

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE
BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

IT(SS)A No. 29/Ind/2023 (AY: 2010-11)

IT(SS)A No. 32/Ind/2023 (AY: 2015-16)

Shri Sharad Sharma, H-3B, Nishant Colony, 74 Bunglows, TT Nagar, Bhopal (PAN: AMZPS9791D) (Assessee/Appellant)	<u>बनाम/</u> Vs.	ACIT, Central, Gwalior (stationed at Bhopal) (Revenue/Respondent)
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ITA No. 304/Ind/2023 (AY: 2015-16)

ITA No. 309/Ind/2023 (AY: 2012-13)

DCIT Central, Gwalior (stationed at Bhopal) (Revenue/Appellant)	<u>बनाम/</u> Vs.	Shri Sharad Sharma, H-3B, Nishant Colony, 74 Bunglows, TT Nagar, Bhopal (PAN: AMZPS9791D) (Assessee/Respondent)
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Assessee by	Shri Kunal Agrawal
Revenue by	Shri Ram Kumar Yadav, CIT
Date of Hearing	29.05.2024
Date of Pronouncement	19.07.2024

आदेश / ORDER

Per B.M. Biyani, A.M.:

Feeling aggrieved by a consolidated appeal-order dated 09.06.2023 passed by Commissioner of Income-tax (Appeal)-3, Bhopal ["CIT(A)"] which in turn arises out of a consolidated assessment-order dated 27.12.2017 passed by ACIT (Central), Gwalior (stationed at Bhopal) ["AO"] u/s 153A/143(3) of the

Income-tax Act, 1961 ["the Act"], the assessee and revenue both have come in the captioned appeals.

2. The background facts leading to present appeals are such that a search u/s 132 of the Act was carried by authorities upon the assessee on 01.07.2015 pursuant to which assessments were framed u/s 153A for preceding six years (AYs 2010-11 to 2015-16) and assessment of search-year (AY 2016-17) was framed u/s 143(3) vide a consolidated assessment-order dated 27.12.2017. Presently we are concerned with AY 2010-11, 2012-13 and 2015-16 in which the AO made certain additions. Aggrieved, the assessee carried matter in first-appeal before CIT(A). The CIT(A) partly allowed assessee's appeals. Now, both sides have come in captioned appeals for their respective grievances.

3. Since these appeals arise from same orders of lower-authorities and many of the issues are common/inter-related; they were heard together at the request of parties and are being disposed of by this consolidated order for the sake of convenience, brevity and clarity. In the subsequent discussions, we would adjudicate these appeals in the sequence of ITA Nos. registered by ITAT.

Assessee's IT(SS)A No. 29/Ind/2023 - AY 2010-11:

4. Following grounds are raised in this appeal:

1. *On facts and circumstances of the case and in law, the Ld. CIT(A) erred in confirming the action of the Ld. A.O by sustaining the addition of Rs. 5,00,000/- made on account of unexplained cash credits.*
 2. *On facts and circumstances of the case and in law, the Ld. CIT(A) erred in upholding the action of the Ld. A.O by sustaining the addition even when the document pertained to M/s Tirupati Balaji Enterprises and can be deciphered from the seized document itself.*
 3. *On facts and circumstances of the case and in law, the Ld. CIT(A) erred in ignoring the jurisprudence that the presumption enunciated u/s 132(4A) of the Act is not conclusive but a rebuttable presumption.*
5. These all grounds raise a single issue of the addition of Rs. 5,00,000/- made by AO and upheld by CIT(A) on account of unexplained cash credit.
6. The AO has made this addition in Para 16 of assessment-order on the basis of a loose paper seized during search marked as "LPS/SS-1-Page 72" which the AO has extracted in assessment-order and copy of same is also filed at Page 126 of Paper-Book. The AO observed that the loose paper contained details of certain financial transactions in cash and cheque aggregating to Rs. 72,75,000/- of different dates with the heading "Tirupati Bank A/c". When the AO show-caused assessee to explain transactions, the assessee submitted vide reply dated 28.08.2017 that he has not made the impugned document and that he has no concern in the name of "Tirupati". The AO rejected assessee's submission by stating that document was seized from assessee's premise, therefore the same would be presumed as belonging to assessee and the contents would also be presumed to be true u/s 132(4A). Ultimately, the AO made addition of Rs. 5,00,000/- in respect of one transaction dated 29.08.2009 of 'cash deposit in OBC TT Nagar' noted in loose paper.

7. During first-appeal, the assessee submitted that the seized document was titled as "Tirupati Bank A/c" and therefore the notings made therein cannot be said to be pertaining to assessee. The assessee also pointed out that no question was raised *qua* this document in the statement recorded u/s 132(4), therefore the provisions of section 132(4A) cannot apply. The assessee requested the CIT(A) to delete the addition made by AO. But the CIT(A) rejected assessee's submission by citing two-fold reasons, namely (i) the document was found from possession of assessee, hence the presumption u/s 132(4A) applied and (ii) the assessee being a partner of a firm named M/s 'Tirupati Balaji Enterprises' was having access to all documents/books of firm and could very well explain the source of deposit in bank a/c of such partnership firm but the assessee has failed to do so. Ultimately, the CIT(A) upheld the addition made by AO.

8. Before us, Ld. AR for assessee firstly drew our attention to Para 15 of assessment-order wherein the AO has made separate additions of Rs. 8,15,000/- in AY 2010-11 and Rs. 6,15,000/- in AY 2011-12 on account of unexplained cash capital introduced by assessee in partnership firm named 'M/s Tirupati Balaji Enterprises' on the basis of another loose-paper 'LPS/SS-2-Page 76' seized during search and extracted by AO in assessment-order. This another loose-paper also contained the details of certain cash and cheques transactions made by assessee. From this loose-paper, the AO concluded that the assessee introduced cash capital of Rs. 8,15,000/- and Rs. 6,15,000/- in financial year 2009-10 and 2010-11

respectively in the said partnership firm from unexplained sources, therefore the AO made respective additions in AY 2010-11 and 2011-12. However, in first-appeal, vide Para 3.7.2 of order, the CIT(A) accepted assessee's submission that the transactions noted in this document represented cash and cheque capital introduced by assessee in partnership firm 'M/s Tirupati Balaji Enterprises' which the assessee informed to AO in a letter dated 30.11.2017 during assessment-proceeding. The assessee also filed copies of his Capital A/cs in the books of firm for the financial year 2009-10 and 2010-11 to show that the transactions were in fact recorded. The CIT(A) accepted assessee's submission and deleted the impugned additions of Rs. 8,15,000/- and Rs. 6,15,000/-.

9. Having explained thus, Ld. AR referred Ground No. 2 raised by assessee and submitted that the seized document itself bears title 'Tirupati Bank A/c' and pertained to 'M/s Tirupati Balaji Enterprises', therefore the presumption u/s 132(4A) against assessee cannot be applied. Ld. AR went further to submit that all transactions mentioned in two documents "LPS/SS-1-Page 72" and "LPS/SS-2-Page 76" seized during search, are matching (except one transaction of Rs. 5,00,000/- with the jotting of "deposit in OBC TT Nagar Bank A/c") and those transactions were also standing recorded in the books of partnership firm 'M/s Tirupati Balaji Enterprises' as accepted by Ld. CIT(A). Therefore, the impugned document does not belong to assessee. Ld. AR standing at the Bar made a very forceful submission that the assessee does not have any a/c with "OBC TT Nagar

Bank" and there was no transaction of Rs. 5,00,000/- done by assessee. Therefore, no addition was warranted in assessee's hands. Alternatively, the separate addition of Rs. 8,15,000/- made by AO in the hands of assessee on account of unexplained cash capital in partnership firm, can be said to have included the transaction of Rs. 5,00,000/- also. Therefore, the addition must be deleted.

10. Relying to above, Ld. DR for revenue submitted that the assessee has been changing his stand from time to time. He submitted that in reply dated 28.08.2017 filed to AO, the assessee stated that he has no concern in the name of 'Tirupati' but before CIT(A) the assessee filed Capital A/cs from the books of partnership firm 'M/s Tirupati Balaji Enterprises'. Even after that, the CIT(A) has observed that the assessee failed to explain the transaction of Rs. 5,00,000/- in the bank a/c of partnership firm although the assessee had all access to documents/books of firm. Therefore, the addition made by AO and confirmed by CIT(A) is in order and must be upheld.

11. In re-joinder, Ld. AR submitted that the assessee filed initial reply dated 28.08.2017 to AO stating that he had no concern in the name of 'Tirupati' because the assessee in fact did not own any such concern named as 'Tirupati'. However, when the assessee subsequently found that the transactions noted in the loose-paper pertained to a partnership firm 'M/s Tirupati Balaji Enterprises', the assessee, after re-verification, filed another letter dated 30.11.2017 to AO informing that the transactions were recorded

in the books of said firm. However, the AO did not take any cognizance of assessee's letter subsequent dated 30.11.2017 but the CIT(A) has taken due note of the same and deleted another addition of Rs. 8,15,000/- made by AO. Thus, Ld. AR contended, there was no change in the stand of assessee. The assessee has made correct submissions to AO.

12. We have considered rival submissions of both sides and carefully examined the documents to which our attention is drawn. Admittedly, there were two loose-papers and the transactions in those two papers were matching except one transaction of Rs. 5,00,000/-. It is also a position of assessee's case that the AO made two separate additions in AY 2010-11, one of Rs. 5,00,000/- and other of Rs. 8,15,000/- on the basis of those two loose-papers. During first-appeal, the CIT(A) confirmed the addition of Rs. 5,00,000/- but deleted the addition of Rs. 8,15,000/-. So far as deletion of Rs. 8,15,000/- is concerned, the CIT(A) has taken cognizance of the letter dated 30.11.2017 filed by assessee to AO and accepted that the transactions were duly recorded in the books of firm. Although Ld. DR is right in claiming that the assessee, in letter dated 28.08.2017, submitted to AO that he had no concern in the name of "Tirupati" but we cannot ignore the factual finding recorded by CIT(A) that the assessee subsequently filed another letter dated 30.11.2017 to the very same AO informing that the transactions stood recorded in the books of partnership firm 'M/s Tirupati Balaji Enterprises'. This clinching fact admitted by CIT(A) is not refuted by revenue. It is also a point that the AO has not made any whisper about the

letter dated 30.11.2017 in assessment-order but the CIT(A) has taken note of the same and given relief to assessee in the matter of another addition. Thus, there appears a *prima facie* merit in the submission of assessee that since he had no proprietary concern of his own in the name of 'Tirupati', he informed to AO in initial letter dated 28.08.2017 accordingly but subsequently after re-verification of transactions when he came to know that the transactions pertained to partnership firm 'M/s Tirupati Balaji Enterprises', the assessee filed another letter dated 30.11.2017 to AO explaining the status of transactions in the books of such partnership firm. Therefore, it should not be viewed as a change in stand of assessee as contended by Ld. DR. In any case, when the assessee filed another letter dated 30.11.2017, the AO could very well discuss the same in assessment-order but the same has not been done. This is one aspect of the matter. Now, coming to the exact issue of addition of Rs. 5,00,000/- upheld by CIT(A), the assessee makes a categorical submission that he did not have any a/c with "OBC TT Nagar Bank". Notably, the AO has also not made any enquiry from concerned bank to ascertain whether the assessee had any such a/c or not. The AO has simply made an addition on the basis of jotting in loose-paper. Further, the CIT(A) has, despite taking cognizance of assessee's subsequent letter dated 30.11.2017 and thereby admitting that all other transactions noted in the seized document were duly recorded in the books of firm, had not made any enquiry from the partnership firm as to the status of the transaction of Rs. 5,00,000/-. In any case, when the

assessee is categorically denying to have any a/c with "OBC TT Nagar Bank" and the Ld. AR for assessee is strongly placing this claim of assessee with full force in open court, we do not find any justification to maintain the impugned addition in assessee's hands. We are, therefore, inclined to delete the addition of Rs. 5,00,000/- made in assessee's hands and we do so. The assessee succeeds in its grounds.

13. Thus, the assessee's appeal of AY 2010-11 is allowed.

Assessee's IT(SS)A No. 32/Ind/2023 – AY 2015-16:

14. Following grounds are raised in this appeal:

- 1. On facts and circumstances of the case and in law, the Ld. CIT(A) erred in confirming the addition made by the Ld. A.O. of Rs. 10,00,000/- as unexplained investment of the appellant.*
- 2. On facts and circumstances of the case and in law, the Ld. CIT(A) erred in confirming the addition made by the Ld. Assessing Officer without considering facts of the case, submission made before him and mistaken understanding of law.*
- 3. The appellant craves, leave to add and any new ground of appeal or alter, amend or delete any of the above grounds of appeal.*

15. These all grounds raise a single issue of addition of Rs. 10,00,000/- made by AO and upheld by CIT(A) on account of unexplained investment.

16. The AO has made this addition in Para 18 of assessment-order on the basis of "LPS-SS-1-Page-4" seized during search. He has observed that seized document bore a heading "T.S." and was dated 19.11.2014. He has re-produced the document in assessment-order. The AO show-caused assessee to explain the transactions noted in impugned document to which

the assessee replied that he was not concerned with any of the entities/ persons mentioned in the impugned document. The assessee denied any relationship with the document. The AO rejected assessee's submission. He observed that the document showed a transaction of Rs. 10,00,000/- on 08.10.2014 showing the narration "Cash Truba". Ultimately, the AO concluded that the transaction represented undisclosed investment of assessee and made addition. During first-appeal, the CIT(A) upheld addition made by AO.

17. Before us, Ld. AR for assessee raised following contentions:

- (i) The addition has been made on the basis of rough jotting in the document.
- (ii) The document does not reflect whether any amount was given or received. It is a dumb document.
- (iii) The department has not found any corroborative evidence.
- (iv) No enquiry was done by AO from concerned persons.
- (v) The onus was upon AO to establish that the assessee had in fact given loan but the AO has failed to discharge such onus.

18. Per contra, Ld. DR for revenue made following submissions:

- (i) The document was found from possession of assessee, therefore the presumptions u/s 132(4A) were applicable according to which the

document belonged to assessee and the contents of document were also true.

- (ii) When the document was found from assessee himself, the primary onus was upon assessee to explain the contents of documents. How can assessee claim that there was any onus upon AO when the assessee has failed to discharge primary onus cast upon him?
- (iii) The assessee merely claimed before lower-authorities that the document did not belong to him. Such blanket submission of assessee cannot be accepted when the document was un-disputably seized from assessee during search.
- (iv) The document clearly shows the amount of loan given, payment received, dates of transactions, etc. How can such a document be treated as a dumb document?
- (v) The CIT(A) has given a perfect finding and upheld addition made by AO.

