आयकरअपीलीय अधिकरण, जयपुरन्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL,
JAIPUR BENCHES,"B " JAIPUR

डॉ. एस.सीतालक्ष्मी, न्यायिकसदस्य एवंश्रीराठोडकमलेशजयन्तभाई, लेखा सदस्य के समक्ष
BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकरअपील सं./ITA. No. 469 & 470/JP/2024
निर्धारणवर्ष/AssessmentYear :2011-12 & 2012-13

The DCIT Central Circle-1 Jaipur	बनाम Vs.	Shri Mahaveer Kumar Jain 65, Surya Nagar, Gopalpura Bypass Jaipur
स्थायीलेखा सं./जीआईआर सं./PAN/GIR No.: ABKPJ 0217F		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

C.O.No. 7 & 8
(Arising out of आयकरअपील सं./ITA. No. 469 & 470/JP/2024)
निर्धारणवर्ष/AssessmentYear :2011-12 & 2012-13

Shri Mahaveer Kumar Jain 65, Surya Nagar, Gopalpura Bypass Jaipur	बनाम Vs.	The DCIT Central Circle-1 Jaipur
स्थायीलेखा सं./जीआईआर सं./PAN/GIR No.: ABKPJ 0217F		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओरसे/Assesseeby : Shri Tanju Agarwal Advocate
राजस्व की ओरसे/Revenue by : Shri Ajey Malik, CIT-DR

सुनवाई की तारीख/Date of Hearing : 24/09/2024
उदघोषणा की तारीख/Date of Pronouncement: 03 /10/2024

आदेश/ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

The Department has filed the captioned appeals against two different orders of the ld. Commissioner of Income Tax, Appeals-4, Jaipur [for short

ld. CIT(A)] dated 29-01-2024. Even assessee also preferred Cross objections to the appeal so filed by the revenue against the same order of the ld. CIT(A). The grounds of appeal filed by the respective parties as to the appeal of the Revenue and C.O. of the assessee are mentioned here in below :-

ITA NO.469/JP/2024 – A.Y. 2011-12 (DEPARTMENT

1. Whether on facts and in circumstances of the case, the Ld. CIT(A) is justified in deleting the addition of Rs. 1,87,93,584/- made on account of unexplained investment in construction of Hotel building without appreciating the fact that during the course of search proceedings, incriminating documents regarding investment in the construction of Hotel building were found and seized from the premises of the assessee and the valuation of building was done by DVO.

2. Whether on facts and in circumstances of the case,the Ld. CIT(A) is justified in deleting the addition of Rs. 56,60,800/- made on account of undisclosed income from Garden Mahaveer Paradise without appreciating the fact that during the course of search proceedings, incriminating documents depicting the actual rate of booking per day were found and seized from the premises of the assessee, Furthermore, the ld. CIT(A) erred in not appreciating the statements of the employees regarding booking of the garden for different occasions.

3. Whether on facts and circumstances of the case, the Ld. CIT(A) is justified in deleting addition made by the AO by relying upon the judgment of Hon'ble Supreme Court in the case of Abhisar Buildwell and UK paint without appreciating the fact that judgment of Hon'ble Supreme Court in Abhisar Buildwell case is applicable where no incriminating documents on which the additions were made are found whereas in the instant case, incriminating documents were found and seized during the course of search and seizure proceedings carried out at the premises of the assessee.

ITA NO.470/JP/2024 – A.Y. 2012-13 (DEPARTMENT

(1) Whether on facts and in circumstances of the case, the Ld. CIT(A) is justified in deleting the addition of Rs. 1,52,531/ made on account of unexplained investment in construction of Hotel building without appreciating the fact that during the course of search proceedings, incriminating documents regarding investment in the construction of Hotel building were found and seized from the premises of the assessee and the valuation of building was done by DVO.

(2) Whether on facts and in circumstances of the case, the Ld. CIT(A) is justified in deleting the addition of Rs. 62,37,040/ made on account of undisclosed income from Garden Mahaveer Paradise without appreciating the fact that during the course of search proceedings, incriminating documents depicting the actual rate of booking per day were found and seized from the premises of the assessee, Furthermore, the CIT(A) erred in not appreciating the statements of the employees regarding booking of the garden for different occasions.

(3) Whether on facts and in circumstances of the case, the Ld. CIT(A) is justified in deleting the addition of Rs. 1,63,26,661/- made u/s 69 of the Act on account of unexplained investment in construction of residential property in partnership with the firm during the course of search proceedings, incriminating documents regarding investment in construction of building were found and seized from the premises of the assessee and the valuation of building was done by the DVD

(4) A Whether on facts and circumstances of the case the 14. CIT(A) is justified in deleting addition made by the AO by relying upon the judgment of Hon'ble Supreme Court in the case of Abhisar Buildwell and UK paint without appreciating the fact that Judgment of Hon'ble Supreme Court in Abhisar Buildwell case is applicable where no incriminating documents on which the additions were made arm found whereas in the instant case, incriminating documents were found and seized during the course of search and seizure proceedings carried out at the premises of the assessee.

C.O. No.7/JP/2024-A.Y. 2011-12 (Assesse)

(1) That on the facts and circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals) grossly erred in not quashing the assessment order as well as the notice issued u/s 153A as illegal, barred by limitation and without jurisdiction.

2. That on the facts and circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals) grossly erred in not quashing the

assessment order passed without mandatory Document Identification Number (DIN) as illegal and non est.

C.O. No.8/JP/2024-A.Y. 2011-12 (Assesse)

1. That on the facts and circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals) grossly erred in not quashing the assessment order passed without mandatory Document Identification Number (DIN) as illegal and non est.

2. At the outset of hearing, the Bench noted that in both the respective Departmental appeals, there is delay of 13 days for which the Department has filed applications for condonationof delay with the reasons that *''However, due to voluminous time barring matters pending for disposal by 31-03-2024, this office was unable to file further appeal before the Hon'ble ITAT, Jaipur Bench, Jaipur within stipulated timeline i.e. within 60 days from the receipt of the appeal order''*. The ld. AR of the assessee has not raised any objection for such delay. Based on the reasons advanced the delay caused for 13 days in filling the appeal is condoned in the interest of equity and justice. However, the Department should be vigilant in filing the appealsin time in future.

3. First of all, we take up the appeal of the Revenue in ITA No. 469/JP/2024 & C.O.No. 7/JP/2024 for adjudication.

3.1 Brief facts of the case are that the assessee has declared business income from Chandala Kalyanmal (50% share), firm Kalyan Hotel (50% share), income from house property from 65, Surya Nagar, Gopalpura Byepass and Krishna Towers, Central Spine, Vidhyadhar Nagar,Jaipur, income from Long term capital gain, interest income from Bank, interest from parties and interest from NSC. It is noted that assessee filed his original return of income u/s 139 of the Act on 23-08-2011 for the AY 2011-12 declaring total income at Rs.71,98,340/-. A search and seizure operation u/s 132(1) of the Act was carried out on 28-09-2017 at the various premises of Chandalal Kalyanmal (CLKM) Group, Jaipur and the assessee was also covered. The ld. AO issued notice u/s 153A of the Act to the assessee on 21-12-2019, in response to notice, the assessee filed his return of income on 25-12-2019 for the A.Y. 2011-12 declaring a total income at Rs.71,98,340/-. Finally, the AO completed the assessment vide order dated 30-12-2019 at a total income of Rs.3,16,92,010/- by making addition of Rs.1,87,93,585/- on account of unexplained investment in construction of Hotel K Mahaveer, addition of Rs.39,283/- on account of undisclosed capital gain and a further addition of Rs.56,60,800/- on

account of undisclosed income of lawnGarden booking- Garden Mahaveer Paradise.

3.2 Apropos Ground No. 1 of the Department, it is noticed from the order of the ld. CIT(A) who vide para 6 to para 6.1 has discussed the issue in detail and allowed the Ground of the assessee in para 6.2 of his order by observing as under:-

> ‘’6.2 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:-
>
> I have decided the similar issue in the case of the appellant for the assessment year 2010-11 in the ground of appeal number two where the Ground of Appeal has been allowed. Material facts of the present appeal being para material with the fats of the appeal in the assessment year 2010-11 , the findings of the appeal order in the case of assessment year 2010-11 in ground of appeal number two will apply mutatis mutandis to the present appeal for the assessment year 2011-12 and it is held accordingly.
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> Accordingly, this ground of appeal is hereby allowed.

