आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL,
JAIPUR BENCHES,"A" JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य एवं डा0 मीठा लाल मीना, लेखा सदस्य के समक्ष
BEFORE: SHRI SANDEEP GOSAIN, JM & DR MITHA LAL MEENA, AM

आयकर अपील सं./ITA No. 349/JP/2024
निर्धारण वर्ष/Assessment Year : 2016-17

The ACIT Central Circle Kota	बनाम Vs.	Shri Naresh Jain 192, Ballabh Bari Kota
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAZPJ 0485 H		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ITA No. 358/JP/2024
निर्धारण वर्ष/Assessment Year : 2016-17

Shri Naresh Jain 192, Ballabh Bari Kota	बनाम Vs.	The ACIT Central Circle Kota
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAZPJ 0485 H		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

राजस्व की ओर से/Revenue by: Shri A.S. Nehra, Addl. CIT-DR
निर्धारिती की ओर से/Assessee by : Shri Mahendra Gargieya Adv
Shri Hemang Gargieya, Adv.

सुनवाई की तारीख/Date of Hearing : 22/05/2024
उदघोषणा की तारीख/Date of Pronouncement: 05/08/2024

आदेश/ORDER

PER: SANDEEP GOSAIN, JM

Both these appeals are cross appeals filed by the Revenue and the assessee against the order of the ld. CIT(A), Udaipur-2 dated 25-01-2024 for the assessment year 2016-17 raising therein following grounds of appeal.

ITA NO. 349/JP/2024 – A.Y. 2016-17 (REVENUE)

(i) Whether on facts and in circumstances of the case, the Ld. CTT(A) is justified in nor appreciating the fact that incriminating documents found and impounded during the survey containing all the incriminating information of transactions recorded therein and supported by the explanation and acceptance of Naresh Jain on oath u/s 131 during survey on the basis of which additions of Rs. 2,36,73,654/- were made under different heads.

(ii) Whether on facts and in circumstances of the case, the Ld. CTT(A) is justified in nor appreciating the facts that in respect of cash payment to Devilal Bairwa and Ajay Modi and that the assessee failed to the discharge the onus to prove with explanation of the persons concerned in respect of these transactions.

(iii) Whether on facts and in circumstances of the case, the Lil. CIT(A) is justified in deleting the addition of Rs. 9,75,000/- out of total addition of Rs. 20,22,500- on the account of unaccounted investment in agricultural land situated at Mandalia, Jhalawar Road, Keta which was made on the basis of incriminating documents impounded during the survey dated 04.02.2017, without appreciating the facts that the agricultural land belong to SC/ST category which cannot be transferred in the name of Naresh Jain, the assessee made an arrangement to make it registered in name of Devilal Bairwa of SC category and occupied it.

(iv) Whether on facts and in circumstances of the case, the Ld. CIT(A) is justified in deleting the addition of Rs. 9,50,000/- on account of unaccounted investment in ST land situated at Mandana Kota.

(v) Whether on facts and in circumstances of the case, the Ld. CIT(A) is justified in giving telescoping effect to the assessee to set off Rs. 1,00,30,778/- from the sustained addition of Rs. 1,29,02,990/- resulting in actual sustenance of Rs. 28,72,212/- only as effective addition.

(vi) The appellant craves to add, amend or withdraw any of the grounds during the course of appellate proceedings.

ITA NO. 358/JP/2024 – A.Y. 2016-17 (ASSESSEE)

1. The survey carried out u/s 133A on the office premises of M/s Creative Advertising Company at 149, Ballabh Bari, Kota on 02.02.2017 is illegal, void ab intio being without jurisdiction and therefore any inference or implications flowing from, such an illegal survey, deserves to be ignored or be not given effect

to while adjudicating the other grounds relating to the additions towards the declared income or otherwise.

2. The statements of the appellant recorded on dated 04.02.2017 u/s 131 of the Act were recorded unauthorizedly and illegally by the person who was not authorized in law to administer oath. Consequently, there is no evidentiary value of such illegally recorded statement being without authority of law, hence the implication or inference flowing from such statements may be directed to be completely ignored.

3. Rs.10,47,500/-: The Id. CIT(A) seriously erred in law as well as in facts of the case in partly confirming the addition of Rs.20,22,500/- on account of unexplained investment in purchase of land to the extent of Rs. 10,47,500/- (20,22,500 less relief 9,75,000). The addition so made and partly confirmed being contrary to the provision of law and facts may kindly be deleted in full.

4. Rs.58,00,000/- & Rs.60,00,000/-: The Id. CIT(A) erred in law as well as in fact the case in confirming the additions of Rs.58,00,000/- as allegedly paid to one Mr. Ajay Modi and also another amount of Rs.60,00,000/- which was to be paid for CBSE affiliation as presumed to have been paid but not recorded in the accounts out of the total addition made by the AO of Rs.1,58,00,000/- The addition-so made and partly confirmed by the CIT(A) being contrary to the provision of law and facts and facts may kindly be deleted in full.

5. Rs.48,46,094/-: The Id. AO erred in law as well as on facts of the case in making the addition of Rs. 48,46,094/-on account of the alleged repayment of salary to the staff u/s 69A of the Act. The addition so made and confirmed being contrary to the provision of law and facts may kindly be deleted in full.

6. The Id. AO further erred in law as well as on the facts of the case in imposing tax, surcharge, cess etc, as per provision of S. 115BBE of the Act. The invoking of 8.115BBE is contrary to the provisions of law, on facts and without jurisdiction. The appellant totally denies its liability. The tax liability no created, kindly be deleted in full.

7. Rs. 55,490/ The Id. CIT(A) also erred in law as well as in fact to the case in confirming the addition made by the AO u/s 69C on account of the unexplained agricultural expenses. The addition so made and confirmed being contrary to the provision of law and facts may kindly be deleted in full.

8. Rs.33,43,380/- The Id. AO erred in law as well as on the facts of the case in charging interest u/s 2344 & 234B of the Act. The appellant totally denies it liability of charging of any such interest. The interest, so charged, being contrary to the provisions of law and facts, kindly be deleted in full.’’

2.1 It may be noted that both the appeals are cross appeals against the order of CIT(A) dt. 25.01.2024. Since the ld. CIT(A) has already stated the relevant facts hence, the same are not being repeated here. During the course of hearing, the parties were directed to file detailed written submissions in support of their oral arguments, if so desired. However, the ld.DR supported the order of the AO. To this effect, the ld. AR of the assessee has filed the following written submissions countering the grounds of appeal raised by the Revenue. Now we firstly proceed to deal with assessee's appeal in ITA No. 358/JP/2024 (assessee) . However, the common grounds taken by the Revenue in its appeal in ITA No. 349/JP/2024 (Deptt) are also being adjudicated together.

Submission:

1. AO cannot blindly rely upon a statement alone:

1.1 During survey dt. 02.02.2017 statements of assessee were recorded u/s 131 and various impugned addition were based on statement of Shri Naresh Jain. However, it's crucial to note that firstly, these statement u/s 132(4) so as to have binding evidentiary value against the person admitting and secondly, the assessee Shri Naresh Jain has retracted from his statement through affidavit dt. 14.02.2017 submitted on 06.04.2017 before ADIT (Inv.) (APB 82-85). In the light of this fact, our submission are follows:

1.2.1 Sole Statement, not a good basis for Addition: At the outset, we submit that no addition can be made merely and solely on the basis of a statement. The ld. AO heavily relied upon the statement of the Shri Naresh Jain recorded u/s 131) on dated 02.02.2017 by the Survey Team. However, the credibility of such statements is highly doubtful and not binding for various reasons, as enumerated below:

1.2.2 No addition permissible solely based on statements: Pertinently, the impugned additions have been made solely based on the statement of the assessee without any corroborative evidence, and **that too ignoring the retraction**. It is settled that an admission cannot be made the sole basis of assessment since it is a matter of common knowledge that during the course of

Search/Survey, the Revenue Authorities normally do exert unwanted pressure and influence over the assessee's to get something surrendered to make their survey a success. To expect the assessee to furnish infallible evidence of concrete nature in such a situation is totally beyond comprehension.

1.3 The authorities below even violated the binding **CBDT Circular No. 286/2/2003 dt. 10.03.2003** and the Budget Speech, 2003 by the Finance Minister please be referred, which is reproduced herein below :

"Instances have come to the notice of the Board where assessee have claimed that they have been forced to confess the undisclosed income during the course of the search & seizure and survey operations. Such confessions, if not based upon credible evidence, are later retracted by the concerned assessee while filing returns of income. In these circumstance, on confessions during the course of search & seizure and survey operations do not serve any useful purpose. It is, therefore advised that ***there should be focus and concentration on collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed before*** *the Income Tax Departments, Similarly, while recording statement during the course of search & seizures and survey operations no attempt should be made to obtain confession as to the undisclosed income. Any action on the contrary shall be viewed adversely.*

*Further, in respect of pending assessment proceedings also****, assessing officers should rely upon the evidences/materials gathered during the course of search/survey operations or thereafter while framing the relevant assessment."***

The said instruction was relied upon in the cases of R. K. synthetics 30 TW 228 (Jd), ITO vs. Suresh Chandra Koolwal (2004) 32 TW 23 (Jp) and also CIT v/s Shri Ramdas Motor Transport 238 ITR 177(AP).

1.4 Judicial Guideline: The authorities below did not appreciate that the Survey & Search creates tension in the mind of the person being searched and a layman normally used to lose confidence. It can't be denied that such action creates an anxiety and medical problem to the person being searched. Pertinently, the **Kelkar Committee** has also taken note of this prevailing attitude of the search parties and consequently remarked very adversely. Reliance is placed on:

1.4.1 The existence of tension and surcharged atmosphere has been recognised even by the courts. Kindly refer **Jagdish Narayan Ratan Kumar 22 TW 209 (JP).** Such statements, therefore are bound to give a distorted picture and are not fully reliable as such.

1.4.2 On this aspect it will be quite relevant to refer to decision of Hon'ble Gujarat High Court **Kailashben Manharlal Chokshi vs. CIT (2008) 14 DTR 257/ (2010) 328 ITR 411 (Guj.)** wherein, it was held as under:

*"**22.** It is also to be seen as to whether an addition made is merely based on the statement recorded by the AO under s. 132(4) of the Act and whether any cognizance may be taken of the retracted statement. So far as case on hand is concerned, the* ***glaring fact*** *required to be noted is that the* ***statement of the assessee was recorded under s. 132(4) of the Act at midnight.***

In normal circumstances, it is too much to give any credit *to the statement recorded at such odd hours. The person may not be in a position to make any correct or conscious disclosure in a statement if such statement is recorded at such odd hours. Moreover, this statement was retracted after two months.*

26. In view of what has been stated hereinabove we are of the view that this explanation seems to be more convincing, has not been considered by the authorities below and ***additions were made and/or confirmed merely on the basis of statement recorded under s. 132(4) of the Act. Despite the fact that the said statement was later on retracted*** *no evidence has been led by the Revenue authority. We are, therefore, of the view that merely on the basis of admission the assessee could not have been subjected to such additions unless and until, some corroborative evidence is found in support of such admission. We are also* ***of the view that the statement recorded at such odd hours cannot be considered to be a voluntary statement,*** *if it is subsequently retracted and necessary evidence is led contrary to such admission. Hence there is no reason not (sic) to disbelieve the retraction made by the AO (sic-assessee) and explanation duly supported by the evidence. We are, therefore, of the view that the Tribunal was not justified in making addition of Rs. 6 lacs on the basis of statement recorded by the AO under s. 132(4) of the Act. The Tribunal has committed an error in ignoring the retraction made by the assessee."*

2. Admission retracted / Not acted upon - Hence addition invalid:

2.1 Unfortunately, in present case the AO ignored the settled legal position that **a person making a statement is legally entitled to retract** from what it had stated earlier. It has been held that an admission, though best evidence against such a person, if shown to be out of ambiguity, under tension or was against the facts or misconception of law, can be validly retracted. The assessee repeatedly submitted that it had prepared a retraction letter supported by affidavit dated 14.02.2017 (APB 140-143) which was filed before the ADIT(Inv.), Kota on 06.04.2017 for this purpose the assessee purchased a Non-Judicial Stamp Paper on 07.02.2017 (i.e. just within 4 days) executed on 14.02.2017, when it was signed in the presence of the Notary Commissioner. The contents of the same are reproduced here under :

"3. THAT the normal business hours of our business units are from 10:00 AM to 8:00 PM and business, activities are conducted at respective office 149, Ballabhbari, Kota during these hours only.

4. THAT the Income Tax Investigation Team has visited ***on 2nd February, 2017 at around 6:30 AM*** *at my residence without prior notice and forced me to open the business premises at the same time.*

5. THAT the Officials of Income Tax Department after forcing me to open the business premises ***started the survey on 2nd February, 2017 at around 7AM which continued till 5th February, 2017 around 3:30AM.*** *The survey was conducted based on some suspicious information about our connection with Allen Career Institute. The Officials of the survey team, recorded my statement from time to time to establish, that we have unrecorded transactions with M/s Allen Career Institute. Having not found anything incriminating with reference to our transaction with Allen Career Institute, they started looking into our personal affairs and pressurised me to give statement about my transactions/properties.*

6. THAT I gave the statement as per my information and knowledge without any verification from the books of accounts. This statement continued from 2nd February, 2017 to 5th February, 2017 and my statement was recorded in more than 25 pages. The survey party ***impounded various documents, books and papers*** *and asked me to sign each and every paper without providing*

me any opportunity to read what they have written in my statement and thus concluded the survey at around 3:30 AM on 5th February, 2017. ***I was so exhausted*** *in this continuous survey that I signed the papers as required by the survey party.*

7. THAT-on-7th February, 2017 from the media news on ETV News and Zee Marudhara, ***I came to know that the Income Tax Survey Party has sought a declaration of undisclosed income of around Rs. 9 ers from me,*** *On hearing this news, I was shocked as I had not made any such declaration nor the survey party have stated about any such undisclosed income in course of survey. 1, therefore, immediately went to the Income Tax Office, CAD Road, Kota - Room No.217 at around 7 PM but no official who came for survey was present there. Therefore, I rang up Shri Dinesh Gehlot, Commissioner but as soon as I started talking to him about the media news of my declaration of undisclosed income, he disconnected the call. Thereafter, I tried to contact Shri Mukesh Ji Sharma (ITO) but he also did not meet me. Thereafter, I called Mr. Jakhad, Jodhpur who informed me that as per my statement on various points, I have mentioned some amount which amounts to approximately Rs. 9 crs and this is the amount which I have surrendered in my statement.*

8. THAT I am ***not aware that what has been recorded*** *by the survey team in my statement recorded in survey as I was not given any opportunity to understand and read that statement. These statements were recorded under coercion and undue influence; therefore, I disown the statement recorded in course of survey.*

9. That I assure that after obtaining the various documents impounded from me and. after analyzing the same, if any unrecorded income is found, I will disclose the same in the return of income.

10. Whatever declaration 1 have made and wherever documents they have made me signed, 1 was not in a state of mind to analyze the situation at that time. So, I request you to please not to consider the statement given at the time of survey, they were all taken by coercion and misrepresentation by the income Tax Officials which is against the law.

11. That the facts stated in Paras 1 to 10 above are true and correct to the best of my knowledge and belief, SO HELP ME GOD."