19. We have considered rival submissions of both sides and perused the orders of lower-authorities. We find that the CIT(A) has passed following order upholding the addition made by AO:

"3.10.2 The appellant before me has contended that the impugned document contained various rough jottings including jotting of cash transaction dated 08.10.2014 of Rs. 10 lacs titled as 'cash truba harish'. The loose paper is titled as "T.S." and also mentions jottings as 'TBE', 'SR' & 'Sallu'. Therefore, the jotting mentioned the seized loose paper cannot be held to be pertaining to

appellant. Further, no independent enquiry was made by the Ld. AO from 'Truba' in order to obtain their version on the impugned document and, therefore, the Ld. AO erred in applying provisions of section 132(4A) of the Act. Further, the document cannot be held to be incriminating in nature.

3.10.3 I have considered the facts of the case material evidences on record, written submission filed by appellant and to the facts and findings of the Ld. AO inter alia material brought on record. Here, I find that the impugned document was found in possession of appellant and, therefore, onus enshrined u/s 132(4A) is entrusted upon appellant to explain the contents of loose paper with logical reasoning or documentary evidences. In the subject issue in hand, the appellant has claimed that the impugned loose paper contained abbreviations such as 'truba', 'SR' & 'Sallu' and does not pertain to appellant. It is established fact that appellant had made investment in TASK (supra) in the form of unsecured loan and therefore, he cannot claim that the loose paper does not belonged or related to him. The appellant neither before the Ld. AO nor before me has explained the nature and source of cash as mentioned in the loose paper. Admittedly, the impugned loose paper was found from possession of appellant and, therefore, as per provisions of section 132(4A) of the Act, the appellant ought to have explained source of cash investment in 'truba'. Further, the appellant could also have demonstrated that the impugned cash was not paid by him, however, none of which have been done. Therefore, it can safely be presumed that the impugned cash was paid by the appellant for which no explanation has been offered to explain source thereof. Thus, in absence of any meaningful explanation with supportive documentary evidence, I don't find any infirmity in the order of the Ld. AO and, thus, addition made by the Ld. AO amounting to Rs. 10,00,000/- is upheld. Therefore, appeal on this ground is dismissed. "

20. On perusal, we do not find any infirmity, perversity or error in the order of CIT(A). We agree that the document was found in possession of assessee and the presumptions u/s 132(4A) were attracted. The assessee has not brought anything on record to dislodge the presumptions. The assessee's only submission that the document did not belong to him, is not sufficient to go away from presumptions created u/s 132(4A). Therefore, the pleadings made by Ld. AR are also not acceptable. We do not find any material coming from assessee to rebut the observations and conclusions made by CIT(A). Therefore, without repeating the contents of CIT(A)'s order

for the sake of brevity, we suffice to concur with the order of CIT(A) and uphold the same. The assessee fails in its grounds.

21. Thus, the assessee's appeal of AY 2015-16 is dismissed.

Revenue's ITA No. 304/Ind/2023 – AY 2015-16:

22. Following grounds are raised in this appeal:

1. *Whether on the facts and on the circumstances of the case and in law, the Ld. CIT(A) was justified in deleting the addition of Rs. 45,00,000/- on account of unexplained cash loan, on the basis of documents seized from the assessee's premises (same residential address as that of Shri Shailendra Sharma), despite the presumption laid down u/s 132(4) of the Act regarding ownership and accuracy of seized documents, which was not adequately countered by the assessee?*
2. *Whether on the facts and on the circumstances of the case and in law, the Ld. CIT(A) was justified in accepting the submission that incriminating documents with entries of unsecured loan given by the assessee to M/s Truba Advance Science Kombine (TASK), is a dumb document and in deleting the addition of Rs. 45,00,000/-, without taking cognizance of the fact that the said seized incriminating document is a dated document with names of lenders (including the assessee) & amount received from them by M/s Truba Advance Science Kombine (TASK) as on date specified therein, wherein several names in the seized document correspond with the names of lenders of unsecured loan as per the actual books of M/s Truba Advance Science Kombine (TASK), with a higher amount mentioned against their names in the seized document vis-à-vis the books of M/s. TASK?*
3. *Whether on the facts and on the circumstances of the case and in law, the Ld. CIT(A) was justified in relying upon the assessee's submission on the issue of cash loan of Rs. 45,00,000/- when the assessee could not explain the source of the said unsecured loan of Rs. 45 lakhs extended by the assessee to M/s Truba Advance Science Kombine and not recorded in the books of M/s Truba Advance Science Kombine during the assessment proceedings?*
4. *Whether on the facts and on the circumstances of the case and in law, the Ld. CIT(A) was justified in deleting the addition of Rs. 2,44,30,000/- on the basis of surrender in the statement recorded on 02.07.2015 under oath u/s 132(4) of the Act without appreciating the fact that such surrender was made by the assessee on the basis of income received him from his firms which was not disclosed while filing ITR by the assessee and the surrender was reaffirmed by the assessee consequently in his statement recorded on 11.12.2015 u/s 131 of the Act?*

5. *Whether on the facts and on the circumstances of the case and in law, the Ld. CIT(A) was justified in deleting the addition of Rs. 2,44,30,000/- and accepting the retraction of the assessee without taking into consideration the fact that such retraction was made after a period of 2 years from the date of search and the assessee failed to justify the delayed retraction with any documentary evidence?*
6. *Whether on the facts and on the circumstances of the case and in law, the Ld. CIT(A) was justified in deleting the addition of Rs. 2,44,30,000/- and accepting the retraction of the assessee without taking into that:*
 - a) *If in the course of such search, the assessee makes some admission, he debars the authorized officer from making further investigation. In view of this, Legislature in its wisdom has provided that such statement can be used in evidence and the assessment can be made on the basis of such statement?*
 - b) *It is settled law that admission by a person is a good piece of evidence though not conclusive and the same can be used against the person who makes it. The reason behind this is, a person making a statement stops the opposite party from making further investigation' (Bhogilal Mool Chand [2005] 3 SOT 211 (Ahd.)?*
7. *On the facts and circumstances of the case, whether the Ld. CIT(A) has erred in deleting the addition of Rs. 5,27,923/- on account of income from house property, relying upon documents statements of the firm furnished by the assessee before CIT(A) as additional evidence, without providing any opportunity to be assessing officer to rebut the same, when it is mandatory as per Rule 46A of Income Tax Rules at Ld. CIT(A) shall not take into account any evidence produced under Rule 46(1) of Income Tax Rules, unless the Assessing Officer has been allowed a reasonable opportunity to examine such evidence and rebut the same?*
8. *Whether on the facts and on the circumstances of the case and in law, the Ld. CIT(A) was justified in deleting the addition of Rs. 15,08,000/- on account of cash deposits in bank accounts, without appreciating that:*
 - a) *the assessee failed to furnish detailed date-wise cash flow statement of these bank accounts for AY 2015-16 and justify the opening cash in hand shown in the receipt and payment account for the FY 2009-10 despite giving reasonable time during assessment proceedings?*
 - b) *on this issue the Ld. CIT(A) has accepted additional evidence without providing any opportunity to the assessing officer to rebut the same, when it is mandatory as per Rule 46A of Income Tax Rules that CIT(A) shall not take into account any evidence produced under Rule 46(1) of Income Tax Rules, unless the Assessing Officer has been allowed a reasonable opportunity to examine such evidence and rebut the same?*

Ground No. 1 to 3:

23. In these grounds, the revenue claims that the CIT(A) was not justified in deleting the addition of Rs. 45,00,000/- made by AO on account of unexplained cash loan given by assessee.

24. The AO has made this addition in Para 10 of assessment-order. He has noted that a document marked as "LPS-1-Page 23 to 28" was seized from residence of Shri Shailendra Sharma which revealed that the assessee has given a loan of Rs. 50,00,000/- to M/s Truba Advance Science Kombine (M/s TASK) but the post-search enquiry made from M/s TASK revealed that a loan of Rs. 5,00,000/- was only recorded in the books of M/s TASK in the name of assessee. Therefore, the AO concluded that the differential of Rs. 45,00,000/- was invested by assessee in M/s TASK from undisclosed sources and accordingly made addition.

25. During first-appeal, the CIT(A) deleted addition by passing following order:

"3.3.3 I have considered the facts of the case, material evidences on record, written submission filed by appellant and to the facts and findings of the Ld. AO inter alia material brought on record. After analyzing entire facts, I reach to conclusion that impugned addition was made on the basis of assumption and presumption which neither sustainable on facts nor in law. The Ld. AO has reached to conclusion that appellant has given unsecured loan of Rs. 50,00,000/- to TASK and only a sum of Rs. 5,00,000/- was shown in books of account of TASK. On plain and cursory look the impugned loose paper does not clarifies whether the amount mentioned against the name of appellant and other individuals represents unsecured loan given by appellant (as alleged by the Ld. AO) or amount received by appellant from TASK or the same is for some other purpose best known to the author of the impugned loose paper. Admittedly, the impugned loose paper was found from possession of Shri Shailendra Sharma and therefore, the onus enshrined u/s 132(4A) of the Act to explain the contents of the same lies on Shri Shailendra Sharma. In this regard, statement of Shri Shailendra Sharma, brother of appellant, was recorded u/s 131 of the Act, wherein he explained that the impugned loose

paper contains proposed future projections of investments to be made in university. It is also worth mentioning that the Ld. AO has not disputed the statement of Shri Shailendra Sharma in this context. The statement of Shri Shailendra Sharma also finds support from the factual position that the amounts mentioned in the seized loose papers does not matches with the actual outstanding balance in the books of TASK. Also, in the case of 9 individuals no such amount was recorded in books of TASK. Therefore, the only conclusion which can be drawn in narrated set of facts is that the impugned loose paper represents proposed future projections of investments to be made in TASK by the appellant and other concerns/persons. Per contra, the Ld. AO has treated the jottings made on impugned loose paper as gospel truth and made addition of difference amount in the hands of appellant without establishing a direct nexus with the alleged amounts with supportive independent evidences. Therefore, in absence of any cogent evidence having direct nexus with the impugned transaction, the said impugned papers i.e. page no 25 of LPS-1 are nothing but deaf and dumb documents and cannot be used against the assessee.

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

ACIT Vs. Satyapal Wassan (2007) 295 ITR 9 (AT) 352 (Jabalpur):

Held that

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

Most important ratio laid down in the said judgment is that "impugned document" must be speaking one and without any second interpretation and must reflect all the details about transactions of the assessee. In the instant case, the impugned loose papers are nothing but jotting of future projections of investment and no actual investments. The dumb document does not even bear any signature of appellant, details of recipient of amounts, mode of receipt of amount etc., however, the Ld. AO has presumed that appellant had made investment out of undisclosed sources. Also, the Ld. AO does not have any independent corroborative evidence having nexus that the alleged unaccounted investment by the appellant. Absence of these vital details is making the loose papers under consideration as "deaf & dumb document". The onus was solely on the Ld. AO to fill such vital gaps by bringing positive evidence on record and prove the allegation about alleged "investment out of undisclosed sources" by the assessee, which he utterly failed to do so. The

seized material recovered from the possession of brother of the appellant has not been corroborated with the independent evidences and such document cannot be termed as books of account and thus, cannot be used to assess total income of the appellant. These propositions are also well supported by the following judicial pronouncements:

CBI vs VC Shukla 3 SCC 410: The Hon'ble Supreme Court has held that loose sheets of paper cannot be termed as 'book' within the meaning of s. 34 of Evidence Act. It has also been held therein by the Hon'ble Supreme Court that even correct and authentic entries in books of account cannot, without independent evidence of their trustworthiness, fix a liability upon a person. The Hon'ble Supreme Court also observed that even assuming that the entries in loose sheets are admissible under s. 9 of the Evidence Act to support an inference about correctness of the entries still those entries would not be sufficient without supportive independent evidence.

Common Cause (A Registered Society) Vs. Union of India - 30 ITJ 197 (SC): In this case, the Hon'ble Court held that without any independent evidence or corroborative material, no addition is permissible on the basis of loose paper jottings & notings. The relevant paras of the order are as under :-

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

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

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

"14. In setting aside the order of the trial court, the High Court accepted the contention of the respondents that the documents

were not admissible in evidence under Section 34 with the following words:

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

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

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

20. It is apparent from the aforesaid discussion that loose sheets of papers are wholly irrelevant as evidence being

not admissible under Section 34 so as to constitute evidence with respect to the transactions mentioned therein being of no evidentiary value. The entire prosecution based upon such entries which led to the investigation was quashed by this Court."

3.3.5 Further, in numerous other case laws courts have consistently upheld the view that no addition could be made in the hands of the assessee on the basis of the dumb loose papers seized during search, in absence of any corroborative material to show unaccounted expenditure etc. Some of the case laws are as under:-

- (i) **M M Financiers (P) Ltd Vs. DCIT (2007) 107 TTJ (Chennai) 2000**
Held that "no addition could be made in the hands of assessee on the basis of the dumb loose slips seized from his residence, in the absence of any corroborative material to show payment of any undisclosed consideration by the assessee towards purchase of land".
- (ii) **Monga Metals (P) Ltd Vs. ACIT 67 TTJ 247 (All. Trib)**
Holding that Revenue has to discharge its burden of proof that the figures appearing in the loose papers found from assessee's possession constitute undisclosed income. [In the present case, loose papers were not even seized from assessee's possession].
- (iii) **Pooja Bhatt Vs. ACIT (2000) 73 ITD 205 (Mum. Trib)**
Held that *where* document seized during search was merely a rough noting and not any evidence found that actual expenditures were not recorded in books of account, additions not justified. [In the instant case, similarly no other corroborative evidence was found in search to prove that details/figures mentioned in notings on page 117 to 119 of A/1 represent 'on money' payments by the assessee].
- (iv) **Atul Kumar Jain Vs. DCIT (2000) 64 TTJ (Del.Trib) 786 -**
Held that additions based on chit of paper, surmises, conjectures etc could not be sustained in the absence of any corroborative evidence supporting it. [Similarly in present case, neither either parties have admitted payment/receipt of 'on money' nor any corroborative evidence was seized to support the findings of the AO].
- (v) **S K Gupta Vs. DCIT (1999) 63 TTJ (Del.Trib) 532**
Held that

"that additions made on the basis of torn papers and loose sheets cannot be sustained as same do not indicate that any transaction ever took place and does not contain any information in relation to the nature and party to the transaction in question."
- (vi) **Jagdamba Rice Mills Vs. ACIT (2000) 67 TTJ (Chd) 838**
Held that

"No addition can be made on dump documents".