3.3 During the course of hearing, the ld. DR supported the order of the AO and submitted that the ld. CIT(A) is not justified in deleting the addition of Rs.1,87,93,584/- made on account of unexplained investment in construction of Hotel building without appreciating the fact that during the course of search proceedings, incriminating documents regarding investment in the construction of Hotel building were found and seized from

the premises of the assessee and the valuation of building was done by DVO. He further vide his letter No. CIT(DR-II)/ITAT/JPR2024-25/466 dated 20-08-2024 has forwarded the letter of DCIT, Central Circle-1, Jaipur in connection with ITA No. 469& 470/JP/2024 relating to Shri Mahaveer Kumar Jain whose narration are as under: -

> ‘’No. DCIT/CC-1/JPR/2024-25/431 Date:-12-08-2024
> To,
> The Commissioner of Income-tax(DR-II)
> ITAT, Jaipur
>
> Sub:-Appeal before the Hon'ble ITAT, Jaipur in ITA No. 469 & 470/JPR/2024 in the case of Shri Mahaveer Kumar Jain for A.Y.- 2011-12 & 2012-13-regarding-
>
> Respected Sir,
> Kindly refer to your good office letter no. 424 dated 08.08.2024 on the subject mentioned above. In this connection, the requisite report is submitted
> as under:-
> 1. During the course of search proceedings on the residence of the assessee i.e. plot no. 21,22,33 and 34, Shree Gopal Nagar, Jaipur and survey proceedings on the business premises i.e. M/s Kalyan Hotel & Resorts, Rajendra Prasad Nagar, Jaipur, various incriminating documents as well as digital data were found and seized. On verification of seized material, it was noticed that the assessee has made huge investment in the construction of the Hotel K. Mahaveer but no such investment was declared in the regular books of the assessee. Therefore, notice u/s 153A of the Act was issued to the assessee on 21.12.2019 and assessment was completed u/s 153A/143(3) of the Act on 30.12.2012 making addition on account of undisclosed investment in construction of hotel and on account of undisclosed income from garden Mahaveer Paradise.Thus, it is clear that notice u/s 153A of the Act was issued after finding the discrepancy between the amount of investment mentioned in seized data and in regular books. Therefore, the judgement of Hon'ble Supreme Court in the case of Abhisar Buildwell and UK paint is squarely not applicable in the case of the assessee.
>
> 2. On verification of documents seized during the search proceedings, it was gathered that the assessee has made huge investment in hotel construction which is not declared in the regular books(copy enclosed). Details of such documents are as under:-

Address of the premise	Exhibit No.	Page No.	Description
33-34, Gopal Gopalpura Shree Nagar,Byepass, Jaipur	AS-12	16to 18	Draft sale deed of Hotel K Mahaveer
	AS-12	1 & 2	Specification of hotel K Mahaveer regarding land, building and furniture
	AS-11	27 to 26	Copy of Ikrarnama of Hotel K Mahaveer
	AS-7	21-27	Copy of draft sale deed of Hotel K Mahaveer

Thus, there was sufficient evidence in the form of incriminating documents to initiate proceedings u/s 153A of the Act.

3. Further, it is also submitted that the search proceedings were carried out at the premises of the assessee on 28.09.2017. Therefore, proceedings u/s 153A of the Act was initiated in compliance to provisions laid down in section 153A(1)(b) of the Act.

4. It is also submitted that the Id.CIT(A) has followed the same judgement in the appeal no. 1165/2019-20 for AY 2010-11 in the case of the assessee but involved tax effect was less than the prescribed limit for filing further appeal and also not falls under any exception clause as per CBDT's circular no. 17/2019 dated 08.08.2019

5. It is also submitted that the documents submitted by the assessee before Hon'ble bench in the form of paper book has already been entertained during the assessment as well as appellate proceedings. No new justification or evidence has been furnished by the assessee, therefore, no further comments on paper book are required to be submitted.

6. Further, the cross objection filed by the assessee that the assessment order was passed without mandatory DIN has no significance as the assessment was communicated vide DIN no. ITBA/AST/M/153A/2019- 20/1023482059(1) dated 30.12.2019.

Looking to the above facts, addition made on account of investment made in construction of hotel and on account of undisclosed income from garden Mahaveer Paradise are justified.

Encl.:- Paper book and copy of relevant seized documents.
Yours faithfully,
Sd/-
(Akshay Kabra)
Dy. Commissioner of Income Tax
Central Circle-1, Jaipur
Copy to :-
The Addl. Commissioner of Income Tax, Central Range, Jaipur
Dy. Commissioner of Income Tax
Central Circle-1, Jaipur''

3.4 Further, the ld. DR vide his letter dated 24-09-2024 has also adduced the copy of DIN in assessment year 2011-12 and 2012-13 in connection with ITA No. 469 & 470/JP/2024 (A.Y. 2011-12 & 2012-13 in the case of Mahaveer Kuma Jain) for information of the Bench and the same has been taken into consideration by the Bench.

3.5 During the course of hearing, the ld. AR supported the order of the ld. CIT(A) as to the issue in question raised by the revenue and has placed on record the paper book and written submission to support the order of the ld. CIT(A).

3.6 We have heard both the parties and perused the materials available on record. The brief facts in this case are thatthe assessee is a family member in Chandalal Kalyanmal group engaged in the business of

wholesale as well as retail trade of timber, ply-boards, laminated sheets, teak wood etc. Search and seizure operations were carried out on 28.09.2017 at various premises of Chandalal Kalyanmal (CLKM) group**.** Copies of return of income filed by the applicant assessee and relied upon valuation report were furnished at paper book page no. 3 to 58.The AO made certain additions by passing assessment order u/s 143(3) read with section 153A of the Income-tax Act, 1961, without quoting DIN (Document Identification Number). It is noted that the AO issued notices u/s 153A for the AY 2012-13 to AY 2018-19 in 2018. It is also noticed that at fag end of the assessment proceedings, notices u/s 153A for AY 2010-11 and AY 2011-12 were also issued against which the assessee filed objections and reply but the AO proceeded ahead and framed the assessment directly without disposing off the objections by a separate speaking order. Even DIN was not quoted in the assessment order. In the hands of the assessee, an addition was made with regard to unexplained investment in construction of Hotel Building of M/s Kalyan Hotel And Resorts, a separate partnership firm in which the assessee is one of the partners. It is noticed from the records that objection in this regard was also filed with the AO during the pendency of the assessment proceedings but still the addition

was made by the AO who completely relied upon the DVO's valuation report. It is noticed from the submissions of the assessee that no time was allowed by the AO to furnish registered valuer report or other evidences as the assessment was framed in a hurried manner by making addition of Rs. 1,87,93,584/- being the amount of alleged investment in construction of Hotel building. Further, addition of Rs.50,60,800/- was also made as unexplained income from Mahaveer Paradise garden thereby completely ignoring the two important facts, first that Mahaveer Paradise was not even started during the year under consideration and second that the property was solely used by the assessee for get-togethers of family, relatives, business associates etc. on obligatory basis for which no rent was charged. On appeal to the ld. CIT(A), assessee submitted additional evidencealong with application under Rule 46A. In remand report [available in the PB page 389-382], the AO failed to point the relation of addition with that of any incriminating material found during search and his remand report revolved merely around the issue of PWD rates versus CPWD rates for valuation submitted. The ld. CIT(A) after considering the assessment order, documents and judgments on record, remand report and submissions of the assessee passed a detailed order against which department has

preferred this appeal. Assessee has filed CO on the legal issue of non-quoting of DIN in the assessment order. The Bench noticed from the records that notices u/s 153A can be issued for prior six assessment years and for relevant assessment years (prior ten assessment years in case alleged income represented in the form of an asset exceeds rupees fifty lakhs). In the present case, since the allegation of higher valuation of construction arises in the case of another independent assessee M/s Kalyan Hotel & Resorts having PAN : AAJFK7695L, a partnership firm who is an independent assessee under the Income-tax Act, 1961, who undertook construction activity of Hotel K Mahaveer and running of Hotel, any notice if required to be issued u/s 153A for allegation of escapement of income should have been issued to that partnership firm and not to the assessee who is merely a partner in that firm. Hence, the notice issued u/s 153A in the case of the assessee partner is illegal and time barred as the asset represented in the form of construction of Hotel K. Mahaveer building pertains to separate legal assessee M/s Kalyan Hotels & Resorts [AAJFK7695L] and not to the assessee and this fact was also brought to the notice of the AO by way of objections raised during the assessment proceedings but the AO failed to consider the same while framing the

assessment and the AO remand report is also silent on this issue. As is evident that the dispute is related to the assessment year 2011-12. Search was carried out on 28-09-2017 and the addition disputed by the revenue is based on the valuation report and that of the extrapolation of the revenue of Lawn-Garden.

