. On the other hand, 'Liability' includes items such as share capital, reserves, loans obtained (secured as well as unsecured) etc. which cannot be characterized or classified as 'Asset'. Similarly, items of 'expenses' or revenues in form of 'sales' / 'turnover' does not constitute 'asset'. This can be illustrated in the following manner ('Asset' below falls within the ambit of the fourth proviso to Section 153A of the Act):

Profit & Loss Account	
Particulars (Debit)	Particulars (Credit)
Expenses	Revenues

Balance Sheet	
Liabilities (Credit)	Assets (Debit)
Share Capital/ Reserves/ Loan/ Current Liabilities	Immoveable Property/ Loans & Advances/ Shares/ Bank Balance



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8.13 The above view of ours get bolstered from reading of Explanation 2 appended to the fourth proviso, which defines ‘asset’, for the purpose of fourth proviso to Section 153A, to include i) immovable property, ii) shares and securities, iii) loans and advances & iv) Deposit in bank. Hence, where search action u/s 132 of the Act reveals that, (i) the assessee owns an undisclosed immovable property, or (ii) information has been gathered which shows that the assessee had given loans or advances outside the regular books or (iii) search has revealed unaccounted investments held by assessee in shares & securities, which do not form part of regular books of accounts or (iv) if undisclosed bank accounts having deposits, have been found in the course of search, pertaining to the 7th-10th AY preceding the search; then having in his possession this jurisdictional fact, the AO may assume jurisdiction under the fourth proviso to Section 153A of the Act for the relevant seventh to tenth assessment year preceding the searched assessment year. Hence, the most important aspect is that, these ‘assets’ must have been found to be undisclosed or unaccounted, in the regular books of account maintained by the assessee, and discovered during the course of search, which otherwise would not have seen the light of the day but for the search, resulting in escapement of income.

8.14 As per our discussion, it is to be kept in mind that, the term ‘deposits in bank account’ has to be considered with the term ‘asset’. The term ‘deposits in bank account’ and ‘asset’ are to be understood in their cognate sense, as it takes their colour from each other, i.e., the more general is restricted to a sense analogous to the less general. Hence, the term ‘deposits in bank account’ denotes discovery of an ‘asset’ in the form undisclosed



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bank deposits, say fixed deposit bank a/c, savings deposit bank a/c, foreign deposit bank a/c etc. which is found to have escaped assessment in the 7th-10th AY preceding the search. It does not suggest or include any or all credits in bank accounts, which is disclosed and forms part of the regular books of accounts. To say, if any credits in a regular bank account, like sale proceeds/ loan / share capital etc. is found to be unexplained, then it may be a case of discovery of undisclosed ‘income’ / ‘cash credit’ but it does not suggest discovery of an undisclosed ‘asset’ by the Revenue so as to bring it within the teeth of the fourth proviso to Section 153A of the Act for invoking jurisdiction u/s 153A for the extended period.

8.15 Hence, from the above discussion, it is thus clear that Section 153A of the Act can be invoked only if the AO comes to a positive conclusion that he has in his possession documents or information revealing an undisclosed asset of the assessee qua the assessment year (7th to 10th) which is valued Rs. 50 lakhs or more. This, in our judgment is a foundational, fundamental or jurisdictional fact.

.....

8.21. The Ld. A.R Shri Dudhwewala in the alternate also pointed out that, even in the assessment order, the AO had singularly failed to identify and spell out such “asset”, as defined in Explanation 2 to the fourth proviso to Section 153A of the Act, which had escaped assessment for AY 2011-12 and did not make any addition to the income of the assessee u/s. 69, 69A or 69B of the Act. So, therefore, according to Shri Dudhwewala, since the AO did not make any addition on account of escaped income



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represented in form of undisclosed/unaccounted asset, the AO could not have made any other addition like, in respect of credit entry u/s. 68 of the Act. For this, he relied on the decisions rendered by the case of Hon'ble High court of Bombay in Jet Airways (supra) and Hon'ble Delhi High Court in Ranbaxy Laboratories (supra) though in the context of reopening u/s. 147 of the Act. So, according to Shri Dudhwewala, the AO's action of making addition u/s. 68 of the Act, was even otherwise, legally impermissible.

8.22. From our discussion (supra) it is clear that, only if any of specified 'asset/s' as defined in Explanation (2) is unearthed during the course of search and the acquisition of such an 'asset' being unexplained or undisclosed, which is valued Rs. 50 Lakhs or more, that the AO can be said to be in possession of the jurisdictional fact to initiate proceedings u/s 153A for 7th-10th AY (AY 2011-12, in the instant case). Now, to understand the alternate ground of argument of Shri Dudhwewala, let us for the sake of argument, assume that the AO had validly invoked the jurisdiction u/s 153A for AY 2011-12. Then in such an event, it has to be borne in mind that, first the AO had to make addition in respect of the purported undisclosed asset valued at Rs. 50 lakhs or more; and only thereafter the AO can venture to make any other additions/disallowance which are not in the nature & character of 'Asset' but represents undisclosed/unexplained income/expenditure/credit etc. Perusal of the assessment order impugned before us, shows that that AO did not make any addition/s in respect of escaped/undisclosed asset in the relevant AY 2011-12. We therefore find ourselves in agreement with Shri Dudhwewala that, unless the AO made addition/s of Rs. 50 Lakhs



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or more in relation to escaped/undisclosed asset, he could not assume jurisdiction to make addition/s on other items (viz. liabilities like credit entry etc.) The reason is simple, because in such a scenario, it bellies the claim of the AO in issuing notice u/s 153A of the Act, that he is in possession of the jurisdictional fact i.e. undisclosed asset valued Rs. 50 lakhs or more has escaped assessment, which constitutes the key to open the lock and then re-assess the income of the assessee for the 7th to 10th AY. It is therefore incumbent upon the AO to show that the key used for opening the lock for the concluded 7th to 10th AY is the most appropriate key to unlock and thereby reopen the proceedings for bringing to charge any other items of escaped/unexplained income unearthed in the course of search. However in a case where, either the assessee demonstrates that the key used by the AO for reopening the assessment is either incorrect or where the AO himself abandons the jurisdictional fact in the course of assessment proceedings, then as a corollary, it has to be held that the key used by the AO for opening the lock was incorrect and thereby the lock placed earlier on the concluded assessment remained unopened and therefore the AO could not enter upon the arena of reassessing the income of the assessee. So, when the AO fails to make any addition for the 'undisclosed asset', then it tantamount to admission that there was no jurisdictional fact present before the AO in the first place, and the necessary corollary is that he has wrongly assumed jurisdiction u/s. 153A for AY 2011-12 and therefore AO cannot proceed further to make other items of additions/disallowances. In such a scenario, the AO has no other option but to drop the assessment proceedings. He may however proceed again, if there is any new/fresh jurisdictional fact before him, of course, subject



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to limitation. For this conclusion of ours, we rely on the ratio laid down in the judgments of CIT Vs Jet Airways (supra) & Ranbaxy Laboratories Ltd. vs. CIT (supra). Though these judgments were rendered in the context of reopening u/s. 147 of the Act, however the ratio decidendi will apply in the present case, because, like Section 147/148 of the Act, the AO gets the authority to assess/reassess the income of a searched person or other person u/s 153A/153C for the extended assessment years (7th to 10th AYs) only if he has in his possession the jurisdictional fact, as discussed. If the AO is found to have assumed jurisdiction erroneously on mistaken belief about the existence of jurisdictional fact or ultimately drops it (after making enquiries in the course of assessment) while framing the reassessment order; then the AO cannot legally proceed further with the assessment/reassessment and/or make any other items of additions/disallowances, because the jurisdictional fact on the strength of which he assumed section 153A jurisdiction is absent or not in existence. In the light of the aforesaid discussion, and in our considered opinion, this alternate plea of Shri Dudhwewala is well founded and deserves to be accepted.

8.23. In view of the above and on perusal of the impugned re-assessment order, we note that the only addition made by the AO in AY 2011-12 was on account of unexplained cash credit represented by share application monies of Rs.5,38,35,000/- u/s 68 of the Act. According to the AO, the source of source of the monies received from shareholder, M/s Hari Trafin Pvt Ltd was not properly explained, and therefore the same was added as unexplained cash credit u/s 68 of the Act. As noted above, the additions on account of unexplained cash credit and that too share



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capital, which is in the nature of 'liability' could not have been made by AO, unless he first made an addition of undisclosed 'asset' valued at Rs. 50 Lakhs or more. So in this case, as there was no addition made by AO on account of undisclosed asset, we can safely infer that there was no jurisdictional fact in the AO's hand or in his possession when he assumed jurisdiction u/s 153A for AY 2011-12 in the first place itself. As, the very usurpation of jurisdiction u/s. 153A of the Act is found to be bad in law for want of jurisdiction, the AO was precluded from making any other addition in the assessment for AY 2011-12. Hence, the AO's action of making addition u/s 68 of the Act in the relevant AY 2011-12 is held to be unsustainable for want of jurisdiction and is therefore is quashed. The assessee thus succeeds on this ground raised in the cross objections and the same is allowed."