*It is settled legal position that onus of proof is on the person who makes any allegation and not on the person who has to defend. As per legal maxim "**affairmanti non neganti incumbit probatio**" means burden of proof lies upon him who affirms and not upon him who denies. Similarly as per doctrine of common law "**incumbit probatio qui digit non qui negat**" i.e. burden lies upon one who alleges and not upon one who deny the existence of the fact. Further, it is most important to mention that neither the appellant nor the beneficiary TASK has ever admitted that sum of Rs. 50,00,000/- was paid by appellant. The Ld. AO has failed to discharge his onus of proof especially when addition has been made under "deeming fiction". In view of this lacune on the part of Ld. AO, impugned addition is legally not sustainable.*

3.3.6 *In such facts and circumstances, Hon'ble jurisdictional MP High Court in the case of **PCIT vs Shri Pukhraj Soni** (supra), by following the decision of Hon'ble Apex court in the case of **Common Cause** (supra) has held that "The Apex Court has taken into account in similar circumstances the incriminating materials in form of random sheets, loose papers, computer prints, hard disk and pen drives etc and has held that they are inadmissible in evidence, as they are in the form of loose papers". A similar view was taken by Hon'ble jurisdictional ITAT Indore bench in the case of **Shri Mohanlal Chugh** (supra) and in the case of **M/s KL Sharma & Sunita Maheshwari** (supra).*

3.3.7 *In absence of any corroborative evidence to prove that the impugned amount has exchanged hands, the Ld. AO has no locus to assume that appellant has paid sum of Rs. 45,00,000/- out of undisclosed sources. It is settled law that AO cannot make any addition merely on basis of suspicion, however strong it may be. The Ld. AO is not justified in presuming certain facts without having anything to corroborate. Hon'ble Supreme Court in the case of **Dhakeshwari Cotton Mills Ltd. v/s CIT (1954) 26 ITR 775 (SC)** has held that although strict rules of evidence Act do not apply to income tax proceedings, still assessment cannot be made on the basis of imagination and guess work. It has been held in the case of **Umacharan Saha & Bros co. v/s CIT 37 ITR 21 (SC)** that suspicion, however strong cannot take place of evidence. Similar views have been expressed by Apex court in the case of **Dhiraj Lal Girdharilal v/s CIT (1954) 26 ITR 736 (SC)**.*

3.3.8 *In view of the above discussion, material evidences on record and case laws cited, firstly, the loose papers or rather say it as dumb document should be a speaking one having direct nexus with the impugned investment, which was not in the case of appellant. Secondly, the loose paper is not signed by the appellant. The appellant has also claimed that he is not the author of the said loose paper which has also not been disputed by the Ld. AO. Thirdly, no independent incriminating material was found suggesting alleged investment by the appellant. Even during post search investigation the outstanding position of unsecured loan was called for from TASK and none of the alleged investment made was found recorded in books of TASK. Fourthly, neither the appellant nor any other person has admitted of any such cash transaction. My*

*findings on the issue under consideration are based on the various conclusions drawn by me which have been discussed in the above paras. Therefore, the Ld. AO was not justified in making additions simply on guess work and solely on the basis of some dumb document. Thus, the addition made by the Ld. AO amounting to **Rs. 45,00,000/- is Deleted**. Therefore, appeal on these grounds is **Allowed.**"*

26. Before us, Ld. DR for revenue submitted that the CIT(A) has wrongly given relief to assessee. He submitted that the AO has made addition on the basis of seized document and not on mere presumption. He referred Para 10 of AO's order wherein the AO has re-produced the seized document and also extracted 'Group Summary' from books of M/s TASK and submitted that many of the entries mentioned in the seized document are matching with the books of M/s TASK and wherever there is a mis-matching/differential, investment had been made in cash by respective parties from undisclosed sources and so far the assessee is concerned, the seized document shows investment of Rs. 50,00,000/- whereas the books of M/s TASK shows only investment of Rs. 5,00,000/-, therefore there is a mis-matching/differential of Rs. 45,00,000/- indicating undisclosed investment made by assessee. Therefore, the AO was very much justified in making impugned addition in the hands of assessee. He submitted that the CIT(A) has made a wrong observation that the document was found from possession of Shri Shailendra Sharma and not from assessee whereas the fact is such that Shri Shailendra Sharma is a brother of assessee and the assessee and Shri Shailendra Sharma occupied the same premise.

27. Per contra, Ld. AR for assessee opposed the contentions of Ld. DR with following submissions:

- (i) The AO has himself noted in Para 10 of assessment-order that the document was seized from residence of Shri Shailendra Sharma. That even if Shri Shailendra Sharma and assessee happen to be brothers and the premise of both brothers is same, every individual is a separate person/assessee in the eyes of civil law as well as Income-tax law and how can a document not seized from assessee be attributed to assessee?
- (ii) The authorities have interrogated Shri Shailendra Sharma in Q.No. 10 of the statements recorded u/s 132(4) and in response Shri Shailendra Sharma has immediately and categorically stated that the seized document "LPS-1-Page 23 to 28" contained future projections of M/s TASK. The relevant portion of Q.No. 10 raised by authorities and reply given by Shri Shailendra Sharma are re-produced below for an immediate reference (Page 44-45 of Paper-Book):

"प्रश्न . 10आपके निवास पर तलाशी एवं जब्ती की कार्यवाही के दौरान जब्त LPS-1 के पृष्ठसं 1 . से 43 आपको दिखाये जा रहे हैं । कृपया इस LPS के सभी पृष्ठोंक अवलोकन करें एवं इनका स्पष्टीकरण दीजिए ।

उत्तर - XXX

पृष्ठक्रमांक 23 से 28 Trubai Education society की भविष्य की विश्वविद्यालय की योजना के संबंधमें working करते समय तैयार किए गए कुछ कागज प्रतीत होते हैं ।
"

(iii) That the AO has not done any enquiry from M/s TASK regarding the difference. Therefore also, the addition made by AO is patently wrong.

28. We have considered rival submissions of both sides and perused the documents filed in Paper-Book to which our attention has been drawn. Admittedly, the AO has compared the amount noted in the seized document with the amount recorded in the books of M/s TASK against assessee's name and treated the differential of two amounts as undisclosed investment made by assessee. Therefore, it becomes important to know as to what the amounts noted in the seized document were? Whether they represented actual investments made in M/s TASK or they were something else? Undisputably, the document was seized from Shri Shailendra Sharma and the authorities immediately confronted Shri Shailendra Sharma regarding the said document in Q.No. 10 of statements u/s 132(4) as reproduced above. In his statements, Shri Shailendra Sharma instantly stated that the notings in the document were future projections prepared for planning/working of M/s TASK. Thus, the nature of document is clearly explained by Shri Shailendra Sharma in the very statements recorded u/s 132(4). When it is so, how can the AO assume or treat the projected investment of Rs. 50,00,000/- appearing against the name of assessee as something actually invested by assessee? Admittedly, the AO has no other document or basis to draw a conclusion that the assessee really invested Rs. 50,00,000/- in M/s TASK. Needless to mention that the AO has not made any enquiry from M/s TASK to ascertain whether the assessee really made any investment beyond

what was recorded in the books of M/s TASK? Therefore, in the situation, the addition made by AO on mere comparison of two figures, one mentioned in the seized document and other extracted from books of M/s TASK, remains an unproved investment having been considered by the AO on mere surmise and conjecture. Hence, we do not find any justification or strength in the addition made by AO. Consequently, we approve the deletion of addition by CIT(A). The grounds raised by revenue are therefore dismissed.

Ground No. 4 to 6:

29. In these grounds, the revenue claims that the CIT(A) was not justified in deleting the addition of Rs. 2,44,30,000/- made by AO on account of undisclosed income surrendered by assessee in the statements recorded u/s 132(4).

30. The AO has made this addition in Para 12 of assessment-order. He has noted that in reply to Q.No. 8 of statements recorded u/s 132(4) on 02.07.2015, the assessee stated that he had received income from his firms (M/s Sharad Sharma, M/s Tirupti Balaji Enterprises, M/s Linkage Technology Information, M/s Kirpal Construction, M/s Rama Construction and Developers, M/s Jay Bhole Real Estate, M/s Mahadev Buildcon, M/s Hotel Sanchi Regency and Vaishnavi Enterprises Ltd.) but due to lack of information, he was not able to furnish the exact information of income which was received. Therefore, the assessee admitted yearwise income which was not incorporated in income-tax returns. For AY 2015-16, the

assessee admitted such income at Rs. 2,44,30,000/-. The AO has further noted that the surrender was also made to accommodate various loose-papers and documents found during search for which the assessee could not furnish any satisfactory explanation. The AO has further noted that the assessee re-confirmed surrender in statements again recorded on 11.12.2015 u/s 131. The AO has re-produced both of the statements in assessment-order. During assessment-proceeding, when the AO show-caused assessee, the assessee denied having made any voluntary disclosure as the same is not corroborated by business activities of any of the firms or any incriminating material. The assessee filed retraction vide letter dated 24.11.2017 followed by another letter dated 19.12.2017 alongwith an affidavit. The AO, however, rejected assessee's retraction stating that till 24.11.2017, the assessee did not raise any objection and sudden filing of retraction-letter dated 24.11.2017 was an afterthought. Ultimately, the AO made addition in Para 13.5 by observing that though the addition was on the basis of statements recorded u/s 132(4) yet it was based on voluminous seized records with multiple transactions and the reconciliation of each and every document is extremely difficult if not impossible, hence addition is justified to prevent the leakage of revenue.

31. During first-appeal, the CIT(A) deleted addition fully by following order:

"3.4.2 I have considered the facts of the case, plea of the appellant, case laws relied upon by the appellant and Ld. AO and findings of the Ld. AO. The

appellant during appellate proceedings has contended that during the course of search proceedings his statement was recorded u/s 132(4) on 01.07.2015 & 02.07.2015. The appellant in his statement submitted that due to non-availability of timely information from partners certain income pertaining to his partnership firm could not be shown in returns of income and made surrender of additional income aggregating to Rs. 3,70,94,000/- in AYs 2009-10 to 2016-17. However, during post search investigation after receipt of seized material the appellant observed that only the income received from M/s Linkage Technologies in AYs 2009-10, 2010-11 & 2012-13 amounting to Rs. 29,022/-, Rs. 57,489/- & Rs. 37,878/- respectively were not considered while filing returns of income. Therefore, the appellant vide his joint retraction dated 24.11.2017 had retracted from the admission made in his statement recorded u/s 132(4) of the Act. The retraction has been made on following grounds:-

- (i) The declaration is not supported by seized incriminating material
- (ii) The declaration is not backed by investigation by AO or by investigation wing
- (iii) The declaration was made under mental pressure as the wife of Shri Deepak Sharma was diagnosed with breast cancer and they were in hurry to leave for Bombay for treatment.
- (iv) No legal assistance was provided during search proceedings.
- (v) No documents was found and seized in relation with Narmada Health Group.
- (vi) No cross examination of witness was provided by the AO.

3.4.3 The Ld. AO did not accepted the retraction made by the appellant and the same was rejected vide letter dated 29.11.2017 by stating that it was made after a gap of two years from the date of admission of unaccounted and undisclosed income. Further, the admission was made on the basis of corroborative material seized during search. Here, I find that the appellant had partly retracted from the surrender and has accepted additional income received from M/s Linkage Technologies for which a separate addition has also been made by the Ld. AO vide para 11 of the assessment order. Further, the appellant has explained that the partial retraction was made after receipt of seized material which seems to be a valid ground for retraction after a gap of two years. Most importantly, no incriminating material was found during search which could prove that the retraction by the appellant is incorrect. The Ld. AO has also not referred any seized material in support of his allegation and has placed heavy reliance on statement of appellant, which as per appellant was given under mental trauma caused on discovery of cancer to wife of Shri Deepak Sharma. Hon'ble Apex Court in the case of **M/s Baban Singh Vs Jagdish Singh, AIR (1967) SC 68**, has held that the importance and relevance of the averments made in the affidavit cannot be brushed aside without really having any material to contradict the same. Further, Hon'ble Supreme Court in the case of **M/s Mehta Parikh and Company (1956) 30 ITR 181 (SC)** has held that in the case of an affidavit filed on behalf of an assessee, the burden is upon the revenue to prove if the contents of the affidavit can be accepted or not and an affidavit properly verified and filed is a piece of evidence which alongwith other material on record has to be taken into consideration before any finding is arrived at. In the instant case, the Ld AO failed to brought any contrary material on record to prove the contents of the affidavit were wrong. In such a

circumstances, the affidavit sworn by all brothers of appellant deserves to be accepted, as it is a valid piece of evidence. Rejection by the Ld. AO should have been supported by material seized during search and seizure proceedings which he did not do. Thus, the Ld AO was not justified in rejecting the retraction filed in form of affidavit. The appellant in support of its contentions has also placed reliance upon various judicial pronouncements of its favour. It has been held by Hon'ble Supreme Court and other courts that it is open to an assessee show that the admission made in the statement was not correct. The decision of Hon'ble Supreme Court in the case of **Pullangode Rubber Produce Company Limited 91 ITR 18 (SC), Nagubai Amal vs B Sharma Rao AIR 1956 (SC) 593 and Awad Kishore Dass AIR 1979 (SC) 861** are squarely applicable to the case of the appellant. In the case of **Pullangode Rubber Produce Co Ltd (Supra)**, it has been held that "an admission is an extremely important piece of evidence but it cannot be said that it is conclusive. It is open to the assessee who made the admission to show that it is incorrect." In the case of **Nagubai Ammal Vs. B. Sharma Rao** (supra), it has been held "an admission is not conclusive as to the truth of the matters stated therein. It is only a piece of evidence, the weight to be attached to which must depend on the circumstances under which it is made. It can be shown to be erroneous or untrue". In the case of **Smt. S. Jayalakshmi Amman** reported in **390 ITR 189 (Mad)**, it has been held that "we are of the view that mere statement without there being any corroborative evidence should not be treated as conclusive evidence against the maker of the statement." It has been further held that "we are of the considered view that, for deciding any issue, against the assessee, the authorities under the IT Act, 1961 have to consider, as to whether there is any corroborative material evidence. If there is no corroborating documentary evidence, then statement recorded under s. 132(4) of the IT Act, 1961, alone should not be the basis, for arriving at any adverse decision against the assessee. If the authorities under the IT Act, 1961, have to be conferred with the power, to be exercised, solely on the basis of a statement, then it may lead to an arbitrary exercise of such power. An order of assessment entails civil consequences. Therefore, under Judicial review, courts have to exercise due care and caution that no man is condemned, due to erroneous or arbitrary exercise of authority conferred." The court further held that "if the assessee makes a statement under s. 132(4) of the Act, and if there are any incriminating documents found in his possession, then the case is different. On the contra, if mere statement made under s. 132(4) of the Act, without any corroborative material, has to be given credence, than it would lead to disastrous results. Considering the nature of the order of assessment, in the instant case characterised as undisclosed and on the facts and circumstances of the case, we are of the view that mere statement without there being any corroborative evidence, should not be treated as conclusive evidence against the maker of the statement." In the case of **Krishanlal Shivchand Rai Vs. CIT 88 ITR 293 (P & H)**, it has been held that "it is true that authorized officer carrying on search u/s 132 is entitled as per the statutory provision, to record statement of the person searched u/s. 132(4) of the I.T. Act and use that statement for the purpose of assessment. All the same person carrying the search is a person possessing some authority and, therefore, the assessment wholly and exclusively based on confessional statement procured by the revenue authority then, there was no need to have elaborate provision in the statute. There was no need to use long arm of search to collect material for making assessment.