3.7 As regards the quantum addition amounting to Rs.1,87,93,584/- under section 69 as unexplained investment in construction in respect of construction of hotel property Hotel K. Mahaveer in the partnership firm M/s Kalyan Hotel And Resorts at Dr. Rajendra Prasad Nagar, Jaipur, it is noted that as against the declared construction of Rs.1,25,07,551/- the AO relied on DVO valuation report estimating the construction cost at Rs.6,01,40,900/-. Details are tabulated as under (CIT(A) order page 40)

Financial Year	**Cost of Construction (Rs.)**		**Difference**
	Declared by the assessee (Rs.)	**Estimated by Valuation Cell (DVO) (Rs.)**	
2009-10	3285697	15798800	12513103
2010-11	4934816	23728400	18793584
2011-12	4287038.45	20613700	16326661.55
	12507551.45	60140900	32935093

3.8 It is noted from the documents available before the Bench that the addition made by the AO was unjustified due to the following reasons:-

1 FIRST REASON : **NO ADDITION IN SEARCH, IF NO INCRIMINATING MATERIAL FOUND DURING SEARCH** : It is now a settled law that no addition can be made in search u/s 153A in respect of completed/unabated assessments, if no incriminating document found during search. Reliance is being placed on the judgment of **Hon'ble Supreme Court** in the case of **PCIT Vs. Abhisar Buildwell P. Ltd.** in Civil Appeal No. 6580 Of 2021 recently decided on 24.04.2023 wherein it was held as under :-

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

ii. all pending assessments/reassessments shall stand abated;

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

iv. in case no incriminating material is unearthed during the search, the AO cannot assess or reassess taking into consideration the other material in respect of completed assessments/unabated assessments.

Meaning thereby, in respect of completed/unabated assessments, no addition can be made by the AO in absence of any incriminating material found during the course of search under Section 132 or requisition under Section 132A of the Act, 1961. However, the completed/unabated assessments can be re-opened by the AO in exercise of powers under Sections 147/148 of the Act, subject to fulfilment of the conditions as envisaged/mentioned under sections 147/148 of the Act and those powers are saved.

It is further noted that no incriminating material was found during search operations in respect of the construction of house property as is also evident from the assessment order passed u/s 153A wherein there is no mention about any incriminating material found for the relevant assessment year even no mention in the AO remand report.

2. SECOND REASON : NO ADDITION SOLELY ON THE BASIS OF DVO VALUATION REPORT AS IT IS MERE AN ESTIMATION/OPINION : It is now a settled law that no addition can be made solely on the basis of DVO Valuation report as it is mere an estimation and mere an opinion of a person.

In this regard, reliance is being placed on the judgment of **Hon'ble Gujarat High Court** in the case of **PCIT Vs. J. Upendra Constructions Pvt. Ltd.** in Civil Appeal No. 173-176/2015 decided on 30.03.2015 wherein at para no. 4.1 & 5 it was held that as under :-

> *"4.1 At the outset, it is required to be noted that in the present case, the Assessing Officer made additions with respect to the difference in the cost of construction based upon and/or relying upon the DVO's report in the case of one M/s.Manjusha Estate Pvt.Ltd. from whom, the assessee subsequently got the project. It is true that in the present case, copy of the DVO's report was furnished to the assessee during the reassessment proceedings. However,* ***it is required to be noted that except the DVO's report, there was no further tangible material before the Assessing Officer. Therefore, solely on the basis of the DVO's report which, as per the catena of decisions of the Hon'ble Supreme Court as well as this Court, can be said to be the opinion of the DVO only, no addition can be made with respect to difference between the cost of construction determined by the DVO and shown by the assessee****.*
>
> *5. Under the circumstances and in the facts and circumstances of the case, it cannot be said that the learned Tribunal has committed any error in deleting the additions made by the Assessing Officer on account of difference of the cost of construction which was solely based upon the DVO's report."*

3. **THIRD REASON** : **DISCREPANICES POINTED OUT BY THE ASSESSEE IN DVO'S REORT NOT CONSIDERED BY LD. AO** :

It is noted that no discrepancies were pointed out in the valuation report dated 21.01.2020 of registered valuer Mr. G.P. Meena at Rs.3,64,37,200/- (rupees three crores sixty four lakhs thirty seven thousand two hundred) forming part of the paper book, furnished to the AO alongwith rule 46A application. Moreover, the discrepancies pointed out in the DVO report during the assessment

proceedings were not considered by the ld. A.O. while making the impugned addition. It is humbly submitted that the DVO considered CPWD rates instead of State PWD rates and also not allowed higher deduction for self supervision. It is well settled by a number of decisions that for the purpose of valuation it is the State PWD rates which are to be applied and adopted in place of the CPWD rates and reliance in this regard is placed on the decision of the Hon'ble Supreme Court in the case of CIT, Ajmer v. Sunita Mansingha reported in 393 ITR 121 (SC). Self supervision deduction of 10% is well justified in view of numerous decisions and we are placing reliance on the decision of the ITAT, Jaipur Bench "B", Jaipur in the case of ITO, Kota v. Nitesh Maheshwari, Kota reported in 44 Tax World 131 in which the Hon'ble ITAT has allowed a deduction of 12% for self-supervision. It is also pertinent to mention here that the assessee is engaged in the business of sale of construction material viz. Timer, Plywood, Sunmica etc, hence, the assessee is well conversant with various construction persons/business viz. Architects, Builders, Contractors, Carpenters, Other Construction material suppliers etc. As a result, the assessee has taken good advantage of his contacts in construction line, material goods as well as construction services, resulting in further reduction in construction costs to a significant extent. Hence, it is humbly submitted that the assessee is further able to save around 10% of the construction costs in this regard.

4. **FOURTH REASON** : **CONSTRUCTION ACTIVITY OF HOTEL K. MAHAVEER CARRIED BY SEPARATE ASSESSEE WHEREAS ADDITION MADE IN ASSESSEE HANDS** :

It is noted that the construction activity and running of Hotel K. Mahaveer was done by separate assessee M/s Kalyan Hotel & Resorts having PAN : AAJFK7695L, a partnership firm who is an independent assessee under the Income-tax Act, 1961. This firms runs business activities of Hotel K. Mahaveer after obtaining necessary licenses and earns room rent and other income incidental thereto. The construction was duly recorded in the regular books of account maintained by the partnership firm whose books of accounts were audited. Building was shown in the fixed assets chart of the said firm which was used for running a hotel by the said partnership firm whose income was being declared in the income tax return of the said firm. Assessee is merely a partner in that firm. In relation to the partnership firm M/s Kalyan Hotels & Resorts, partnership deed, audit report alongwith audited financial statements, income tax return, computation of total income, building/construction account in the books of M/s Kalyan Hotels & Resorts have been furnished in the paper book page no. 113 to 181 and reasons are best known to the A.O. regarding why notices were issued u/s 153A to the assessee and the impugned additions for construction were made in the hands of the assessee instead of the partnership firm wherein construction activity was being carried and in whose books of account building construction was being recorded. The books of account of the partnership firm