3.7 It is noted that the above decision of this Tribunal has since been upheld by the Hon'ble Gauhati High Court which is reported in **156 taxmann.com 529**. In light of the ratio decidendi laid down above, we now revert back to the facts involved in the present case. The case of the Revenue is that the notings found on Page No. 52 of Annexure A-1 represented payment made for acquiring tenancy rights and therefore qualified as an investment made by the assessee and thus falls within the inclusive definition of 'asset' set out in Explanation 2 of fourth proviso to Section 153A of the Act. Having perused this loose paper, we however are of the view that, no such acquisition of investment was discernible from the notings found on Page no. 52 of Annexure A-1. The said notings appears to suggest that amounts of Rs.55 lacs and Rs.80 lacs were paid in FYs 2012-13 and 2013-14 towards tenants for



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‘Shuklaji’. The admitted facts of the case are that, the assessee had undertaken project ‘Feugo’ at Shuklaji Street in FY 2007-08. The Ld. AR had brought to our notice that there was an existing chawl at the said premises and the project was to re-develop the same into a new building for the tenants there. The Ld. AR explained that these notings denoted payments made to certain tenants in connection with the said project. It is not in dispute that the assessee is engaged in the business of construction and it is a common phenomenon for builders to make payments to tenants in order to carry out their real estate project. On these given facts, we find merit in the explanation of the assessee that these payments were in the nature of expenditure incurred for the purposes of the project and not for acquisition of any investment or asset. It appears that the lower authorities had classified these payments to be in the nature of payments made for acquisition of unaccounted investment purely on surmise, having no rationale basis. Even the Revenue was unable to bring on record any other material or evidence unearthed in the course of search which would suggest that these payments led to acquisition of an asset / investment. Instead, the explanation given by the assessee in relation to notings found on Page no. 52 of Annexure A1 is found to be plausible on the given facts of the case. Having regard to the foregoing therefore and following the decision (supra), we hold that the notings in question represented unaccounted expenditure which did not qualify as ‘asset’ as defined in Explanation 2 to the fourth proviso of Section 153A of the Act.



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3.8 For the above reasons, according to us, the AO was not in possession of any evidence / material which suggested that income represented in form of an 'asset' had escaped tax in these AYs 2012-13 & 2013-14 and therefore the jurisdictional fact as prescribed under the fourth proviso to Section 153A of the Act is found to be absent and the AO is noted to have usurped jurisdiction u/s 153A of the Act on wrong assumption of jurisdictional fact. As a consequence, we hold that the AO could not have legally proceeded further with the reassessment for AYs 2013-14 & 2014-15 and make any other additions/disallowances, because the jurisdictional fact on the strength of which he had sought to assume jurisdiction under Section 153A is found to be not in existence. Accordingly, the impugned orders passed u/s 153A/143(3) of the Act for AYs 2013-14 & 2014-15 are held to be ab initio void and bad in law for want of jurisdiction and the same is hereby directed to be quashed. Consequently, all the addition/s made in these AYs 2013-14 & 2014-15 stands deleted. Hence, Ground Nos. 1 & 2 of the assessee's appeal stands allowed.

4. In view of our above decision, all other grounds of the assessee in AYs 2013-14 & 2014-15 have been rendered academic and therefore is not being separately adjudicated upon. Likewise, the appeals of the Revenue in ITA Nos. 3532 & 3534/Mum/2023 for AYs 2013-14 & 2014-15 have become infructuous and are therefore dismissed.



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5. We now take up the appeals for AYs 2015-16 to 2017-18, 2019-20 to 2021-22 together as the issues / additions involved in all these years are similar or inter-linked. For the sake of convenience, and to avoid repetition of facts; we deem it fit to adjudicate each of the common issues across all AYs before us together. The summary of the additions/disallowances in Rupees made by the Assessing Officer which are in dispute in the cross appeals for AYs 2015-16 to 2017-18, 2019-20 to 2021-22 are as follows:

(in Rs.)

Asst Year	Issues		
	Addition of Interest expense u/s 69C	Addition on account of on-monies received in cash	Addition of unaccounted rental income
2015-16	Rs.6,30,481	Rs.2,86,425	-
2016-17	Rs.1,33,684	Rs.1,89,29,360	-
2017-18	-	Rs.1,80,00,000	-
2019-20	-	Rs.8,00,73,500	-
2020-21	-	Rs.3,96,50,000	-
2021-22	-	Rs.15,30,48,000	Rs.2,40,000

6. Issue 1: Disallowance of interest paid thereon u/s 69C of the Act

Ground No. 4 & 5 of Assessee's appeal for AY 2015-16

Ground No. 4 & 5 of Assessee's appeal for AY 2016-17

6.1 This issue relates to the disallowance of interest paid on unsecured loans by the assessee in unabated AYs 2015-16 & 2016-17. The facts as noted by us are that, according to the AO, details of unsecured loans were found and seized in the form of loose paper ID marked Annexure A1, Page 50 at the residential premises of Mr. Tabrez Shaikh. The AO stated that this sheet contained names of



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several lenders who had advanced loans to the entities of Rubberwala Group. According to the AO, the content of this seized material was incriminating in nature. The AO in the assessment order has extracted the answers given by Mr. Tabrez Shaikh in his statement recorded in the course of search, wherein he was confronted with the details of these lenders, to which he did not give any proper reply. The AO further noted that, Mr. Shaikh was required to establish the identity, creditworthiness and genuineness of the loan transactions and why these loans should not be treated as accommodation entries. In response, the AO noted that Mr. Shaikh had only pleaded before the Investigating authorities that these loans ought not be considered as accommodation entries. The AO however observed that no supporting documents were provided by him to the Investigating Authorities. The AO thereafter discussed the post search enquiries made by the Investigating Authorities from these lenders and noted that some of these lenders had not complied with the notices issued to them. The AO in the course of assessment is noted to have made independent enquiries from these lenders u/s 133(6) of the Act. Based on the replies received or the details furnished by the assessee, the AO analyzed each of these lenders and held that the assessee was unable to discharge the creditworthiness of the lenders and the genuineness of the transactions and therefore, treated the interest paid on the unsecured loans which received from these parties in earlier years to be unexplained expenditure and added it back u/s 69C of the Act. Aggrieved by the order of the AO, the assessee preferred an appeal before the Ld.



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CIT(A) who confirmed the same. Being aggrieved by the Ld. CIT(A)'s action, the assessee is in appeal before us.

6.2 Assailing the action of the lower authorities, the Ld. AR of the assessee raised preliminary legal plea that AYs 2015-16 & 2016-17 were unabated assessment years and therefore the entire impugned addition made in this AY was unsustainable since it was not based on any incriminating material found in the course of search. Per contra, the Ld. CIT, DR, appearing for the Revenue, supported the order of the lower authorities. According to Ld. CIT, DR therefore the AO had rightly made the addition based on incriminating material in the unabated AYs 2015-16 & 2016-17. The Ld. CIT, DR therefore urged that the disallowance of interest u/s 69C of the Act ought to be upheld.

6.3 Heard both the parties. In light of the facts narrated in Para 2 above, it is noted that, on the date of search i.e. 17.03.2021, income tax assessment for AYs 2015-16 & 2016-17 were unabated. While adjudicating the appeal in the case of another entity belonging to Rubberwala Group viz., **M/s Rubberwala Housing & Infrastructure Ltd.** in their **ITA Nos. 3444 to 3448/Mum/2023**, we have already held that the seized document A-1, Page 50 read with the statement of Mr. Shaikh did not constitute incriminating material found in course of search and therefore the addition/s made by way of unsecured loans and interest paid thereon in the unabated AYs were held to be unsustainable, by holding as under:-



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“4.6 ...The provisions of Section 153A of the Act, forming part Chapter XIV of the Act contain special provisions for completing assessments in case of search conducted u/s 132 of the Act or requisition made u/s 132A of the Act. These provisions can be invoked only in cases where the Income-tax Department has exercised its extra ordinary powers of conducting search and seizure operations after complying with stringent pre-conditions prescribed in Section 132 of the Act. We find that Section 153A itself creates the differentiation amongst specified six assessment years depending whether prior to search, the proceedings are abated or not. We note that, the relevant section itself clarifies that where an assessment was already completed against an assessee and any appeals or further proceedings are pending, then such appeals or other proceedings do not abate. We should therefore keep in mind that merely because an assessee is subjected to search u/s 132 of the Act, such action by itself does not give carte blanche to the Department to subject such an assessee to the rigors of the assessment afresh for all the completed assessments. It is for this reason that the Parliament in its wisdom has categorically created two classes among the six years, (a) un-abated assessment and (b) abated assessments. Consequent to a search conducted u/s 132 of the Act, the AO is required to issue notices u/s 153A of the Act to assess the income of the assessee for six assessment years preceding the date of search. These six assessment years comprise of assessments which are not abated; and assessments which are pending on the date of search, and is treated to be abated. In case of abated assessments, the AO is free to frame the assessment in regular manner and determine the correct taxable income for the relevant year inter alia including the undisclosed income, having regard to



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the provisions of the Act. However, in relation to unabated assessments, which were not pending on the date of search, there is an embargo on the powers of the AO. In case of unabated assessments, the AO can re-assess the income only to the extent and with reference to any incriminating material which the Revenue has unearthed in the course of search. Considering these aspects the Hon'ble Delhi High Court in the case CIT vs Kabul Chawla (supra) held as under:-

“37. 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:

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.

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 Ld AOs as a fresh exercise.

The Ld AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The Ld 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



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order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".

Although Section 153A 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 Ld 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."

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 complete assessment proceedings.

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 Ld AO.

Completed assessments can be interfered with by the Ld AO while making the assessment under section 153A only



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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."

38. The present appeals concern AYs 2002-03, 2005-06 and 2006-07, on the date of the search the said assessments already stood completed. Since no incriminating material was unearthed during the search, no additions could have been made to the income already assessed."

4.7 We find that the decision of Hon'ble Delhi High Court has since been affirmed by the Hon'ble Supreme Court in the case of PCIT vs Abhisar Buildwell Pvt. Ltd. (supra). In view of the foregoing, the settled law is clear that, in the case of unabated assessments of an assessee, no addition is permissible in the order u/s 153A unless it is based on any tangible & cogent incriminating material found during the course of search.

4.8 In light of the above settled position of law, which has not been disputed by either of the parties, the limited question for our consideration is, whether the contents of the seized document A1, Page 50 read with the statement of Mr. Shaikh, referred to by the AO, was 'incriminating' in nature or not. For the sake of convenience, the said seized material is reproduced below:

...