Therefore, it is insisted that confessional statement should be corroborated some material to show that assessment made is true and fair". In view of these decisions, the reliability, importance and sanctity of admission made during search could be refuted only by cogent and convincing evidence. The statement recorded on oath can be retracted later on by showing the cogent evidences/explanation. In the instant case, the statement u/s 132(4) of the Act, was retracted first time during assessment proceedings after the lapse of substantial time period which has been found beyond the control of the appellant and reasoning given for this delay is found satisfactory. More importantly, the retraction is backed by good logic and reasoning. The retraction is also supported by the submission on each and every point made during the assessment proceedings by the appellant. Therefore, making addition ignoring the retracted statement of the appellant and without considering material brought on record during assessment proceedings, the action of the Ld. AO cannot be held justifiable. Considering the above discussion, the contentions of the appellant are found acceptable.

3.4.4 Nonetheless, no specific reference was made by the Ld. AO to any incriminating material having its bearing on the surrendered income. During the course of appellate proceedings, appellant has contended that during the course of search no incriminating material was found in relation to surrendered income. The Ld. A.O has also failed to bring on record any positive evidence having nexus with the assessee or business transaction carried out or income earned by the appellant or by pointing out appellant's connection with the seized document in name or otherwise. Thus, it can be safely concluded that the addition made by the Ld. A.O. was not on the basis of the incriminating material found during the course of search but only on the basis of statement of appellant only. Thus, no irregularity has been brought on record qua the surrendered income and the only addition made is towards income declared in the statement recorded u/s 132(4) of the Act. Hon'ble ITAT Indore in the case of **ACIT(1) VS. Sudeep Maheshwari ITA No 524/Ind/2013 dated 13.02.2019** has held as under:-

"6. It is the case of the assessee that during the course of search & seizure, no incriminating material or undisclosed income or investments were found. It is stated that the assessee was under mental pressure and tired. Therefore, to buy peace of mind, he accepted and declared Rs.3 crores in personal name. It is also stated that the case laws as relied by the A.O. are not applicable on the facts of the present case. The assessee has relied on the decision of the Hon'ble Supreme Court rendered in the case of Pullangode Rubber Produce Co. Ltd. 91 ITR 18 (SC), wherein the Hon'ble Court has held that admission cannot be said that it is conclusive. Retraction from admission was permissible in law and it was open to the person who made the admission to show that it was incorrect. However, reliance is placed on the judgement of the Hon'ble Gujarat High Court rendered in the case of CIT Vs. Chandrakumar Jethmal Kochar (2015) 55 Taxmann.com 292 (Gujarat), wherein it has been held that merely on the basis of admission that few benami concerns were being run by assessee, assessee could not be basis for making the assessee liable for tax and the assessee retracted

from such admission and revenue could not furnish any corroborative evidence in support of such evidence. It was further urged by the assessee that admission should be based upon certain corroborative evidences. In the absence of corroborative evidences, the admission is merely a hollow statement. We have given our thoughtful consideration to the rival contentions of the parties. It is undisputed fact that the statement recorded u/s 132(4) of the Act has a better evidentiary value but it is also a settled position of law that the addition cannot be sustained merely on the basis of the statement. There has to be some material corroborating the contents of the statement. In the case in hand, revenue could not point out as what was the material before the A.O., which supported the contents of the statement. In the absence of such material, coupled with the fact that it is recorded by the Ld. CIT(A) that the assessee himself had surrendered a sum of Rs.69,59,000/- and Rs.75,00,000/- in A.Y. 2008-09 and 2009-10 respectively. The A.O. failed to co-relate the disclosures made in the statement with the incriminating material gathered during the search. Therefore, no inference is called for in the finding of the Ld. CIT(A) and is hereby affirmed. Ground raised by the revenue is dismissed."

3.4.5 Hon'ble Gujarat High Court in the case of Kailashben Mangarlal Chokshi vs. CIT - (2008) 14 DTR 257 (Guj.) has held that merely on the basis of admission, the assessee could not have been subject to additions, unless and until some corroborative evidence is found in support of such admission. Similar view was taken by Hon'ble Jharkhand High Court **Shree Ganesh Trading Co. V/s Commissioner of Income-tax, Tax Case No.8 of 1999 order dated 03.01.2013** held as under:-

"4. We considered the submissions of the learned counsel for the parties and perused the reasons given in the impugned orders as well as reasons given in the case of Kailashben Manharlal Chokshi (supra).

5. It appears from the statement of facts that there was a search in the business premises of the petitioner's firm as well as in the residential premises of its partner, Shri Sheo Kumar Kejriwal, on 24th September, 1987. During the course of search, the statement of Shri Sheo Kumar Kejriwal had been recorded under section 132(4) of the Income Tax Act and in the statement, he stated that he was partner in the Ganesh Trading Company, i.e. the present assessee-firm in his individual status and that he surrendered Rs. 20 lacs for the assessment year 1988-89 as income, on which tax would be paid. He further stated that other partners would agree to the same; otherwise it would be his personal liability. However, in the returns filed after search, the income of Rs. 20 lacs surrendered by Shri Sheo Kumar Kejriwal was not declared by the assessee-firm. On being asked to explain the reason for not showing the surrendered amount in the returns, it was submitted by the assessee that declaration made by the partner was misconceived and divorced from real facts. It was contended that the declaration was made after persuasion, which,

according to the learned counsel for the assessee, Shri Binod Poddar, in fact, was because of coercion exerted by the search officers. In explanation, it was submitted that the firm or the individual had no undisclosed income. The assessee's said retraction was not accepted by any of the authorities below on the ground that the statement given by the assessee appears to be voluntarily given statement disclosing undisclosed income of Rs. 20 lacs. According to the learned counsel for the assessee, Shri Binod Poddar, the Assessing Officer had full jurisdiction to proceed for further enquiry and could have collected evidence in support of alleged admission of undisclosed income of the assessee.

6. *We are of the considered opinion that statement recorded under section 132(4) of the Income Tax Act, 1961 is evidence but its reliability depends upon the facts of the case and particularly surrounding circumstances. Drawing inference from the facts is a question of law. Here in this case, all the authorities below have merely reached to the conclusion of one conclusion merely on the basis of assumption resulting into fastening of the liability upon the assessee. The statement on oath of the assessee is a piece of evidence as per section 132(4) of the Income Tax Act and when there is incriminating admission against himself, then it is required to be examined with due care and caution. In the judgment of Kailashben Manharlal Chokshi (supra), the Division Bench of Gujarat High Court has considered the issue in the facts of that case and found the explanation given by the assessee to be more convincing and that was not considered by the authorities below. Here in this case also, no specific reason has been given for rejection of the assessee's contention by which the assessee has retracted from his admission. None of the authorities gave any reason as to why Assessing Officer did not proceed further to enquire into the undisclosed income as admitted by the assessee in his statement under section 134(2) in fact situation where during the course of search, there was no recovery of assets or cash by the Department. This fact also has not been taken care of and considered by any of the authorities that in a case where there was search operation, no assets or cash was recovered from the assessee, in that situation what had prompted the assessee to make declaration of undisclosed income of Rs. 20 lacs.*

Mere reading of statement of assessee is not the assessment of evidentiary value of the evidence when such statement is self-incriminating. Therefore, we are of the considered opinion that in the present case, a wrong inference had been drawn by the authorities below in holding that there was undisclosed income to the tune of Rs. 20 lacs.

7. *In view of the above reasons, without answering the question about retrospective operation of the proviso to section 134(4), we are holding that the authorities below have committed error of law in drawing inference from the materials placed on record, i.e. admission of the*

assessee coupled with its retraction by the assessee. The Revenue may now proceed accordingly”.

3.4.6 Further, Hon'ble ITAT in the case of **M/s Ultimate Builders vs ACIT Central-II, Bhopal ITA No 134/Ind/2019 dated 09.08.2019**, wherein it has been held that the statement given by the assessee was without any specific reference to any incriminating material therefore, addition on account of undisclosed income offered in statement was deleted. Besides this, decision of Hon'ble Gujarat High Court in the case of **Kailashben Manharlal Choksi 328 ITA 411 (2008)** also supports the contention that merely on the basis of admission, the assessee could not be subjected to addition unless & until some corroborative evidences is found in support of such addition.

3.4.7 In the case of **CIT vs Jaya Lakshmi Ammal (2017) 390 ITR 189 (Mad.)** Hon'ble Madras High Court has held as under:

“we are of the considered view that, for deciding any issue, against the assessee, the authorities under the IT Act, 1961 have to consider, as to whether there is any corroborative material evidence. If there is no corroborating documentary evidence, then statement recorded under s. 132(4) of the IT Act, 1961, alone should not be the basis, for arriving at any adverse decision against the assessee. If the authorities under the IT Act, 1961, have to be conferred with the power, to be exercised, solely on the basis of a statement, then it may lead to an arbitrary exercise of such power. An order of assessment entails civil consequences. Therefore, under Judicial review, courts have to exercise due care and caution that no man is condemned, due to erroneous or arbitrary exercise of authority conferred.”

The court further held that “if the assessee makes a statement under s. 132(4) of the Act, and if there are any incriminating documents found in his possession, then the case is different. On the contra, if mere statement made under s. 132(4) of the Act, without any corroborative material, has to be given credence, than it would lead to disastrous results. Considering the nature of the order of assessment, in the instant case characterised as undisclosed and on the facts and circumstances of the case, we are of the view that mere statement without there being any corroborative evidence, should not be treated as conclusive evidence against the maker of the statement.”

3.4.8 Hon'ble Jurisdictional Tribunal Indore in the case of **ACIT Vs. Shri Yogesh Kumar Hotwani 30 ITJ 353/380 (Ind-Trib)** has held that no addition can be made merely based on statement u/s.132(4) without linking to the seized books of accounts, other documents, money, bullion, jewellery or other valuable articles or things. In para 18 of the order, Hon'ble Tribunal held as under :-

“We also find that disclosure was not made by the assessee hence it is not binding on him. We also rely on the decision in the case of CIT v. Chandra Kumar Jethmal Kochar, (2015) 230 Taxman 78 (Guj), Asstt.

CIT v. Kunwarjeet Finance Pvt. Limited, (2015) 61 Taxmann.com 52 (Ahm.-Trib.), CIT v. Jagdish Narayan Ratan Kumar, (2015) 61 taxmann.com 173 (Raj), wherein it was held that when addition of disclosure made by the assessee in statement recorded u/s 132(4), it cannot be sustained despite retraction, when Revenue could not furnish any positive evidence in support of such addition. Therefore, we are unable to uphold the findings of the AO and inclined to agree with Ld. CIT(A). Further, the Hon'ble Rajasthan High Court in the case of Jagdish Narayan Ratan Kumar (supra) has held that statement made during search must be correlated with records, which are found and if there is no ambiguity, explanation given by the assessee should be taken into consideration before making assessment. Thus, based on these decisions, we are of the opinion that the addition made by merely based on statement u/s 132(4) without linking to the seized books of accounts, other documents, money, bullion, jewellery, other valuable articles or things is not sustainable in law."

3.4.9 *In view of the above discussion & facts stated above, I come to unescapable conclusion that the Ld. AO was not justified in making addition as undisclosed income based on disclosure made during the search because no specific reference has been made by the Ld. AO to any incriminating material found during the course of search suggesting earning of such unaccounted income. Therefore, judiciously following the decision of Hon'ble ITAT, Indore in the case of **Sudeep Maheshwari, Yogesh Kumar Hotwani & M/s Ultimate Builders (supra)**, the addition made by the Ld. AO amounting to **Rs. 8,10,000/- in AY 2010-11, Rs. 10,05,000/- in AY 2011-12, Rs. 10,01,000/- in AY 2012-13, Rs. 12,50,000/- in AY 2013-14, Rs. 80,97,000/- in AY 2014-15 and Rs. 2,44,30,000/- in AY 2015-16 are deleted. Therefore, appeal on this ground is allowed."***

32. Before us, Ld. DR raised following contentions:

- (i) The assessee categorically admitted and declared income from firms in the statements recorded u/s 132(4). The AO has also noted in Para 12.19 of assessment-order that several incriminating documents were confronted to assessee but the assessee was unable to explain and it was not possible for search-authorities to find every minute detail of discrepancies. Taking into account these aspects, the assessee voluntarily surrendered income. By making surrender, the assessee stopped authorities from making further probe in the matter.

(ii) The retraction was after two years and after-thought.