2.3 The Authorities below doubted the fact of filing the affidavit yet however, no positive evidence has been brought on record by them from the office of the ADIT (Inv) denying the fact of receiving in the retraction letter/affidavit. The very fact of filing the affidavit together with the other facts and in absence of any contrary evidence, has to accept that the assessee did retract within a period of just four days from the date of admission during the course of survey statement on dated 02.02.2017. Even the revenue has not taken any specific ground on this aspect nor the ld. DR could controvert these facts.

2.4 Legal Principles:

2.4.1 It is trite law that an admission, though best evidence against such person, if **shown to be out of ambiguity, under tension or was against the facts or misconception of law,** can be validly retracted. It has been held by the Hon'ble Supreme Court in **Pullangode Rubber Produce Co. Ltd. vs. State of Kerala & Others 91 ITR 18 (SC):**

"Such 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, and the assessee should be given a proper opportunity to show that the books of accounts do not disclose the correct state of facts".

2.4.2 The Hon'ble Apex Court in Nagubai Ammal v/s B. Sharma Rao AIR 1956 (SC)593: held as under

*"An **admission is not conclusive as to be 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".*

2.4.3 In **Rajesh Jain v/s DCIT (2006) 100 TTJ 929 (Del),** held that computation of undisclosed income solely on the basis of confessional statement of the assessee was not justified, inter alia, where the conduct of affairs by the Revenue Authorities showed that **good amount of psychological pressure** was built on the assessee to make the said statement and all material found during search **was duly explained by assessee on which no adverse comments was made by the AO.** This decision contains various references and relevant extract quoted from various case laws.

2.4.4 Further kindly refer Polat Marmo Agglomerates Ltd vs. Union of India (1994) 73 ELT 536 (Raj.) wherein it was held that the admission made in **ignorance** of correct position of law and facts are not binding upon a party.

2.4.5 Similarly, in the case of **Ambalal vs. Union of India (1983)13 ELT 1321 (SC)** it was held that confessional statements recorded under threat, coercion, inducement or promise are not valid but persons concerned should take care to retract such confessions without delay. Retraction would then be weighed in the light of other evidence available

2.4.6 The Hon'ble Supreme Court in **Vinod Solanki v/s Union of India (2009) 233 ELT 157 (SC)** makes it abundantly clear that the issue of summons and obtaining statements from the persons summoned, cannot and should not be the only basis to make out a case by the Revenue against the assessee. The Hon'ble Supreme Court took into account the fact that the **burden of the revenue cannot be dispensed with and the onus cannot be shifted by it to the assessee by obtaining confessional statement.** After elaborate judicial analysis of the legal position, the Hon'ble Supreme Court allowed the appeal of the assessee and vacated the orders of all the lower authorities.

2.4.7 Also refer **Heirs and LRs of Late Laxman Bhai S. Patel v/s CIT (2009) 222 CTR 138 (Guj).**

3. Statement of assessee can't be incriminating material:

3.1 ACIT, Central Circle-1(4), Ahmedabad v. Himalaya Darshan Developers (Gujarat) (P.) Ltd [2021] 128 taxmann.com 435 (Ahmedabad - Trib.) held as under:

"Besides the above, the Assessing Officer has also made reference to the statement of the director of 'SJSL' recorded under section 132(4) and statement of another director under section 131(1A), wherein it was admitted that the company namely 'SJSL' is engaged in providing accommodation entries. Thus the same is a paper company. On perusal of the statement

recorded under section 133(4) reproduced by the Assessing Officer in his order there was remarks made by such director to the effect that material/ document seized during the search does not belong to the PS i.e. 'SJSL', or belong to the assessee company. In this regard, there were no incriminating material against OP was found in the search. Further, ***section 153C emphasize that there should be material or document seized which belong to the OP. As such statement recorded during search is not a material or document found and seized. Therefore, the statement recorded under section 132(4) cannot be construed as material/document for invoking proceeding under section 153C specially, in the circumstances where no material of incriminating in nature found belonging to OP.*** *[Para 8.4]*

The documents/ any fact/ evidence which could suggest that the documents/ transactions claimed or submitted in any earlier proceedings were not genuine, being only a device/ make belief based on non-existent facts or suppressed/ misrepresented facts, fulfilling the ingredients of undisclosed income, would constitute the documents sufficient to make assessment for the purposes of the Act. The courts have referred such documents as an 'incriminating material'. While going through a large number of the decision rendered in the context of search assessment, it was observed that the word 'incriminating material' has been used very often, but the ***point here is that what is the meaning of 'incriminating material'*** *or in other words what meaning can be attributed to 'incriminating material', as the same is the main bone of contention while framing the search assessment order under section 153A/ 153C and the same has not been defined under the Act. Therefore, it is imperative to understand the meaning of the word 'incriminating material'. Practically stating it can be stated that the 'incriminating material' can be in any form such as a document, content of any document, entry in the books of account, an asset etc. [Para 8.5]*

Any fact/evidence which could suggest that the documents/transactions claimed or submitted in any earlier proceedings were not genuine, being only a device/make belief based on non-existent facts or suppressed/misrepresented facts, fulfilling the ingredients of undisclosed income, would constitute an 'incriminating material' sufficient to make assessment for the purposes of the Act. *[Para 8.6]"*

3.2 PCIT, Delhi-2 *v.* Best Infrastructure (India) (P.) Ltd.* [2017] 84 taxmann.com 287 (Delhi) Hon'ble High Court of Delhi held as under:

"38. *Fifthly, statements recorded under Section 132 (4) of the Act of the Act do not by themselves constitute incriminating material as has been explained by this Court in Harjeev Aggarwal (supra)…."*

4. No evidentiary value of Survey Statement:

4.1 As per S. 133A, there is nothing which suggests that a statement can be recorded on oath before the commencement of Survey or during Survey. However, if recourse is taken to section 131(1), during the survey, a statement can be recorded on oath, as the powers to record a statement on oath are vested in the authority u/s. 131(1) r/w S.133(6) but only in the given facts & circumstances as specified u/s. 133(6) only. Section 133A does not empower any ITO to examine any person on oath, so **statement recorded under section 133A has no evidentiary value and any admission made during such statement cannot be made basis of addition**.

4.2 Further, the **statute has provided different provisions** looking to the different factual situations as regard recording of the statement, somewhere on oath and somewhere without oath, **u/s 132(4) (in such matters), u/s**

133A(3)(iii) (in survey case) and u/s 131 (for general inquiry). These provisions operate independently in their respective fields and cannot be used interchangeably. S.133A(3)(iii) is separate and independent from S. 131, as evident from the further fact that S. 133A (6), refers to use of the powers u/s 131 only in a given fact situation (as stated above), which manifests the legislative intention that statement of the assessee can be recorded under any of these three provisions as the situation may demand. Further, S.132(4) provides that such statement recorded during search may be used as evidence against the assessee in any proceedings, which is not the situation with S. 133A(3)(iii) nor with S. 131. In other words, though statement may be recorded on oath u/s 131, yet the statute not having provided such statement to be used as evidence against the assessee in any proceedings, the statement recorded under these two provisions loses their evidentiary value on the strict interpretation of the fiscal statute. Ignoring this significant difference will render the use of these words intendedly u/s 132(4), purposeless or nugatory. Therefore, to say that statement recorded u/s 133A(3)(iii) is equivalent to statement recorded u/s 131 is a gross misinterpretation of the provisions.

4.3 Reliance placed on:

4.3.1 CIT v. Khader Khan Son (2008) 300 ITR 157 (Mad.) (HC). Affirmed by Apex Court in, **CIT v. S. Khader Khan Son (2012) 210 Taxman 248(2013) 352 ITR 480 (SC) / (2012) 25 taxmann.com 413 (SC).**

4.3.2 Moreover in a comparatively recent case of **Pr. CIT, Central -2, New Delhi v. Meeta Gutgutia [2017] 82 taxmann.com 287 (Delhi)** Hon'ble Delhi High Court referred to the decision of the Kerala High Court in Paul Mathews & Sons v. CIT [2003] 263 ITR 101/129 Taxman 416 and of the Madras High Court in S. Khader Khan while considering distinction between statements under Sections 132(4) and 133A held as under:

"40. The main plank of Mr. Manchanda's submission was that the disclosure made by Mr. Pawan Gadia in his statement under Section 133A was sufficient to be construed as incriminating material qua all the aforementioned AYs, the assessment for which could be re-opened by invoking Section 153A of the Act. It is significant that while in the written submission dated 26th April, 2017, Mr. Manchanda termed the statement of Mr. Pawan Gadia as "the statement dated 23rd December, 2005 recorded under Section 132(4) of the Act", he was careful to describe it as such in the subsequent written submission dated 2nd May, 2017. This was for a good reason. ***The statement was in fact not under Section 132(4) of the Act but under Section 133A*** *of the Act.* ***There is a difference*** *between a statement made during a survey under Section 133A of the Act and that made during the course of search under Section 132 (4) of the Act. Section 132(4) of the Act states that the authorized officer may, during the course of search and seizure, "examine on oath any person who is found to be in possession or control of any books of account, documents, monies, bullion, jewellery..."****and that any statement made during such examination may be used thereafter in evidence in any proceeding under the Act.*** *On the other hand, Section 133A does not talk of the recording of any statement on oath. Under Section 133A (3) (iii), the Income Tax Authority acting under the said provision could "record the statement of any person which may be useful for, or relevant to, any proceeding under this Act." Therefore,* ***there is a considerable difference in the nature of the statement recorded under Section 132(4) and that recorded under Section 133A(3)(iii) of the Act.***

*41. This **distinction was noticed** by this Court in **Dhingra Metal Works (supra).** The Court there referred to the decision of the Kerala High Court in **Paul Mathews & Sons v. CIT [**2003] 263 ITR 101/129 Taxman 416 and of the Madras High Court in **S. Khader Khan Son (supra)** and observed that the word 'may' occurring in Section 133A(3)(iii) of the Act "clarifies beyond doubt that the material collected and the statement recorded during the survey is not a conclusive piece of evidence by itself." Incidentally, the decision of the Madras High Court in S. Khader Khan Son (supra) has been affirmed by the Supreme Court by the dismissal on 20th September, 2012 of SLP (Civil) No. 13224/2008 filed by the Revenue against the said decision after granting leave. To the same effect is the decision of this Court in **Sunrise Tooling System (P.) Ltd. (supra)** and of the Jharkhand High Court in **Shree Ganesh Trading Co. (supra).** The CBDT's instructions dated 10th March, 2003 and 18th December, 2014 have also emphasized that there should be no recording of statement during "search/seizure/other proceeding" under the Act under "undue pressure or coercion".*

*42. Therefore, in the present case**, it would be wrong on the part of the Revenue to characterize the statement of Mr. Pawan Gadia as by itself an incriminating material that could be used for making additions** in all the AYs in question apart from the year of search."*

4.3.3 Covered issue: This Hon'ble ITAT in the case of **Unique Art Age v. AO [2014] 50 taxmann.com 194 (Jaipur - Trib.),** has also taken similar view holding that:

"3.8 Effect of admission made in statements recorded during survey under section 133A of the Act

*18. **The position of law regarding the evidentiary value of admissions made in such statements is now settled.** After considering the rival stands on this issue, we have already discussed the same in the earlier part of this order. **No admission made in a statement recorded under section 133A on oath during survey can be relied as evidence against the maker or the assessee.** Undeniably, the Assessing Officer has made impugned addition on the basis of the statement of Shri Manohar Lal Agarwal and specifically by relying on his reply to question No. 23 of his statement. As per the assessment order, the excess stock of Rs. 5,08,98,166 has been worked out after giving the benefit of discount and the gross profit rate but mainly relying on the statement of one of the partners of the assessee-firm. If the statement of Shri Manohar Lal Agarwal and others are excluded in view of the above legal position, the value of the alleged excess stock can be ascertained in the light of the facts of this case. The legal issue is decided in favour of the assessee"*

4.4 Decision cited by CIT(A) not applicable: The reliance placed by the ld. CIT(A) on certain decisions are based on the peculiar facts available in those cases only not available in the present case. eg. in Hukum Chand retraction was made **after 2 years** and in Kantilal C Shah retraction was made **after 9 months hence both the cases are not applicable** looking to the abnormally long period as **against merely 2 months** in the present case (04.02.2017) and affidavit towards retraction filed on 06.04.2017 (Pg.54 CIT(A) order).

4.5 It is pertinent to note that the CIT(A) has **rejected the claim of filing retraction** by the Assessee before him, at the same time, **he considered the documentary evidences**, furnished by the assessee with a view to explain the impounded document and to clarify the admission made hence, it can't be said that the CIT(A) granted relief only and only on the legal aspect (that statement

recorded during survey u/s 133A(3)(iii) and/or u/s 131, has no evidentary value and not being conclusive, no addition can be made merely on that basis). On the contrary, it is discernible from his findings in all the 4 cases, where he has granted relief, he has extensively dealt with the merits of each case for examining the impounded documents, explanation of assessee, remand report and rejoinder etc., independently.

Thus, under totality of the facts and circumstances detailed above, the CIT(A) deleted the addition. **Therefore, this ground taken by the revenue deserves to be dismissed.**

AGOA-3: Wrong confirmation of addition upto Rs.10,47,500/- (out of Rs. 20,22,500/-) by the CIT(A) (also refer DGOA-2 & DGOA-3 for deletion of addition of Rs.9,75,000/- separately dealt with)**:**

Facts: The AO has dealt with this issue at Pg 2 Pr 4 and copied at page no.5 para 4.1 of CIT(A) order. The detailed written submissions dt.19.11.2019 filed before the CIT(A) are at page no.16 para 4.2, the remand report thereupon by the AO dt. 07.06.2023 is at page no.36 para 4.4, the rejoinder dt. 20.06.2023 at page no. 47 para 4.5 and finally the ld. CIT(A), after considering the detailed submissions, the remand report, rejoinder made before him, at Page 52, Para. 4.6 concluded in following words:

"4.6.1 The discussion on various additions against which appeal has been filed are being discussed as under.

i. Addition for payment for land of Rs. 20,22,500/- (Revised Ground No. 2)

In this case, the AO noted that in reply to Q No. 23 of his statement recorded during survey action u/s 133A on 04.02.2017, Sh. Naresh Jain explained that these documents relate to purchase of agriculture land at Khasra No. 495/ 251, Mandalia, Jhalawar Road, Kota. He explained that the total price of land is ***Rs.19,50,000/- wherein Shri Naresh Jain holds 50% share only. The remaining 50% share is held by Shri Devilal S/o Bhawani Shankar Bairwa.*** *Shri Naresh Jain again admitted that he paid a sum of Rs.9,75,000/- towards his share in cash.*

During the course of assessment proceedings, the appellant stated that the amount given as ***Advance to Devi Lal Bairwa has been accounted for in the Balance Sheet of Naresh Jain on 31.03.2016 relevant to A.Y. 2016-17*** *and be appropriated out of income declared Rs.46,43,094/-. The AO considered that the assessee had made payment for this land of Rs. 20,22,500/- (19,50,000 + 72,500).*

It is argued that the ***appellant was neither party to any of the documents impounded during survey nor signed by the appellant as party****; has stated in his statement that he had made cash payment of Rs.9,75,000/- for purchase of half share of land; has given advance of Rs.9,75,000/- to Shri Devi Lal for purchase of half share of alleged land and there is* ***no evidence on record that to prove that the appellant has paid entire amount of Rs.20,22,500/- and no enquiry has been made from Shri Devi Lal*** *about the land/transaction etc.*