were regularly maintained and were duly audited by a Chartered Accountant with construction bills/vouchers duly available for verification. It is now a settled law that addition for unexplained construction on the basis of DVO's report cannot be made without rejecting the books of account maintained for construction as reference to DVO cannot be made without rejecting books of account on some legal or justified basis. Reliance is being placed on the judgment of Hon'ble Punjab & Haryana High Court in the case of CIT Vs. Freedom Board & Paper Mills in ITA No. 210 to 213 of 2013 decided on 23.04.2015. Hon'ble Gujarat High Court in the case of CIT Vs. Vijaykumar D Gupta in ITA No. 293-294/2014 decided on 15.04.2014 held that AO has not brought any material on record to establish that the assessee had made any unaccounted investment in the construction of the building in question and that the books of account do not reflect the correct cost of construction, thus, there was no occasion for AO to make a reference to the Valuation Officer — Unless the books of accounts were rejected, the AO cannot make a reference to the Valuation Officer, therefore reference made to the Valuation Officer, not being in consonance with the provisions of law was invalid and accordingly, the report made by the Valuation Officer pursuant to such an invalid reference could not have been made the basis for addition u/s 69. It is pertinent to mention that the assessment of the assessee for AY 2010-11 to 2012-13 by the income-tax department u/s 143(3) were completed after due verification. Copy of the assessment orders have been submitted in the paper book at page no. 57 to 72. On the same of set of facts, now income-tax department has taken a different stand which is not permissible under law. It is further noted that the assessee is also partner in other partnership firm M/s Chandalal Kalyanmal (PAN : AABFC2171P) wherein for the AY 2018-19 addition of Rs.1,52,29,857/- for excess unexplained stock found during survey was made by the same A.O. in the assessment order passed on the same day i.e. on 30.12.2019 u/s 153B/143(3) (copy placed on PB page 383 to 392). On one hand the A.O. made addition for unexplained stock of partnership firm in the hands of the partnership firm itself whereas on the other hand addition for construction in building of partnership firm was made by the ld. A.O. in the hands of one of the partner instead of the partnership firm, which is not justified and it tantamounts to blowing hot and cold at the same time which is not permissible. It seems that the . AO selected one of the partner instead of the partnership firm for issuing notice u/s 153A, keeping aside the provisions of law, for the reason that it was more beneficial from revenue viewpoint. The Bench noticed that the A.O. generally mentioned in the remand report that there are various discrepancies in the valuer report but no specific discrepancy is mentioned in the remand report except PWD rate.

3.9 The ld. CIT(A) considered all these aspect of the matter and allowed the ground of the assessee which is evident from Para No. 6.2 at page no. 47 of the ld. CIT(A) order for AY 11-12 and corresponding para no. 6.2 at page no. 57 of the ld. CIT(A) order for AY 2010-11. The ld. CIT(A) after considering the assessment order, documents and judgments on record, remand report and submissions of the assessee passed a detailed and reasonedorder, and the Bench does not find any infirmity in his order.

3.10 Moreover, as is evident that the assessment year under consideration is beyond the six years and relates to the proceeding carried out by the revenue based on the provision of section 132 and 153A of the act along with Rule 112 of the Income-tax Rules'1962. It would be better to go through those provision of the Act and rules to decide the issue on hand:

Relevant part of section 153A of the act

Assessment in case of search or requisition

153A. (1) Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, in the case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003 but on or before the 31st day of March, 2021, the Assessing Officer shall—

(*a*) issue notice to **such person** requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years and for the relevant

assessment year or years referred to in clause (*b*), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139;

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

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

xxx *xxx* *xxx*

Relevant part of section 132 of the act

Search and seizure.

132. (1) Where the Principal Director General or Director General or Principal Director or Director or the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner or Additional Director or Additional Commissioner or Joint Director or Joint Commissioner in consequence of information in his possession, has reason to believe that—

(*a*) **anyperson** to whom a summons under sub-section (1) of section 37 of the Indian Income-tax Act, 1922 (11 of 1922), or under sub-section (1) of section 131 of this Act, or a notice under sub-section (4) of section 22 of the Indian Income-tax Act, 1922, or under sub-section (1) of section 142 of this Act was issued to produce, or cause to be produced, any books of account or other documents has omitted or failed to produce, or cause to be produced, such books of account or other documents as required by such summons or notice, or

(*b*) **anyperson** to whom a summons or notice as aforesaid has been or might be issued will not, or would not, produce or cause to be produced, any books of account or other documents which will be useful for, or relevant to, any proceeding under the Indian Income-tax Act, 1922 (11 of 1922), or under this Act, or

(*c*) **any person** is in possession of any money, bullion, jewellery or other valuable article or thing and such money, bullion, jewellery or other valuable article or thing represents either wholly or partly income or property which has

not been, or would not be, disclosed for the purposes of the Indian Income-tax Act, 1922 (11 of 1922), or this Act (hereinafter in this section referred to as the undisclosed income or property),

then,—

(*A*) the Principal Director General or Director General or Principal Director or Director or the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner, as the case may be, **may authorise** any Additional Director or Additional Commissioner or Joint Director, Joint Commissioner, Assistant Director or Deputy Director, Assistant Commissioner or Deputy Commissioner or Income-tax Officer, or

(*B*) such Additional Director or Additional Commissioner or Joint Director, or Joint Commissioner, as the case may be, **may authorise** any Assistant Director or Deputy Director, Assistant Commissioner or Deputy Commissioner or Income-tax Officer,

(the officer so authorised in all cases being hereinafter referred to as the authorised officer) to—

(*i*) enter and search any building, place, vessel, vehicle or aircraft where he has reason to suspect that such books of account, other documents, money, bullion, jewellery or other valuable article or thing are kept;

(*ii*) break open the lock of any door, box, locker, safe, almirah or other receptacle for exercising the powers conferred by clause (*i*) where the keys thereof are not available;

(*iia*) search any person who has got out of, or is about to get into, or is in, the building, place, vessel, vehicle or aircraft, if the authorised officer has reason to suspect that such person has secreted about his person any such books of account, other documents, money, bullion, jewellery or other valuable article or thing;

(*iib*) require any person who is found to be in possession or control of any books of account or other documents maintained in the form of electronic record as defined in clause (*t*) of sub-section (1) of section 2 of the Information Technology Act, 2000 (21 of 2000), to afford the authorised officer the necessary facility to inspect such books of account or other documents;

(*iii*) seize any such books of account, other documents, money, bullion, jewellery or other valuable article or thing found as a result of such search:

Provided that bullion, jewellery or other valuable article or thing, being stock-in-trade of the business, found as a result of such search shall not be seized but the

authorised officer shall make a note or inventory of such stock-in-trade of the business;

(*iv*) place marks of identification on any books of account or other documents or make or cause to be made extracts or copies therefrom;

(*v*) make a note or an inventory of any such money, bullion, jewellery or other valuable article or thing :

xxx xxx xxx

Relevant part of Rule 112 of the Income-tax Rules'1962

112 . (1) The powers of search and seizure under section 132 shall be exercised in accordance with sub-rules (2) to [56][(14)].

[57][(2) (*a*) The authorisation under sub-section (1) of section 132 (other than an authorisation under the proviso thereto) by the [58][Director-General or Director] or the [59][Chief Commissioner or Commissioner] or any such [60][Deputy Director] or [61][Deputy Commissioner] as is empowered by the Board in this behalf shall be in Form No. 45;

(*b*) the authorisation under the proviso to sub-section (1) of section 132 by a [59][Chief Commissioner or Commissioner] shall be in Form No. 45A;

(*c*) the authorisation under sub-section (1A) of section 132 by a [59][Chief Commissioner or Commissioner] shall be in Form No. 45B.

(2A) Every authorisation referred to in sub-rule (2) shall be in writing under the signature of the officer issuing the authorisation and shall bear his seal.

xxx xxx xxx

If we peruse all these provisions together i.e. provisions of section 132 and 153A of the act along with Rule 112 of the Income-tax Rules'1962 activate the applicability of provision of Section 153A of the Act. As it evident that the search is initiated on the strength of warrant of authorization issued by the authorizing officer to the authorized officer in terms of Section 132 of the act read with Rule 112 of the Income-tax

Rules1962. Search warrant can be issued against any person who is falling within the scope of either or more of the conditions as mentioned in clause (*a*),(*b*) or (*c*) of section 132(1) and against whom "reasons to believe" has been formed based on the possession of information. Therefore, the warrant of authorization so issued should specify the name of the person or persons against whom it is issued along with the complete address of the premises to be searched. In other words, if a warrant of authorization has not been issued in case of a person, the provisions of Section 153A cannot be initiated in his case.

3.11 Having discussed the relevant provision and rules now the question which the posed before us as to whether any material found in the search of any other person than the assessee can be considered in the assessment under section 153A of the assessee?

This controversy and the scope of assessment under section 153A has been considered by the Hon'ble Delhi High Court in case of CIT v. Kabul Chawla [2015] 61 taxmann.com 412/234 Taxman 300/[2016] 380 ITR 573 (Delhi). In the said decision, the high court has considered all earlier decisions of Hon'ble Delhi High Court and has also considered the

decisions of other High Courts and Tribunals and summarized the legal position in paragraph 37, which is reproduced below:-

Summary of the legal position

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

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

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

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

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

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

vi. Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under section 153A merges into one. Only one assessment shall be made separately for

each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.