4.9 On perusal of this seized material, it is noted that it simply contains the names of lenders, corresponding names of borrower entities belonging to Rubberwala Group and the



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amounts lent by them. On examination of the entries in the documents, it is noted that this was a tabulation of the unsecured loans availed by the assessee and its Group entities through banking channels and the same formed part of their books of accounts. There is no mention of any word such as 'cash' or 'cheque entry' on this document. The manner in which this tabulation has been made is prima facie noted to form part of the regular books of the assessee and its group entities, having no incriminating contents whatsoever. We further note that the Ld. CIT, DR in her written submissions, at Para 2.5, has observed that, *the loose paper containing details of loan transactions may not be said to be incriminating by itself.* We also note that the unsecured loans found mentioned against the name of the assessee in this sheet correlates with the loans appearing in the books of accounts of the assessee and therefore we find merit in the plea of the assessee that this document cannot be construed to be incriminating in nature. It is noted that somewhat similar facts and circumstances were involved in the case before this Tribunal at Guwahati in the case of ACIT vs Goldstone Cements Ltd. (ITA Nos. 126-131/Gau/2020) dated 10.12.2021. In this decided case, the AO had referred to a statement retrieved from the hard disk which contained the shareholding pattern of the assessee along with the details of shares issued to each of the share subscribers as an incriminating document and accordingly added the share capital by way of unexplained cash credit. This Tribunal after examining the meaning of the term 'incriminating material', concluded that this document was not incriminating as the shareholding pattern found mentioned therein was verifiable with the books of accounts. Hence, in absence of any incriminating material found in the course of search, this Tribunal deleted the



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addition made u/s 68 of the Act in the unabated AYs. The relevant findings of the Tribunal as taken note by us is as follows:

“9.9 Heard both the parties. In light of the above settled position of law, which has not been disputed by either of the parties, the limited question for our consideration is, whether the contents of the seized document GCL-HD-1, referred to by the AO, was 'incriminating' in nature or not. Before we proceed to examine the contents of the seized document GCLHD-1, it is first relevant to understand as to the meaning of the expression "incriminating material" or evidence. There can be several forms of incriminating material or evidence. In order to constitute an incriminating material or evidence, it is necessary for the AO to establish that the information, document or material, whether tangible or intangible, is of such nature, which incriminates or militates against the person from whom it is found. Some common forms of incriminating material, inter alia, are for instance, where the search action u/s. 132 of the Act reveals information (oral or documentary) that the assets found from the possession of the assessee in form of land, building, jewellery, deposits or other valuable assets etc. do not corroborate with his returned income (which includes earlier AY's return also) and/or there is a material difference in the actual valuation of such assets and the value declared in the books of accounts. Further, incriminating evidence may also constitute of information, tangible or intangible, which suggests or leads to an inference that the assessee is conducting transactions outside the regular books of account which are not disclosed to the Department. Incriminating material may



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also comprise of document or evidence found in search which demonstrates or proves that what is apparent is not real or what is real is not apparent. In other words, let us assume that an assessee has recorded transactions in his books or other documents maintained in the ordinary course of business, then it is discovered in the search from certain material or evidence which states the contrary. In such an event then, the discovered material or evidence can be held to be incriminating in nature, only when it is found to affect the veracity of the entries made in the books of the assessee and thus lead to the conclusion that the entries made regularly/maintained by the assessee do not represent true and correct state of affairs. Rather the evidence unearthed or found in the course of search would go on to show that the real transaction of the assessee was something different than what was recorded in the regular books and therefore the entries in the books did not represent true and correct state of affairs i.e. the assessee has undisclosed income/expense outside the books or that the assessee is conducting income earning activity outside the books of accounts or all the revenue earning activities are not disclosed to the tax authorities in the books regularly maintained or the returns filed with the authorities from time to time is not true etc. The nature of the evidence or information gathered during the search should be of such nature that it should not merely raise doubt or suspicion but should be of such nature which would prima facie show that the real and true nature of transaction between the parties is something different from the one recorded in the books or documents maintained in ordinary course of



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business. In some instances, the information, document or evidence gathered in the course of search, may raise serious doubts or suspicion in relation to transaction reflected in regular books or documents maintained in the ordinary course of business, then also in such an event the AO is not permitted to straightaway treat such material as 'incriminating' in nature unless the AO thereafter brings on record further corroborative material or evidence to transform his suspicion to belief and conclude that the transaction reflected in regular books or documents did not represent the true state of affairs and rather that can be the starting point of inquiry to un-earth further material or evidence to transform his suspicion to belief and conclude that the transaction reflected in regular books or documents did not represent the true state of affairs. Until these conditions are satisfied, it cannot be held that every seized material or document found in the course of search as incriminating in nature qua the assessee justifying the additions in unabated assessments. In other words, any and every seized material, which comes in AO's possession cannot be construed as 'incriminating material' straightaway. For instance, scribbling or rough notings found on loose papers cannot be straightaway classified as 'incriminating material' unless the AO establishes nexus or connect of such notings with unearthing of undisclosed income of the assessee. This nexus or connect has to be brought out in explicit terms with corroborative material or evidence which any prudent man properly instructed in law must be able to understand or correlate so as to justify the AO's inference of undisclosed income from such seized



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incriminating material. This exercise is therefore found to be essentially a question of fact.

.....

9.14 We note that the Ld. CIT(A) had examined in detail the contents of the above document and concluded that this document was not an incriminating document and that it was a shareholding pattern of the assessee which was duly verifiable from the books of accounts and other secretarial records filed by the assessee with ROC, prior to the date of search. For the sake of convenience, the relevant findings recorded by the Ld. CIT(A) in this regard, at Pages 145 to 147 of his order, is extracted below:

....

9.15 Having examined the contents of GCL-HD-1, we find ourselves in agreement with the above findings of the Ld. CIT(A) that this document was a share-holding pattern document prepared by way of secretarial compliance report, which as the assessee has shown, was filed along with the company's annual return in Form MGT-7 on 28-11-2017 with the Registrar of Companies and was therefore available in the public domain (much prior to the date of search). It is found to contain the details of the name of shareholders, their amount and percentage of shareholdings. In our considered view, this document was a regular business document having no incriminating content whatsoever. Nothing whatsoever has been brought on



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record by the Revenue to correlate or link as to how the contents of this statement led to unearthing of unexplained cash credit by the AO and therefore the aforesaid factual finding of the Ld. CIT(A) remains uncontroverted. Hence, we do not see any reason to interfere with the order of the Ld. CIT(A) on this aspect and hold that the seized document GCL-HD-1 did not constitute incriminating material or evidence.”

4.10 We note that the above findings has since been affirmed by the Hon’ble Gauhati High Court which is reported in 156 taxmann.com 529, by observing as under:

“11. The issue whether a document, which in these cases is the electronic device in the form of a hard drive extracted from the computer of the assessee during search conducted in the year 2017 constitutes incriminating material or not, would unquestionably require evaluation, assessment and appreciation of contents of such document which is an exercise of evaluation of evidentiary worth of the document. Thus, this Court has no doubt in its mind that the conclusions recorded on the nature of contents of the document by the competent forum, be it the Commissioner of Income-tax (Appeals) or the Income-tax Appellate Tribunal as to whether the same was incriminating or not, would definitely be findings of fact and hence, the proposed substantial question of law No. 2 in all these appeals, which is the primary ground for assailing the judgment passed by the Income-tax Appellate Tribunal and



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seeking admission of the appeals, cannot be considered to be a substantial question of law. The question so framed, pertains to examination and re-appreciation of contents of the document GCL-HD-1 for deciding its creditworthiness and to adjudicate whether the same constitutes incriminating material or otherwise. Such an exercise unquestionably tantamounts to re-appreciation of evidence and cannot constitute a substantial question of law and rather poses a simple issue of facts which too stand concluded against the revenue by 2(two) competent forums, *i.e.* the Commissioner of Income-tax (Appeals) and the Income-tax Appellate Tribunal who after threadbare discussion and appreciation of the contents of GCL-HD-1, the projected incriminating material, have recorded concurrent findings of fact that the same does not constitute incriminating material so as to justify the re-opening of the assessment by virtue of Sections 153A of the Income-tax Act for the unabated/completed assessments.

12. In wake of the discussion made hereinabove and keeping in view the law as laid down by Hon'ble the Supreme Court in the case of *Abhisar Buildwell (P.) Ltd. (supra)*, followed by this Court in a recent judgment dated 14-8-2023 passed in ITA No. 5/2022 (*The Commissioner of Income-tax & Anr. v. Fortune Vanijya Private Limited*), we have no hesitation in holding that the Hard Drive GCL-HD-1 collected by the jurisdictional authority during the search carried out in the premises of the assessee in the year 2017 does not constitute incriminating material so as to justify reopening of assessment of unabated/completed



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assessments under sections 153A of the Income-tax Act and addition to the income of the assessee under section 68 of the Income-tax Act. The concurrent findings of fact recorded by the Commissioner of Income-tax (Appeals) *vide* judgment dated 18-3-2020 and the Income-tax Appellate Tribunal in the 3(three) appeals of the revenue and the cross-objections of the assessee *vide* judgment dated 10-12-2021 cannot be termed to be perverse, illegal or unjustified in any manner. Hence, we are of the unhesitant opinion that the appeals herein, do not involve any substantial question of law warranting admission.”