The appellant ***also argued that 133A does not empower to record statement on oath*** *and said statement was duly retracted by filing Affidavit and hence does not have any evidentiary value.*

With regard to evidentiary value of the statement recorded under oath u/s 131 it is held in various decisions that the statement recorded under oath is having evidentiary value. The ITAT Delhi Bench 'E' discussed these issues in detail in the case of Nokia India (P.) Ltd. v. Deputy Director of Income-tax, Circle -2(1), International Taxation, New Delhi [2015] 59 taxmann.com 212 (Delhi - Trib.) on these issues in detail. The relevant part is extracted as under-

"Accordingly, it is to be held that there was ***no illegality in carrying out survey and the statements recorded under section 131*** *at Chennai were validly recorded. [Para 7.19]*

Thus, as has been already held that survey was validly conducted, therefore, objection of assessee regarding ***evidentiary value of statements recorded during survey does not survive.*** *However, even otherwise, it is well settled law, as held in the case of Pooran Mal v. Director of Inspection [1974] 93 ITR 505 (SC) and Dr. Pratap Singh v. Director of Enforcement [1985] 155 ITR 166/22 Taxman 30 (SC), that* ***evidence collected during illegal surveys also can be relied upon****. Even otherwise this plea cannot be accepted on the ground of breach of fundamental right of privacy because of the decision of Supreme Court in above cases. [Para 8]*

The next objection of the assessee is that ***statement on oath could not be recorded in course of survey.*** *This issue is covered by the decision of the Bombay High Court in the case of Dr. Dinesh Jain v. ITO [2014] 363 ITR 210/226 Taxman 27/45 taxmann.com 442 and, therefore, this objection raised by assessee does not survive. [Para 9]"*

The ITAT while giving decision has relied upon the decision of Supreme Court and High Courts. It is clearly held that survey was validly conducted, therefore, objection of assessee regarding evidentiary value of statements recorded during survey does not survive. In this case also there is no dispute that survey was validly conducted. Therefore, the statement recorded during survey is a valid piece of evidence. The next objection of the appellant is that ***statement on oath could not be recorded in course of survey.*** *This issue is covered by the decision of the Bombay High Court in the case of Dr. Dinesh Jain v. ITO [2014] 363 ITR 210/226 Taxman 27/45 taxmann.com 442 and, therefore, this objection raised by assessee does not survive.*

The appellant also raised the plea that the statement was retracted. On perusal of the facts, it is seen that the retraction was filed late and the same was not supported by credible evidences. The retraction is therefore only assertion without any supporting evidences.

It is noticed that various judicial authorities have held that a statement recorded under oath is an important piece of evidence and though it is open to the assessee to show that the statement under oath was erroneous. Such retraction must be made soon after the recording of the statements on oath and further such retraction should be backed with suitable and sufficient evidence.

The survey proceedings were conducted on 04.02.2017 whereas the AR of the appellant stated that the affidavit was filed before the ADIT (Inv.) on 6.04.2017. However, no evidence furnished to prove the same. The appellant has accepted some of the transactions pertaining to AY 2015-16. In these circumstances, the retraction filed by the assessee is therefore not acceptable.

In this regard, in an important decision Hon'ble Gujrat High Court of in the case of Asstt. CIT v. Hukum chand Jain [2010] 191 Taxman 319 it was held that if an allegation of duress or coercion was made almost after two years, then such allegation has to be overruled. In this case also the allegation is made after long period of time. No evidence of coercion is furnished. Therefore, the allegations of coercion are not found to be acceptable.

The ITAT Ahmedabad Bench 'C' in the case of Kantilal C. Shah v. Assistant Commissioner of Income-tax, Circle-3, Ahmedabad [2011] 14 taxmann.com 108 (Ahmedabad) considered the similar issue. The head note of the decision is as under–

"Section 132, read with section 69, of the Income-tax Act, 1961 - Search and seizure - Block periods 1-4-1985 to 31-3-1995 and 1-4-1995 to 12-12-1995 - Whether section 132(4) enables an authorized officer to examine a person on oath and such a sworn statement made under section

132(4), thus can be used as an evidence under Act - Held, yes - A search operation was carried out at premises of assessee whereby cash, jewellery, books of account and certain documents were found and seized - Assessee on same day had given a statement under section 132(4) whereunder admissions with regard to unaccounted income of Rs. 6.20 lakhs were made - Said unaccounted income consisted of marriage expenditure, unexplained household expenditure, etc. - Assessing Officer, made additions in respect of unaccounted income of Rs. 6.20 lakhs admitted under section 132(4) - However, after lapse of about nine months from date of admission, assessee through an affidavit sought to retract from statement made under section 132(4) on ground that (a) when there was no evidence or incriminating material discovered at time of search no addition could have been made merely on basis of statement under section 132(4) and (b) that impugned disclosure under admission was obtained forcefully and, hence, not binding - Whether statement recorded under section 132(4) is an evidence by itself and any retraction contrary to that should be supported by strong evidence for demonstrating that earlier evidence recorded was under coercion - Held, yes - Whether assessee retracted from his earlier statement without demonstrating any evidence to establish that statement recorded earlier was incorrect; an allegation of compulsion or coercion must not be accepted merely on a statement if remained unsubstantiated - Held, yes - Whether, therefore, addition made on basis of statement recorded under section 132(4) was to be upheld - Held, yes [In favour of revenue]"

In this case also the Assessing Officer made additions in as admitted in the statement under oath. However, after lapse of long period from date of admission, assessee through an affidavit sought to retract from statement made under oath on ground that (a) when there was no evidence or incriminating material discovered at time of search no addition could have been made merely on basis of statement under oath and (b) that impugned disclosure under admission was obtained forcefully and, hence, not binding. Statement recorded under oath is evidence by itself and any retraction contrary to that should be supported by strong evidence for demonstrating that earlier evidence recorded was under coercion. The assessee retracted from his earlier statement without demonstrating any evidence to establish that statement recorded earlier was incorrect; an allegation of compulsion or coercion must not be accepted merely on a statement if remained unsubstantiated. Therefore, addition made on basis of statement recorded under oath was to be upheld.

The AO also noted that during the survey proceedings the impugned document mentioning purchase of land in cash is found and the statements were recorded on the basis of material found during the course of survey proceedings. Therefore, the addition is made on the basis of statement recorded during survey and the documents found during survey.

The appellant has not furnished any evidence to support that it approached to higher authorities about the alleged coercion used during recording the statement. There is no evidence that the appellant filed any such complaint before higher authorities. Therefore, the allegations of the appellant are unfounded and therefore not found to be acceptable.

On the issue of retraction Hon'ble High Court Of Kerala in the case of

***Commissioner of Income-tax, Kozhikode v. O. Abdul Razak [2012] 20 taxmann.com 48 (Ker.)** held as under -*

"Section 132 of the Income-tax Act, 1961 - Search and seizure - Block period 1988-89 to 1998-99 - Whether any statement recorded under section 132(4), statutorily deemed to have evidentiary value, cannot be retracted at mere will of party - Held, yes - Whether a statement made under oath deemed and permitted to be used in evidence, by express statutory provision, has to be taken as true unless there is contra evidence to dispel such assumption - Held, yes - Pursuant to a search conducted at residential premises of assessee, Assessing Officer computed undisclosed income on basis of clear admission made by assessee in sworn statement recorded under section 132(4) - First addition was with regard to actual money paid by assessee for purchase of four properties - Assessee had voluntarily submitted before ITO that amount shown in document with regard to purchase of four properties were not actual amounts and he had paid more than that

shown in documents - Second addition was with respect to personal expenses - Last additions was of amount of Rs. 3 lakh which assessee claimed as an NRI loan in his cash flow statement and later in a reply stated to be a loan from his elder brother - Later on, assessee retracted from his statement and contended that admissions were made under threat and coercion - Tribunal allowed appeal of assessee and held that no evidentiary value could be attributed to statement under section 132(4) especially in context of there being a retraction and that for making additions, Assessing Officer should necessarily unearth materials during search - Whether on retraction being filed by assessee, there was a burden cast on assessee to prove detraction or rather disprove admissions made - Held, yes - Whether since assessee failed to prove any threat or coercion and had voluntarily disclosed his income by making statement under section 132(4), it could be said that retraction made by assessee was a self-serving after thought and no reliance could be placed on same to disbelieve clear admissions made in statement recorded under section 132(4) - Held, yes - Whether therefore, additions made on account of admissions made under section 132(4) and statement corroborated by documents recovered in search and attendant circumstances was to be sustained - Held, yes [In favour of revenue]"

In this case also on retraction being filed by assessee, there was a burden cast on assessee to prove retraction or rather disprove admissions made. The assessee failed to prove any threat or coercion and had voluntarily disclosed his income by making statement under oath, it could be said that retraction made by assessee was a self-serving after thought and no reliance could be placed on same to disbelieve clear admissions made in statement recorded under oath. Therefore, additions made on account of admissions made under oath and statement corroborated by documents recovered in survey and attendant circumstances is found to be justified.

Without prejudice to the above, there is another angle to the admission during the search and retraction during assessment proceedings. By admitting the appellant during search and survey proceedings the assessee stopped further investigation by the investigation wing. The assessee prevented department to cause further enquiry in his case. Since, the appellant admitted that part of the cash transactions. As such law of estoppels applies in this case. In such circumstances, it is against the principles of law if retraction letter is furnished before the AO during the assessment proceedings is considered.

In view of above discussion, the outright retraction made by the assessee is not found to be acceptable and rejected. However, the documentary evidence to clarify the admission made is admitted in the interest of justice.

*The facts of the case are considered. In the statement recorded during The assessee only admitted that out of total expenditure as recorded on the paper found during the survey of Rs. 20,22,500/- an amount of Rs. 9,75,000/- was not paid by him because the assessee purchased only 50 per cent share in the property. No evidence brought on record by the AO to prove that the assessee paid entire amount. The document was explained by the appellant with reasoning during the survey also. Therefore, the addition of entire amount of transaction in the hands of the appellant was not found to be justified. In view of these facts**, the addition made by the AO is reduced by Rs. 9,75,000/-.** The appellant gets a relief of Rs. 9,75,000/-. **Remaining addition amount of Rs. 10,47,500/- is confirmed**. The appellant gets a partial relief.*

The ground number 1 is treated as partially allowed."

Hence this ground.

Submission:

1. At the outset we strongly place reliance upon our detailed submissions made before AO as also before the CIT(A).

2. We also place strong reliance upon the order of the CIT(A) (Pg.62) to the extent his findings and observations are given in the favour of assessee.

3. We respectfully submit that the Revenue's grounds lack merit for the following reasons:

4.1 No evidence found supporting the addition: The undisputed facts are that, Annex-A, Exhibit-4 Pg.1-9 being Purchase agreement registered on 29.06.2015 (APB 34-41) who is the buyer and the legal owner over the agricultural land for consideration of Rs.19,50,000/- plus expenses of Rs.72,500/- totaling Rs.20,22,500/-. **The assessee never signed the said document, nor he has been a party to the transaction, which is again an undisputed fact on record**. Thus, for all intent and practical purposes, as also on legal side, it is **only Devilal who is the buyer, who paid the consideration** and became the owner and the assessee had got no role to play therein.

4.2 The only basis for the AO was the so-called statement of the assessee wherein he admitted having been paid Rs. 9,75,000/-. However, in the view of above facts, no reliance could be placed solely on the statement admitting income, if any, because it is not corroborated by supporting evidence and in fact, **Shri Devilal initially had entered into an agreement to purchase** on the dt. 01.05.2015,(APB-42-45), for purchase of the agricultural land for Rs.19,50,000/-. Later on, the sale was registered through the registered sale deed on dt29.06.2015 (APB-34-41). Thereafter, because of his financial needs, he approached the assessee to sell ½ share in the said land, towards which the assessee agreed and paid advance of Rs.9,75,000/- to Shri Devilal, the owner and buyer. Accordingly, the **assessee even accounted for the said transaction**, which is reflected in the Balance Sheet as at 31.03.2016 (APB-89) submitted before AO vide submission dt.28.09.2017 (APB 19).

First of all, though the CIT(A) noted this fact and contention, yet however rejected by merely saying that the assessee filed ROI u/s 44AD and hence such accounts were not maintained / cannot be relied upon. Such basis for rejection by the CIT(A), is a misconception of law in as much as S.44AD nowhere prohibits an assessee from maintaining regular books of accounts and it is sole option or prerogative of the assessee whether to opt for S.44AD or not. But having opted for S. 44 AD Presumptive Taxation does not mean that accounts otherwise regularly maintained cannot be relied upon. The assessee merely stated the position of law u/s 44AD but never categorically denied maintaining accounts hence there is no contradiction as alleged by CIT(A). Thus, the assessee merely paid Rs.9,75,000/- and that too was duly accounted for.

Although, specific contention was raised to this effect, in Para 4.6.1 reproduced at page 52 of the appellate order, yet however, the CIT(A) completely ignored this vital fact that the subjected payment of Rs.9,75,000/- was duly accounted for. The accounts produced were not rejected, by the AO or CIT(A).

The CIT(A) however, did not appreciate these facts correctly and sustained the addition to the extent Rs.10,47,500/- granting relief of Rs.9,75,000/-. Once he

has already granted relief to the extent of Rs.9,75,000/-, there is no reason why the balance amount of Rs.10,47,500/- be not deleted, which was a part of the purchase consideration already paid by Shri Devilal to the seller at the time of purchase long back.

5.1 Reply filed during Remand Report (reproduced in CIT(A) order at pg. 37):

*"vide **Exhibit-4, Page 1 to 9 is a registered sale deed in the name of Shri Devi Lal** **(APB 34-45)** **for purchase** of agriculture land admeasuring 0.64 hectare situated at Mandalia for consideration of Rs. 3,00,000/- and agreement to sell between the sellers and Shri Devi Lal for sale consideration of Rs.19,50,000/- and Exhibit-9, Page No. 2is related to expense on purchase of alleged land at Mandalia which includes cost of land of Rs.19.50 Lakhs and expenses of Rs.72,500/-. The registered sale deed was duly executed on 29.06.2015.* **(APB 34-41)**

However, In January, 2016, Shri Devi Lal, on account of financial needs, approached the appellant and expressed his willingness to sell half of his share of the said land. The appellant accepted his proposal at price of Rs.9.75 lacs as per Ikrarnama dated 01.05.2015 **(APB 42-45)** *along with terms and condition that the land use of the said land would be converted from agriculture to non-agriculture (the land being in the name of SC/ST and had the technical flaw for the appellant) by Shri Devi Lal himself and till the things and matters materialize to satisfactory end, the appellant kept these paper in his custody for the purpose of security.*

*The **appellant was neither party to any of the documents impounded during survey nor signed by the appellant as party;** has stated in his statement that he had made cash payment of Rs.9,75,000/- for purchase of half share of land; has given advance of Rs.9,75,000/- to Shri Devi Lal for purchase of half share of alleged land and there is no evidence on record that to prove that the appellant has paid entire amount of Rs.20,22,500/- and no enquiry has been made from Shri Devi Lal about the land/transaction etc."*

5.2 AO commented on this aspect in remand report as under:

*"The reply of the assessee has been perused but the same can't be acceptable at this level, as the matter is under consideration before the appellate authority. During the course of assessment proceeding, the **then AO had relied upon the statement recorded during the course of survey** proceedings. Further, during the course of assessment proceedings, the assessee had also not submitted satisfactory documents in support of his claim. In view of above facts, in the opinion of the then AO that the assessee has invested total amount of Rs.20,22,500/- for purchase of agriculture land at village- Mandliya in his Benamidar Shri Devi Lal Bairwa from his undisclosed income. Hence, an addition of Rs. 20,22,500/- was made by the then AO and added to the total income of the assessee as undisclosed income. Hence, the AO had rightly made addition of Rs.20,22,500/- and the contention of the assessee is not acceptable being not correct."*

No adverse comment in the Remand Report nor any concrete evidence brought on record to show that the entire consideration was paid by the assessee alone. **Hence above addition of Rs. 10,47,500/- deserves a complete deletion.**

D-GOA-2: Part1: Alleged Cash payment to Devilal Bairwa:

Facts: As discussed in AGOA-3 above. Revenue in this ground of appeal raised the following issue:

"Whether on facts and in circumstances of the case, the Ld. CIT(A) is justified in not appreciating the facts that in respect of cash payment to Devilal Bairwa and Ajay Modi and that the assessee failed to the discharge the onus to prove with explanation of the persons concerned in respect of these transactions."