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

In clause (*iv*) above, the Hon'ble Cout held that "Obviously an assessment has to be made under this Section only on the basis of seized material". In clause (*v*), the same is reiterated by holding "In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made". In clause (*vii*), it is stated "Completed assessments can be interfered with by the AO while making the assessment under section 153A only on the basis of some incriminating material unearthed during the course of search".From a reading of the above decisions of Hon'ble High Court, it is evident that completed assessment can be interfered with by the Assessing Officer on the basis of any incriminating material unearthed during the course of search. If in relation to any assessment year no incriminating material is found, no addition or disallowance can be made in relation to that year in exercise of power under section 153A of the Act. The reference to the incriminating material in the above decisions of Hon'ble High Court is about

incriminating material found as a result of search of the assessee's premises and not of any other assessee.Therefore, on a conjoint noticeable provision of section 153A read with section 132 of the act and the judgment of the Delhi Court, in our considered opinion only the material unearthed during the course of a search by virtue of execution of a particular warrant of authorization *qua* a person can be used for framing assessment u/s 153A of the act in case of such a person. This view of the Delhi High Court has been confirmed by the apex court in the case of PCIT Vs. Abhisar Buildwell (P) Ltd. [149 taxmann.com 399 (SC)] wherein the apex court has held as under:

> 13. For the reasons stated hereinabove, we are in complete agreement with the view taken by the Delhi High Court in the case of *Kabul Chawla* (*supra*) and the Gujarat High Court in the case of *Saumya Construction* (*supra*) and the decisions of the other High Courts taking the view that no addition can be made in respect of the completed assessments in absence of any incriminating material.
>
> 14. In view of the above and for the reasons stated above, it is concluded as under:

(*i*)	that in case of search under section 132 or requisition under section 132A, the AO assumes the jurisdiction for block assessment under section 153A;
(*ii*)	all pending assessments/reassessments shall stand abated;
(*iii*)	in case any incriminating material is found/unearthed, even, in case of unabated/completed assessments, the AO would assume the jurisdiction to assess or reassess the 'total income' taking into

	consideration the incriminating material unearthed during the search and the other material available with the AO including the income declared in the returns; and
(*iv*)	in case no incriminating material is unearthed during the search, the AO cannot assess or reassess taking into consideration the other material in respect of completed assessments/unabated assessments. Meaning thereby, in respect of completed/unabated assessments, no addition can be made by the AO in absence of any incriminating material found during the course of search under section 132 or requisition under section 132A of the Act, 1961. However, the completed/unabated assessments can be re-opened by the AO in exercise of powers under sections 147/148 of the Act, subject to fulfilment of the conditions as envisaged/mentioned under sections 147/148 of the Act and those powers are saved.
	The question involved in the present set of appeals and review petition is answered accordingly in terms of the above and the appeals and review petition preferred by the Revenue are hereby dismissed. No costs.

3.12 Based on the discussion so recorded herein above and the fact of the case is that in the search conducted at the premises of the assessee **no incriminating material was found related to the income of the assessee.** Therefore, no addition can be made in the case of the assessee invoking the provision of section 153A of the Act. We get support of our view from the judgement of Hon'ble Delhi High Court in the case of Kabul Chawla (supra) and the Gujarat High Court in the case of Saumya

Construction (supra). That view was also ultimately confirmed by the apex court in the Abhisar Buildwell (Supra).

Therefore, action of revenue challenging the addition has no merits and lacks the jurisdiction of the AO u/s. 153A of the Act because the material found in the search of any other person than the assessee in appeal cannot be considered in the assessment under 153A of the assessee. Even that finding of the ld. CIT(A) in the case of the assessee has been decided in detailed in the appeal of the assessee for A. Y. 2010-11 wherein the ld. CIT(A) categorically held that *"if any income on this count, is liable to be assessed in the hands of the partnership firm and accordingly, the appellant succeeds on this issue in these terms."[page 43 of order of the ld. CIT(A)].*

The Bench further noted that ld.CIT(A) considered the submission and allowed the ground of the assessee which is evident from Para No. 5.2 at page no. 39 of the ld. CIT(A) order for AY 11-12 and corresponding para no. 5.2 at page no. 41 of the ld. CIT(A) order for AY 10-11. Further, it is noticed that ld. CIT(A) after considering the assessment order, documents and judgments placed on record, remand report and submissions of the

assessee passed a detailed and reasonedorder. Moreover, the department has merely challenged the quantum addition and not decision of the ld. CIT(A) with respect to allowance of legal ground no. 1 of the assessee in Form No. 35 wherein the legal ground as to challenging the assessment order as time barred and without jurisdiction was decided by the learned CIT(A) in favour of the assessee (relevant paper book page no. 290 to 297).

In the light of the discussion so recorded herein above, Ground No. 1 raised by the revenue is dismissed.

4.1 Apropos Ground No 2 it is noticed that the ld. CIT(A) has allowed the ground of the assessee as to addition of Rs.56,60,800/- on account of undisclosed income from Garden Mahaveer Paradise by taking into consideration the submissions of the assessee and also taking into consideration decision of Hon'ble Supreme Court in the case of PCIT vs Abhisar Buildcon (P)Ltd. (supra). The relevant narration as made by the ld CIT(A) in his order is reproduced as under:-

> ''8.2 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:-

I have decided the similar issue in the case of the appellant for the assessment year 2010-11 in the ground of appeal number four where the Ground of Appeal has been allowed. Material facts of the present appeal being para material with the fats of the appeal in the assessment year 2010-11 , the findings of the appeal order in the case of assessment year 2010-11 in ground of appeal number four will apply mutatis mutandis to the present appeal for the assessment year 2011-12 and it is held accordingly.

Accordingly, this ground of appeal is hereby allowed.''

4.2 During the course of hearing, the ld. DR supported the order of the AO while the ld. AR of the assessee supported the order of the ld. CIT(A).

4.3 The Bench heard both the parties and perused the materials available on record. The Bench noted from the order of the ld. CIT(A) who has taken into consideration the submission as made in his order is as under:=

'' It is humbly submitted the ld. A.O. grossly erred in making the addition as undisclosed income from Mahaveer Paradise Garden because of the following reasons :-

FIRST REASON : **NO ADDITION IN SEARCH, IF NO INCRIMINATING MATERIAL FOUND DURING SEARCH** : It is now a settled law that no addition can be made in search u/s 153A in respect of completed/unabated assessments, if no incriminating document found during search. Reliance is being placed on the judgment of **Hon'ble Supreme Court** in the case of **PCIT Vs. Abhisar Buildwell P. Ltd.** in Civil Appeal No. 6580 Of 2021 recently decided on 24.04.2023 wherein it was held as under :-

i. that in case of search under Section 132 or requisition under Section 132A, the AO assumes the jurisdiction for block assessment under section 153A;
ii. all pending assessments/reassessments shall stand abated;
iii. in case any incriminating material is found/unearthed, even, in case of unabated/completed assessments, the AO would assume the jurisdiction to assess or reassess the 'total income' taking into consideration the incriminating material unearthed during the search and the other material available with the AO including the income declared in the returns; and

iv. in case no incriminating material is unearthed during the search, the AO cannot assess or reassess taking into consideration the other material in respect of completed assessments/unabated assessments.

Meaning thereby, in respect of completed/unabated assessments, no addition can be made by the AO in absence of any incriminating material found during the course of search under Section 132 or requisition under Section 132A of the Act, 1961. However, the completed/unabated assessments can be re-opened by the AO in exercise of powers under Sections 147/148 of the Act, subject to fulfilment of the conditions as envisaged/mentioned under sections 147/148 of the Act and those powers are saved.

It is further submitted that no incriminating material was found during search operations in respect of the assessment year under consideration as is also evident from the assessment order passed u/s 153A wherein there is no mention about any incriminating material found for the relevant assessment year. The additions were made arbitrarily purely on guess work basis. Even in the remand report there is no mention about any incriminating material.

Copy of one register of M/s Kalyan Hotels & Resorts was found (paper book page no. 193) but that document pertains not to the year under consideration but to AY 2018-19 wherein the learned Assessing Officer has made additions which were also sustained in part by the learned CIT(A). In no way the material relates to the year under consideration.