4.11 Now we come to the reliance placed by the Revenue on the statement of Mr. Shaikh to justify the impugned addition. We have perused the contents of the statement of Mr. Shaikh and it is nobody’s case that he had admitted to any wrong doing or had averred that the loans availed from these lenders represented his unaccounted monies. Reading of the statement shows that the Investigating Authorities had required Mr. Shaikh to provide several details of these lenders viz., their address, email ID, business profile, details of meetings held with them, collateral securities provided for obtaining loan, details of intermediaries who arranged the loan, details of board of directors of these lenders etc. On perusal of his reply, it is noted that he had answered some of the queries viz., that no intermediary was involved for availing the loan and therefore question of payment of commission did not arise. As far as other documentary evidences sought for were concerned, Mr. Shaikh had sought time to verify from his records and submit the details. We are unable to agree with the Ld. CIT, DR as to how this averment



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incriminated the assessee. The statement shows that the deponent had only expressed his inability at that material time to provide the data. This, according to us, cannot be treated as incriminating statement to draw adverse inference in an unabated assessment. The Ld. AR has rightly pointed out that the Investigating Authority had put forth these queries regarding several lending entities from whom loans were obtained across several years and understandably, the deponent was required to verify the past business records of the group entities and consult with his office staff so as to provide appropriate reply to these questions. The Ld. AR also rightly contended that, it was not necessary that Mr. Shaikh would be aware of every aspect of the functioning of each of the group entities and he cannot be expected to provide the exact details of the group finances along with supportings spanning across several years on the same day when he was being questioned in the course of search. We thus find force in the Ld. AR's contention that Mr. Shaikh's answer seeking time to provide the relevant details cannot be viewed adversely. Moreover, it was shown to us, that, in the post search enquiries, the assessee had provided these details to the Investigating Authorities. Having regard to the foregoing and more so when the impugned statement itself did not contain any admission or surrender to any wrong doing, we do not countenance this plea of the Revenue that the said statement constituted incriminating material unearthed in the course of search.

4.12 With regard to the whatsapp conversations referred to by the Ld. CIT, DR, it is noted that no incriminating conversations whatsoever were placed before us. Upon query from the Bench, the Revenue was unable to show to us any such



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whatsapp chats which incriminated the assessee qua the unsecured loans obtained from the lenders in question. Instead, we find that the Ld. CIT, DR had baldly relied on the observations made by the AO at Para 6.2.2 of the assessment order. Having perused the same, it is noted that the AO has not cited the exact conversations or the contents of the chat but has simply observed that there were few whatsapp chats between one, Mr. Ahmed and Mr. Shaikh where the word 'cheque-entry' was used and Mr. Ahmed had purportedly stated that this denoted payment in cheque which was returned in cash. It is however not the AO's case that, these whatsapp chats related to the unsecured loans obtained from these lending entities. Instead, the AO is noted to have referred to the same, which was in completely different business dealings, to deduce that these unsecured loans would also be in the nature of accommodation entries obtained in lieu of cash. According to us, such an inference based on surmises and presumptions was far-fetched and untenable. We are in agreement with the Ld. AR that these presumptive observations made by the AO cannot be construed as an incriminating or tangible material which would suggest that the unsecured loans were in the nature of unexplained cash credits.

4.13 We now come to the Ld. DR's reliance on the past history of litigation of the assessee group on this issue of unsecured loans to justify addition/s in unabated assessments. The Ld. AR, in this regard, has pointed out to us that, the addition/s made by the AOs in the earlier AYs on account of unsecured loans u/s 68 of the Act has since been deleted by this Tribunal and the relevant appellate order of the concerned group entity has been placed at Pages 319 to 335 of Paper Book. Be that



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as it may, according to us, this cannot be regarded as an incriminating material found in the course of search and hence this particular contention of the Revenue is also rejected.

4.14 For the reasons set out in the preceding paragraphs and the judicial precedents discussed above, we are therefore of the considered view that there was no incriminating material found in the course of search on the basis of which additions u/s 68 and 69C of the Act could have been legally made in the unabated AYs 2016-17 and 2018-19. We accordingly direct the AO to delete the impugned addition/s made u/s 68 & 69C of the Act in the unabated AYs 2016-17 & 2018-19.”

6.4 Following the above, we thus hold that there was no incriminating material found in the course of search on the basis of which disallowance u/s 69C of the Act could have been legally made in the unabated AYs 2015-16 & 2016-17. The AO is accordingly directed to delete the same. Hence, these grounds of the assessee stands allowed.

7. Issue 2: Addition on account of on-monies received on sale of flats

Ground Nos. 2 & 3 of Assessee’s appeal for AY 2015-16

Ground Nos. 2 & 3 of Assessee’s appeal and Ground No. 1 of Revenue’s Appeal for AY 2016-17

Ground Nos. 1 & 2 of Assessee’s appeal and Ground No. 1 of Revenue’s Appeal for AY 2017-18

Ground Nos. 1 & 2 of Assessee’s appeal and Ground No. 1 of Revenue’s Appeal for AY 2019-20

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7.1 The facts relating to this issue as noted by us are that, in the course of search, there were electronic data found which inter alia included the details of sale of unit/flats in the real estate projects undertaken by Rubberwala Group across several entities including the Project Feugo undertaken by the assessee. It is noted that, the following sources/material concerning the details of on-monies received by the assessee was found and seized by the Investigating authorities, which have been taken note of by us as well.

- a) excel sheet namely '*tot_sale_RB_HR*' found in excel workbook namely '*profit of feugo 11.04.19 (33_24)*', copy of which is placed at Pages 198-199 of Paper Book
- b) excel sheet namely '*Allotment*' found in excel workbook namely '*profit of feugo 11.04.19 (33_24)*', copy of which is placed at Pages 192-198 of Paper Book
- c) *Page Nos. 55, 56 & 57 of Annexure A-1*, copy of which is placed at Pages 189-191 of Paper Book

7.2 These facts gathered in the course of search along with the statements of the persons from whose possession these electronic data was found was confronted to Mr. Shaikh, the principal promoter of the Rubberwala Group. He is noted to have admitted having received the on-monies on sale of flats in the real estate project undertaken by the assessee. He however pointed out two particular aspects viz., (a)



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against the receipt of these on-monies, expenses were also incurred in cash towards the project and thus Mr. Shaikh is noted to have accordingly offered 8% of the on-monies by way of unaccounted income derived upon sale of flats and (b) the notings found for 15 flats in the name of RHIL, Rubberwala Housing & Infrastructure Ltd, did not represent actual receipt of on-monies and therefore urged that the same be ignored. It is further noted that in the course of post-search verification, another excel sheet titled '2002 to 1.1.2020-1' was also found in a pen drive seized from the premises of Mr. Shaikh, which according to the AO contained details of both unaccounted cash income and expenditure relating to the projects undertaken by Rubberwala Group including the assessee. Based on the data found, the AO is noted to have compiled the aggregate details of on-monies received by the assessee, which is as follows:

Assessment Year	Total On-Monies (in Rs.)
2015-16	63,65,000
2016-17	1,89,29,360
2017-18	1,80,00,000
2018-19	-
2019-20	8,00,73,500
2020-21	3,96,50,000
2021-22	15,30,48,000*
Total	38,91,06,811

**Quantification in dispute*



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7.3 It is noted that the details of on-monies as quantified by the AO in AYs 2015-16 to 2020-21 have been accepted by Mr. Shaikh and he had accordingly offered 8% of the aggregate undisclosed proceeds by way of unaccounted profit derived by the assessee from the project undertaken by it. On the basis of this disclosure, the assessee is noted to have accordingly filed the returns of income u/s 153A of the Act, wherein it has admitted and offered the aforesaid unaccounted profit to tax. The AO, for the various reasons set out in the assessment order, is noted to have disputed the assessee's action of only offering profit element in the on-monies and instead has added the entire value of on-monies by way of unaccounted income of the assessee. On appeal the Ld. CIT(A) is noted to have in principle accepted the assessee's plea that only the profit element embedded in these on-monies ought to have been taxed by the AO. The Ld. CIT(A) however restricted the quantum of addition viz., the profit element embedded in the on-monies, to 12.5% as opposed to 8% of the receipts, offered by the assessee, across the years. Hence, the dispute before us in these AYs 2015-16 to 2020-21 is only whether the entire value of these receipts have to be brought to tax, or only the profit element embedded therein has to be taxed. However, in AY 2021-22, the assessee had disputed the receipt of on-monies of Rs.15,30,48,000/- found in the notings of 15 flats in the name of RHIL itself and thus claimed that no addition was warranted in this regard. The Ld. CIT(A) is noted to have accepted the contention put forth by the assessee and has deleted the addition of on-monies made in AY 2021-22.



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7.4 In light of the above facts, we first consider it fit to take up the Ground No. 1 of the Revenue's appeal in AY 2021-22 to ascertain whether at all the assessee was in receipt of on-monies of Rs.15,30,48,000/- in relation to the notings found for 15 (fifteen) flats in the name of RHIL.