D-GOA-3: Deletion of Rs. 9,75,000/- (out of Rs. 20,22,500/- w.r.t. unexplained investment in purchase of land):

Facts: As discussed in AGOA-3 above, Revenue in this ground of appeal raised the following issue:

"Whether on facts and in circumstances of the case, the Ld. CIT(A) is justified in deleting the addition of Rs. 9,75,000/- out of total addition of Rs. 20,22,500/- on the account of unaccounted investment in agricultural land situated at Mandalia, Jhalawar Road, Kota which was made on the basis of incriminating documents impounded during the survey dated 04.02.2017, without appreciating the facts that the agricultural land belong to SC / ST category which cannot be transferred in the name of Naresh Jain; the assessee made an arrangement to make it registered in name of Devilal Bairwa of SC category and occupied it."

Submission:

1. At the outset it is submitted that the assessee vide AGOA-3 had already challenged the confirmation of addition of Rs.10,47,500/-[20,22,500/- less 9,75,000/- relief granted by CIT(A)]. Therefore, the submission made thereunder also take care and answer both the ground taken by Revenue vide DGOA-2 & DGOA-3.

2. Further the allegation made in DGOA-2 appears to be highly misconceived and confused because it is the case made out by the Revenue itself that in the statement assessee admitted making cash payment of Rs.9,75,000/-. Hence, there is no question of failure to discharge the onus to prove with explanation of person or otherwise it appears senseless.

3. Further **in DGOA-3,** the allegation leveled is seriously lacking legal support in as much as the merely suspected that the assessee might have purchased and paid the total payment of Rs. 20,22,500/- through Devilal who is an SC/ST person. But at the same time, the **AO never held Devilal to be Benamidar** of assessee which was condition precedent. Secondly, there is no evidence brought on record to show that entire payment of Rs. 20,22,500/- by assessee alone (on the contrary assessee merely admitted Rs.9,75,000/- cash payment to Devilal). This further **shows contradictory approach** of the Revenue where they rely upon the statement of the assessee as and when best suited to them, but where it did not suit they are ignoring them same. Though the CIT(A) was justified in deleting the addition of Rs.9,75,000/- however, he was **completely unjustified in sustaining part addition of Rs. 10,47,500/-** which deserves complete deletion as stated above**.**

Thus, under totality of the facts and circumstances detailed above these two **grounds taken by the Revenue deserves to be dismissed.**

AGOA – 4: Additions of alleged cash payments of Rs.1.58 crores (58 lacs and Rs. 60 lacs) to Shri Ajay Modi (Bhagat Public School):

Facts: This addition consists of three figures being Rs.40 lacs, Rs.60 lacs and Rs.58 lacs paid to Shri Ajay Modi. The AO has dealt with this issue Pg.4 Pr. 5 and copied at page no.7 of CIT(A) order. The detailed written submissions dt.19.11.2019 filed before the CIT(A) are at page no.9 para 4.2, the remand report thereupon by the AO dt. 07.06.2023 is at page no.35 para 4.4, the rejoinder dt. 20.06.2023 at page no. 47 para 4.5 and finally the findings of the CIT(A) are at page no.52 onwards para 4.6.

The addition of Rs.60 lacs & Rs.58 lacs were confirmed by CIT(A) hence, the assessee is in appeal (though addition of Rs.58 lacs is not being pressed) whereas, addition of Rs.40 lac was deleted, against which the department is not in appeal.

The facts as noted by the ld. CIT(A) and his findings at Pg.57 are as under:

"ii. Addition of Rs 1,58,00,000/- on the basis of certain documents impounded and statement of appellant recorded u/s131 (Revised Ground No. 3 and 4)

The AO noted that during the survey action u/s 133A of the I T Act at office premises of Shri NAresh Jain some incriminating documents were seized and inventorised. In his statement recorded during survey action, Sh. Naresh Jain explained that these documents relates to agreement for running of Bhagat Public School entered between Shri Naresh Jain and Shri Ajay Modi. This agreement was entered on 16/10/2015 **(APB49-52)**. *This agreement contains information in relation to payments to Shri Ajay Modi and various expenditures incurred forBhagat Public School, which are analyzed as follows:-*

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From above chart and further acceptance of Shri Naresh Jain in his statement, a sum of Rs. 1,35,00,00/- was paid through cheque and balance Rs. 1,65,00,000/- was paid in cash. The cash payment is nowhere recorded in books of accounts. Again vide reply to Q. No. 26. **(APB 77)**, *Shri Naresh Jain admitted that the above said sum of Rs. 1,65,00,000/- is not recorded in books of accounts and offered the same for taxation.*

Apart from above, an incriminating documents was also seized and inventorised by Annexure A, Exhibit 11, Pg No. 7 **(APB 46)***which contains information of cash payment of Rs. 34 Lacs made to Shri Ajay Modi, Modak. Shri Naresh Jain, vide reply to Q No. 23* **(APB74)** *admitted that this cash payment is also no-where recorded in books of accounts.*

The AO stated that assessee had admitted in his statement recorded during the course of survey vide reply he had made payment of Rs. 3,00,00,000/- to Shri Ajay Modi for running of school of Bhagat Public School. Out of this payment, he has admitted that Rs. 1,65,00,000/- paid in cash which is not recorded in his books of account. On going through the impounded papers and statement of the assessee, it is found that assessee had taken administrative control on Bhagat Public School, Village Alaniya Since March 2012 and paid security money and incurred expenses on construction and for affiliation. ***Assessee has filed page wise reply during the course of assessment proceedings, wherein he has mentioned that Rs. 1,35,00,000/- paid by Nisha Jain*** *who is assessee's wife which is not accepted that this issue was not raised in during the course of survey proceedings.*

On the above facts, assessee has made expenses and cash payment to Shri Ajay Modi from his unaccounted income of Rs. 1,65,00,000/- out of which Rs. 1,58,00,000/- made during the FY 2015-16 and Rs. 7,00,000/- in the F.Y. 2016-17.

Hence, considering his statements given during survey proceedings. Hence, an addition of Rs. 1,58,00,000/- is made in assessment year 2016-17 and added to the total income of the assessee.

The appellant explained with regard to addition made of Rs. 1,58,00,000/- as under:

1. Rs. 18,00,000/- through cheque to Mr. Ajay Modi by Nisha Jain

2. Rs. 22,00,000/- through cheque to Ajay Modi by Nisha jain.

3. Rs. 58,00,000/- in cash to Mr. Ajay Modi by Naresh Jain

*4**. Rs. 60,00,000/- was to be paid for CBSE affiliation but did not materialize** and transaction did not take place.*

The appellant argued that he has duly retracted the statement by filing Affidavit dated 14.02.2017 before the ADIT(Inv.), hence the alleged statement does not have any evidentiary value. The evidentiary value of the statement is already discussed in the preceding paragraphs. In view of the discussion made earlier, the outright retraction made by the assessee is not found to be acceptable and rejected. However, the documentary evidence to clarify the admission made is admitted in the interest of justice.

It is argued that during the course of assessment proceedings the appellant has furnished the chart of amount paid to Ajay Modi in respect of Bhagat Public School. It is argued that the appellant has given advance of Rs. 65 lacs only out of which Rs. 58 lacs was paid during the same financial year and balance of Rs. 7 lacs in immediate succeeding financial year.

The appellant has accepted payment of Rs. 1.65 lacs out of which Rs. 1.58 lacs was paid during this year and balance of Rs. 7 lacs in immediate succeeding year. Hence, there is no dispute on this amount. Therefore, the addition made by the AO of Rs. 58,00,000/- is found to be justified to this extent for this year and confirmed. Rs. 7,00,000/- is considered in the AY 2017-18.

*The appellant **also submitted that amount of Rs. 40 lacs paid by his wife Nisha Jain and alleged amount was duly recorded in books of accounts of her proprietorship** concern M/s Quick Advertising Co. It is argued that the AO himself concurrently assessed the case of Smt. Nisha Jain, wife of the appellant for the assessment year 2016-17 but he failed to verify himself that out of alleged amount of Rs. 1,58,00,000/-, Rs. 40,00,000/- was paid by Smt. Nisha Jain in earlier financial years which is duly recorded in books of accounts of her proprietorship concern in the respective financial years.*

*The argument of the appellant are considered. **The appellant has furnished evidences** before the AO to prove that the payment of Rs. 40,00,000/- was paid by Smt. Nisha Jain in earlier financial years which is **duly recorded in books of accounts** of her proprietorship concern in the respective financial years. This explanation of the assessee was not accepted by the AO because this issue was not raised in during the course of survey proceedings. The reason for rejecting the explanation of the appellant is not found to be justified in view of evidences submitted before the AO. **The addition made by the AO is not found to be sustainable** in view of the explanation furnished by the appellant. The appellant gets partial relief of Rs. 40,00,000/- accordingly.*

*The appellant also **submitted that amount of Rs. 60,00,000/- has never been paid** as appeared in the alleged agreement being de-facto & de-jure, the deal was not materialized.*

The explanation of the appellant that the amount of Rs. 60,00,000/- was not paid is not found to be acceptable because, if the payment was not made, the same should have been mentioned during the survey. The cash transaction takes place in secret manner and there is no trace is left. Therefore in the absence of credible evidence, the claim of the appellant remains unsupported with any evidence. The logic of the appellant that because the deal was not materialised the payment is not made is also hollow claim. The deal was for entire transaction and not for

piecemeal work. The appellant has accepted other transactions like the payment made by Ms. Nisha Jain of Rs. 40,00,00/- and payment of Rs. 58,00,000/- recorded on same evidence impounded during survey. Therefore, the claim of the appellant is not found to be acceptable and the addition of Rs. 60,00,000/- made by the AO is found to be justified and confirmed.

The appellant further stated that source of such advance of Rs.58 lacs is treated as application of additional income declared by the appellant on which tax liability has been duly discharged.

*The **claim of the appellant is with regard to giving telescoping benefit** for showing availability of cash in the hands of the appellant. This issue is being dealt while deciding the ground number 7 of revised grounds of appeal It is argued that no inquiries have been made from Shri Ajay Modi to whom the alleged amount of Rs. 1.58 crore was alleged to be paid. The argument of the appellant are not relevant for the case of the appellant as the appellant has accepted making payment in cash in his statement. Whether inquiry is made from the receiver or not is of no consequence in the case of the appellant. Hence, the argument of the appellant is not found to be relevant and the same is rejected.*

Accordingly as discussed above, the addition of Rs. 20,22,500/- is restricted to Rs. 10,47,500/- and relief of Rs. 9,75,000/- is provided to the appellant (ground no. 2). The addition of Rs. 58,000/- and Rs. 60,00,000/- is confirmed (ground no.3). The addition of Rs. 40,00,000/- is deleted (ground no. 4).

*Ground number 2, 3 and 4 are treated as **partially allowed."***

Hence this ground.

Submissions:

1. At the outset, we strongly place reliance upon our detailed submissions made before AO as also before the CIT(A) on all the issues.

2A As regards alleged cash payments of Rs.60 lacs to Ajay Modi:

2A 1.1 No payment made – agreement did not materialize: One of the contentions raised by the assessee was that Rs. 60 lakhs, which as per agreement, was to be paid to Shri Ajay Modi for getting affiliation from CBSE. However, **such agreement never materialized** for the simple reason that the assessee had already got the affiliation long back, vide letter no.556085 dated 13.05.2013 (APB 53-55), issued by the CBSE New Delhi by its own efforts and hence, the assessee was not required to incur any expenditure separately. The basic contention of the assessee has all along been that the assessee **never had an occasion to make payment of Rs. 60 lakhs**, though it was a part of the agreement. Kindly refer the **reply of the assessee** reproduced at internal Pg. 5 & 6 of the assessment order of Naresh Jain AY 2016-17 is as under:

*"As regards balance amount Rs.60 lacs the same does appear only in the agreement. De-facto & de-jure the **deal and the amount of Rs.60 lacs did not materialize at all**. It was an erroneous term which was not rectified in the due course."*

The ld. CIT(A) rejected such contention saying that such facts should have been mentioned during the survey; normally cash transactions take place in secret manner and it was a composite deal for the entire transaction and not for piecemeal work. However, **such findings are completely contrary to the facts** on record and a purported misreading, as submitted hereunder:

2A 1.2 Firstly, the very fact that the parties in the said agreement has given the breakup showing different heads of the total agreed consideration of Rs. 3 crores(as alleged) towards taking over of the management of Bhagat Public School, viz. towards security money, construction expenses. One of the head was expenses for CBSE affiliation, which itself **imply that it was not a composite contract** of Rs. 3 crore payable to Shri Modi. In the agreement there is **no whisper that the entire Rs. 3 crores was payable** to Shri Modi even though part of the work is not carried out by him or some of the terms & conditions are not fulfilled by Shri Modi. The very fact showing specific amounts payable towards a specific job goes to show that the parties agreed for making payment on or in relation to the specific jobs mentioned there against.

2A 1.3 Secondly and pertinently, there is **no date mentioned** against the entry at serial number 3rd of Rs. 60 lakhs which is left blank as against the other entries when cash payments have been made (either the month or a specific date is mentioned as is the case at serial numbers 5, 6, 8 to 10). The other impounded documentA-11, Pg. 7 backside (APB46) which contains the details of cash payment of Rs. 34 lakhs, is also silent on this aspect. There is **no specific question raised** by this survey team noticing this fact of absence of the date of cash payment. The law is well settled that **evidence has to be read in its entirety** and it is not permissible that a part which suits a party is considered but the other part is ignored which doesn't suit him.

2A 1.4 Moreover, the ld. **CIT(A) has contradicted its own contention** in as much as while granting relief of Rs. 40 lakh, which was not answered while recording the statement during survey, yet it was not objected to (that Rs. 40 lakh was paid by Nisha Jain were recorded in the accounts) and the ld. CIT(A) did not find such objection raised by the AO as justified, at the same time however, one of the grounds of rejection was that this contention of non-materializing of the agreement of getting CBSE affiliation, was not mentioned during those statements.

2A 1.5 Further, the agreement dated 16.10.2015 (APB 49-52) was entered by and between the parties just to record the terms & conditions **for the proposed transfer** of the administration of Bhagat School from Shri Ajay Modi to the assessee and different amounts were agreed as payable towards different activities but no amount as such was paid.