33. Per contra, Ld. AR made following submissions:

(i) The statements recorded by search-authorities in Q.No. 8 are vague and general. The question raised by authorities and reply given by assessee, re-produced below, would indicate that the authorities have obtained confessional statement on ad hoc basis:

Q.8 - आपके घर से मिले बैंकों के (2) बैंक - बुक, - नं. 3115, 41
 1. आगरा पर उक्त बैंकों से प्राप्त Bank Statement में तिथि 2008-09 से वर्तमान तक (P.N.B, Habibgand - A/C No - 13050021000 19745, Bhopal Co-operative central Bank, Korum - A/C No. - 651022006505, Allahabad Bank - A/C No. - 50028669569 इत्यादि) के Bank statement दिखाये जा रहे हैं, इनमें बहुत जारे Debit एवं Credit अंक के माहजन व की जमी है, क्या इनका स्पष्टीकरण दें ?
 माध्यम

उत्तर :- मेरी मोटी जानकारी के अनुसार मेरे द्वारा मेरी निजी तथा मेरी भागीदारी इमें M/s Sharad Sharma, M/s Tirupati Balasi Enterprises, M/s Linkage Technology Information, M/s Kripal Construction, M/s Rama Construction & Developers, M/s Jay Bhole Real Estate, M/s Mahadev Buildcon, M/s Sanchi Rengeny एवं Vaidhavi Enterprises Ltd. इत्यादि इमें की कुछ काम भागीदारी से समय-2 पर खंडित जानकारी यही मिल पाके के कारण आम की जाना एवं आम का दर्शाया जाना इट गया है, जिसका दायमाभार स्वयं निम्न सूची है।

वित्त वर्ष	रुपय
2008-09	501000/-
2009-10	810000/-
2010-11	1005000/-
2011-12	2,100,000/-
2012-13	1001000/-
2013-14	1250000/-
2014-15	8097000/-
2014-15	24430000/-

तथा मेरे द्वारा एक HUF भी किमानील है, जो कि Sharad Sharma के नाम व है जिसमें वित्त वर्ष 2007-08 से आम दर्शाया जाना शक है, जिसका विवरण निम्न है।

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 Anveed
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- (ii) That the AO confronted assessee vide notice dated 07.07.2017 (Para 12.3 of assessment-order). The assessee immediately filed reply dated 28.08.2017 (Para 12.4 of assessment-order) denying the surrender. The assessee also filed a retraction-letter on 24.11.2017 followed by another letter dated on 19.12.2017 with an affidavit (Para 12.13 of assessment-order). In Para 5 of letter dated 24.11.2017, copy at Page 48-55 of Paper-Book, the assessee categorically mentioned the factual position in following words which clearly shows the manner and situation in which the confessional surrender was obtained from assessee:

"5. The assessee above named state that the surrender of undisclosed income was made against their will and knowledge of facts. They were forced to make a disclosure of Rs. 5 crores and for doing that an excel work sheet was got prepared by the search officers on the assessee's laptop computer. A print out of the said excel worksheet is enclosed. It can be seen that the said sheet totaled to Rs. 4.96 crores and the amount has been distributed to various entities. Finding it difficult to distribute the amount the officers went to the extent of declaring income in the hands of HUFs who had only agricultural income and did not even have PAN; the Officers could not even keep track of the volume of disclosure and the possibility of having such an undisclosed income with no corresponding business or other source of income in the hands of the assesseees. The said Laptop Computer has been got examined by Microsoft authorized service station who has certified that the said Excel Worksheet has been created at 7.20 p.m. on 3rd July, 2015.

It is worth noting that the Search began at 7 a.m. on 01.07.2015; the initial statements were recorded on 01.07.2015 in respect of all the persons assessed. The search operations and discovery of documents was complete on that day itself and commencement of Final Statement in respect of Shri Shailendra Sharma was also on the 1st July, 2015; and that in respect of Shri Deepak Sharma and Sharad Sharma were commenced on 2nd July, 2015. However, the search team was present till 4th July, 2015 till 5.45 a.m. The Authorized officer closed the statements of all the three persons only on the morning of 4th July, when the assessee were thoroughly harassed and in need to go for the cancer treatment of Smt. Aradhna Sharma. There was no activity other than of pressurizing the assessee for surrender during the period from

1st July, 2015, to 4th July morning. This fact must also be confirmed from the witnesses present.”

- (iii) The assessee had been denying surrender throughout the proceeding.
- (iv) The AO has not made any enquiry from the firms mentioned in Q.No. 8 of the statements re-produced above except from one firm 'M/s Linkage Technologies' u/s 133(6). Vide Para 11 of assessment-order, the AO has made separate additions of Rs. 29,022/-, Rs.57,489/- and Rs. 37,878/- in AY 2010-11, 2011-12 and 2013-14 respectively *qua* the remuneration and interest on capital earned by assessee from 'M/s Linkage Technologies'. Thus, the AO has made separate additions *qua* the undisclosed income earned by assessee in the form of remuneration and interest on capital from 'M/s Linkage Technologies' and the assessee has also accepted this separate addition made by AO because it was corroborated by evidence.
- (v) Ld. AR referred Para 13.5 / Page 33 of assessment-order (Para No. 13.5 is wrongly mentioned in assessment-order, it should be numbered as 12.27) to show that the AO has noted "The reconciliation of each and every seized document considering the voluminous nature is extremely difficult if not impossible, hence the addition of Rs. 3,65,93,000/- (for clarity, Rs. 3,65,93,000/- is aggregate for six years, out of which addition for AY 2015-16 is Rs. 2,44,30,000/-) is completely justified to prevent the leakage of revenue." Ld. AR contended that this mention by AO clearly shows that the AO had no material whatsoever

to support the addition and the entire addition has been made on vague reason of voluminous material and citing the premise of revenue leakage.

- (vi) A strong reliance is placed on Para 9 of order of *ITAT, Indore in Ved Prakash Goyal Vs. DCIT, ITA No. 698/Ind/2019 dated 02.01.2024* wherein, taking into account ***CBDT's instruction dated 10.03.2003***, it was held that no addition can be made on mere confessional statement without corroborative evidences:

*"9. We have considered the foregoing rival contentions of both sides and perused the orders of lower-authorities as also the documents filed in Paper-Book to which our attention has been drawn. After a careful consideration, we find no merit in the arguments of revenue because of the simple reason that there appears no evidence for the impugned addition made by AO except the assessee's statement during search forming basis of the impugned addition. Ld. DR reiterated Revenue's stand that the addition is very much based on documents found during search. We, however, notice from a perusal of statements recorded u/s 132(4) duly extracted by AO in assessment-order itself that the assessee surrendered a figure of Rs. 5,00,00,000/- and that too in his own hands as well as family member's hands while agreeing to give year-wise/assessee-wise chart subsequently. Thus, the figure of Rs. 5,00,00,000/- cannot be said to be a final figure, it is in the nature of lump sum, an ad hoc figure. The assessee is very much entitled and justified to do homework after search and arrive at a correct figure for offer in return. Had the correct figure been higher than surrender, the AO would have been entitled to assess more and if it is lower, the AO must assess only lesser amount. This is for the reason that under the scheme of Income-tax, only correct income has to be taxed. On a careful reading of para 13.5 of assessment-order, re-produced earlier, one can find that the AO has himself admitted that he proposed to make addition of Rs. 1,76,68,829/- on the basis of statement recorded u/s 132(4) although the AO has, as contended by Ld. AR, made a bald statement that the addition is also emanating from the seized document. Even the CIT(A) has also supported AO's action on the premise that the statements made u/s 132(4) have evidentiary value and admission made therein warrants addition. We find that the **CBDT instruction dated 10.03.2003 (supra)** is clearly placing restrictions in stricter terms at both levels, namely (i) while recording statements during the course of search/survey, no attempt should be made by search/survey authorities to obtain confession as to the undisclosed income, and (ii) while framing assessment, the AO should rely only upon the evidence/material gathered during the course of search/survey. Further, various judicial rulings of different courts, as filed by Ld. AR in Case Law Paper-Book, also carry a view that no addition can be made on the basis of mere surrender made during survey/search unless the same is corroborated by some tangible evidence. We thus find no merit in the addition*

made by revenue authorities after appreciation of the factual matrix of present case in the light of CBDT Instruction as well as judicial rulings quoted at the behest of assessee. Resultantly, we are inclined to delete the addition made/ upheld by lower-authorities. Ordered accordingly. The assessee succeeds in this appeal."

(vii) That even otherwise, partnership firm is a separate person/assessee under the scheme of Income-tax Act, 1961 and the income earned by a partner from firm is exempted u/s 10(2A) except remuneration from firm and interest on capital specifically allowed to the firm as deduction u/s 40(b). The AO has already made separate addition of remuneration and interest on capital earned by assessee from one of the firms 'M/s Linkage Technologies' and the impugned addition of Rs. 2,44,30,000/- made by AO does not represent remuneration and interest on capital, therefore the AO has made addition of income which cannot be legally taxed in the hands of assessee.

(viii) Lastly, Ld. AR relied upon order of CIT(A).

34. We have considered rival submissions of both sides and perused the documents filed in the Paper-Book to which our attention has been drawn. On a careful consideration, we *firstly* find that the AO has made addition on the basis of income admitted by assessee during statements recorded u/s 132(4) on 02.07.2015 by search authorities. The AO has also referred assessee's statement re-recorded by DDIT(Inv)-II, Bhopal on 11.12.2015 u/s 131 confirming the earlier admission. The AO has, however, not mentioned a single incriminating material in the assessment-order and just acted upon the surrender made by assessee. The assessee has also made a strong

retraction against the surrender obtained by search-authorities as has been re-produced in earlier para but the AO has rejected the assessee's retraction also. Therefore, it is a clear-cut case of addition on mere confessional statement recorded during search. This is also supported from the fact that the AO has made impugned addition *qua* the income alleged to have been earned by assessee from several firms (including one 'M/s Linkage Technologies') but the AO is able to bring on record a corroborative information *qua* the undisclosed remuneration and interest earned by assessee from one firm named 'M/s Linkage Technologies' only. Admittedly, the remuneration and interest from 'M/s Linkage Technologies' has been separately added by AO and the assessee has also accepted AO's action. Thus, the impugned addition of Rs. 2,44,30,000/- with which we are concerned in these grounds, remain uncorroborated by any evidence. There can hardly be any dispute that such addition is against the ***CBDT's Instruction dated 10.03.2003*** as analysed by ITAT, Indore in ***Ved Prakash Goyal (supra)*** and therefore liable for deletion. *Secondly*, we also find weightage in the submission of Ld. AR that the income earned by a partner from partnership firm is exempted u/s 10(2A) of the Income-tax Act except that the remuneration and interest on capital allowed as deduction to firm u/s 40(b) is only taxable in the hands of partner. This contention raised by Ld. AR is very much legal and as per provisions of Income-tax Act. It is not the case of revenue that the alleged income for which the addition of Rs. 2,44,30,000/- has been made by AO represented remuneration and interest

on capital for which deduction had been allowed to the concerned firms u/s 40(b). Therefore, the Ld. AR is very much justified in claiming that the AO had no legal authority to tax the same in the hands of assessee. Needless to mention that the AO is very much aware of the legal provision of Income-tax Act, 1961 and that is why he taxed only remuneration and interest on capital received by assessee from the firm named 'M/s Linkage Technologies' by way of a separate addition. Thus, looking from all angles as discussed, we find that the addition of Rs. 2,44,30,000/- made by AO is not legally sustainable. Therefore, we uphold the deletion of addition by CIT(A) and the grounds raised by revenue are dismissed.

Ground No. 7:

35. In this ground, the revenue claims that the CIT(A) was not justified in deleting the addition of Rs. 5,27,923/- made by AO on account of income from house-property, relying upon the additional evidence filed before CIT(A) without giving opportunity to AO in terms of Rule 46A(1) of Income-tax Rules, 1962.

36. The AO has made this addition in Para 13 of assessment-order on the basis of "LPS/SS-1-Page 48/49" seized during search. The AO observed that the seized document showed that rental income had been earned from a property located at Karond Chouraha, Bhopal. When the AO show-caused assessee, the assessee filed reply dated 29/11/2017 which is re-produced by AO in Para 13.3 of assessment-order. The assessee informed to AO that

the property was owned by M/s Sharad Sharma, a partnership firm and income by way of rent and from sale of property was declared in the income-tax returns of firm. The AO, however, rejected assessee's submission and made addition on account of undisclosed rental income in the hands of assessee. During first-appeal, the CIT(A) deleted addition.

37. The revenue's grievance in ground is such that the CIT(A) has given relief to assessee on the basis of additional evidences filed before him in violation of Rule 46A(1). To resolve the grievance of revenue, we first extract the order of CIT(A) which reads as under:

"3.5.2 I have considered the facts of the case, material evidences on record, written submission filed by appellant and to the facts and findings of the Ld. AO inter alia material brought on record. The appellant during appellate proceedings has strongly contended and stated that the commercial complex located at karond Chouraha, Bhopal is owned by the firm namely M/s Sharad Sharma and the entire rental income received therefrom has duly been offered in the hands of the said firm. All the supportive documents were furnished before the Ld. AO, however, the same were not considered. The entire addition has been made on surmise and conjecture by estimating annual rent on the basis of information submitted by M/s Mannapuram Finance Ltd. Further, M/s Sharad Sharma has already offered rental income higher than the rental income estimated by the Ld. AO. In support of ownership of the complex and rental income earned by M/s Sharad Sharma appellant has filed various documents viz. copy of property tax for FY 2021-22, information collected from Municipal Corporation, Bhopal, copies of return of income and statement of total income of the firm. On perusal of the evidences put forth by the appellant, I find that as per records of Municipal Corporation Bhopal the said complex is registered in the name of M/s Sharad Sharma. This fact is also supported with property tax receipt of the said complex. Further, on perusal of returns of income of the said firm it has been observed that it has shown actual rental income which is more than the income estimated by the Ld. AO. The said firm has shown following rental income:-

AY	Rental income offered by firm
2010-11	637212
2011-12	605727
2012-13	817954

2013-14	1044104
2014-15	749635
2015-16	996358
2016-17	618540

The said firm has offered actual rental income from the said complex, however, the Ld. AO on the basis of details provided by M/s Manapuram Finance Ltd has presumed that appellant earned rental income from the said complex which has not been offered to tax. Hence, it is evidently and abundantly clear that the Ld. AO has made addition on sheer assumption and presumption basis. **The Ld. AO has also alleged that appellant failed to furnish any document evidence in support of ownership of the said complex. Here, it is important to mention that appellant has furnished details of ownership before the Ld. AO, however, the same were not considered.** Further, the Ld. AO could have called for information from Municipal Corporation of Bhopal regarding ownership of the said property, however, nothing was done. Rather, the Ld. AO has presumed rent income by applying same rate for all the shops, halls and other premises in the said complex which is not in sync with actual rental income earned by M/s. Sharad Sharma. It is settled legal pronouncement that only the real income has to be brought under the preview of tax. The real income was actually earned by M/s Sharad Sharma and was offered to tax.