7.5 The background facts concerning this issue is noted to be similar to the on-monies found in AYs 2015-16 to 2020-21, but the claim of the assessee is that, the notings found in name of RHIL in the excel sheet did not represent on-monies actually received by it. It is observed that the excel sheet, namely, '*tot_sale_RB_HR*', which was part of the excel workbook '*profit of feugo 11.04.19 (33_24)*', contained the details of party wise and flat wise consideration received in cheque and cash for the Project Feugo. The said sheet is noted to contain the details of name of the party, flat numbers, rate, area, total cost, cheque amount, cash amount and the amount received. The total consideration reflected therein aggregated to Rs.82,77,90,812/-. The notings in this excel sheet inter alia contained details of certain flats against which the buyer was mentioned to be 'RHIL', i.e. M/s Rubberwala Housing & Infrastructure Ltd., the flagship company of the group. It was brought to our notice that, only the notings in the name of RHIL did not contain the details of cheque payments or date of receipt of cash consideration. In the same excel workbook - '*profit of feugo 11.04.19 (33_24)*', there is another excel sheet, namely, '*Allotment*' which also contains the details of flats in Project Feugo. In this excel sheet, against each flat, the status is shown as 'Sold' but the total



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consideration received comes only to Rs.61,99,20,356/-. It was shown that in this excel sheet- '*Allotment*', the notings of the 15 flats in the name of RHIL was blank and no consideration was stated to have been received from RHIL, which according to assessee, lent credence to its explanation that neither were any flats sold to RHIL nor was any on-monies received from RHIL. Apart from the foregoing electronic data, loose papers marked as *Page Nos. 55 to 57 of Annexure A-1* were seized by the Investigating Authorities which also contained the details of flats in Project Feugo. In these papers, the status of the flats were reflected as either Sold, Available or Block. The total consideration on this page came to Rs.82,77,90,812/-. This page is noted to contain elaborate details of on-monies along with the date of receipt. On these pages, the status of 15 flats against the name of RHIL was stated to be 'Block' and not 'Sold', whereas against other flats the status was reflected as 'Sold'. It is noted that, Mr. Shaikh, in his statement recorded in the course of search enquiries, had stated that the flats mentioned against the name of RHIL were unsold and blocked flats and thus no on-monies were received qua the same. The relevant portion of his statement is noted to be as under:-

“Q.16. During the course of search proceedings of group companies, the statement u/s 132(4) of the Income Tax Act, 1961 was taken on 17.03.2021 at 1402, Ameena Heights, Dr. A Nair Road, Agripada, Mumbai - 400 011 and in answer to the Q.23 to 28 you stated that "Ma am I will have to look into the Books of Accounts and cash flows of my various entities and only then I



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will be able to comment on the pendrive in question.". Till today you have not filed any explanation for the questions asked during the course of search proceedings, in these circumstances why amount of Rs. 82,77,90,812/- received by you in cash, for the Project "Fuego" should not be considered as the unaccounted income of M/s Hilton Infrastructure on which no taxes have been paid? Please comments.

Ans. Sir, in reply to answers above, I have already elaborated the circumstances for noncompliance from my side and request you to treat the reasons listed above as reasonable cause for the delay in replying and condones the delay on my part.

.....

Total cash received towards the Fuego project are as under and the income @8% on unaccounted receipts is offered as additional income for M/s Hilton Infrastructure:

Financial Year	Total Unaccounted Receipts	Additional Income @8% of Receipts
2014-15	63,65,000	5,09,200
2015-16	1,89,29,360	15,14,349
2016-17	1,80,00,000	14,40,000
2018-19	8,00,73,500	64,05,880
2019-20	3,96,50,000	31,72,000
2020-21	15,30,48,000	-*
Grand Total	31,60,65,860	1,30,41,429

*- I also like to clear that the amount as shown into financial year 2020-21 for amounting to Rs. 15,30,48,000/- pertains to the "Rubberwala Housing & Infrastructure Limited (RHIL)" for the Unsold or Blocked Flats. Therefore, no amount was received in cash by the company. The same can be verified from the page



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number 55, 56 and 57 of the seized material in respect to the Fuego project.”

7.6 The AO in the course of assessment is however noted to have disputed the above explanation put forth by the assessee. The AO is found to have primarily relied on the excel sheet, namely, ‘*tot_sale_RB_HR*’ which was part of the excel workbook ‘*profit of feugo 11.04.19 (33_24)*’. The AO observed that this sheet mentions cash component against the notings in the name of RHIL and that there is no status mentioned for these flats in this sheet and therefore this sheet suggests receipt of on-monies by the assessee from RHIL. According to AO, the excel sheet, namely, ‘*Allotment*’ which was referred to by the assessee to contend that, the flats reflected in name of RHIL were never allotted / sold and thus no on-monies could have been received in connection therewith, was incomplete and therefore not reliable. As far as loose papers marked as *Page Nos. 55 to 57 of Annexure A-1* is concerned, the AO noted, although the status was mentioned as ‘Block’ and not ‘Sold’ against the notings in the name of RHIL but the assessee had conveniently ignored that cash component which was stated corresponding to these notings as well. The AO accordingly held that, the aforesaid information clearly suggested that the assessee had received on-monies in cash from RHIL in relation to the 15 flats sold to RHIL and therefore added the entire cash component of Rs.15.30 crores mentioned against these notings as unaccounted income of the assessee. Being aggrieved by this order of



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the AO, the assessee preferred an appeal before the Ld. CIT(A) who was pleased to delete the same. The Revenue is now in appeal before us.

7.7 We have heard both the parties and perused the material placed before us. It is noted that the assessee had not disputed that the excel sheet, namely, '*tot_sale_RB_HR*', which was part of the excel workbook '*profit of feugo 11.04.19 (33_24)*', inter alia contained the notings of flats sold in Project Feugo and also the on-monies received on sales. In fact, the assessee is noted have considered the on-monies received on sales on these flats (*except the notings of 15 flats in name of RHIL*) while offering the additional income @ 8% to tax. According to the assessee however, the notings of flats in name of RHIL did not represent actual sales and thus the purported cash mentioned in these notings could not be inferred as receipt of on-monies. The case of the Revenue however is that, since amounts were mentioned in the cash column in these notings of 15 flats in name of RHIL, it denoted receipt of on-monies. In order to adjudicate this issue, let us first examine *Page Nos. 55 to 57 of Annexure – A-1*, relied upon by the Revenue, which was placed at Pages 189 to 191 of the Paper Book. The Ld. AR showed us that, the status of flats in name of RHIL was shown as 'Block' and not 'Sold'. He also pointed out that, unlike other notings of flats which were sold, the notings in the name of RHIL did not contain any details of cheque payments or the date on which cash was received. The Ld. AR thus explained that the notings of flats in name of RHIL were dumb notings and hence the Ld. CIT(A) had rightly held



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that the purported cash mentioned in these notings did not represent actual receipt of on-money. In order to appreciate the foregoing contentions, we had examined the notings in the name of RHIL and other flat purchasers. For the sake of convenience, the notings for Flat Nos. 808 & 809 found on these pages are taken note of as under :-

Flat No.	Name of Buyers	Sold/ Available	Area	Area	Rate	Total Cost	Amount recd (A) Comp	Cheque Date	Cheque Amount	Amount recd in (B) Comp	Date
808	Tasneen Bhopalwala	Sold	794	1310	9250	1,21,17,500	22,39,324	25/08/2012	1,00,000	69,04,912	13/12/2010
809	RHIL	Block	674	1115	11,999	1,33,78,951				1,33,78,951	

7.8 From the above it is noted that where the flat was actually sold (Flat No. 808), the status was mentioned as 'Sold' and complete details of the manner in which consideration was received viz, the details of cheque component and cheque date amount as well as the details of cash component and date of receipt of cash is found to be mentioned. Whereas, against the notings in name of RHIL, the status is not shown as 'Sold' but 'Block'. Also the details of cheque component and cheque date amount are not there. Further even the date of receipt of cash is also not mentioned. Instead, it is noted that in all the fifteen (15) instances, the total consideration value is correspondingly



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mentioned in the cash column. Having examined the notings on these Pages as well as the excel work book, we find force in the assessee's case that the notings in name of RHIL was dumb and did not represent receipt of actual on-monies. Even, the excel sheet 'Allotment' found in the same excel workbook is noted to contain extensive details of the flats sold, cheque and cash received in the Project Feugo. It is observed that this excel sheet does not contain any cash notings pertaining to the 15 flats reflected in the name of RHIL, which lends support to the case of the assessee.

7.9 We also find merit in the Ld. AR's contention that, the flat could not possibly have been sold entirely in cash. Moreover, the conduct of the assessee group across several projects is noted to involve sale of flats having both cheque and cash component and also the details found in electronic data contains complete details of receipt of both cheque and cash component. However, these common aspects which were found across all other notings of on-monies were completely absent in the notings of the 15 flats in name of RHIL. The Ld. AR also invited our attention to the details of unsold flats which was appearing in the closing inventory for AY 2021-22, which was placed at Page 200-201 of Paper Book to show that the 15 flats which were mentioned in name of RHIL were indeed unsold. It is noted that this contemporaneous fact could not be controverted by the Revenue as well. For the foregoing reasons, we find ourselves in agreement with the following findings of the Ld. CIT(A) :-



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“64. I have considered the facts of the case and submission of the appellant. The AO has referred to three sources of information as far as on-money is concerned. They are narrated in para 7.2.1 of assessment order. The appellant had pointed out that in page No. 55, 56, 57 of Annexure A1, all the 15 flats shown as "block" against the name RHIL. The appellant has also further pointed out that although entries are made in "amount received in (b) comp" the date entries are left blank in all such cases. As regards the excel sheet named as allotment, in the excel file "profit of Feugo 11.04.19 (33) 34", although the units are shown as "sold" the rest of the columns are left blank which according to the appellant confirms that no sale has been made.

64.1. As regards the excel sheet named "tot_sale_RB_HR" the appellant has stated that the flats are sold in a consolidated way in serial No. 64. The entire amount is shown as cash amount and no cheque amount is shown in said sheet. Moreover, it is the contention of the appellant that none of these 15 flats has been sold as on 31.03.2021 and they form part of closing inventory as per audited financials.

64.2. Having considered the entire facts and explanation given by the appellant, I am of the view that there is no adequate basis to hold that this sum of Rs. 15,30,48,000/- represents actual receipt of on-money. It is also noted that the appellant has accepted the cash receipts in the case of appellant and other group concerns during various years although it has claimed for taxation on basis of real income theory. Accordingly this ground stands ALLOWED and the addition stand deleted. There is no need to adjudicate the alternative claims of the appellant.”



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7.10 In view of the above, we see no reason to interfere with the order of Ld. CIT(A) deleting the addition made on account of on-monies of Rs.15,30,48,000/-. Hence, the sole ground involved in the Revenue's appeal for AY 2021-22 stands dismissed.