2A 1.6 **No corroborative evidence was found** during survey supporting the allegation of making cash payment of Rs.1.65 crores. It is only an impounded paper being Annexure-A exhibit 11 Pg.7 (APB46) however that is only for Rs.34 lakhs and not for Rs.1.65 crore and in absence of date and other details it could not have been linked with the present transaction.

2A 1.7 It is further submitted that the best person who could have confirmed whether the assessee made payment of Rs. 60 lakh cash or not, could be Shri Ajay Modi who was the alleged or proposed recipient and

therefore, a **specific contention of non-inquiry from him,** was also raised before the CIT(A)(Pg.61) but was rejected as under:

"It is argued that no inquiries have been made from Shri Ajay Modi to whom the alleged amount of Rs. 1.58 crore was alleged to be paid.

The argument of the appellant are not relevant for the case of the appellant as the appellant has accepted making payment in cash in his statement. *Whether inquiry is made from the receiver or not is of no consequence in the case of the appellant. Hence, the argument of the appellant is not found to be relevant and the same is rejected."*

2A 2. Transaction fall in the AY 2014-15:

2A 2.1 In the **alternative**, even assuming it is held that the assessee made the payment of 60 lakhs, but there is **no evidence** found during the course of survey nor referred by the revenue to show that such unexplained investment was made in subjected AY 2016-17 only. On the contrary, the said agreement, heavily relied upon by the AO itself shows at page 1 para1, that the amount of **Rs.60 lakhs was already kept deposited** with the first party Ajay Modi in the following words:

"tatha CBSE affiliation mein kharch hue Rs.60 lac ki rakam pratham paksh ke pass jama hai"

The amount kept deposited means it was already paid prior to agreement dt.16.10.2015.

2A 2.2 The said agreement also refers to some **older agreement dated 16.05.2013** entered between the parties which was for the period ending on 31.03.2016. There apart, in the table (AO Pg.5) where other payments have been shown, like **the entries of Rs.3 lakh is dated 24.05.2013, Rs.10 lakh is dated 15.06.2013, Rs.5 lakh is dated 05.07.2013** and so on. This goes to show that the parties acted upon the earlier agreement of 2013, which continued and was renewed in October, 2015 for further terms up to 30.09.2019, which supports the contention that Rs.60 lakhs (even assumed) was paid in FY 2013-14 (AY 2014-15) only and not in this year (although this contention might not have raised earlier but, this being a pure legal plea, based on the facts already available on record, is fully permissible to the parties to take as per settled law).

2B. As regards alleged cash payment of Rs.58 lacs: On this aspect, the assessee already admitted additional income but **requested for giving benefit of telescoping** which was accepted by the CIT(A) while dealing with GOA-7 before him. **Hence this ground (to the extent of Rs.58 lakh is concerned) is not been pressed.**

Thus, under totality of the facts and circumstances detailed above, the CIT(A) has erred in sustaining the impugned addition of Rs.60 lakhs which deserves to be deleted.

AGOA-5 : Rs.48,46,094/- on account of alleged repayment of salary to staff u/s 69:

Submission: On this aspect, the assessee already admitted additional income but requested for giving benefit of telescoping which was accepted by the CIT(A) while dealing with GOA-7 before him. Hence this ground is not been pressed.

AGOA-7 : Rs.55,490/- on account of Disallowance of Expenditure relating to Agriculture activities:

Facts: The AO has dealt with this issue at Pg 9 Pr 8 and copied at page no.9 para 4.1 of CIT(A) order. The detailed written submissions dt.19.11.2019 filed before the CIT(A) are at page no.30 para 4.2, the remand report thereupon by the AO dt. 07.06.2023 is at page no.46 para 4.4, the rejoinder dt. 20.06.2023 at page no. 51 para 4.5 and finally the ld. CIT(A), after considering the detailed submissions, the remand report, rejoinder made before him, at Page 64, Para. 4.6 concluded in following words:

Hence this ground.

Submission:

1. At the outset we strongly place reliance upon our detailed submissions made before AO as also before the CIT(A).

2. During appellate proceedings, remand report was called for by ld. CIT(A) whereby assessee submitted rejoinder as under (also reproduced at CIT(A) pg 51):

"Addition of Rs. 55,490/- on account of un-accounted agriculture expenses.

(i) It is very humbly submitted that referring to the facts and circumstances of the case and the submissions filed by the appellant with relevant documentary evidences, the Assessing Authority interalia observes that-

During the course of Survey Proceedings, page No 12 of Exhibit 11 was impounded wherein agricultuural expenses of Rs. 55,490/-. Therefore, same expenses of Rs. 55,490/- is addeded to total income of the assessee. Hence the AO had rightly made addition of Rs. 55,490/- and the contention of the assessee is not acceptable being not correct."

It is very humbly submitted that L'd Assessing Authority itself has interalia observed that 'During Assessment proceedings, the appellant has furnished detailed and pagewise explanation for all the exhibits impounded during the course of Survey u/s 133A of Income Tax act 1961 including page No 12 of Exhibit-11, and clarified that the expenses were incurred on agriculture activities by the appellant and Shri Devi Lal on 50:50 basis of total expenses of Rs. 55,490/- being Rs. 27,745/- and the appellant has paid the above said sum of Rs. 27,745/- out of the cash balance/funds available with the appellant"

(i) It is very humbly submitted that despite details and page wise explanation for page No 12 of Exhibit -11 submitted by the appellant, L'd Assessing Authrotiy, placing undue importance and emphasis to recorded statement of appellant has added Rs. 55,490/- to the income of appellants, sans any bsis and cause and needs to be deleted.

(ii) It is humbly submitted that L'd Assistant Commissioner of Income Tax, Kota has simply stated in his remand report that 'The reply of the assessee has been perused but the same can't be acceptable at this level, as the matter is under consideration before the Appellate Authority. Further, the assessee had also not submitted satisfactory documents in support of his claim. The Assessing Authority has not considered the fact and supporting documents submitted by the appellant. He has simply stated in his remand report that AO had rightly made addition of Rs. 55,490/- and the contention of the assessee is not acceptable being not correct."

3. The AO has commented on the above submission as under (also reproduced at CIT(A) pg.46 pr.4.5):

"During the course of survey proceedings, page number 12 of Exhibit 11 was impounded wherein agricultural expenses of Rs. 55,490/-. Therefore, same expenses of Rs. 55,490/- is added in total income of the assessee. Hence, the AO had rightly made addition of Rs.55,490/- and the contention of the assessee is not acceptable being not correct."

4. No cogent evidence brought on record-facts not rebutted by lower authorities: Unfortunately however, the ld. CIT(A) as well as AO failed to bring any corroborative evidence contrary to the facts and submissions made by assessee.

Thus, under totality of the facts and circumstances detailed above, the CIT(A) has erred in sustaining the impugned addition which deserves to be deleted in full.

DGOA-4: Deleting the addition of Rs. 9,50,000/- on account of unaccounted investment in ST land situated at Mandana Kota:

Facts: The AO has dealt with this issue at Pg 8 Pr 6 and copied at page no.9 para 4.1 of CIT(A) order. The detailed written submissions dt.19.11.2019 filed before the CIT(A) are at page no.28 para 4.2, the remand report thereupon by the AO dt. 07.06.2023 is at page no.45 para 4.4, the rejoinder dt. 20.06.2023 at page no. 50 para 4.5 and finally the ld. CIT(A), after considering the detailed submissions, the remand report, rejoinder made before him, at Page 62, Para. 4.6 concluded in following words:

"iii. Addition of Rs 9,50,000 as unaccounted investment (Ground No. 5)

During the course of assessment proceedings, the AO had relied upon the statement recorded during the course of survey proceedings. In view of above facts, the AO had made addition of Rs. 9,50,000/- for the assessment year 2016-17 and added to the total income of assessee.

The appellant argued that he is an individual and shown his business income as per provision of Section 44AD of the Act and hence, not liable to maintain his books of account.

The reply of the appellant is contradictory to the stand taken by him where it is stated that the date and transaction is relevant to A/Y 2017-18 and not to A/Y 2016-17 to Shri Deva Bhadak Gurjar and the same has been duly reflected by the appellant in their Personal Balance sheet as on 31/03/2017. In one palce the appellant is relying on books of accounts and at another place, it is claimed that the books are not maintained. The argument of not maintaining books of accounts is therefore, not found to be maintainable and rejected.

It is argued that the appellant has given aggregated advance of Rs.34.50 lacs to Shri Deva Bhadak Gujar at various dates. The detail of advance given as reflected on Page No. 1 of Exhibit – 9 impounded during Survey proceedings u/s 133A of the Act are as under:

---------xxx--------xxx--------xxx--------xxx--------xxx--------xxx--------

It is stated that the said page was confronted to the appellant while recording his statement during the course of survey and the appellant has replied that he had given advance of Rs. 10,00,000/- on 27/01/2015 and Rs. 9,50,000/- on 04/11/2016 in cash and Rs. 15,00,000/- on 24/03/2015 through Cheque and advance given in cash is not recorded in books of account.

It is noted that the advance given of Rs. 10,00,000/- on 27/01/2015 has been accepted by the appellant for AY 2015-16 under the VsVs Scheme. Therefore, there is no reason for not accepting the same transaction for 4.11.2016.

It is also argued that the appellant has duly retracted from his statement by filing Affidavit dated 14.02.2017 before the ADIT(Inv.), hence the statement of the appellant does not have evidentiary value to be relied upon.

The evidentiary value of the statement is already discussed in the preceding paragraphs. In view of the discussion made earlier, the outright retraction made by the assessee is not found to be acceptable and rejected. However, the documentary evidence to clarify the admission made is admitted in the interest of justice.

The appellant argued that as has reflected on page No 1 of Exhibit -9, impounded during Survey Action u/s 133A of Income Tax Act 1961, the advance of Rs. 9,50,000/- was given by the appellant on 04/11/2016 (the date and transaction is relevant to A/Y 2017-18 and not to A/Y 2016-17 to Shri Deva Bhadak Gurjar and the same has been duly reflected by the appellant in their Personal Balance sheet as on 31/03/2017.

Considering the reply of the appellant that transaction was dated 4-11-2016 pertaining to AY 2017-18. The addition made during the year is not found to be sustainable as the transaction does not pertain to the current year. Therefore, the addition is deleted in current year. However, this amount is added in AY 2017-18 by way of enhancement.

The appellant gets relief of Rs. 9,50,000/- in the current year.

The ground no. 5 is accordingly treated as allowed."

Hence this ground.

Submission:

1. We strongly rely upon our detailed submissions (Pg.9-35 Pr.4.2) and rejoinder (Pg.47-52 Pr.4.5 of CIT(A) Order) and the paper book filed before the CIT(A).

2. We place strong reliance on the order of the CIT(A) to the extent, his findings and observations are given in the favour of assessee.

3. The **ld. CIT(A) has not completely deleted this addition but merely that it pertains to AY 2017-18** and rightly so because in the impounded paper (APB 47) itself the date mentioned towards Rs. 9.50 lakh as advance given was 04.11.2016 which falls to AY 2017-18. Accordingly, the CIT(A) has

rightly deleted here hence, under totality of the facts and circumstances detailed above this ground taken by the Revenue deserves to be dismissed.

Additional Ground of Appeal "AGOA"-10: Telescoping benefit - not fully allowed: Since the Department has taken a specific ground DGOA-5 challenging the benefit of telescoping given by the CIT(A) **however, it is noticed that the working done by the CIT (A) suffers from some legal & factual infirmities** and benefit of telescoping has to be **further recomputed** based on the result of the ITAT order in relation to various grounds taken by both the parties, **hence the following Additional Ground of Appeal, which is a pure legal ground of appeal may kindly be admitted considered and oblige:**

*"**Addl-AGOA-10:** The ld. CIT (A) erred law as well as on the facts in not properly computing and providing the benefit of telescoping. Moreover, such computation has to be revised in the light of the result of the ITAT Order. Hence such benefit of telescoping may kindly be recomputed in accordance with law and facts and benefit be allowed to the assessee."*

It is submitted that the above is a purely legal ground of appeal, which do not require any fresh investigation of fact in as much as the same are already available on record. We rely on **National Thermal Power Corporation Ltd. 229 ITR 383 (SC).** Hence, the above ground may kindly be admitted, considered and oblige.

DGOA-5: Telescoping benefits of Rs. 1,00,30,778/-:

Facts: The ld. CIT(A) has dealt with and considered the aspect of telescoping at Pg. 69 pr.5.3 and the assessee has also taken additional AGOA-10 above, both of which are prayed to be considered and decided conjointly. His findings are in following words:

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

The appellant in the ground number 7 of the revised ground of appeal stated that benefit of telescoping and set off should be provided against the addition made by the AO and sustained in the appeal. It is further argued that there are various judgments of Hon'ble Supreme Court and Hon'ble High Courts who have applied the theory of telescoping in dealing with the Income Tax issues before them. The appellant relied upon the decision of Apex Court in case of Mahaveer Kumar Jain v. CIT (2018) 404 ITR 738 : 302 CTR 1 : 255 Taxman 161 : 165 DTR 113 (SC)], ITAT Jaipur in the case of Kushal Dasot v/s ACIT, Circle-7, Jaipur, in Appeal No ITA-675/JP/2012, Bombay High Court, in the case of Commissioner Of Income-Tax, ... vs Jawanmal Gemaji Gandhi on 5 October, 1983 discussing on the earlier decision of Kerala High Court in [1980] 121 ITR 433.

The facts related to claim of telescoping benefit is presented as under

AY 2013-14 (Rs. 5,53,474/-)

Return filed in response to notice u/s 148 on 23.03.2019. The same assessed on 3-07-2019. The assessee claimed this amount as income from other sources. This amount was in the form of cash withdrawn from excess salary claimed to be paid to employees in Bhagat Public School.

AY 2014-15 (Rs. 16,34,573/-)
Return filed in response to notice u/s 148 on 08.04.2019. The same assessed on 3-07-2019. The assesse claimed this amount as income from other sources. This amount was in the form of cash withdrawn from excess salary claimed to be paid to employees in Bhagat Public School.

AY 2015-16 (Rs. 41,56,437/-)
Return filed in response to notice u/s 148 on 26.04.2018. The same assessed on 20-12-2018. The assesse claimed this amount as income from other sources. This amount was in the form of cash withdrawn from excess salary claimed to be paid to employees in Bhagat Public School.

Out of this an amount of Rs. 11,60,000/- was utilised during AY 2015-16. Accordingly, the appellant claimed that Rs. 51,84,484/- (63,44,484-11,60,000) was available cash as on 31-03-2015.

The appellant also stated that during the year also the cash was withdrawn by the assessee as under -

AY 2016-17 (Rs. 48,46,294/-)
Return filed on 31.03.2017. The same assessed on 21-12-2018. The assesse claimed this amount as income from other sources. This amount was in the form of cash withdrawn from excess salary claimed to be paid to employees in Bhagat Public School. The appellant has offered this amount in the assessment proceedings of AY 2016-17. The AO made addition of Rs. 48,46,094/- u/s 69A and taxed the same 115BBE of the Income Tax Act. The appellant has not furnished any appeal on the addition made in this regard. Therefore, it is considered that the appellant has accepted the addition made.

Accordingly, the appellant claimed that Rs. 1,00,30,778/- (51,84,484/- + 48,46,294/-) was available with the assessee. Therefore, against the additions confirmed during the year the set off should be given for the cash which is already offered for tax by the assessee. The appellant has also relied upon decisions as discussed above.