3.5.3 In view of the above discussion, the Ld. AO was not justified in not considering entire facts of the case before making impugned additions. No independent enquiry from government agencies was made by the Ld. AO and entire addition was made on presumption an assumption basis. Thus, addition made by the Ld. AO amounting to Rs. 5,27,923/- each in AYs 2010-11 to 2016-17 is hereby deleted. Therefore, appeal on this ground is allowed."
[Emphasis supplied]

38. On perusal, one can easily find that the order passed by CIT(A) is self-speaking. The CIT(A) has clearly noted that all supportive documents were furnished before the AO, however, the same were not considered. In any case, the CIT(A) has given relief to assessee having regard to two set of documents. The first set of document is the record of Municipal Corporation, Bhopal in the form of property tax return/receipts of property tax payments showing that the underlying property from which alleged rent was earned, actually belonged to a partnership firm and not to the assessee. These documents are statutory records of local body of Govt. The second set of

documents is the Income-tax Returns filed by partnership firm which show that the alleged rental income was already disclosed by partnership firm to Income-tax Department. These documents are the record of Income-tax department itself. Therefore, there is nothing like additional evidence. In our considered view, the CIT(A) has passed order on the basis of cogent analysis giving due regard to the statutory documents and the record of income-tax department itself. Hence, the ground raised by revenue regarding violation of Rule 46A(1) by CIT(A) does not have enough strength. Being so, the revenue's ground is dismissed.

Ground No. 8 of AY 2015-16 (alongwith Ground No. 8 of Revenue's appeal for AY 2012-13):

39. In Ground No. 8 of AY 2015-16 and the identically numbered Ground of AY 2012-13, the revenue claims that the CIT(A) was not justified in deleting the addition of Rs. 15,08,000/- in AY 2015-16 (correct amount should be Rs. 15,61,000/-) and addition of Rs. 14,54,610/- made by AO on account of unexplained cash deposits in bank a/c.

40. Although these grounds relate to two different assessment-years but they involve identical issue and the AO as well as CIT(A) have considered this issue analogously, therefore we feel it convenient to take up these grounds together for adjudication.

41. The AO has made this addition in Para 9 of assessment-order. During assessment-proceeding, the AO show-caused assessee to explain the source

of cash deposits in various bank accounts. In response, the assessee filed following submission vide letter dated 29.11.2017 which is re-produced by AO in Para 9.1 of assessment-order as under:

“the assessee submits herewith the Receipts and Payments Account drawn from the bank account of the assessee and his return of income. The said statement explains all the transactions that have been entered into by the assessee. The sources of cash and the utilisation of cash is clearly provided. From a perusal of copy of bank statements already been provided and the remaining now provided, the entries appearing in the Receipts and Payments Account can be verified. It is humbly requested that any discrepancy noted may please be pointed out to the assessee so that immediate explanation will be offered.”

However, the AO rejected assessee’s submission and made following additions terming the bank deposits as unexplained:

AY 2015-16:

Sl. No.	Name of the bank	Amount of cash deposit (Rs.)
1	Bhopal Central Co-operative Bank, Karond	15,08,000
2	SBI	53,000
	Total	15,61,000

AY 2012-13:

Sl. No.	Name of the bank	Amount of cash deposit (Rs.)
1	Bhopal Central Co-operative Bank, Karond	1,72,610
2	Punjab National Bank, Habibganj	9,72,000
3	Allahabad Bank, Mata Mandir	1,71,000
4	Canara Bank	1,30,000
5	SBI	9,000
	Total	14,54,610

42. During first appeal, the CIT(A) deleted entire additions by following order:

“3.2.2 I have considered the facts of the case, material evidences on record, written submission filed by appellant and to the facts and findings of the Ld. AO inter alia material brought on record. The appellant during assessment proceedings as well as during appellate proceedings has strongly contended that the Ld. AO erred in considering two bank accounts with Bhopal Cooperative Bank, Karond Branch, Bhopal and Punjab National Bank,

Habibganj branch, Bhopal as held and operated by appellant in fact the same were held and operated by M/s Sharad Sharma, a partnership firm. In support appellant has filed copies of annual account of M/s Sharad Sharma and relevant bank account statement. On perusal of documentary evidences furnished by the appellant, it has been observed that M/s Sharad Sharma is a partnership firm having PAN AAOFS6041H and has shown bank account no 1305002100019745 with PNB, Habibganj branch Bhopal and bank account no 651022006505 with Bhopal co-operative Central, Bank, Karond, Bhopal as held and operated by the said firm. Therefore, the Ld. AO was factually incorrect in holding that both the accounts were held by appellant. Once, it has been proven beyond doubt that the accounts were not held and operated by appellant in individual capacity then the addition on account of cash deposit in these accounts cannot be made in the hands of appellant. The following additions have been made by the Ld. AO in the hands of appellant with regards to the mentioned bank accounts:-

Name of the bank	AY	Cash deposit
Bhopal Central Co-operative Bank, Karond	2010-11	74500
	2011-12	17000
	2012-13	172610
	2013-14	188600
	2014-15	391980
	2015-16	1508000
	2016-17	632460
	Total	2985150
PNB, Habibganj, Bhopal	2011-12	95000
	2012-13	972000
	2013-14	90000
	2014-15	172000
	Total	1329000
	Grand total	4314150

Thus, addition made by the Ld. AO in relation with these two bank accounts amounting to **Rs. 43,14,150/-** is directed to be **deleted**.

3.2.3 However, for the balance addition, the appellant has submitted that the cash deposited in bank account with Canara Bank, SBI and Allahabad Bank were out of disclosed cash receipts and have been fully offered to tax. In support appellant has filed copies of cash flow statement for FY 2008-09 to 2015-16 alongwith copies of return of income and computation. On perusal of these evidences, I found that the appellant has shown following income and expenses:-

Cash flow statement for FY 2008-09

Particulars	Amount	Particulars	Amount
Opening cash balance	773987.47	Cash deposited in	

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Cash withdrawal from		Canara bank	5000
SBI	137000	SBI	319700
Canara Bank	15000	Expenses payments	2340281
Contract receipts	3002787	Tirupati Balaji Enterprises	1575000
Kripal Constructions	300000	Rama Construction	107268
Agricultural Income	148678	Withdrawals	124600
M/s Sharad Sharma	550000	Closing cash balance	455603.47
	4927452.47		4927452.47

Cash flow statement for FY 2009-10

Particulars	Amount	Particulars	Amount
Opening cash balance	455603.47	Cash deposited in	
Cash withdrawal from		Canara bank	382000
SBI	120500	SBI	145000
Canara Bank	804500	Expenses payments	109794
Agricultural Income	174600	Tirupati Balaji Enterprises	815000
		Closing cash balance	103409.47
	1555203.47		1555203.47

Cash flow statement for FY 2010-11

Particulars	Amount	Particulars	Amount
Opening cash balance	103409.47	Cash deposited in	
Cash withdrawal from		Canara bank	152400
SBI	169500	SBI	127000
Canara Bank	1220000	Allahabad bank	220000
Allahabad bank	90000	Tirupati Balaji Enterprises	615000
Agricultural Income	122400	Kripal Construction	300000
Contract receipts	2500	Expenses payment	265892
Rama Construction	115040	Closing cash balance	142557.47
	1822849.47		1822849.47

Cash flow statement for FY 2011-12

Particulars	Amount	Particulars	Amount
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Shri Sharad Sharma

IT(SS)A Nos. 29 & 32/Ind/2023 and ITA Nos. 309 & 304/Ind/2023- A.Y.2010-11, 2012-13, 2015-16

Opening cash balance	142557.47	Cash deposited in	
Cash withdrawal from		Canara bank	130000
SBI	108500	SBI	9000
Agricultural Income	164130	Allahabad bank	171000
Contract receipts	1500650	Kripal Construction	250000
Rama Construction	250000	Expenses payment	1326097
		Closing cash balance	279740.47
	2165837.47		2165837.47

Cash flow statement for FY 2012-13

Particulars	Amount	Particulars	Amount
Opening cash balance	279740.47	Cash deposited in	
Cash withdrawal from		Canara bank	50000
SBI	73000	SBI	45000
Canara Bank	50000	Allahabad bank	915000
Allahabad bank	1400000	Rama Construction	75000
Shailendra Sharma	100000	Expenses payment	520974
		Advance	50000
		Closing cash balance	246766.47
	1902740.47		1902740.47

Cash flow statement for FY 2013-14

Particulars	Amount	Particulars	Amount
Opening cash balance	246766.47	Cash deposited in	
Cash withdrawal from		Canara bank	50000
SBI	3500	SBI	155000
Allahabad bank	555000	Allahabad bank	453005
Contract receipts	2290800	Rama Construction	20000
Agricultural Income	35500	Expenses payment	2268744
		Closing cash balance	184817.47
	3131566.47		3131566.47

Cash flow statement for FY 2014-15

Particulars	Amount	Particulars	Amount
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Opening cash balance	184817.47	Cash deposited in	
Cash withdrawal from SBI		SBI	53000
SBI	1037500	Expenses payment	757251
Allahabad bank	160000	Linkage Technologies INC	400000
Contract receipts	816530	Withdrawals	1143000
Tirupati Balaji Enterprises	450000	Closing cash balance	295596.47
	2648847.47		2648847.47

Cash flow statement for FY 2015-16

Particulars	Amount	Particulars	Amount
Opening cash balance	295596.47	Cash deposited in	
Cash withdrawal from SBI		SBI	104500
SBI	831209	Allahabad bank	210000
Allahabad bank	54560	Investment	751744
Contract receipts	465000	Expenses payment	556165
Tirupati Balaji Enterprises	75000	Closing cash balance	98956.47
	1721365.47		1721365.47

From the above mentioned cash flow statements, it is evident that appellant has sufficient source of cash income which was either utilized for the purpose of business or the same was deposited in bank account. Opening cash balance as on 01.04.2009 is properly supported by "receipt and payment account" of F.Y.2008-09. Cash deposits in the bank account is duly supported by withdrawals from bank accounts/partnership firm or receipts from agriculture operation/business etc. The Ld. AO has also not taken any adverse view on agriculture receipts shown by the appellant. Veracity of such receipts have not been doubted by bringing cogent material on record by the Ld. AO. I find no reason to doubt Cash flow receipt and payment statement furnished for the years under consideration. Therefore, the same cannot be held as non-genuine. Thus, cash deposited in the above bank accounts cannot be held as unexplained.

3.2.4 In view of the above discussion, the Ld. AO was not justified in making additions on account of cash deposits in bank accounts. Thus, additions made by the Ld. AO amounting to **Rs. 6,01,500/- in AY 2010-11** , **Rs. 6,11,400/- in AY 2011-12**, **Rs. 14,54,610/- in AY 2012-13**, **Rs. 12,43,600/- in AY 2013-14**, **Rs. 12,21,985/- in AY 2014-15**, **Rs. 14,61,000/- in AY 2015-16** and **Rs.9,46,960/- in AY 2016-17** are **deleted**. Therefore, appeal on this ground is **allowed**."

43. Before us, Ld. DR for revenue made two-fold submissions, namely (i) the assessee failed to explain date-wise cash flow and also failed to explain opening cash shown in Receipt & Payment A/c for Financial Year 2009-10 during assessment-proceeding and (ii) the CIT(A) has wrongly deleted addition relying upon additional evidence filed before him without giving opportunity to AO in terms of Rule 46A(1) of Income-tax Rules, 1962. With these submissions, Ld. DR prayed to remand this issue back to CIT(A) for reconsideration.

44. Per contra, Ld. AR strongly opposed the contentions of Ld. DR. The arguments advanced by Ld. AR are duly mentioned in the following Written-Submission filed by Ld. AR:

- "1. *The Ld. AO considered cash deposit in total 2 bank accounts amounting to Rs. 15,61,000/- as unexplained cash credits.*
2. *That out of the two bank accounts, one bank account namely Bhopal Central Co-operative Bank, Karnod belonged to Partnership firm M/s. Sharad Sharma in which the assessee is a partner. Therefore, cash deposit amounting to Rs. 15,08,000/- became out of question on such account.*
3. *The same can be verified from the annual accounts of M/s. Sharad Sharma and relevant part of bank statement to prove the fact that these bank statement belonged to M/s. Sharad Sharma, Partnership Firm. **[Kindly refer page nos. 86-91 of the paper book]***
4. *For the remaining amount of cash deposit, the assessee had duly submitted cash receipt and cash payment account to support and substantiate the cash deposit transaction. **[Kindly refer page nos. 92-93 of the paper book].***
5. *The Cash receipt and Payment account was also supported by the Income tax Return of the assessee in which all the income were duly offered. **[Kindly refer page No. 7-11 of the paper book].** Most importantly, the contents of the said statement were never doubted or challenged by the Ld. AO, thus establishing its veracity. Also, the*

income offered by the assessee in the return of income was also accepted by the Ld. AO.

6. *For the Opening cash balance of Rs. 4,55,603/- as on 01.04,2009, the assessee had submitted Receipt and Payment account of F.Y. 2008-09 also. The assessee is a regular tax payer for the last 20 years. And also belongs to a reputed family of Bhopal. Thus, there was no basis to doubt the said cash balance.*
7. ***There was no additional evidence submitted by the assessee during the appeal proceedings as alleged in the grounds of appeal of the department and every detail and documents were available with the Ld. AO."***

45. We have considered rival submissions of both sides and perused the orders of lower-authorities as well as the documents filed in Paper-Book. After a careful consideration, we find that the CIT(A) has passed a vehement order giving complete findings *qua* the additions made by AO and finally arrived at a conclusion to delete the additions. We also find that in response to the notice issued by AO during assessment-proceeding, the assessee explained the source of deposit from availability of cash-in-hand with the support of Cash Flow Statement but the AO did not accept. The CIT(A), after considering the factual aspect from record that the two bank a/cs viz. Bhopal Central Co-operative Bank, Karnod and PNB, Habibganj, Bhopal did not belong to assessee and for other banks, the assessee had explained the sources of deposits from Cash Flow Statement submitted to AO which in turn is supported by income-tax returns of assessee, has completely deleted the additions made by AO for all seven years falling within the realm of section 153A including the AY 2015-16 and 2012-13 under consideration. The department has not brought any contrary fact before us to point out any discrepancy in the Cash Flow Statement as well as opening balance in the

hands of assessee as reflected in Cash Flow Statement. It is also a fact that the same Cash Flow Statement as filed before CIT(A) was also filed by assessee to AO during assessment-proceeding. Accordingly, we do not find any error or illegality in the order of CIT(A) and the same is upheld. Thus, the ground No. 8 raised by revenue in both AY 2015-16 and 2012-13 is dismissed.