2. SECOND REASON : **LD. A.O. IGNORED THE FACT AND MATERIAL ON RECORD THAT GARDEN WAS STARTED ON 01.12.2015 WHEREAS ADDITIONS WERE MADE FOR PERIOD PRIOR TO THAT** : It is humbly submitted that Mahaveer Paradise garden was started on 01.12.2015 which is evident from the copy of certificate of registration issued by the Commercial Taxes Department, Government of Rajasthan submitted at paper book page no. 182. This document was also submitted during the assessment proceedings but the ld. AO opted to make additions to total income brushing aside the material

evidences on record. Hence, impugned addition made for a period prior to start of activity was rightly deleted by the learned CIT(A).

3. THIRD REASON : **LD. A.O. IGNORED THE FACT AND MATERIAL ON RECORD THAT THE GARDEN WAS EXCLUSIVELY USED BY ASSESSEE FAMILY AND HIS CLOSE FRIENDS FOR WHICH NO RENT WAS CHARGED** : It is submitted that this garden was used by the assessee family for their personal programs/get togethers. The assessee also permits use of this garden by his relatives, friends, business associates, institutions, associations etc. on obligatory basis without charging any rent. Even this garden was used many times by Rajasthan Tax Consultants Association and Tax Consultants Association, Jaipur for their programs/functions for which nothing was charged from them. This garden is not let out by the assessee for earning any income.

The first and only booking for which advance was charged was from a person named Hemant which was cancelled by him and the entire advance was refunded to him, resulting in no income. The seized document pertains not to the year under consideration but to the AY 2018-19 (paper book page no. 193) which contains the detail of Mr. Hemant. The booking was cancelled by him for the reasons best known to him. Another name of Mr. Sawariya is appearing on the seized documents. This booking is complementary booking without any rent and relates to Mr. Hoti Lal Sawariya (GST Department). During the assessment proceedings, the assessee requested the ld. AO to exercise her powers under law for verification of facts with Mr. Hemant and Mr. Sawariya but the ld. AO opted not to do so and passed the assessment order by making the impugned additions. Affidavit of Mr. Hoti Lal Sawariya was submitted before learned CIT(A) alongwith application of admission of additional evidence under Rule 46A wherein he has confirmed that the assessee has provided him the garden for his function free of cost on complimentary basis (paper book page no. 393 to 397).

The caretaker Shri Mansingh Gurjar, whose statements were recorded only had knowledge of the fact that parties and functions are held at Mahaveer Paradise, he had no knowledge of the fact that whether the functions were complimentary on obligatory basis or were chargeable.

The fact that the garden was used for personal purposes for assessee family and friends on complimentary basis is duly evident from the following :

a. Confirmation letter from the Rajasthan Tax Consultants Association confirming that Mahaveer Paradise Garden was given to the association free of any charges on 31.12.2017 and 31.12.2018 has been submitted at paper book page no. 194, 196.

b. Copy of image of a memento presented to the assessee by the Rajasthan Tax Consultants and the Tax Consultants Association, Jaipur in appreciation of providing the garden free of cost to the associations has been submitted at paper book page no. 195.

c. Assessment order passed by the Luxury Tax and Vat department for the F.Y 2016-17 confirming that no income was there from Mahaveer Paradise has been submitted at paper book page no. 183.

d. The assessee also filed nil GST returns for Mahaveer Paradise as there was no rental income which can be verified from the GST returns furnished at paper book page no. 184 to 192.

e. Affidavit of Mr. Hoti Lal Sawariya wherein he has confirmed that the assessee has provided him the garden for his function free of cost on complimentary basis (paper book page no. 393 to 397).

All these evidences establish that the assessee was not charging any rent for Mahaveer Paradise and was giving the garden to his knowns/associates on obligatory basis.

4. FOURTH REASON : LD. A.O. MADE ADDITION ARBITRARILY PURELY ON SURMISES, ASSUMPTIONS, PRESUMPTIONS AND GUESS WORK THEREBY COMPLETELY IGNORING MATERIAL EVIDENCES ON RECORD :

The ld. AO made the impugned addition arbitrarily merely on assumptions and presumptions by estimating 20 bookings of hotel rooms and garden per year. Estimated income for one booking was adopted as Rs.461000/- for FY 2017-18 which was adjusted by applying capital gains indexation factor to estimate the revenue for other years.

It is now a settled law that additions cannot be made arbitrarily merely on surmises and conjectures.

It is further submitted that the ld. A.O. grossly erred in extrapolating a solitary transaction (though it was the first transaction which also was unfortunately cancelled and it pertains to AY 2018-19) to other earlier years in which the marriage garden was not functional. It is now a settled law that in case of search assessments, additions has to be made solely on the basis of incriminating material found during search and there is no scope for the AO to extrapolate and estimate undisclosed income. The additions are to be based

solely on tangible material and not on the basis of estimation or extrapolation theory. In this regard, reliance is being placed on the following judgments in this regard :-

A.Sivashankar Vs. DCIT, ITA No. 617 to 620/CHNY/2017 decided on 31.05.2022 (ITAT, Chennai Bench) (Para 8 & 9)

"In this case, except agreement to sale for one plot with Mr.M.A.Salim, the AO does not have any other credible evidence to support his estimation of income by extrapolation of rate on the basis of agreement to sale with Mr.M.A.Salim to remaining plots sold during the block period. In our considered view, the estimation made by the AO towards undisclosed income of under reporting of sales Revenue from sale of plots, is purely a guess work, which is based on the suspicion and surmises, but not based on any material evidences. Therefore, we are of the considered view that the AO is completely erred in estimating sales Revenue from sale of plots for all the three assessment years. The Ld.CIT(A) after considering relevant facts has rightly deleted the additions made by the AO and thus, we are inclined to uphold the findings of the Ld.CIT(A) and accordingly, the appeals filed by the Revenue are dismissed for all the three assessment years"

This legal principle is supported by the decision of the **Hon'ble Bombay High Court in the case of M/s.Harish Textile Engrs. Ltd v. DCIT, reported in 379 ITR 160**, wherein, it has been clearly held that on-money received on sale of Stenter Machines for the block period, cannot be estimated on the basis of evidences filed for few instances. A similar view had been taken by the **Hon'ble Gujarat High Court in the case of M/s.Standard Tea Processing Co. Ltd., reported in 215 Taxman 659**. The **Hon'ble Karnataka High Court in the case of B. Nagendra Baliga, reported in 363 ITR 410**, had also considered an identical issue and held that the AO is not entitled to extrapolate undisclosed income detected in the course of search for a particular period to entire block period on estimation basis. Therefore, from the above decisions, one common principle is very clear, in as much as there is no scope for the AO to estimate undisclosed income for the block assessments on the basis of evidences found during the course of search for part period or few instances.

Array Land Developers Pvt. Ltd. Vs. DCIT, ITA No. 379 to 381/CHNY/2022 decided on 09.06.2023 (ITAT, Chennai Bench) (Para 9 to 11)

"9. Proceeding further, it is trite law that in case of search proceedings, the additions are to be based solely on the basis of incriminating material found during the course of search operations. Guess work or estimation or extrapolation of income is not permissible unless there are strong evidences to

suggest otherwise. The additions are to be based solely on tangible material and not on the basis of estimations or extrapolation theory. This principle supports the case of the assessee.

10. The aforementioned legal position is duly supported by the judgment of ***Hon'ble Supreme Court in case of CBI v. V.C. Shukla (1998 3 SCC 410)*** *wherein it was held that any presumption of transaction on some vague, tenuous and dubious entries in a sheet of paper is not rational unless there is corroboration by corresponding entry in regular accounts of both the parties to the transaction. ….*