The argument of the appellant are considered. The appellant has offered additional income in the reopened assessments which has been accepted by the AO. Therefore, the availability of cash with the assessee during the year is established from the records. Accordingly, the credit of cash available to the assessee which has already been offered for taxation is claimed.

This issue is related to theory of telescoping benefit. If income is available to an Assessee, then that income can be explained as a source for an item of investment or expenditure that the Assessee is unable to explain, provided the income was available to the Assessee when the investment or expenditure is made/incurred. The idea is ultimately tax is levied either only on the income or only on its application. The telescopic theory operates on the basic presumption that when there are undisclosed income and also certain undisclosed investments, then it could be reasonably presumed that the undisclosed investments have been sourced out of the undisclosed income, so that only the income may be taxed or only the investment may be taxed and not both, in the hands of the assessee under the provisions of the Act. When an income is taxed/addition is made to taxable income in an earlier year, the assessee may claim that the income arising in subsequent year/subsequent period is sourced out of the income taxed earlier.

Hon'ble Bombay High Court held in the case of CIT v. Jawanmal Gemaji Gandhi [1983] 15 Taxman 487 (Bombay)/[1985] 151 ITR 353 (Bombay)/[1984] 39 CTR 127 (Bombay)[05-10-1983] held as under -

"The Supreme Court has held in the case of ***Anantharam Veerasinghaiah & Co. v. CIT [1980] 123 ITR 457*** *that the secret profits or undisclosed income of an assessee earned in an earlier assessment year can constitute a fund, though concealed, from which the assessee may draw subsequently. The assessee, in the instant case, acquired the gold in the latter half of the assessment year: it could then very well be that the undisclosed income earned in that very year, which had been added on account of the increased estimated turnover, constituted the fund from which this asset was acquired. The conclusion reached in this behalf by the Tribunal was reasonable and justifiable."*

The assessee, in the present case, acquired the cash from the employees of school which is offered for tax as per detail provided. It could then very well be that the undisclosed income earned in the form of cash which had been offered for taxation constituted the fund from which this application of cash is made.

In the case of Addl. CIT v. Dharamdas Agarwal, it was held that when cash credits were treated as income from undisclosed sources, the assessee can take an alternative contention before the Appellate Assistant Commissioner that the cash credits were out of undisclosed income taxed in earlier years and the assessee is entitled to raise such alternative plea before the Appellate Assistant Commissioner for the first time. ***– [Addl. CIT v. Dharamdas Agarwal– (1983) 144 ITR 143 (MP)]***

In the case of CIT v. K.S.M. Guruswamy Nadar and Sons, it was held by the Madras High Court that when there are two separate additions, one on account of suppression of profit and another on account of cash credit, it is open to the assessee to explain that the suppressed profits had been brought in as cash credits and one has to be telescoped into the other resulting only in one addition. It was, therefore, held that the Tribunal was right in its view in telescoping the additions made towards the cash credits. – ***[CIT v. K.S.M. Guruswamy Nadar and Sons (1984) 149 ITR 127 (Mad)]***

In the case of CIT v. Tyaryamal Balchand, additions were made to the trading results as also amounts representing cash credits were added as income from undisclosed sources. It was held that the AAC and the Tribunal had committed no error of law in holding that the unproved cash credit of Rs. 16,950 should be taken to have come out of intangible additions as substantial additions had been made even in the earlier years. It had also been rightly held by the Tribunal that even during the present assessment, an addition of Rs. 18,117 had been made, which would sufficiently cover any unexplained income to the extent of Rs. 16,950. The amount of Rs. 16,950 could not, therefore, be added as income from undisclosed sources. Additions were made to the trading results as also amounts representing cash credits were added as income from undisclosed sources. The Tribunal found that the additions in trading results would cover the amount of cash credits as also substantial additions had been made in earlier years, it was held that the Tribunal was justified in deleting the addition on account of cash credits. – ***[CIT v. Tyaryamal Balchand (1987) 165 ITR 453 (Raj)]***

In view of the decisions relied upon by the appellant and the decisions discussed above, the additional income declared by the appellant in the return filed u/s 148 in earlier years would cover the amount of unexplained investments of the current year. The claim of the appellant is found to be acceptable in this regard.

Accordingly, following additions confirmed in appeal are given benefit of telescoping.
Rs. 10,47,500/- (2022500-975000) Rs. 58,00,000/-
Rs. 60,00,000/-
Rs. 55,490/-
Total Rs. 1,29,02,990/-

As discussed earlier, Rs. 1,00,30,778/- was already available with the assessee during the year as per additional income declared in the form of cash from AY 2013-14 to AY 2016-17. Therefore, the net addition sustained is computed at Rs. 28,72,212/-. There is no amount of cash available for giving telescoping benefit in next year as the amount of cash available remains NIL as the cash available has been utilised in the additions upheld.

In the result the addition to the extent of Rs. 28,72,212/- is upheld. The remaining additions of Rs. 1,00,30,778/- out of total additions confirmed of Rs. 1,29,02,990/- are not found to be sustainable as the assessee is able to explain the source out of undisclosed cash offered for taxation as indicated above.

This ground of appeal is treated as partly allowed."

Hence this ground.

Submission:

1. In this ground, the Revenue has challenged the benefit of telescoping given by the CIT(A) of the availability of income of Rs. 1,00,30,778/- against the additions sustained by him to the extent of Rs. 28,72,212/-. The facts are not denied that the assessee has surrendered additional income of Rs. 1,00,30,778/- based on the detailed submissions dt. 10.01.2024 reproduced at Pg.65, Pr. 5.1 and another submissions dt. 20.01.2024 at Pg.68, Pr.5.2.

2. The Revenue has not brought anything on record to show that the additional income so offered in various years detailed below stood utilised elsewhere and was not available for the undisclosed income/undisclosed investment made by the assessee in this year to the extent, they were confirmed by the CIT(A). Kindly refer following table showing year wise surrender of income:

Sr No.	Asst. Year		Amount (in Rs.)
1.	2013-14		5,53,474
2.	2014-15		16,34,573
3.	2015-16		41,56,437
4.	2016-17		48,46,294
5.	Total Income surrendered / disclosed		**1,11,90,778**
6.	*Less: Income Uitilised in AY 2015-16*		*(11,60,000)*
7.	**Balance income available in cash for utilisation**		**1,00,30,778**

8.	Additions confirmed by CIT(A):		**1,29,02,990**
	Less: Addition Related to Investment in SC/ST land (20,22,500-9,75,000) confirmed by CIT(A)	10,47,500	
	Less: Alleged Payment to Ajay Modi confirmed by CIT(A)	58,00,000	
	-do-	60,00,000	
	Less: disallowance of Agriculture Exp confirmed by CIT(A)	55,490	
9.	**Net Addition sustained after telescoping benefit (8-7)**		**28,72,212/-**

4. Submission on AGOA-10:

4.1 The ld. CIT (A) has wrongly reduced Rs. 11,60,000/- showing as income utilising in AY 2015-16, which is contrary to the facts on record in as much as in this case, additions were made to the extent of Rs. 13,18,875/- by the AO in its order dated 20.12.2018 passed u/s 147 r/w 143(3)(APB-90-97), against which the assessee went in appeal. However since the assessee opted for VSV(APB-98-101), the appeal stood withdrawn and dismissed vide order dated 29.03.2022 of the CIT (A)-2, Udaipur (APB-102). The assessee accordingly even paid tax which became due under VSV (APB-100). **Admittedly since, the assessee is not disputing this addition and paid the taxes thereon, it can't be a case of the income utilized** and hence could not have been reduced for the purposes of computing availability of cash for telescoping. Thus, **the addition sustained by the CIT(A) of Rs. 28,32,212/- has to be reduced by 11,60,00 and the net amount should remain at Rs.16,72,212/- only.**

4.2 However again, the above is the position upto the stage of CIT(A). **If these additions (of outgoing / investment) are further reduced by the Hon'ble ITAT, the balance of Rs.28,72,212/- or Rs.16,72,212/- may be covered against the same, and only if there remains anything, may be the income to be finally assessed.**

At the same time however, if because of the deletion of additions by the Hon'ble ITAT, **it results into more availability then the balance leftover additions of outgoings, there will be no income** and the balance available cash has to be carried forwards and set-off against the additions (if any sustained upto the stage of the ITAT) in AY 2017-18 and so on.

Consequentially, this part of order of CIT(A) deserves to be modified.

5. Supporting Case Laws:

5.1 The issue of telescoping is no more Res Integra and rather a well settled principle because long back in the case of **Anantharam Veerasingaiah & Co vs CIT [1980] 3 Taxman 56**, the Hon'ble Apex Court has in principle agreed that the undisclosed income in one year will constitute a fund which can be drawn by the assessee later on and can be utilised for acquiring goods or in making investments, etc. and therefore, separate additions on both the counts cannot be made.

5.2 The Hon'ble jurisdictional High Court in the case of **CIT v. Tyaryamal Balchand (1987) 165 ITR 453 (Raj)** has also held so, following the aforesaid apex court judgement.

Consequentially, CIT (A) was justified in principle (but not to the extent of reducing Rs. 11,60,000) and such computation for benefit of telescoping has to be revised in accordance with the result of ITAT order as aforesaid. **Therefore, this ground of the revenue may kindly be dismissed.**

AGOA-6: S.115BBE wrongly invoked:

Facts: The ld. AO while making various impugned additions, proposed to tax the income u/s 115BBE listed here under:

- Rs. 20,22,500/- : on account of undisclosed income u/s 69 for purchase of agricultural land situated at village Mandliya, Kota; however, relief of Rs.9.75 Lakhs was allowed by ld. CIT(A)
- Rs. 1,58,00,000/-: on account of unaccounted investment in Bhagat Public School, Aalania, Kota; however, relief of Rs.40 Lakhs was allowed by ld. CIT(A)
- Rs. 9,50,000/-: on account of unaccounted investment in ST land Situated at Mandalia, Kota however, entire addition was deleted by ld.CIT(A) considering the same for AY2017-18.
- Rs. 48,46,094/-: on account of alleged receipt from staff of Bhagat Public School u/s 69A of the Act.
- Rs. 55,490/-: on account of alleged unaccounted agriculture expenses.

Submission:

1. At the outset it is submitted that **the AO before invoking S.115BBE never confronted assessee**, which is serious violation of principles of natural justice therefore, application of S.115BBE deserves to be quashed on this ground alone.

2. Invoking S. 115BBE of the Act is without jurisdiction: There is absolutely no case made out by AO to invoke S.115BBE. Admittedly the additions so made which are under challenge, are not the income from other sources but by AO's own admission, these are the cases of business income only. Once it is so, S.115BBE cannot be invoked. The entire impugned additions as listed above though not at all admitted but once made, could not

have been assessed as income under the head Income From Other Sources. (these submissions are without prejudice to our basic contention that the entire additions itself was bad in law and without jurisdiction and for various reasons).

3. AO can't change head of income:

3.1 It is submitted that S.115BBE specifically refers to the income which are of the nature as referred in S. 68,69,69A of the Act being the income from other sources. Therefore, subjected income has essentially to be classified u/s 14 of the Act as Income From Other Sources and that is possible only when the income is not capable of being classified under any other head being income from salary, house property, capital gain, business or profession.

3.2 A combined reading of S. 14 with S. 56 of the Act makes is evidently clear that for the assessment of an income it must have to be classified under four heads of income as enumerated u/s 14 and if it doesn't fall under any specific head of income as per item A to E of S. 14, such income has to be assessed under the residuary head of income i.e. item F of S. 14. Therefore, income added u/s 68 or 69 etc. has to be given a specific head in terms of S. 14, 4.3 The Hon'ble Supreme Court in case of **Karanpura Development Co Ltd vs. CIT [1962] 44 ITR 362 (SC)** held that these heads are in a sense exclusive to one another and income which falls within one head cannot be brought to tax under another head. Further, the Hon'ble Supreme Court in case of **Nalinikant Ambalal Mody v CIT [1966] 61 ITR 428**, has held that whether an income falls under one head or another is to be decided according to the common notions of practical man because the Act does not provide any guidance in the matter. Of course, lot of judicial precedents are available to a taxpayer to arrive at a conclusion about determination of appropriate head of income.

4. Binding judicial guideline: The Hon'ble Rajasthan High Court as also Tribunals whose decision are binding upon the assessing officer as a juridical precedence have also been consistently holding so. Kindly refer:

4.1 The Hon'ble ITAT Jaipur, Jaipur in its decision in the cases of **Smt. Rekha Shekhawat Vs. Pr. CIT (2022) 219 TTJ (Jp.) 761 & Shri Ram Narayan Birla in ITA No. 482/JP/2015 dated 30.09.2016** has held that unrecorded/excess investment or expenditure surrendered during the course of the survey has to be assessed as business income only and not under the head income from other sources. The Hon'ble ITAT Jaipur followed the case of **Choksi Hiralal Mangal vs. DCIT 131 TTJ 1 (Ahd)**.

4.2 The Hon'ble Ahmedabad Tribunal in case of **Chokshi Hiralal Maganlal vs DCIT (ITA No. 3281/Ahd/2009 AY 2004-05 dated 05.08.2011)** held that for invoking deeming provisions u/s 69, 69A, 69B & 69C of the Act there should be clearly identifiable investment or asset or expenditure (i.e. in our understanding not connected with business so as to make convenient to invoke

aforesaid sections). In case source of investment or asset or expenditure is clearly identifiable and has no independent existence of its own where a case arises to claim that it cannot be separated from business then first 'what is to be taxed is the **undisclosed business receipt.** Only on failure of such exercise, it would be regarded as taxable u/s 69 on the premises that such excess investment or asset or expenditure is unexplained and unidentified, satisfying the mandate of the law.

4.3 In the case of **Shri Lovish Singhal vs ITO (ITA No 142 to 146/Jodh/2018 for AY 2014-15 dated 25.05.2018)**, the Jodhpur Tribunal applying the proposition of law laid down by the Hon'ble Rajasthan High Court in the **Bajargan Traders (supra)**, held that the lower authorities were not justified in taxing the surrender made on account of excess stock and excess cash found U/s 69 of the Act and accordingly held that **there is no justification for taxing such income u/s 115BBE of the Act.**

5. In the present case the addition of Rs. 20,22,500/- is already subjected to challenge before the Hon'ble ITAT. Only the amount upheld, if any, could be considered for this purpose. Addition of Rs.1.58 crore relates to the Bhagat Public School which is a business activity. Again the deletion of Rs. 40 lakhs and confirmation of addition of Rs. 60 lakhs are subjected to ITAT decision and balance Rs. 58 lakhs is admitted by the assessee. However whatever addition is sustained by the Hon'ble ITAT or Rs. 58 lakh as admitted income, they are all part of business income earned by assessee from advertising business as was result of suppressed income therefrom. Similar is the position with regard to the additions Rs. 9,50,000/-, Rs.48,46,094/- and Rs.55,490/-.

To sum up, firstly the addition sustained by the Hon'ble ITAT in response to cross appeal filed by the assessee and Department can only be considered but that also being suppressed business income could not be subjected to S.115BBE by assessing as Income from Other Sources by any stretch of imagination.