7.11 Having regard to the above findings, the quantum of on-money receipts concerning the Project Feugo of the assessee, is noted to be as follows-

Assessment Year	Total On-Monies (in Rs.)
2015-16	63,65,000
2016-17	1,89,29,360
2017-18	1,80,00,000
2018-19	-
2019-20	8,00,73,500
2020-21	3,96,50,000
Total	23,60,58,811

7.12 The above details of on-monies as quantified by the AO in AYs 2015-16 to 2020-21 have not been disputed by both the parties. Having quantified the on-money receipts, the issue now to be adjudicated is, whether the entire value of these receipts has to be brought to tax, or only the profit element embedded therein has to be taxed. It is noted that identical issue has been adjudicated by us in the case of the



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flagship entity belonging to Rubberwala Group viz., **M/s Rubberwala Housing & Infrastructure Ltd.** in their **ITA Nos. 3444 to 3448/Mum/2023**. Like in the decided case, the findings & observations of the AO, arguments of the Ld. DR as well as the contentions put forth by the assessee are noted to be verbatim same. While adjudicating this issue in the case of M/s Rubberwala Housing & Infrastructure Ltd. (supra), it has been held that only the profit element embedded in the on-monies ought to be assessed to tax and that on the given facts, the addition of entire value of on-monies made by the AO was held to be unwarranted. It was further held that, 8% is the appropriate profit percentage to estimate profit element embedded in on-monies received on sale of units/flats. The relevant findings set out therein are as follows :-

“5.7 We have heard both the parties and perused the material placed before us. At the outset, it is noted that there is no dispute between the parties that the assessee had received on-monies on sale of units at its Platinum Mall Project. Even the quantum of on-money receipts quantified by the AO have not been disputed by both the parties, which as noted by Ld. CIT(A) is as follows :-

....

5.8 The limited issue for our consideration is whether the entire value of these receipts have to be brought to tax or only the profit element embedded therein has to be taxed. From the facts placed before us, it is noted that the assessee is engaged in the business of development of real estate. In the course of search,



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electronic data was found, more particularly excel sheets which inter alia contained details of on-monies received on sale of flats. Having perused these excel sheet on sample basis, it is noted that the same sheet also contained notings of expenses. From the statement of Mr. Shaikh, it is gathered that even the Investigating authorities tacitly acknowledged that there were notings of cash expenses incurred by the assessee in this excel sheet by putting up the following questions to Mr. Shaikh.

“Q.47. Please refer to your response to the question above. It is seen from the various sheets which have been named at Q. No. 43, that there are names of various parties with whom payment and receipt transactions have been undertaken by you. Therefore, your claim that you don't have the details of the names is not correct. Many of the names are mentioned as aliases and in abbreviated forms. In view of this, please go through the said excel sheets and clarify the complete names of the various parties involved.

Ans: Sir, the names mentioned in the sheet are the names of various persons who gives us the payments on behalf of someone and also the names of the persons to whom we made the payments on behalf of someone and therefore I am unable to recollect the transactions as the name in the sheets have no direct relations with the actual transactions. Further as the transactions were in cash therefore the proper details of the same was not maintained by us and that's why details are not available with us.”



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5.9 It is further noted that Mr. Shaikh had further averred that in both his statements recorded in course of the search as well as in post search enquiries that the exact profit from the working in these excel sheets was not possible and therefore he had estimated the profit from on-monies @ 8% and offered the same to tax. The relevant questions and answers taken note of by us are as follows :-

“Q.10. During the course of search proceedings of group companies, the statement u/s 132(4) of the Income Tax Act, 1961 was taken on 17.03.2021 at 1402, Ameena Heights, Dr. A Nair Road, Agripada, Mumbai 400 011 and in answer to the Q.47 to 54 you stated that "Ma'am I will have to look into the Books of Accounts and cash flows of my various entities and only then I will be able to comment on the pen drive in question and the statement of Mr. Imran Ansari". Till today you have not filed any explanation for the questions asked during the course of search proceedings, in these circumstances why amount of Rs. 151,39,11,026/- should not be considered as the unaccounted income of M/s Rubberwala Housing Infrastructure Limited, from the sale of shops at Platinum Project undertaken by the company. Please comments.

Ans.Sir, I have already elaborated the circumstances under which I was not been able to file my replies on the questions asked by you during the course of search proceedings. Now I am in receipt of the copy of the statements along with the seized documents and after verification of the documents it is submitted that we have received cash towards the shops and also make various expenditures in cash towards the project out of the said cash receipts. I am submitting herewith the cash receipts and payments details for the following years.

...



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On the plain reading of the seized material as provided by you it is evident that we have made various expenditures towards the platinum project out of the cash received towards the shops in the project. As the data is voluminous and exact profit working from the seized data cannot be derived therefore exact details of profit or loss toward the cash transactions recorded in the seized material cannot be ascertained.

Further as far as my knowledge is concerned, I have not earned anything out of the total receipts in cash as income because unaccounted cash received from the various business activity are paid towards the expenses of the projects of the group. To settle the dispute, avoid further litigations and assuming that no penalty will be levied on M/s Rubberwala Housing and infrastructure Ltd for disclosure of additional income. I am offering an amount equitant to 8% of total unaccounted receipts as additional income of the respective company.

Total cash received towards the Platinum project are as under and the income @ 8% on unaccounted receipts is offered as additional income for M/s Rubberwala Housing and infrastructure Ltd

.....

Q.43. During the course of post search proceedings, you have been provided the soft copy of the excel sheet named as "2002 to 1.1.2020-1 which is retrieved from the 16GB SanDisk pen drive on which white paper pasted found during the course of Search Action u/s 132 in your laptop bag of your bedroom at Flat No. 1402, Ameena Heights, Agripada, Mumbai 400011. Please explain the content of the excel sheets?

Ans. Sir, I have gone through the excel sheet as provided by you and in the given excel sheet the seven columns



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starting from column A to column G. The column wise details is as under:

Column	Explanation
A	This column of the excel sheet with the heading as 'Date' i.e. the column contain the date of transaction.
B	This column of the excel sheet with the heading 'Particulars' i.e. the said column contain the details of short Name of party.
C	This column of the excel sheet with the heading 'Vch Type' i.e. the column contain the type of the voucher. Further the same includes voucher of Receipt, payments etc.
D	This column of the excel sheet with the heading 'Description' i.e. the said column the nature of transactions.
E	This column contains the amount of receipts.
F	This column contains the amount of payment.
G	This column of the excel sheet with the heading 'Company' i.e. the said column contain the details of Name of Project, location or nature of the receipt and payment etc.

In this sheet unaccounted cash income and expenditure related to various projects are noted. This is the consolidated income and expenditure sheet for Rubberwala Group entities. All receipts in respect of the projects are noted in the sheet at the receipt side. Further the receipts are noted in the name of various persons (L.e. employees/associates/partners of Rubberwala group) from whom the cash was received, because the cash was collected from the customers by various employees of the group and after that the same was received by the respective senior persons and after aggregating the said cash was handed over to me and the same was noted in the sheet as aggregated basis.

Therefore, each entry of the individual sheets (ie. Platinum mall project and Fuego project excel sheets) recovered during the course of search may not be reconciled individually but on overall basis the receipts noted in the



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"2002 to 1.1.2020 -1" are more than the individual sheets found during the course of search.

The said received cash are duly expensed out for the projects and the same fact can easily be verified from the sheet provided by you. In the said excel sheet received cash is duly paid towards the expenditure of the projects running by the group. There are various expenses of the projects like relocation of the tenant, payment towards vacating of the land, material procurement expenses, Labour payments and various other approval related expenses etc. are noted and was made out of the cash receipt from the project and the same are verifiable from the said sheet therefore it is beyond doubt that the group earned all the unaccounted cash as income.

As the data are voluminous and it is not possible to derive the exact profit working from the excel sheets and therefore to settle the dispute, avoid further litigations and assuming that no penalty will be levied on the group for disclosure of additional income I am offering an amount equitant to 8% of total unaccounted receipts as additional income of the respective company.

As the data noted in the excel sheet entity wise bifurcation are not possible and therefore the project wise income will be offered as per the respective seized material in the respective company/firm and income over and above the individual sheet noting will be offered as additional income in M/s Rubberwala Housing and Infrastructure limited as the company are flagship company of group and major work are done in the same company. The year wise bifurcation of income as per the excel sheet "2002 to 1.1.2020-1" is as under:

....

The above total receipts are including the income offered in various companies/firms as replied in previous questions, and the details of the same are as follows:

....

And therefore, I am offering to tax the assessee wise year wise unaccounted income as additional income as under:



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...

1. Hilton Infrastructure Project Fuego (PAN: AAFH3675R)

Financial Year	Total Unaccounted Receipt	Additional Income @8% of the total unaccounted Receipt
2014-15	63,65,000	5,09,200
2015-16	1,89,29,360	15,14,349
2016-17	1,80,00,000	14,40,000
2017-18	-	-
2018-19	8,00,73,500	64,05,880
2019-20	3,96,50,000	31,72,000
2020-21	-	-
Grand Total	16,30,17,860	1,30,41,429

.....

5.10 From the above answers given by Mr. Shaikh, he is noted to have not only admitted to having received on-monies on sale of flats / units but at the same time also stated that cash expenditure relating to the same activity had also been incurred and accordingly offered additional income @ 8% of receipts. Having regard to these contemporaneous facts, we thus note that the allegation of the Revenue that, the additional income as a percentage of on-monies receipts offered in the return of income was an after-thought, is factually misplaced. Instead, we find that,



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in the course of search itself, the details of expenses were found noted on the same excel sheet where on-monies notings were found. When confronted, Mr. Shaikh admitted to both cash receipts and cash expenses and in the same breath he had offered additional income embedded therein viz., 8% of the receipts.