46. Thus, the revenue's appeal of AY 2015-16 is dismissed.

Revenue's ITA No. 309/Ind/2023 – AY 2012-13:

47. Following grounds are raised in this appeal:

1. *Whether on the facts and on the circumstances of the case and in law, the Ld. CIT(A) was justified in deleting the addition of Rs. 2,69,50,000/- on account of undisclosed investment, on the basis of documents seized from the assessee's premises, despite the presumption laid down u/s 132(4A) of the Act regarding ownership and accuracy of seized documents, which was not adequately countered by the assessee?*
2. *Whether on the facts and on the circumstances of the case and in law, the Ld. CIT(A) was justified in accepting the assessee's submission that incriminating documents with entries of undisclosed investment made by the assessee is a dumb document and in deleting the addition of Rs. 2,69,50,000/-, without appreciating that the incriminating document was seized from assessee's own premise, which the assessee himself in his statement recorded on oath u/s 132(4) of the Act accepted to be pertaining to purchase of land at Prempura, when confronted during search proceedings?*
3. *Whether on the facts and on the circumstances of the case and in law, the Ld. CIT(A) was justified in relying upon the assessee's submission on the issue of undisclosed investment of Rs. 2,69,50,000/- when the assessee could not explain the source of such undisclosed investment of Rs. 2,69,50,000/- during the assessment proceedings?*
4. *Whether on the facts and on the circumstances of the case and in law, the Ld. CIT(A) was justified in deleting the addition of Rs.10,01,000/- on the basis of surrender in the statement recorded on 02.07.2015 under oath u/s 132(4) of the Act without appreciating the fact that such surrender was*

made by the on the basis of income received by him from his firms which was not disclosed while filing ITR for the corresponding years by the assessee and the surrender was reaffirmed by the assessee subsequently in his statement recorded on 11.12.2015 u/s 131 of the Act?

5. *Whether on the facts and on the circumstances of the case and in law, the Ld. CIT(A) was justified in deleting the addition of Rs. 10,01,000/- and accepting the retraction of the assessee without taking into consideration the fact that such retraction was made after a period of 2 years from the date of search and the assessee failed to justify the delayed retraction with any documentary evidence?*
6. *Whether on the facts and on the circumstances of the case and in law, the Ld. CIT(A) was justified in deleting the addition of Rs. 10,01,000/- and accepting the retraction of the assessee without taking into consideration that:*
 - (a) *If in the course of search, the assessee makes some admission, he debars the authorized officer from making further investigation. In view of this, Legislature in its wisdom has provided that such statement can be used in evidence and the assessment can be made on the basis of such statement?*
 - (b) *It is settled law that admission by a person is a good piece of evidence though not conclusive and the same can be used against the person who makes it. The reason behind this is, a person making a statement stops the opposite party from making a statement stops the opposite party from making further investigation' (Bhogilal Mool Chand [2005] 3 SOT 211 (Ahd.)?*
7. *On the facts and circumstances of the case, whether the Ld. CIT(A) has erred in deleting the addition of Rs. 5,27,923/- on account of income from house property, relying upon documents statements of the firm furnished by the assessee before CIT(A) as additional evidence, without providing any opportunity to the assessing officer to rebut the same, when it is mandatory as per Rule 46A of Income Tax Rules that Ld. CIT(A) shall not take into account any evidence produced under Rule 46(1) of Income Tax Rules, unless the Assessing Officer has been allowed a reasonable opportunity to examine such evidence and rebut the same?*
8. *Whether on the facts and circumstances of the case, whether the Ld. CIT(A) was justified in deleting the addition of Rs. 14,54,610/- on account of cash deposits in bank accounts, without appreciating that:*
 - a) *the assessee failed to furnish detailed date-wise cash flow statement of these bank accounts for AY 2015-16 and justify the opening cash in hand shown in the receipt and payment account for the FY 2009-10 despite giving reasonable time during assessment proceedings?*

b) on this issue the Ld. CIT(A) has accepted additional evidence without providing any opportunity to the assessing officer to rebut the same, when it is mandatory as per Rule 46A of Income Tax Rules that CIT(A) shall not take into account any evidence produced under Rule 46(1) of Income Tax Rules, unless the Assessing Officer has been allowed a reasonable opportunity to examine such evidence and rebut the same?

Ground No. 1 to 3:

48. In these grounds, the revenue claims that the CIT(A) was not justified in deleting the addition of Rs. 2,69,50,000/- made by AO on account of undisclosed investment.

49. The AO has made this addition in Para 19 of assessment-order. He has noted that during search loose papers marked as "LPS/SS-1-Page 63 to 68" were seized which revealed investment made by assessee and one Shri Shyam Rathore in purchase of land at Prempura. The AO further noted that a partnership firm named 'M/s Tirupati Balaji Enterprises' was also established in which the assessee and Shri Shyam Rathore were partners. The AO also noted that in the statements recorded u/s 132(4), the assessee has accepted unexplained investment. Finally, based on noting in seized document, the AO worked the quantum of unexplained investment at Rs. 2,69,50,000/- and made addition in assessee's hands with this finding:

"Since the transaction pertains to M/s Tirupati Balaji Enterprises, addition of Rs. 2,69,50,000/- is made in the hands of the assessee on protective basis."

50. During first-appeal, the CIT(A) has deleted addition by passing following order:

“3.11.3 I have considered the facts of the case, material evidences on record, written submission filed by appellant and to the facts and findings of the Ld. AO inter alia material brought on record. During the course of search, page no 63 to 78 of LPS/SS-1 were found and seized. The impunged loose papers, as per Ld. AO, related to purchase of Prempura land which was also confirmed by the appellant in his statement recorded u/s 132(4) of the Act. On the back side of page no 75 of LPS/SS-1 various jotting were made, qua which the Ld. AO has alleged that the impunged land was purchased for sum of Rs. 2,69,50,000/- for which no explanation has been offered by the appellant. Per contra the appellant has stated that the impunged land was purchased by M/s Tirupati Balaji Enterprises on 06.11.2008 for a sale consideration of Rs. 1.25 crores and sum of Rs. 30.05 lacs was spent on stamp and other charges. However, the jotting made on impunged loose papers were made for some planning for sale of the said land on 13.03.2012. In support appellant has filed copy of registered sale-deed of the said land. On perusal of the evidence on record, it has been observed that the impunged land was purchased by M/s Tirupati Balaji Enterprises from Shri Rajendra Kishan Sharma and Smt. Aadarsh Sharma on 06.11.2008. One thing which is clear beyond any doubt that the impunged land was purchased on 06.11.2008 and not on 13.03.2012 as alleged by the Ld. AO. Now the moot question which arises here is whether the Ld. AO is entitled to make addition based on jottings on some loose papers which were found and seized during search. Undoubtedly, the initial onus of explaining the contents of the loose paper as per provisions of section 132(4A) is casted upon the person from whose possession the ibid loose papers were found and seized, in the instant case i.e. the appellant. The appellant in his statement recorded u/s 132(4) has explained that the impunged land was purchased by M/s Tirupati Balaji Enterprises wherein he is a partner having 50% rights. He also explained that the entire transaction of purchase and qua expenses are fully recorded in books of account of the said firm. He further stated that the jotting made on seized paper were made for a proposed sale of the said land. Hence, the appellant has explained the reasons for preparation of the said loose paper with logical explanation and therefore, the onus has been discharged successfully. Now, the ball is in the court of the AO to disprove the explanation furnished by the appellant with supportive independent cogent evidences or findings, however, no such contrary finding is seen in the assessment-order. Here, it is worth mentioning that no independent enquiry was made by the Ld. AO from the said firm. Rather, the Ld. AO has placed reliance on statement of appellant u/s 132(4) of the Act that the transaction pertained to Prempura land, which is self-explanatory. No independent enquiry either from the said firm or from registrar office was done by the Ld. AO to ascertain true and correct facts of the case. It is also unacceptable that the purchase of land was done in FY 2008-09 and the on-money was paid in FY 2011-12. Even if we consider the findings of the Ld. AO correct and true then also any on-money which was paid by the appellant should have been paid on or before the date of sale deed i.e. 06.11.2008 which is outside the jurisdiction of the Ld. AO. Therefore, the only logical conclusion which can be drawn from the facts and circumstances discussed herein above is that the jotting made on back side of page no 75 of LPS/SS-1 relates to proposed sale and does not represents actual transaction and these are not related to the appellant. Therefore, the loose paper under consideration

is nothing but a dumb document and no addition can be made in the hands of appellant on the basis of deaf and dumb document.

3.11.4 It is also important to mention that the Ld. AO in the body of assessment order has given a finding that the impugned transaction pertain to M/s Tirupati Balaji Enterprises and therefore, a protective addition is made in the hands of appellant. The appellant during appellate proceedings has strongly contended that when no substantive addition was made, the protective addition does not survives and placed reliance on various judicial pronouncements (supra). In order to verify the veracity of the claim of the appellant, the Ld. AO vide letter dated 14.06.2021 was required to explain whether any substantive addition was made in the hands of the said firm. The AO in reply vide letter in F.No ACIT(Central)/Gwalior/RR/2021-22/235 dated 16.09.2021 has stated as under:-

- “2. Vide above referred letter, this office was asked to submit remand report in the case of Shri Sharad Sharma. In the requisite report, this office was asked to submit report on the issue of protective addition of Rs. 2,69,50,000/-.
3. from the perusal of the case record of the assessee, it is found that protective addition of Rs. 2,69,50,000/- was made in the case of the assessee after detailed discussion in the body of the order. On this issue, the record have been verified. However, **no letter has been found on record, which could ascertain that the information was passed by the AO in the case of M/s Tirupati Balaji Enterprises.** On searching the PAN of M/s Tirupati Balaji Enterprises, hundreds of PANs are found in the name of M/s Tirupati Balaji Enterprises. Therefore, it is not possible to ascertain the PAN of the entity.”

From the above report, it transpires that no information was passed by the Ld. AO before or after making protective addition in the hands of appellant, per se, no substantive addition has been made in the hands of the said firm. In these circumstances, Hon'ble ITAT Ahmadabad bench in the case of **Pravinkumar Valjibhai Pujara HUF vs ITO in ITA No 142/Ahd/2016 dated 28.06.2021** has held that protective addition framed by the AO without making substantive addition is not sustainable. The relevant extract of decision is reproduced as under:-

“6.4 The facts of the present case are like this. The assessee has deposited cash of Rs. 77,01,600/- in his bank account which was subsequently transferred to the parties as discussed above through the mode of banking channel. Such amount of cash deposit was treated as unexplained investment in the hands of the assessee under the provisions of section 69 of the Act and therefore the same was added to the total income of the assessee on protective basis.

6.5 However, the AO was conscious while framing the assessment of the assessee about the fact that the substantive assessment has to be framed in the name of the persons as discussed above. The relevant observations of the AO as recorded in his order with respect to the substantive assessment reads as under:

“Substantive addition is to be made on the same issue in the cases of 1) Shri Sureshbhai Nathalal Thakkar, 2) Shri Rakesh Sureshbhai Thakkar, 3) Shri Sunil Sureshbhai Thakkar and 4) Smt. Jyotsnaben Sureshbhai Thakkar as the transaction are done by the them, in the bank account of the assessee and they have also failed to give their explanation in this matter, despite of opportunities being given to them to attend by issuing summons and also by the assessee.”

6.6 Undoubtedly, there was no assessment framed in the hands of the persons as discussed above. Thus in our considered view in the absence of such substantive assessment, the protective assessment cannot survive. In holding so we draw support and guidance from the order of Mumbai Tribunal in the case of Suresh K. Jajoo Vs. ACIT reported in 39 SOT 514 wherein it was held as under:

“Thus, protective assessment has to be done only after substantive assessment is done. An assessment can be considered as protective only when there is substantive assessment. Thus, substantive assessment has to precede protective assessment.”

6.7 We also note that the ITAT Jodhpur in the case of Ramesh Chand Premraj Soni (HUF) Vs. ACIT reported in 13 SOT 15 has held that if the substantive assessment in the case of the assessee is struck down being barred by time, the additions made in the protective assessment cannot survive. The relevant extract is reproduced as under:

“In the instant case, there was no dispute with regard to the facts that all the additions, which were the subject-matter of appeal or for that matter that of assessment order passed under section 158BD in the case of the HUF were made on protective basis. All parallel additions were made in the case of ‘R’ individually. The assessment made under section 158BC in the case of ‘R’ did not survive at all, since it had been struck down being time barred. The additions made on substantive basis had not been decided by deleting the same from assessee’s individual hands rather they were thrown along with the block assessment order, meaning thereby, there was no substantive addition in existence at all; and the protective addition presupposed the existence of substantive additions. In another words whenever additions were made, they were only substantive additions. The term ‘protective addition’ is a misnomer; actually it is a substitutive addition. The ‘protective addition’ name has been given to it since it protects the interest of the revenue. In such a case, there happens to be some doubt as to whom a particular income belongs to; when it is not clearly

established as to in whose hands a particular income should be added, when there are evidences that it may belong to either of the two, or when scintillating evidences are available from which it is not possible to come to clear-cut conclusion, readily. In the instant case, the substantive additions had not been declared to not belong to 'R'. Had that been the case, the protective addition could have been considered and added substantially if it was found to belong to 'protective assessee'. From the above observations, it follows that when the substantial additions go, protective additions cannot survive. When the very base of income 'goes', the addition in the assessee's hands, who was treated as 'protective', would also not survive. Consequently, on this legal ground, the assessment order was quashed."

6.8 In view of the above and after considering the facts in totality, we hold that the protective assessment framed by the AO without making the substantive assessment is not sustainable. Hence, the assessee succeeds on this technical ground. As the assessee has succeeded on the technical ground, we do not find any reason to adjudicate the issue raised by the assessee on merit. Hence the grounds raised by the assessee on merit are dismissed."