11. The Hon'ble High Court of Delhi in the case of ***CIT vs. Kulwant Rai (163 Taxman 585; 13.02.2017)*** *held that since the assessee did not sign the agreement, no liability could be attributed qua the agreement towards the assessee and therefore, the additions made by AO was based on surmises, guess work and accordingly, liable to be deleted. The mere fact that the agreement was found from the possession of the assessee could not lead to any conclusion. While adjudicating the same, the Hon'ble Court relied on the decision of* ***Hon'ble Supreme Court in the case of Dhakeswari Cotton Mills Ltd. (26 ITR 775)*** *which held that AO was not entitled to make a pure guess and make an assessment without reference to any evidence or any material at all. There must be something more than bare suspicion to support the assessment order. Similar is the decision of same court in* ***CIT vs. Akme Projects Ltd. (42 Taxmann.com 379)*** *wherein it has similarly been held that the additions made on the basis of unsigned draft agreement could not be sustained when AO had not made any investigation. The draft agreement could have been the starting point of investigation and further detailed verification which had not been carried out. The* ***Hon'ble High Court of Madras in the case of CIT vs.Kalyanasundaram (155 Taxman 454)*** *held that where AO did not conduct any independent enquiry relating to value of property and merely relied on the statement of seller, the additions could not be sustained. The* ***Hon'ble High Court of Gujarat in the case ofCIT vs. Maulikkumar K. Shah (307 ITR 137)*** *similarly held that noting in the seized dairy found from the premises could not lead to additions since AO had not brought any corroborative material to support the same. The onus heavily lay on the revenue to prove with corroborative evidence that the entries in the seized dairy actually represented the sale made by the assessee, Such onus was not discharged by the revenue and therefore, mere entries in the seized material was not sufficient to prove that the assessee indulged in such a transaction. The inference of Ld. AO was merely based on suspicion and surmise and there was no material to prove the same. The additions made by AO being based on mere presumptions and assumptions and without any corroborative evidence, could not be sustained."*

J. Gopal Rao v. State of Orissa [1993] 88 STC 488 (Ori.) – **The Orissa High Court** also had an occasion to deal with an issue relating to backward projection of materials under the Sales Tax Act. In this case, the assessee was carrying on business in grocery articles. In this case, the liability of the petitioner was determined by estimating daily sales at Rs. 75, Rs. 80 and Rs. 100 for the assessment years 1978-79, 1979-80 and 1980-81, respectively. The petitioner objected to the said liability and approached the Orissa High Court. The Court observed that the department did not have any evidence/materials except the admission of the petitioner that daily sales ranged from Rs. 100 to Rs. 125 in February, 1982. **It was observed that for making presumption for the assessment years 1978-79 to 1980-81, some material is required. It cannot be stated by way of generalisation that the result of survey in one year can be treated as the basis of assessment in another year**. If the Assessing Officer wants to do so, some material has to be brought on record to justify just projection. Mere presumption cannot be made the basis for any assessment. What is relevant is the nature of evidence/material discovered. **If the materials discovered relate to any particular assessment year, those cannot be utilised for making assessment of other years unless the relevance to other years is established by the officer**. This view was taken by the concerned Court in the decisions of Allahabad High Court in *Babu Ram Vishnoi* v. *CST* [1972] 29 STC 392 and *Hukam Chand Mahendra Kumar* v. *CST* [1972] 29 STC 394 and relied upon in the present case.

Principal Commissioner of Income-tax v. Rameshbhai Jivraj Desai, High Court of Gujarat [2020] 121 taxmann.com 333 (Gujarat)]

Section 153A of the Income-tax Act, 1961 - Search and seizure - Assessment in case of (Absence of incriminating material) - Assessment year 2008-09 - Pursuant to search, proceedings under section 153A were initiated against assessee - Whether since no incriminating material against assessee in respect of an earlier assessment year for which assessment had already attained finality was unearthed during course of proceedings under section 153A, Assessing Officer while completing assessment under said section could not disturb completed assessment of assessee in respect of such earlier assessment year - Held, yes [Para 7]

4.4 Further during the course of hearing, the ld. AR has drawn our attention to the following decisions by giving the references of the two

decisions in the case of PCIT vs Abhisar Buildwell (P) Ltd. U.K. Paints vis a vis incriminating material:

> ‘’It is humbly submitted that **incriminating** material and not merely material should be found during the course of search for making addition in respect of unabated assessments. The term “incriminating” is a negative term which means “**to provide evidence that somebody is guilty of a crime**”. There is no whisper about any incriminating material found during search in the assessment order or in the remand report.
>
> Moreover, it is pertinent to mention here that the ld. AO in Notice u/s 142(1) dated 26.12.2019 (paper book page no. 234) at para no. 7 had asked :-
>
> *“Please explain whether any incriminating document/electronic device pertaining to you for this AY was found and seized. Please furnish explanation regarding the same and whether the details therein are reflected in the books of a/c”*
>
> It is humbly submitted that from the query raised by the ld. A.O. as to whether any incriminating material was found and seized during search, it is amply evident that no incriminating material was found during search otherwise the AO would have directly asked queries by confronting the incriminating material.
>
> As far as construction bills are concerned, these are duly recorded and declared by the assessee as construction investment. These are in the nature of material and not incriminating material. Each and every material found during search cannot be treated as incriminating. The assessing authorities no where pointed out any specific bill / document which was not declared by the assessee.
>
> The learned CIT(A) duly considered all submissions, judgments, material on record, AO remand report and allowed the appeal of the assessee by passing a detailed and reasonedorder which deserves to be upheld and the department ground deserves to be dismissed.
>
> The department has also filed paper book containing some draft agreements but the same are not relevant for the issue under consideration. During the assessment proceedings, the learned AO raised query about these draft agreements to which the assessee replied (paper book page no. 205) and explained the entire position which was accepted by the AO and no addition was made in this respect. These documents submitted by the department it its paper book are draft agreement for purchase-sale of immovable property and are not in

the nature of any incriminating material for construction of building and thus are irrelevant for the issues under consideration in the present appeals.

4.5 From the entire conspectus of the case, the Bench considered all the documents and submissions of both the parties and noticed that the ld.CIT(A) duly considered all submissions, judgments, material on record, AO remand report and allowed the ground of the assessee which is evident from Para No. 8.2 at page no. 56 of the ld. CIT(A) order for AY 11-12 and corresponding para no. 8.2 at page no. 78 of the ld. CIT(A) order for AY 10-11. The ld CIT(A) after considering the assessment order, documents and judgments on record, remand report and submissions of the assessee passed a detailed and reasonedorder wherein we find no reason to interfere in his order. In this view of the matter, the Ground No. 2 of the Department is dismissed.

4.6 So far as ground no. 3 of the revenue is concernedit is evident that no incriminating material was found during search otherwise the AO would have directly asked queries by confronting the incriminating material. As far as construction bills are concerned, these are duly recorded and declared by the assessee as construction investment. These are in the nature of material and not incriminating material. Each and every material found

during search cannot be treated as incriminating. The assessing authorities nowhere pointed out any specific bill / document which was not declared by the assessee. The ld.CIT(A) duly considered all submissions, judgments, material on record, AO's remand report and allowed the appeal of the assessee by passing a detailed and reasoned order to which we concur with his findings. Thus, the Ground No. 3 of the Revenue is dismissed.

5.1 As regards the C.O. of the assessee, the Bench feels that since the appeal of the department has been dismissed by us, therefore, it has relevance to consider the grounds of the CO for adjudication. Thus, both the grounds of the C.O. are dismissed.

6.1 Now we take up the appeal of the Department in ITA No.470/JP/2024 and the C.O. No. 8/JP/2024 of the assessee for adjudication.

6.2 Brief facts of the case are that the assessee has declared business income from Chandala Kalyanmal (50% share) , firm Kalyan Hotel (50% share) , income from house property from 65, Surya Nagar, Gopalpura Byepass and Krishna Toweers, Central Spine, Vidhyadhar Nagar,Jaipur, income from Long term capital gain, interest income from Bank, interest from parties and interest from NSC. It is noted that assessee filed his

original return of income u/s 139 of the Act on 31-08-2012 for the AY 2012-13 declaring total income at Rs.65,16,580/-.

A search and seizure operation u/s 132(1) of the Act was carried out on 28-09-2017 at the various premises of Chandalal Kalyanmal (CLKM) Group, Jaipur and the assessee was also covered. The AO issued notice u/s 153A of the Act to the assessee on 30-07-2018 for the A.Y. 2012-13. In response to the notice, the assessee filed his return of income on 14-08-2018 for the A.Y. 2012-13 declaring a total income at Rs.65,16,580/-. Finally, the AO completed the assessment vide order dated 30-12-2019 at a total income of Rs.2,92,59,670/- by making addition of Rs.1,52,531/- as unexplained investment u/s 69 construction of residential house property, addition of Rs.26,853/- on account of undisclosed capital gain, addition of Rs.62,37,040/- on account of undisclosed income from Garden Mahaveer Paradise and addition of Rs.1,63,26,661/- on account of unexplained investment in construction of Hotel K Mahaveer.