5.11 The Revenue has however contended that, the expenses found noted on this excel sheet were not shown by the assessee to have been incurred for business purposes. The Ld. AR, on the other hand, brought to our notice that, Mr. Shaikh in his answers had inter alia explained the nature and purpose of expenses which included payments for vacation of land, relocation of tenants, certain material procurement, labour payments etc. which were intrinsic to the said project. The Ld. AR invited our attention to the terms used in the excel sheet viz., *'Building Gate Work'*, *'Zaheer Plumber for excavation labour payment'*, *'Tenant Shifting A/c Chunu'*, *'Manoj Material Purchase'*, *'Labour Salary March 18'* etc. Having examined the contents of the excel sheet in light of the answers given by Mr. Shaikh in his statement, we find merit in the assessee's case that the notings of the expenses found on this excel sheet indeed related to the business i.e. real estate project. We also agree with the Ld. AR that, the fact that these expenses were noted corresponding to on-monies receipts further lends credence to the assessee's contention that these notings were pertaining to the business of real estate.

5.12 Now we come to reliance placed by the Revenue in this regard on the decision of Hon'ble Bombay High Court in the case of Harish Textile Engrs. Ltd. Vs DCIT (supra) to dispute the



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allowability of expenses found noted on these excel sheets. Having perused the said judgment, we find the same to be factually distinguishable. In the decided case, the seized papers were found to indicate only notings of payments which was claimed as deduction u/s 37(1) of the Act by the assessee. On a factual analysis, it was also found that the said seized documents only indicated seeking of funds and/or reimbursement of funds which by itself was held to be insufficient to establish that the money has been actually expended. The said notings were found to be bereft of any details whatsoever which would suggest that it had been incurred for business purposes. On the contrary, in the facts before us, it is noted that the same excel sheet contained notings of both receipts and expenses. Having regard to this material fact, according to us, there is no discretion available either with the Department or the assessee to rely upon a part of the document favourable to it and plead for rejection of the other part which is not favourable to it, or in respect of which no supporting material is found. In general, the contents of the document seized have to be accepted as true irrespective of whether it is favourable to assessee or Department and the seized/impounded document has to be read as a whole. Gainful reference in this regard may be made to the decision of Hon'ble Delhi High Court in the case of CIT Vs D D Gears Ltd (211 Taxman 8) which is found to be relevant in the given facts of the present case. In the decided case also, expenses were found to have been noted on the same document where receipts were recorded. In these circumstances, it was held that expenses, which are recorded in the very same seized material, should be reduced while computing undisclosed income. The Hon'ble High Court accordingly held that, while computing undisclosed income



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on the basis of such seized material, no part thereof can be ignored or no entry stated in such material can also be ignored, if it do not suite the convenience of the Assessing Officer. The material is to be considered as a whole and not selectively.

5.13 Also, the notings found mentioned in the excel sheet clearly suggest that the expenses have already been incurred. Moreover, it cannot be a matter of an argument in the given facts of the present case that, the amount of receipts/ sales by itself would represent the income of the assessee. For this, we gainfully rely on the following findings rendered by the Hon'ble Gujarat High Court in the case of CIT Vs President Industries (258 ITR 654).

“3. Having perused the assessment order made by the Assessing Officer, the order made by the Commissioner (Appeals) and the Tribunal, we are satisfied that the Tribunal was justified in rejecting the application under section 256(1). It cannot be a matter of an argument that the amount of sales by itself cannot represent the income of the assessee who has not disclosed the sales. The sales only represent the price received by the seller of the goods for the acquisition of which it has already incurred the cost. It is the realisation of excess over the cost incurred that only forms part of the profit included in the consideration of sales. Therefore, unless there is a finding to the effect that investment by way of incurring cost in acquiring goods which have been sold has been made by the assessee and that has also not been disclosed, the question, whether entire sum of undisclosed sale proceeds can be treated as income of the relevant assessment year answers by itself in the negative. The record goes to show that



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there is no finding nor any material has been referred to about the suppression of investment in acquiring the goods which have been found subject of undisclosed sales.”

5.14 Furthermore, if Revenue’s plea is acceded to and the notings of expenses are discarded due to insufficiency of documentary evidences to support it, then likewise corresponding notings of on-monies would also have to be treated as unreliable. In our considered view however such an inference in the context of estimation of undisclosed income in the given facts of the present case, would be illogical. For the aforesaid reasons, the decision of Harish Textile Engrs. Ltd. Vs DCIT (supra) relied upon by Revenue is found to be of no assistance.

5.15 The next argument of the Revenue is that, even if these notings are found to be expenses incurred towards business but because the names of the payees along with documentary evidences for such expenses have not been provided, the benefit for the same should not be given. In this regard, we find that, on same set of facts, similar contention was raised by the Revenue before this Tribunal in the case of M/s Prime Developers Vs ACIT (supra) viz., the set-off / benefit of expenses against on-monies should not be allowed as the assessee was unable to substantiate the incurrence of expenses with evidences. This Tribunal is noted to have rejected this plea of the Revenue and upheld the assessee’s plea for estimation of profit element embedded in on-monies by observing as under:-

“42. Scope of Reasonable Expenditure: Assessee needs to expend in order to earn income/profit and it is basic and



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universal principle in any business. This principle applies to both accounted and unaccounted profits. In a case of unaccounted profits, due to its very nature of unaccounting, normally, the parties do not maintain evidences and therefore, evidencing such unaccounted evidences is impossibility. Probably, for this reason, the courts have taken conscious view that it is for the assessing authority to quantify reasonable expenditure considering the facts of the case and industry. Legally speaking, the judgments are uniform in asserting that entire sale proceeds should not be added as income. Honble High court of Ahmadabad ruled in the case of Panna Corporation that the " assessee ought to have spent reasonable amount for the purpose of receiving such gross profit' (para 14 of Tax Appeal No 325 of 2000 dt. 16.6.2012). Further, Hon'ble High Court OF Madya Pradesh held in the case of President Industries 258 ITR 654 that ' entire sale proceeds of the assessee should not be added in his income'. Further, from the judgment in case of Panna Corporation (supra), it is settled proposition that there is no need for the assessee to demonstrate the genuineness of the claim of unaccounted expenditure in the cases of this kind. The underlined logic is that the unaccounted expenditure is always unevidenced and never maintained. Therefore, transferring onus on to the assessee in matters of this kind is not approved. Ex consequenti, it is for the AO allow necessarily reasonable deduction towards such unaccounted expenditure without demanding evidences, considering the nature of industry and also evidences relating to extents of net profits earned by the assessee. Considering the above legal position on the



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matter, we are of the clear-cut opinion, the AO's conclusions on this issue are certainly erroneous. In principle, we uphold the views of the CIT(A) in this regard. Therefore, relevant grounds raised in the revenue's appeals are dismissed.”

5.16 It was brought to our notice that the above findings of this Tribunal have been affirmed by the Hon'ble Bombay High Court in their decision rendered in ITA No.2452 of 2013. Following the binding *ratio decidendi*, this particular argument of the Revenue is hereby rejected.

5.17 The alternate contention of the Revenue that, the cash expenses were still not allowable u/s 40A(3) of the Act is also found to be untenable. For this, we find that the Ld. AR has rightly relied on the following findings of this Tribunal at Pune in the case of Dhanvarsha Builders & Developers (P.) Ltd. Vs DCIT (102 ITD 375) which were as follows:-

“The argument of the learned DR in this matter may also be considered here. His case was that the expenditure has to be proved by the assessee. We are unable to agree with this submission if the impugned seized material is to be considered for the purpose of computation of the undisclosed income. The learned DR had pointed out that the Assessing Officer had verified some of the cash receipts from the customers. It appears that no opportunity of cross examination has been given by the Assessing Officer to the assessee in this behalf. Therefore, the evidence gathered by him in respect of receipt of ‘on money’ is only a tentative



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evidence on which no firm conclusion can be drawn. If the learned DR's arguments regarding expenditure were to be accepted, then, the figures of cash receipts mentioned in the seized paper will also have to be ignored. Such course of action will be against the tenor of the evidence seized in the course of search operation, more particularly, when the evidence gives clear picture of the undisclosed income of the assessee. The other argument of the learned counsel was that provisions of section 40A(3) should be applied in respect of expenditure. It may be pointed out that we are on the issue of computation of income of the assessee de hors the books of account and on the basis of seized material. In such computation, provisions of section 40A(3) are not applicable because this is not the case of the assessee or the revenue that the computation of undisclosed income is on an exact basis as per seized documents and the books of account. The result of the aforesaid discussion is that the undisclosed income is to be quantified at Rs. 14.74 lakhs.”

5.18 We find that similar view has been expressed by this Tribunal in the case of Western India Bakers (P.) Ltd. Vs DCIT (87 ITD 607) wherein also it was held that the limits under Section 40A(3) of the Act cannot be applied while estimating undisclosed income. The relevant findings of this Tribunal as taken note of by us are as follows :-

“28. Coming now to the last issue that whether disallowance under section 40A(3) was possible in the facts of the present case, we have noted that the assessment was



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made on the basis of undisclosed investment. Where the basis is undisclosed investment, one cannot apply the prescription of section 40A(3) of the Act. In the case of CIT v. Aloo Supply Co. [1980] 121 ITR 680 (Ori.), the Hon'ble High Court has held that if an assessee makes payments at different times during the day and he has no idea that he has to pay to the same person on more than one occasion, he cannot be subjected to the statutory provision contained in section 40A(3) of the Act, unless any one payment is above the prescribed limit. The statutory limit under section 40A(3) of the Act applies to payment made to a party at a time and not to the aggregate of the payments made to a party in the course of the day as recorded in the cash book. In the present case there is no finding that the assessee did make any payment exceeding the prescribed statutory limit contained in section 40A(3) of the Act. As such, it cannot be said that the assessee violated the provision under section 40A(3) of the Act.

29. In the case of Hynoup Food & Oil Industries (P.) Ltd. v. Asstt. CIT [1994] 48 ITD 202 (Ahd.), it was held that if an overall estimate of income has been made, there would not be any scope for applying the prescription of section 40A(3) of the Act. When a provision of law is to be applied, it is to be seen that all the circumstances allunde to the application of such provision did exist. If it is not possible to find out that how the violation of the provision was done, addition cannot be made on the basis of inference and surmises. In the present case it is not known that at what point of time and how assessee violated the provisions of



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section 40A(3) of the Act. As such, no addition on this count is warranted. We decide this issue in favour of the assessee and against the revenue.”