Alternatively and without prejudice, w.r.t. these additions, ld. CIT(A) has already granted benefit of telescoping and end of the day he confirmed the balance addition of Rs. 28,72,212/-(1,29,02,990 less Rs. 1,00,30,778) (at CIT(A) order pg.72-73) upto which extent only it could be considered.

In view of the facts & circumstances, judicial guidelines and the statutory provisions, the impugned additions sustained by the CIT(A) could not be subjected to S. 115BBE of the Act.

Common submission: The AO and Revenue in its GOA have repeatedly relied upon the Survey statement of Shri Naresh Jain alleging admission made by him w.r.t. different addition which, are wrongly relied upon being survey statement and further once stood retracted, which has been elaborately submitted in this WS and may be considered towards all such grounds.

AGOA-8: Charging of Interest u/s 234A & 234B: is consequential and kindly be decided accordingly.

Thus, the appeal of the assessee may be allowed (as prayed for) and the appeal of the revenue be dismissed as submitted hereinabove.

The above submissions have been made based on the instructions and the information provided of/ by the client."

4.1 In Ground No. 1, it is noted that the assessee has challenged the legality of the survey conducted, however in the absence of any contention raised in support of this ground by the ld.AR of the assessee, the Ground No. 1 of the assessee is dismissed.

At the time of hearing with regard to the ground no.2 taken by the assessee, the ld A/R pointed out that there are certain typing mistakes which does not convey the real grievance raised by the appellant in as much as S. 131 has been wrongly typed as against S. 133A and also that the said ground has not been properly drafted. Therefore, a prayer for modification of the ground of appeal by way of modifying the grounds of appeal no. AGOA NO. 2 was submitted. After careful consideration of such a prayer and after going through the modified ground, we do not find anything new or extra or additional in nature nor it requires any investigation of facts therefore, such modification, is considered necessary for disposing of the appeal and to decide the issue therein raised by the assessee, hence the same is admitted. The original GOA No. 2 taken by the assessee shall be replaced/substituted by the following modified GOA No. 2 reproduced hereunder:-
"The ld. CIT(A) and the AO seriously erred in alleging / taking stand that statement of the assessee recorded during survey on 04.02.2017 were recorded u/s 131 as against legally and factually correctly stating u/s 133A(3)(iii) and therefore such survey statement has no evidentiary value at all therefore the reliance placed by the AO and supported by CIT(A) for making/confirming the additions (on this legal aspect that statement recorded u/s 131 on oath has evidentiary value hence can be used against the assessee), is a complete misinterpretation of law and misreading of the facts on record and hence, the stand of Revenue deserves to be rejected and moreover the implications flowing from such statements may be directed to be completely ignored."

4.2 We now proceed to adjudicate the modified ground of appeal no. 2. We may clarify that in the other three connected matters being Naresh Jain A.Y. 2017-18 ITA No 374/JPR/2024(D), Nisha Jain A.Y. 2015-16 ITA No. 377/JPR/2024(D) & Nisha Jain A.Y. 2017-18 ITA No 378/JPR/2024(D) also, the Revenue has raised similar grounds/contentions on this very aspect and therefore, for the sake of convenience we are deciding this issue in this appeal. Accordingly, we have considered the findings recorded by the lower authorities on this aspect, the rival contentions and the decisions cited on the issue in hand at bar, in all these four appeals. Our findings on this issue follow hereinafter:

4.3 The short question raised in the modified ground appeal no. 2 by the assessee, to be decided is whether the statement recorded by the authorities during the course of survey carried out u/s 133A of the Act has evidential value so that the admission made, if any in such statement (whether on oath or otherwise), can be used against the assessee. We find that the statute has provided different provisions looking to the different factual situations w.r.t recording of the statement, which may be recorded with or without administering oath viz u/s 132(4) (in search cases), u/s 133A(3)(iii) (in survey case) and u/s131 (for general inquiry). No doubt, these provisions operate independently in their respective fields and cannot be used interchangeably (except unless specifically provided in the statute). S.133A is separate and independent from S. 131, as evident from the statute viz. S. 133A(6)

of the Act, refers to use of the powers u/s 131 only in a given fact situation (as stated above), which manifests the legislative intention that statement of the assessee can be recorded under any of these three provisions as the situation may demand. Further, S.132(4) provides that such statement recorded during search may be used as evidence against the assessee in any proceedings, which is not the situation with S. 133A(3)(iii) nor with S. 131. In other words, though statement may be recorded on oath u/s 131, yet the statute not having provided such statement to be used as evidence against the assessee in any proceedings, the statement recorded under these two provisions loses their evidential value on the strict interpretation of the fiscal statute. Ignoring this significant difference will render the use of these words intendedly u/s 132(4), purposeless or nugatory. Therefore, to say that a statement recorded u/s 133A(3)(iii)/ or even u/s 133A(6) r/w s. 131, is equivalent to a statement recorded u/s 132(4) to be used as evidence against the assessee, is a gross misinterpretation of the provisions. We thus, agree with the contentions raised by the ld. A/R Shri Gargieya. We are supported by the decision, in case of **Pr. CIT, Central -2, New Delhi v. Meeta Gutgutia [2017] 82 taxmann.com 287 (Delhi)** Hon'ble Delhi High Court referred to the decision of the Kerala High Court in Paul Mathews & Sons v. CIT [2003] 263 ITR 101/129 Taxman 416 and of the Madras High Court in S. Khader Khan while considering distinction between statements under Sections 132(4) and 133A held as under:

"40. The main plank of Mr. Manchanda's submission was that the disclosure made by Mr. Pawan Gadia in his statement under Section 133A was sufficient to be construed as incriminating material qua all the aforementioned AYs, the assessment for which could be re-opened by invoking Section 153A of the Act. It is significant that while in the written submission dated 26th April, 2017, Mr. Manchanda termed the statement of Mr. Pawan Gadia as "the statement dated 23rd December, 2005 recorded under Section 132(4) of the Act", he was careful to describe it as such in the subsequent written submission dated 2nd May, 2017. This was for a good reason. The statement was in fact not under Section 132(4) of the Act but under Section 133A of the Act. ***There is a difference between a statement made during a survey under Section 133A of the Act and that made during the course of search under Section 132 (4) of the Act****. Section 132(4) of the Act states that the authorized officer may, during the course of search and seizure, "examine on oath any person who is found to be in possession or control of any books of account, documents, monies, bullion, jewellery..."and that any statement made during such examination may be used thereafter in evidence in any proceeding under the Act. On the other hand, Section 133A does not talk of the recording of any statement on oath. Under Section 133A (3) (iii), the Income Tax Authority acting under the said provision could "record the statement of any person which may be useful for, or relevant to, any proceeding under this Act."* ***Therefore, there is a considerable difference in the nature of the statement recorded under Section 132(4) and that recorded under Section 133A(3)(iii) of the Act.***

41. This distinction was noticed by this Court in ***Dhingra Metal Works (supra).*** *The Court there referred to the decision of the Kerala High Court in* ***Paul Mathews & Sons v. CIT*** *[2003] 263 ITR 101/129 Taxman 416 and of the Madras High Court in* ***S. Khader Khan Son (supra)*** *and observed that the word 'may' occurring in Section 133A(3)(iii) of the Act "clarifies beyond doubt that the material collected and the* ***statement recorded during the survey is not a conclusive piece of evidence*** *by itself." Incidentally, the decision of the Madras High Court in S. Khader Khan Son (supra) has been* ***affirmed by the Supreme Court*** *by the dismissal on 20th September, 2012 of SLP (Civil) No. 13224/2008 filed by the Revenue against the said decision after granting leave. To the same effect is the decision of this Court in Sunrise Tooling System (P.) Ltd. (supra) and of the Jharkhand High Court in* ***Shree Ganesh Trading Co.*** *(supra). The CBDT's instructions dated 10th March, 2003 and 18th December, 2014 have also emphasized that there should be no recording of statement during "search/seizure/other proceeding" under the Act under "undue pressure or coercion".*

42. Therefore, in the present case, it would be wrong on the part of the Revenue to characterize the statement of Mr. Pawan Gadia as by itself an incriminating material that could be used for making additions in all the AYs in question apart from the year of search."

Further the ITAT, Jaipur in the case of Unique Art Age v. AO [2014] 50 taxmann.com 194 (Jaipur - Trib.), has also taken similar view holding that:

"3.8 Effect of admission made in statements recorded during survey under section 133A of the Act

18. The position of law regarding the evidentiary value of admissions made in such statements is now settled. *After considering the rival stands on this issue, we have already discussed the same in the earlier part of this order.* ***No admission made in a statement recorded under section 133A on oath during survey can be relied as evidence against the maker or the assessee****. Undeniably, the Assessing Officer has made impugned addition on the basis of the statement of Shri Manohar Lal Agarwal and specifically by relying on his reply to question No. 23 of his statement. As per the assessment order, the excess stock of Rs. 5,08,98,166 has been worked out after giving the benefit of discount and the gross profit rate but mainly relying on the statement of one of the partners of the assessee-firm. If the statement of Shri Manohar Lal Agarwal and others are excluded in view of the above legal position, the value of the alleged excess stock can be ascertained in the light of the facts of this case. The legal issue is decided in favour of the assessee"*

We also find support from Paul Matthew's & sons Vs CIT [2003] 263 ITR 101, S. Kadar Khan Sons [2008] 300 ITR 157 (Madaras) affirmed by Hon'ble Apex court in CIT Vs S. Kadar Khan [2013] 352 ITR 480 (SC). The reliance placed by the ld. CIT(A) on certain decisions are based on the peculiar facts available in those cases only not available in the present case. The ld. CIT(A) in his order in A.Y. 17-18 (in ITA No. 374/JPR/2024(D)) has wrongly placed reliance on the case of Ravi Mathur (RHC) incorrectly stating that the evidentiary value of the statement recorded during survey was upheld whereas, the said decision was rendered in the context of search u/s 132(4) of the Act and the bone contention raised by the assessee was that there is a significant difference between the language of S. 132(4) viz-a-viz S. 131(1) and S. 133A for that reason, which aspect, has been fully appreciated by the various decisions cited by the ld. A/R. The ld. CIT(A) has completely misinterpreted and misapplied the ratio of the aforesaid case. Further the decision in case of Nokia (Supra) is completely distinguishable in as much as in that case, validity of survey itself was under challenge and the statements were recorded u/s 131 r/w 133A(6) because of non-cooperation from the side of the assessee and powers were also assumed u/s 131(1A) of the Act, which is not the case here hence, the same is completely distinguishable. The decision in the case of Dinesh Jain (Supra) is also not applicable in as much as there also, the lower authorities were not satisfied with the explanation furnished w.r.t the impounded

document though the assessee had earlier admitted income based thereon, which are not the facts in the present case. Moreover, Meeta Gutgutia (Supra) is a much later decision, making a comparative study of the relevant provisions in detail. Thus, respectfully following the ratio laid down in the above cited decisions, we are of the considered opinion that, the plea of the Revenue that the CIT(A) should have solely relied upon the survey statement of Shri Naresh Jain recorded u/s 133A(3)(iii) (or even u/s 131 on oath) admitting income but ignoring the impounded documents found and the explanation furnished thereon with the supporting evidences should be ignored, can not be accepted. We are thus not in agreement with the dissenting findings recorded by the CIT(A) on this aspect. For the above reasons, the modified ground of appeal no. 2 taken by the assessee is allowed.

4.4 However, except the above legal aspect decided by the CIT(A) against the assessee, we agree with the ld. CIT(A) in the respective grounds that the AO used the statement to corroborate said material found during the survey but, at the same time, the assessee had successfully explained the contents of the said impounded document/s in responding to the additions made by the AO and thus, were rightly deleted as by the CIT(A). Hence, no blind reliance could be placed on the statement of the assessee alleging admission. The law is well settled that no addition can be made solely based on the statement. Even the CBDT directed the

subordinate authorities not to press the assessee to make surrenders. We also find that the CIT(A) rightly placed reliance on the decision of **C.K. Abdul Aziz (2019) 111 taxman.com 74 (Ker) .** Thus, we find no infirmity in the order of the CIT(A) on this aspect. It is necessary to clarify that we have confirmed the deletions of additions by the CIT(A) on merits independent of these legal aspects. **Therefore, the ground of the Revenue, on the aspect of the admission by the assessee in statement is hereby dismissed.**

4.5 It is noticed that the alleged admission is claimed to have been retracted by filing affidavit dt. 14.02.2017 (APB 140-143) before the ADIT (INV) on 06.04.2017 i.e within a period around 2 months after the survey when admission was made. The ld. CIT(A) although rejected the claim of the assessee of filing retraction in absence of any evidence brought on record of approaching to the higher authorities. However, he appreciated the contents of the impounded documents and the explanation furnished by the assessee thereon and recorded independent finding, while granting relief. Therefore, he recorded a categorical finding that the retraction from the earlier statement was with sufficient, credible and corroborate evidence to support the claim of the assessee. We have also carefully considered the claim of filling retraction; however, in view of the contrary claims raised, we have not gone into this controversy.

5.1 The cross grounds of appeal (**AGOA-3 & DGOA-3)** taken by the assessee and the Revenue both, relate to the addition of Rs. 20,22,500/- (Rs. 19,50,000/- + Rs. 72,500/-) made by the AO based on impounded document being Exhibit 4 Pg 1-9 , which is a registered sale deed dot. 29.06.2015 in the name of one Devilal Bairava showing the purchase of the agricultural land for Rs. 19,50,000/- and further Exhibit 9 Pg. 2 relates to expenditure incurred of Rs. 72,500 agricultural land at Mandaliya 5 and based on Q&A No. 23 of the appellant recorded during survey on 04.02.2017 wherein, the assessee admitted making cash payment of Rs. 9,75,000/-. Out of the total addition made by the AO of Rs. 20,22,500/-, the CIT(A) deleted the addition of Rs. 9,75,000/- which is under challenge by the Revenue in its D-GOA-3 however, he confirmed the addition of Rs. 10,47,500/- which is under challenge by the assessee in its A-GOA-3 . Since these cross grounds relate to the same issue and addition, we are dealing with the same at one place.

5.2 On a careful consideration of the rival contentions, the material available on record and in the light of the judicial pronouncements cited at bar, we find no force in the ground of the Revenue. The undisputed facts are that the impounded registered sale deed dated 29.06.2015 copy of which is placed at assessee PB 34-41 shows Devilal Barwa to be the buyer of the agricultural land for Rs. 19,50,000/- and the appellant neither signed the same nor was a party to the transaction. Thus,

at the first instance, the entire transaction was between the strangers i.e. Devilal and the sellers. Admittedly, no evidence found nor is relied upon by the Revenue to support its allegation that the entire Rs. 22,50,000/- being the purchase consideration and the expenses incurred were paid by the assessee only. The allegation that it was a land of SC ST and which the assessee could not purchased and hence he might have transacted through Devilal, is a clear case of suspicion without any corroborative evidence and hence cannot be sustained. Thus, up to this stage, the said transaction could not have been considered in the hand of the assessee at all. However, in the statement, the assessee admitted having paid cash of Rs. 9,75,000/- as advance paid to Devilal towards the sale of half share in the said agricultural land in favour of the assessee. The assessee explained the said payment to have been accounted for in its Balance Sheet for the year ending in 31.03.2016 and we find that such payment has been shown therein as advance payment (copies placed at ABP Pg. 89). Though the assessee admitted that it was a cash payment not recorded anywhere in the accounts however, no evidence in support of this statement was found and needless to say that, it usually happens for want of availability of the record and because of tensed moments, an assessee is used to admit. But the fact remain that the payment of said advance is recorded in the Balance Sheet which was submitted before the authorities below through a letter dated 28.09.2017 (copy at APB 19). Neither the accounts were rejected nor

this contention was disproved by the Revenue and therefore, the same shall prevail over the verbal statement of the assessee. We thus find no force in the addition, so made by the AO. Even there was no occasion for the AO to have made an addition of the entire Rs. 20,22,500/- and since the CIT(A) has already deleted Rs. 9,75,000/-, the balance addition of Rs. 10,47,500/- is also deleted.