3.11.5 In view of the above discussion, the Ld. AO was not justified in making impugned addition on protective basis in the hands of appellant. Further, in view of the various judicial pronouncements, the appellate authority cannot sustain protective addition. Such decisions are as under:

(i). Hon'ble Allahabad High Court in the case of **Durgawati Singh (1988) 234 ITR 249**. The operative part of the decision is as under:-

*7. It is settled that when there is a doubt as to which person amongst the two was liable to be assessed, parallel proceedings may be taken against both and alternative assessments may also be framed. **It is also equally true that while a protective assessment is permissible, it is not open to the income-tax appellate authorities constituted under the Act to make a protective order.** The law does not permit assessment of the same income successively in different hands, The tax can only be levied and collected in the hands of the person who has really earned the income and is liable to pay tax thereon.*

(ii). Hon'ble Allahabad ITAT in the case of **Prakash Wine Agencies (1990) 38 TTJ 39 (Allahabad)** has held that an appellate authority should decide and determine the substantive addition and cannot

confirm protective addition. The relevant para of the said judgment is reproduced hereunder:-

6. In our opinion, there is merit in the assessee's submission. No appellate authority is authorised to evade the ground of appeal which is raised before it for adjudication by the appellant. Even a protective assessment gives rise to right of appeal relating to the finding of protective assessment itself and, therefore, it was the bounden duty of the learned Commissioner (Appeals) to have determined as to who was the real owner of the income in question, namely, whether the assessee firm was the benami of Late Shri S.N. Sahu. This issue cannot be left undecided in appeal. The right to make protective assessment has been given to the ITO by the case law *Lalji Haridas v. ITO (1961) 43 ITR 387 (SC)* but an appellate authority cannot evade the determination of the issue when it is brought before it by way of an appeal either by the assessee who is substantially assessed. The course of action adopted by the learned Commissioner (Appeals) was *prima facie* against law and, therefore, his order deserves to be set aside and so we set it aside.

(iii). Hon'ble MP High Court in the case of **Dayabai vs CIT 23 taxman 377** has held that the appellate authority cannot uphold a protective order, meaning thereby appellate authority cannot pass protective appellate order against the assessee. The relevant para of the said judgment is reproduced hereunder:-

8. It is, therefore, clear that the protective assessment made against Smt. Dayabai only to meet a situation that in case the assessment of Vinit Talkies is not made, this assessment could become operative, cannot now be maintained as the same income has already been assessed as the income in the hands of the firm Vinit Talkies, Jabalpur.

9. In this view of the matter, our answer to the question referred to by the Tribunal is in the negative that the Tribunal was not justified in confirming the protective assessment. In the circumstances of the case parties are directed to bear their own costs.

(iv). Hon'ble ITAT Pune in the case of **Natwarlal Radheshyam Bagaria ITA No 715 to 719/PN/2007** has held that it is not open to the CIT, appeal in confirming the addition on protective basis in the case of an assessee, even though substantive addition was deleted in the hands of same assessee. The operative part of decision is as under:-

14. In this background we find that it was the duty of the CIT(A) to determine as to who was the real owner of the income in question. This issue could not be left undecided in appeal. The right to make protective assessment has been given to the ITO by the case law *Lalji Haridas Vs. ITO and Anr (1961) 43 ITR 387 (SC)* but an appellate authority cannot evade the determination of the issue when it is brought before it by way of an appeal either by the assessee who is substantially assessed.

Further, we find that the Bombay Bench of the Tribunal in the case of Sipem UK Ltd. (supra) has held as under:

“Another important issue was as to whether the A.O having already assessed the income in the hands of the real assessee, could make a protective assessment in the case of assessee holding it to be agent of ‘V’. Such double taxation militates against the cardinal principles for levying tax on income. It is true that the department may not be sure as to in whose hands, the income should be brought to the charge of tax or for which assessment year such income is assessable. In such situation, the department is legally justified in making two assessments out of which one is substantive assessment and the other is protective assessment. This was what had happened in the instant case. The A.O had brought to a charge of tax the relevant income on substantive basis in the hands of ‘V’ and on protective basis in the hands of the assessee company

The appeal in the case of V was dismissed by the CIT(A) on 28-7-2003 and, thus, the assessment in the case of ‘V’ achieved finality. The CIT(A) was wholly unjustified in confirming the protective assessment made in the case of the assessee company even though substantive assessment was confirmed by him. For the said reasons, the relevant orders passed by the A.O and the CIT(A) were to be quashed.”

In view of the above, we are of the opinion that the CIT(A) after upholding the addition on substantive basis in the other case, could not make protective appellate order in the case of the assessee. The Assessing Officer may not be sure as to in whose hands the income should be brought to charge of tax or for which assessment year such income is assessable. In such a situation, the Assessing Officer is legally justified in making two assessments out of which one is substantive assessment and the other is protective assessment. But in appeal, it is not open to the CIT(A) in confirming the addition on protective basis in the case of an assessee, even though substantive addition was deleted in the hands of the same assessee. In view of the above, we hold that the CIT(A) was not justified in directing the Assessing Officer to sustain the addition mentioned above on protective basis and thus, his direction is hereby vacated.

Accordingly, entire addition made by the Ld. AO amounting to **Rs. 2,69,50,000/-** is **deleted**. Therefore, appeal on this ground is **allowed**.”

[Emphasis supplied]

51. During hearing before us, Ld. AR for assessee submitted that as per judicial rulings noted by CIT(A) in above order, no addition could be made in the hands of assessee on 'protective basis' when there was no addition made by assessing authority on 'substantive basis' in the hands of primary person. This view has also accepted by this very Bench of ITAT in ***IT(SS)A No. 305/Ind/2023 - DCIT (Central), Bhopal Vs. Shri Shailendra Sharma:***

"31. Thus it is clear that the CIT(A) has followed the decision of this Tribunal as well as judgment of Hon'ble Allahabad High Court and Hon'ble jurisdictional High Court on the point that the appellate authority cannot confirm the protective addition once the substantive assessment is confirmed or deleted. Further no substantive addition has been made in the hands of TES and TASK and therefore, the protective addition made in the hands of the assessee would not survive. Even otherwise the protective addition cannot be made in in isolation exclusion of substantive addition. The Gauhati Bench of this Tribunal in case of ITO Vs. Keshava Nanda Kakati 192 ITD 445 has held with this issue in para 8 and 9 as under:

"8. We have heard both the parties and perused the records. We note that the Ld. CIT(A) has made a categorical finding of fact that there was no substantial addition of such an amount (Rs. 1,51,56,830/-) made prior in the case of M/s. Society of Education and this finding of fact has not been rebutted/controverted of assailed by the revenue before us by filing specific ground to this effect in this appeal. From a perusal of the grounds of appeal raised by the revenue (supra), it is clear that the revenue has only assailed the decision of the Ld. CIT(A) in deleting the protective addition made by the AO to the tune of Rs. 1,51,56,830%. And it can be very well seen that the basis for deletion resorted by Ld CIT(A) to delete the protective assessment in the hands of assessee was because there was no substantial addition in the hands of M/s fiociety of Education. This crucial fact has not been rebutted/controverted/assailed before us. Therefore, this finding of fact of 14 CIT(A) crystallizes (Le no substantive addition in the hands of M/s. Society of Education) and, therefore, we do not find any infirmity in the order passed by the Ld. CIT(A) on this issue on deletion of protective addition without substantial addition. We also take note that the Ld. CIT(A) to come to such a decision has taken note of relevant decisions of this Tribunal which reads as under:

"In the case of ITO v. Fussy Financial Services Private Limited (LTA. No. 44/DEL/2014 dated 5-6- 2017, it was held/averred, as follows, by the Hon'ble ITAT-Delhi:

We further note that the analysis of the investment account reveal that the company has made investment of Rs.5,04,01,000/-. The statement given by Sh. PN Jha assumes importance wherein he categorically admitted that the company was doing the business of investment and finance and during the year the bank accounts of the company have been used to provide the accommodation entries. The addition of Rs. 31767952/- made by the Assessing Officer on protective basis, which is not sustainable in the eyes of law, because in this case the AO himself stated in the assessment order that the Department is looking after the case of beneficiaries and the amounts channelized through this group would be taxed in hands of the beneficiaries, the amount of total credits of Rs. 3,17,67,951/- made in its bank account with Kotak Mahindra Bank, KG Marg, New Delhi, during the year is added to the income of the assessee on protective basis. In this case we find that AO has not made any substantive assessment. There may be substantive assessment without any protective assessment, but there cannot be any protective assessment without there being a substantive assessment.

In the case of MP Romchandran v. DCIT [129 TTJ 190 at page 195), it was held/averred, as follows, by the Hon'ble ITAT:

"In order to give a different colour, the Id. DR contended that this disallowance was made on protective basis only and hence cannot be equated with the substantive disallowance. We have noted above about the validity and presumption of the protective assessment in general. Protective assessment cannot be pendent of substantive assessment. This protective assessment is always successive to the substantive assessment. There may be a substantive assessment without any protective assessment but there must be any protective assessment without there being a substantive assessment. In simple words where has to be some substantive assessment addition first which enables the AO to make a protective assessment/addition. Substantive addition/assessment is made in the hands of the person in whose hands the AO prima facie holds the opinion that the income is rightly taxable. Having done so and with a view to protect the interest of the Revenue, if the AO is not sure that the person in whose hands he had made the substantive addition rightly, he embarks upon the protective assessment. Thus the protective assessment is basically based on the doubt of the AO as distinct from his belief which is there is the substantive assessment."

In the case of Gregory & Nicholas v. Asst. CIT [IT Appeal No. 5102 (Mum.) of 2006, dated 1-3-2007], it was held averred, as follows, by the Hon'ble ITAT (Mumbai):

"21. In the case of Suresh K. Jaju (2010) 39 SOT 414(Mum), E-Bench of the Tribunal at pages 532 to 533 held as follows:

"The AO made the following observations:

"As the assessee has already offered this income in assessment year 2001-02, the same is assessed in this year to protect the interest of the revenue"

Whether the above observations are enough to conclude that the assessment of the capital gains as long- term capital gain in assessment year 2001-02 by the Assessing Officer was only a protective assessment? We have already seen the ratio laid down by the Hon'ble Supreme Court in the case of Lalji Haridas (supra) wherein the Hon'ble Supreme Court while recognizing the concept of protective assessment has very clearly laid down that there must be an exhaustive enquiry and the question as to who is liable to pay (in this case which year the capital gain is to be assessed and whether as long-term capital gain in assessment year 2001-02 or short term capital gain in assessment year 2000-01) should be determined after hearing objections. He should determine the question in the case of one person (in this case of the other person (in this case in other year) in whose case assessment has to be made protectively. Thus, protective assessment has to be done only after substantive assessment is done. An assessment can be considered as protective only when there is substantive assessment. Thus, substantive assessment has to be precede protective assessment"

In case of G.K. Consults Ltd V. ITO [Appeal No.1502 Delhi) of 2013, dated 27.6.2014}, [upheld in CIT v G.K. Consultants Ltd. [IT Appeal No.86 of 2015, dated 24.5.2016] [High Court], it was held/averred, as follows, by the Hon'ble ITAT Delhi:

"19. On careful consideration of above contention, we are of the view that there may be a substantive assessment without any protective assessment but there cannot be any protective assessment/addition, meaning thereby there has to be some substantive assessment/addition

first which enables the AO to make a protective assessment/addition. In the present case, the AO proceeded to make protective assessment by way of reopening of assessment of the assessee appellant company without being a substantive assessment on the date of assumption of jurisdiction u/s 147 of the Act which is not permissible as per decision of ITAT, Mumbai in the case of MP. Ramachandaran v. DCIT (supra) and Suresh K Jaju Vs. CIT (supra)." (Emphasis given by us)

In the light of the aforesaid decision of the Tribunal and based on the discussion, we do not find any infirmity in the action of Ld. CIT(A) to have deleted the protective assessment in the hands of the assessee when the fact was that there was no substantive addition in the hands of M/s. Society of Education or other assessee's and ergo the same is confirmed. 10. In the result, the appeal of the revenue is dismissed."

32. Accordingly following a series of decisions on this point, the Gauhati Bench of this Tribunal held that the protective assessment cannot be independent of substantive assessment. Thus a protective assessment is always successive to the substantive assessment. Therefore, there cannot be any protective assessment in the absence of a substantive assessment. Accordingly in the facts and circumstances of the case as discussed above when there is no substantive addition/assessment of the said income which is assessed in the hands of the assessee on protective basis, the same is not valid and hence, in view of various decisions referred above we do not find any error or irregularity in the impugned order of CIT(A) qua this issue and the same is upheld."

52. Ld. DR for revenue could neither controvert the order passed by CIT(A) nor rebut the contention raised by Ld. AR on facts or in law.

53. Faced with this situation, we subscribe to the order of CIT(A) in the light of judicial view and therefore the order passed by CIT(A) is hereby upheld. The revenue's ground is rejected being devoid of any merit.

Ground No. 4 to 6:

54. In these grounds, the revenue claims that the CIT(A) was not justified in deleting the addition of Rs. 10,01,000/- made by AO on account of undisclosed income surrendered by assessee in the statements recorded u/s 132(4). The issue involved and underlying facts in these grounds are identical to Ground No. 4 to 6 of AY 2015-16, therefore our adjudication in foregoing paras would apply *mutatis mutandis*. Applying same, these grounds raised by revenue are dismissed.

Ground No. 7:

55. In this ground, the revenue claims that the CIT(A) was not justified in deleting the addition of Rs. 5,27,923/- made by AO on account of income from house-property, relying upon the additional evidence filed before CIT(A) without giving opportunity to AO in terms of Rule 46A(1) of Income-tax Rules, 1962. The issue involved and underlying facts in this ground is identical to Ground No. 7 of AY 2015-16, therefore our adjudication in foregoing paras would apply *mutatis mutandis*. Applying same, this ground raised by revenue is also dismissed.

Ground No. 8:

56. In this ground, the revenue claims that the CIT(A) was not justified in deleting the addition of Rs. 14,54,610/- made by AO on account of unexplained cash deposits in bank a/c. We have already adjudicated and

dismissed this ground while adjudicating Ground No. 8 of AY 2015-16 in foregoing para.

57. Resultantly, assessee's appeal for AY 2010-11 is allowed and appeal for AY 2015-16 is dismissed. The revenue's appeals for both years are dismissed.

Order pronounced in open court on 19.07.2024.

Sd/-
(VIJAY PAL RAO)
JUDICIAL MEMBER

sd/-
(B.M. BIYANI)
ACCOUNTANT MEMBER

Indore

दिनांक/ Dated : 19.07.2024.
CPU/Sr. PS

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

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