5.19 Overall therefore, we thus find that the electronic material seized in the course of search did support the assessee’s case that, it had incurred expenses out of the on-monies received from sale of units. In light of the foregoing, we find merit in the assessee’s plea that, the entire value of on-monies receipts could not be taxed but only the profit element embedded therein was to be taxed in its hands, in the facts and circumstances of this case. On this aspect, it is noted that in the case of ITO Vs. Anand Builders, this Tribunal in similar circumstances had held that, 8% of the unaccounted on-money could be taxed in place of the entire unaccounted on-money receipts since there is always the unaccounted payments. The above decision of this Tribunal is noted to have been upheld by the Hon’ble Gujarat High Court and the SLP filed against the judgment before the Supreme Court was also dismissed and reported in 265 ITR 37. The relevant findings of Hon’ble Apex Court is noted to be as follows:

“Dismissed the special leave petition filed by the Department against the judgment dated January 21, 2002 of the Gujarat High Court in ITA No. 52 of 2002 whereby the High Court dismissed the Department’s appeal on the ground that no substantial question of law arose. The question of law raised in the appeal before the High Court was whether the Appellate Tribunal’s finding while directing the Assessing Officer to tax only 8 per cent of the unaccounted on money receipt instead of fully taxing it, in



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the absence of any evidence of expenditure, could not be stated to be perverse.”

5.20 We further find that a similar view had been taken by the Hon’ble High Court of Gujarat in the case of PCIT, Surat Vs. Anupam Organiser (2020) (9) TMI 973. In its said order the Hon’ble High Court relying on its earlier order passed in the case of DCIT vs Panna Corporation (74 DTR 89), had observed, that the Tribunal was justified in considering that the assessee ought to have spent reasonable amount for the purpose of receiving the amount of on-monies and thus, what could be brought to tax was the profit embedded in such receipts and not the entire receipts. Similar view is noted to have been expressed by the Hon’ble High Court of Gujarat in the case of CIT Vs. Abhishek Corporation (158 CTR 374).

5.21 We further noted that another coordinate Bench of this Tribunal at Mumbai in the case of ACIT Vs. Guruprena Enterprises (ITA Nos. 255 to 257, 544 & 545/Mum/2010 and 4836/Mum/2009) had observed as under:

“Even though it is established from seized documents that assessee was receiving premium/on-money on booking of flats belonging to third parties, entire receipts of on-money/premium cannot be treated as undisclosed income of assessee; only net profit rate can be applied on unaccounted sales/receipts for making addition.”

5.22 We note that the above decision has since been affirmed by the Hon’ble Bombay High Court in ITA No. 1849 of



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2011. Also, relying on the aforesaid judicial pronouncements, this Tribunal at Mumbai in the case of Sumer Builders Vs. Dy. CIT, Central Circle-5(3), Mumbai, ITA No. 4915/Mum/2016; dated 09.01.2021 had observed as under:

"Further, admittedly the on-money is merely receipts of sale proceeds as noted by the Assessing Officer in his order at Page No. 3 and what could be taxed is only income and not receipts. We further note that in various judgments relied on above it has been categorically held that on-money receipts are in the nature of sale price and not income per se. In the case of CIT vs. President Industries [258 ITR 654 (Guj)] it has been held that the entire sum of undisclosed sale proceeds cannot be treated as income. Similar view has been taken by the Hon^{ble} Bombay High Court in the case of CIT vs. Hariram Bhambhani in ITXA No. 313 of 2013. Further in the case of Guruprerna Enterprises (supra) relying on Abhishek Corporation vs. DCIT [63 TTJ (Ahd) 651] it has been held as under

:-

....

The other judgments relied on by the assessee also support its case. The ld. D.R has not brought on record any contrary judgments. We, therefore, agree with the consistent view expressed in these judgments that on-money receipts are in the nature of undisclosed receipts and not income per-se and therefore only profit element embedded therein are liable to be taxed and not the entire on-money receipts."



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5.23 Gainful reference is also made to the following findings recorded by another coordinate Bench in the case of Ekta Housing Pvt Ltd in ITA No. 1732/Mum/2019 dated 24.05.2021 wherein on similar issue regarding taxability of on-monies, it was held as under:-

“In the case before us, in the backdrop of the fact admitted by the A.O while framing the assessment that the incriminating documents seized in the course of the search proceedings contained records of cash transactions, both receipts and expenses, which were not accounted for in the regular books of accounts of the assessee, and that the unaccounted transactions w.r.t cash expenses incurred by the assessee out of the unaccounted sales receipts i.e on-money receipts had surfaced in the course of the search proceedings, we are of the considered view that no infirmity arises from the order of the CIT(A) who drawing support from the judicial pronouncements that were relied upon by the assessee before him, had concluded, that the addition as regards the on-money received by the assessee was to be made to the extent of the income element embedded in such receipts and the entire amount of on-money could not have been added in the hands of the assessee. We, thus, agreeing with the consistent view taken in the aforesaid judicial pronouncements, therein respectfully follow the same, and thus, finding no infirmity in the view taken by the CIT(A), uphold the same.”

5.24 For the reasons discussed in the foregoing and following the decisions (supra), we accordingly hold that only the



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profit element embedded in the on-monies ought to be assessed to tax and that on the given facts, the addition of entire value of on-monies was unwarranted.

5.25 Now we come to the issue of estimating the profits of the assessee. The Ld. CIT(A) is noted to have estimated the profit at 12.5% of the on-monies. We however note that no rational basis or logic has been provided by the Ld. CIT(A) for arriving at such a rate. On the other hand, the Ld. AR brought to our notice that, the Hon'ble Supreme Court in the case of ITO Vs Anand Builders (supra) had upheld the Tribunal's action of estimating profit percentage @ 8% of on-monies. The Ld. AR pointed out that the aforesaid assessee was also in the same line of business as that of the assessee i.e. real estate. Further, this Tribunal in the cases of M/s Platinum Properties Vs DCIT (ITA No.2600/Mum/2012) and Dhanlaxmi Builders Vs DCIT (ITA No. 504/Mum/2009) had held 8% to be appropriate profit percentage to estimate profit embedded in on-monies received on sale of units/flats."

7.13 Following the above, we accordingly uphold the assessee's offer of 8% of the on-monies receipts in the returns of income filed u/s 153A of the Act to be fair and reasonable. Hence, no further addition on the impugned issue was required and we therefore direct the AO to delete the addition/s made on account of on-monies, over and above the assessee's offer of 8% in AYs 2015-16, 2016-17, 2017-18, 2019-20 & 2020-21. Hence, the grounds taken by the Revenue in this regard are dismissed and that of the assessee stands allowed.



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8. Issue 3 : Addition made by way of unaccounted rental income

Ground No. 1 of Assessee's Appeal in AY 2021-22

8.1 The facts relating to this issue are that, in the course of search, one, Mr. S K Choudhary was found to be running a proprietorship concern, viz. Patel Mobile at Ground floor in the parking premises of Feugo Tower which was developed and managed by the assessee. The said Mr. S K Choudhary is noted to have been examined by the Investigating Authorities and he had submitted that he had been paying rent of Rs.40,000/- per month in cash for the godowns from October 2020 and onwards. On the basis of this admission of Mr S K Choudhary, the AO is noted to have made an addition of unaccounted rental income of Rs.2,40,000/- for the period of six months, i.e. October 2020 to March 2021. On appeal, the Ld. CIT(A) is noted to have confirmed the impugned addition. Being aggrieved by the order of Ld. CIT(A), the assessee is now in appeal before us.

8.2 Heard both the parties. At the time of hearing, the Ld. AR for the appellant was unable to controvert the following findings recorded by the Ld. CIT(A) for confirming the impugned addition :-

“67. I have considered the facts of the case and submission of the appellant. Sh. Shravan Kumar Choudhary has stated to have paid Rs. 2,40,000/- rent in cash to Mr. Imran Rubberwala. The premises which are stated to be used by him are located in the appellant's project. Sh. Imran Ansari is also an employee of Rubberwala Group. Besides, there are various other evidences to



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show that the appellant has been in receipt of unaccounted cash. Sh. Shравan Kumar Choudhary has reiterated its contention during post search proceedings also. If the claim was untrue, the appellant could have easily prove it otherwise given that the premises are located in the very same project being developed by the appellant. It would have been impossible for a person to use the premises in the building being developed by the appellant commercially and yet he is not aware of the same. This grounds stands dismissed.”

8.3 It is noted that the assessee was unable to dislodge the fact that Mr. S K Choudhary was found to be running a proprietorship concern, viz. Patel Mobile at Ground floor in the parking premises of Feugo Tower and therefore his statement admitting to paying rent in cash cannot be discarded. Clearly, it would have been impossible for any person to operate from the premises without either purchasing the space from the assessee or paying rent to the assessee. For the aforesaid reasons, we see no reason to interfere with the above findings of Ld. CIT(A) and accordingly confirm the impugned addition. This ground of the assessee is therefore dismissed.

9. In the result, the appeals of the assessee for AYs 2013-14, 2014-15, 2015-16, 2016-17, 2017-18, 2019-20 & 2020-21 stands allowed and the appeal of the assessee for AY 2021-22 is dismissed. Further, the appeals of the Revenue for AYs 2013-14, 2014-15, 2016-17, 2017-18, 2019-20, 2020-21 & 2021-22 stands dismissed.

Order pronounced in the open court on this 07/06/2024.

Sd/-
(B R BASKARAN)
ACCOUNTANT MEMBER

Sd/-
(ABY T. VARKEY)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 07/06/2024.



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Vijay Pal Singh, (Sr. PS)

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1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
5. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

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