5.3 Coming to the ground no. 3, taken by the Revenue, suffice to say that we have already considered the above matter and held that even the addition of entire of Rs. 22,22,500/- could not be made by the AO, therefore there is no force in the ground taken by the Revenue. ***In the result, GOA-3 taken by the assessee is hereby allowed whereas GOA-3 taken by the Revenue is hereby dismissed***.

6.1. In ground No. 4, the assessee has challenged the addition made on account of the alleged cash payments of Rs. 60 lakh and Rs. 58 lakh made to one Ajay Modi in connection with taking over the management of Bhagat Public School. The addition is based on an impounded document, an agreement dated 16.10.2015 impounded as Annexure-A, Exhibit 11, Page no. 7 (APB 46), which contained information about cash payment of Rs. 30 lakh made to Ajay Modi and the statement of the assessee recorded during the course of the survey u/s 133A of the Act vide Q&A 23 (APB 74) and 26, whereby the payment of Rs. 3 Crore is stated to have been admitted by the assessee (out of this, Rs. 1.65 Crore are cash payments not recorded in the accounts). However, the present dispute is confined

to the addition of Rs. 60 lakh only, although in the grounds taken by the assessee, the addition of Rs. 58 lakh has also been assailed but during the course of the hearing and in the written submission, this part of the ground was not pressed. For completeness, it is clarified that the cash payment of Rs. 40 lakh made by the assessee was deleted by the ld. CIT(A), against which the Department is not in appeal. Thus, the dispute is confined only to the addition of Rs. 60 lakh. Although the addition of Rs. 60 lakhs has been challenged on various grounds, however, after careful consideration of the impounded document and its contents, we are satisfied that the payment of Rs. 60 lakh, in fact, did not pertain to the year under consideration (A.Y. 2016-17) as the Rs. 60 lakh was already paid earlier, as evident from the language used in the agreement (APB 49-52). It is stated that the amount of Rs. 60 lakh towards CBSE affiliation expenditure is already deposited, implying that such payment was made prior to entering into the impounded agreement dated 16.10.2015 and not on or after the said agreement. The aforesaid agreement also contains a reference to an earlier agreement dated 16.05.2013, for the period which had already expired on 31.03.2016. Moreover, there is a reference to various other payment entries on such dates (e.g. Nov 2013, Oct 2013 and 05.02.2014), falling within the financial year 2013-14 (A.Y. 2014-15).

6.2 We are therefore in full agreement with the contention of the ld. AR that, (alternatively), such addition (if at all required) could have been made only in A.Y. 2014-15, but not in any case in A.Y. 2016-17. Such interpretation is supported by the language of S. 69 of the Act, based on the jurisdictional facts, which could not be disputed by the Revenue. In this view of the matter, we find no justification for making the impounded addition of Rs. 60 lakh, and the same is deleted. This ground of appeal is thus partly allowed (addition of Rs. 60 Lakhs is deleted however addition of Rs. 58 Lakhs is confirmed), for the reasons stated above.

7.1. During the course of hearing and in the Written submission also, the assessee did not press Ground No. 5. Hence the same is dismissed as not pressed.

8.1. In ground No. 6, the assessee has agitated the application of S. 115BBE of the Act which is a provision for applying special tax rates in the cases where the income is assessed u/s 68 to 69C under the head Income from Other Sources. On a careful consideration of the rival contentions, the material available on record and in the light of the judicial pronouncements, cited at bar, we find no force in the ground of the Revenue. It is noticed from a perusal of the assessment order that the AO invoked S. 115BBE of the Act with reference to the total additions made by him totaling Rs. 2, 46,40,114/-, the detailed breakup of which is available in the written submission of the assessee reproduced somewhere in this order. However

thereafter, the additions were subjected to scrutiny by the CIT(A) and his order is now under challenge before us by way of cross appeals by the parties. Therefore, only those additions which are finally sustained up to the stage of the ITAT may be subjected to application of S. 115BBE of the Act, if at all so required. Since some of the additions have been sustained by us and some of the grounds relating to additions, though agitated, were not pressed. Hence, the following additions have been sustained finally: addition of Rs. 58 lakh (out of Rs. 1.58 crore), being the unexplained payment made to Shri Ajay Modi in relation to Bhagat Public School, Kota, Rs. 48,46,094/- addition made u/s 69A of the Act on account of receipt of excess salary paid to the staff of Bhagat Public School - Not pressed and Rs. 55,490/- unaccounted agriculture expenses. Thus, total additions of Rs. 1,07,01,584/- have been sustained up to the stage of the ITAT. However these additions are further subject to the benefit of telescoping, which, in this case, was allowed by the CIT(A) and the balance additions of Rs. 28,72,212/- remained uncovered at his stage. But in Departmental Ground of Appeal No. 5 taken by the Revenue against benefit of telescoping and after considering the claim made by the assessee in Additional Ground of Appeal No. 10, the additions sustained after giving effect to the present order remains NIL. Since there remains nothing on account of any addition made by the AO u/s 69 to 69C, there is no question of sustaining the invocation of S. 115BBE of the Act. But otherwise also we find that

the only identifiable source of investment or asset or expenditure, which were alleged to be unexplained and additions were made by the AO, emanates from the only source of income being advertising business in his proprietary namely M/s Quick Advertising Company, as per the computation of total income placed at APB Pg. 39 & 40. There is no other known source of income, which could give rise to undisclosed income, under consideration. We find support from the decisions of the coordinate bench of ITAT, Jaipur, in the cases of Ram Narayan Birla (Supra), Rekha Shekawat (Supra) and the decision by Hon'ble Raj. High Court in Bajranggan Traders (Supra). Thus, otherwise also in the facts & circumstances of the present case S. 115BBE could not have been invoked. **For the above reasons the invoking of S. 115BBE is therefore, quashed, and this ground taken by the assessee is therefore, allowed.**

9.1 In ground no. 7 taken by the assessee, the addition made by the AO u/s 69C on account of unexplained agriculture expenses of Rs. 55,490/- has been agitated. After a careful consideration of the findings recorded by the authorities below, written submissions and counter comments, we find no force in the ground so taken as the ld. CIT(A) has recorded cogent and detailed findings while rejecting this ground taken by the assessee before him. **Therefore, this ground No. 7 taken by the assessee is dismissed.**

10.1 In Ground No. 8, the assessee has challenged the levy of interest u/s 234B & 234C. Since such levy is consequential in nature hence the AO is directed to recompute the same after giving effect to this order.

11.0 We now proceed to decide the appeal of the Department in ITA No. 349/JPR/2024.

12.1 In ground of appeal no. 1 taken by the Revenue, the deletion of the total addition of Rs. 2,36,73,684/- which are alleged to be based on incriminating documents and also contrary to the admission made by Naresh Jain in the statement recorded on oath u/s 131. However, we find that this total Rs. 2.37 Crore (app.) consisted of various additions discussed in the other grounds of appeal already taken by the Revenue and appears to be general in nature, hence no separate adjudication is required. However, the other part of the ground placing reliance on the admission by the assessee, has already been dealt with while deciding assessee's modified grounds of appeal no. 2 herein above and decided against the Revenue. **Hence the latter part of this ground is dismissed, as indicated above.**

13.1 In ground no. 2 taken by the Revenue, the Revenue has alleged that the ld. CIT(A) did not appreciate that cash payments were made to Devilal Bairwa and Ajay Modi and the assessee failed to discharge the onus, to prove with explanation

of the concerned persons. However, we find that a part of this ground relating to payment made to Devilal Bairwa has been dealt with by us separately in ground of appeal no. 3 (D- GOA 3) taken by the Revenue and ground no. 3 (A-GOA 3) taken by the assessee in relation to the addition of Rs. 20,22,500/- and therefore does not call for any separate adjudication. Similarly, the issue relating to payment made to Ajay Modi is also under challenge by the assessee in ground of appeal no. 4 (AGOA 4) taken by it. Further in absence of any specific amount having been mentioned by the Revenue in its ground, it is seen that the payment of Rs. 40 lakh (part of Rs. 1.58 cr) to Ajay Modi was made through cheque only and not in cash and the ld. CIT(A) after recording a detailed finding, and appreciation of the evidences, has deleted the same, which is not under challenge by the Revenue. The additions of Rs. 60 lakhs and Rs. 58 lakhs have also been dealt with separately in ground of appeal no. 4 taken by the assessee. In view of these facts, therefore, this ground also doesn't need any separate adjudication as indicated above.

14.0 This ground No. 3 of the Department has already been dealt with and adjudicated along with aassessee's ground No. 3 (AGOA-3) herein above.

15.0 In Ground No. 4, the Revenues is aggrieved by the deletion of the addition of Rs. 9,50,000/- made by the on account of unrecorded investment made in the purchase of a land situated at Mandana, Kota, belonging to SC ST person. The ld. CIT(A) did not delete the addition in principle but found that the date mentioned

on the impounded document relating to the payment of Rs. 9.50 lakh was 04.11.2016 which fall in F.Y. 2016-17 relating to A.Y. 2017-18 and thus directed accordingly. Before us, the Revenue failed to rebutt this factual aspect that the impounded document shows the date of payment at 04.11.2016, hence, we find full justification in the order of the CIT(A) who rightly deleted the addition in this year on this basis. Hence this ground No. 4 taken by the Revenue is hereby dismissed.

16.1 DGOA-5 & GOA 10 (Addl.): In this ground the Revenue has challenged the benefits of telescoping given by the ld. CIT(A) of the availability of the income of Rs. 1,00,30,778/- against the addition sustained by him of Rs. 1,29,02,990/- which resulted into addition Rs. 28,72,212/- only.

16.2 On a careful consideration of the rival contentions, the material available on record and in the light of the judicial pronouncements cited at bar, we find no force in the ground of the Revenue. At the time of the hearing, the ld A/R of the assessee made oral prayer for admission of a legal grounds of appeal which was also repeated in its written submissions to the effect that the ld. CIT(A) wrongly computed the amount of benefit of telescoping and that the same has to be recomputed in the light of the result in the ITAT order as both the parties are under appeal challenging the additions/deletions in this year. After careful consideration of the grounds so raised and the pleas so raised, we find that it is a purely legal ground of appeal and necessary facts to decide the issue are already available on

record and do not require another examination of the facts hence following the decisions in the case of NTPC (229 ITR 383 (SC)), we admit the additional ground of appeal (which has been numbered as AGOA-10 by the assessee) and proceed to adjudicate the same.

16.3 Based on the said additional ground no.10, it was contended by the assessee that the l'd CIT(A) wrongly reduced the additions made, totalling to Rs. 11,60,000/- relating to A.Y- 15-16 as income utilised, from the cash availability (due to the addition income declared in the preceding years) and accordingly computed the net income not covered even by telescoping benefits at Rs. 28,32,212/- on the ground that the additions made by the AO A.Y 15-16 in the scrutiny assessment were challenged in the first appeal but during the pendency of the appeal, the assessee opted for VSV and paid the taxes becoming due thereon. Copies of the Assessment order, Appellate order and VSV certificates were submitted which are available in the II APB pages: 92-102 and have been duly perused by us. We agree with the contention of the ld A/R that once the assessee has already settled the issue by not further disputing the same and having paid the taxes thereon, such income (on account of investment/outgoing) could not have been termed as income utilised and the CIT(A) was not justified in reducing the same. Hence, the amount uncovered by the telescoping benefit computed by the CIT(A) at Rs. 28,32,212/- is to be reduced by Rs. 11,60,000/- as aforesaid, which

leaves the balance of Rs. 16,72,202/- as the income not covered even by the telescoping benefit.

16.4 . However, again this is the position only upto the stage of the ld. CIT(A) order, which is further subjected to the result of the ITAT order as the additions sustained by the ld. CIT(A) were challenged by the assessee. Hence, the additions confirmed upto the stage of the ITAT requiring to be set off/telescoped against the available income has to be recomputed.

16.5 It is noticed that while deciding the assessee's appeal in this year (i.e. A.Y 16-17), the additions of Rs. 10,47,500/- (20,22,500/- less 9,75,000/-) challenged in AGOA-3 and of Rs. 60 lakhs in AGOA-4, has been deleted by us and therefore the additions made by the AO and confirmed by the CIT(A) totalling Rs. 1,29,02,990/- should be reduced by these two deletions totaling to Rs. 70,47,500/-, resulting into the additions sustained upto the stage of the ITAT at Rs. 58,55,490/- (1,29,02,990/- less Rs. 70,47,500/-) only. We find that against the additions sustained of Rs. 58,55,490/- as aforesaid, the income available in cash for utilisation remains at Rs. 1,11,90,778/-. Therefore consequently, there remains no income this year and rather against the available cash of Rs. 1,11,90,778/-, the additions (outgoing/investments) sustained at this stage now stands at Rs. 58,55,490/- leaving the available cash balance of Rs. 46,64,712/- which, as prayed, shall be available for utilisation in the subsequent year/s in absence of any direct cogent

evidence showing the utilisation of the same is bought on record by the AO. For better understanding, same appears in tabular form as under:

Sr No.	**Assessment Year**		**Amount (in Rs.)**
1.	2013-14		5,53,474
2.	2014-15		16,34,573
3.	2015-16		41,56,437
4.	2016-17		48,46,294
5.	Total Income disclosed/Assessed (**income available in cash for utilization)**		**1,11,90,778/-**
6.	Additions confirmed by the ITAT		**58,55,490/-**
	Less: Alleged Payment to Ajay Modi confirmed	58,00,000	
	Less: disallowance of Agriculture Exp confirmed	55,490	
7.	**Net Addition sustained after telescoping benefit (5-6)**		**Nil**
8.	**Balance income available in cash to be C/F(5-6)**		**46,64,712/-**

In the result, ground taken by the Revenue (DGOA-5), is hereby dismissed whereas, the additional ground taken by the assessee (AGOA-10) is hereby allowed in terms of above discussions.

17.0 This ground Deptt. Ground of Appeal No. 6 (DGOA-6) is general in nature and calls for no specific comments.

18.0 In the result, the appeal of the assessee is partly allowed whereas appeal of Revenue is dismissed, as indicated above, with no orders as to cost.

Order pronounced in the open court on 05 /08/2024.

Sd/- Sd/-

(डा॰ मीठा लाल मीना) (संदीप गोसाई)
(Dr. Mitha Lal Meena) (Sandeep Gosain)
लेखा सदस्य / Accountant Member न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 05/08/2024
*Mishra
आदेश की प्रतिलिपि अग्रेशित / Copy of the order forwarded to:
1. The Appellant- The ACIT, Central Circle, Kota
2. प्रत्यर्थी / The Respondent- Shri Naresh Jain, Kota
3. आयकर आयुक्त / The ld CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
5. गार्ड फाईल / Guard File (ITA No.374/JP/2024)

आदेशानुसार / By order,

सहायक पंजीकार / Asstt. Registrar