6.3 Apropos to Ground No. 1 of the Department which relates to an addition of Rs.152,531/- as unexplained investment u/s 69 in respect of

construction of residential house property. It is noticed that the ld. CIT(A) has allowed this ground of appeal of the assessee by observing as under:-

> ‘’6.2 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 consideration. under year The contentions/submissions of the appellant are being discussed and decided as under:
>
> (i) A reference was made to the District Valuation Officer for valuation of construction expenses on the residence of the assessee i.e. Plot No. 21, 22, 33 and 34 Shree Gopal Nagar, Jaipur. The District Valuation Officer has furnished his report on 23.10.2018. As per the valuation report furnished by the DVO total investment in the construction of house was Rs. 5,72,26,401/- during the F.Y. 2011-12 to 2014-15. However, the appellant has declared total investment of Rs. 2,42,91,308/-. The copy of valuation report was provided to the appellant. During assessment, the AR of the appellant has furnished written submission on 14.12.2019. The assessee has not furnished the source of investment in construction of the house, rather he has challenged the valuation done by the DVO, Jaipur. The objections of the appellant were as under:-
>
> * The DVO has used the CPWD rates for valuation whereas the rates of State PWD rates are also valid.
>
> *The valuation of the furniture, bath fittings, lift, and other items is taken at higher side by the DVO.
>
> * The DVO has provided deduction for self-arrangement to the extent of 2.5% o
>
> (ii) The Id. AO in the remand report has stated that the contention of the assessee that no incriminating material / document found during the course of search is not acceptable, as during the course of search/survey original bills of various materials /items, amounting to Rs. 1,94,97,589/ issued by various concern in the name of Shri Mahaveer Kumar Jain, who is the key person of this group, were found for construction of his residential house situated at 33- 34, Shree Gopal Nagar, Gopal Pura Bypass, Jaipur for various FYs. The appellant has in this regard stated that there is no mention about any incriminating material found during search even in the assessment order. The bills relating to construction were duly considered in the declared investment and nothing was unrecorded. Copy of construction account of 33-34, Shree Gopal Nagar in the books of main assessee (head of the family) Mr. Mahaveer Kumar Jain, was also submitted to the Id. AO. Construction bills found during search which are duly declared are in the nature of material and not incriminating material. Each and

every material found during search cannot be treated as incriminating. Appellant has further stated that Ld. A.O. in the notice u/s 142(1) dated 19.07.2019 had raised a query as to whether any incriminating material was found and seized during search, it is amply evident that no incriminating material was found during search otherwise the AO would have directly asked queries by confronting the incriminating material. This was replied in negative by the appellant.

In this regard, as noted in the assessment order, the appellant has declared total investment of Rs. 2,42,91,308/- in the records. The Id. A.O. in the remand report has mentioned that the income declared by the appellant is not commensurate with the investment made in the house property. However in this regard it is noticed that no addition has been done in the assessment in connection with the declared investment in the house property Further the appellant has stated that this observation of the Id. A.O. is erroneous as it does not consider the housing loan and other funds utilized for construction of house property.

(iii) Having perused the material on record it is noticed that on the issue, a reference to the DVO was made and the report of DVO was received and following the due procedure of law addition was done by the learned assessing officer in the hands of the appellant with reference to the unexplained investment in the house property, considering the fact of higher valuation then the amount claimed to have been spent. There is no reference neither in the assessment order nor in the remand report to any documents or other incriminating material found during search like emails exchanged or whatsapp messages or unaccounted bills or cash payment documents etc. showing unaccounted payments or investment. The addition has been done solely on the basis of valuation report obtained during the course of assessment proceedings. From the above discussion, it is hereby held that the addition in the impugned assessment year on the issue is not on the basis of incriminating material unearthed during the course of search and seizure action.

(iv) It is argued on behalf of the appellant that there was no incriminating material unearthed during the course of search and the addition is done without the basis of any incriminating material and since the assessment was not an abated assessment in other words no assessment was pending when the search took place hence the scope of addition which could have been done by the learned assessing officer in an assessment in pursuance of search & seizure in a non-abated assessment was restricted to the issues on which incriminating material was found during the search.

(v) The facts regarding the status of any pending assessment as on date of search and seizure action and the time limit for issuance of notice under section 143(2) of the Act are not in dispute. No assessment for the impugned assessment year was pending as on date of search and seizure action took

place which is 28-09-2017 as no such proceedings are mentioned neither in the assessment order nor in the remand report. The time limit to issue notice u/s 143(2) of the Act for taking the case of the appellant under regular scrutiny had already expired as the original ITR for respective years were filed on the following dates:-

Assessment Year	Date of filing of original ITR
A.Y. 2010-11	17-09-2010
A.Y. 2011-12	23-08-2011
Λ.Y. 2012-13	31-08-2012
A.Y. 2013-14	26-09-2013
Λ.Y. 2014-15	21-10-2014
Λ.Y. 2015-16	18-08-2015

(vi) Further the issue of scope of assessment in pursuance to search and seizure action is no longer rest integra as this legal issue has been considered and adjudicated by honourable Supreme Court in the judgement in the case of Principal Commissioner of Income-tax, Central-3 v. Abhisar Buildwell (P.) Ltd. [2023] 149 taxmann.com 399 (SC)/[2023] 293 Taxman 141 (SC)/[2023] 454 ITR 212 (SC)[24-04-2023). The judgement has been carefully considered. In para 14 Hon'ble Supreme Court has held as under:-

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

(i)…

(ii)….

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

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

(emphasis supplied)

On the issue there is similar judgement of Hon'ble Supreme Court in the case of Deputy Commissioner of Income-tax v. U. K. Paints (Overseas) Ltd. [2023] 150 taxmann.com 108 (SC)/[2023] 454 ITR 441 (SC)[25-04-2023). The judgement has been carefully considered. In para 1 and 3 the Hon'ble Supreme Court has held as under:-

In this batch of appeals, the assessments in case of each assessee were under section 153-C of the Income-tax Act, 1961 (for short, 'the Act). As found by the High Court in none of the cases any incriminating material was found during the search either from the Assessee or from third party. In that view of the matter, as such, the assessments under section 153-C of the Act are rightly set aside by the High Court. However, Shri N Venkataraman, learned ASG appearing on behalf of the Revenue, taking the clue from some of the observations made by this Court in the recent decision in the case of PY. CIT. Abhisar Buildwell (P) Ltd.(2023) 149 taxmann.com 399 (SC), more particularly, paragraphs 11 and 13, has prayed to observe that the Revenue may be permitted to initiate re-assessment proceedings under section 147/148 of the Act as in the aforesaid decision, the powers of the re-assessment of the Revenue even in case of the block assessment under section 153-A of the Act have been saved.

….

3. However, so far as the prayer made on behalf of the Revenue to permit them to initiate the reassessment proceedings is concerned, it is observed that it will be open for the Revenue to initiate the re assessment proceedings in accordance with law and if it is permissible under the law

(emphasis supplied)

In para 11 of the order in case of Principal Commissioner of Income-tax, Central-3 v. Abhisar Buildwell (P.) Ltd. (Supra), the Hon'ble Supreme Court inter-alia has held as under:-

11. However, in case during the search no incriminating material is found, in case of completed/unabated assessment, the only remedy available to the Revenue would be to initiate the reassesstment proceedings under sections 147/48 of the Act, subject to fulfilmenent of the conditions mentioned in sections 147/148, as in such a situation, the Revenue cannot be left with no remedy. Therefore, even in case of block assessment under section 153A and in case of unabated/completed assessment and in case no incriminating material is found during the search, the power of the Revenue to have the reassessment under sections 147/148 of the Act has to be saved, otherwise the Revenue would be left without remedy."

(vii) The assessmen order and submissions of the appellant in the appeal and the remand report on the issue and the rejoinder reply of the appellant on the remand report, all have been duly and carefully considered. The status of assessments before issuance of notice u/s 153A has been discussed in pre-paragraphs. There was no pending/abated assessment for the assessment years involved in the subject appeals.

(viii) In the case of CIT v. Bimal Auto Agency [2009] 314 ITR 191 (Gauhati), Hon'ble Gauhati High Court has held as follows:-

‘’13. In the present case, admittedly, no evidence or materials was discovered in the course of the search of the premises of the group to which the assessee belongs. The undisclosed income in so far as the building is concerned was solely made on the basis of the report of the Departmental Valuation Officer as obtained by the search party. The report of the Departmental Valuation Officer does not constitute materials or information relatable to the search. Such a view have been recorded in the judgments of the Madhya Pradesh High Court in CIT v. Khushlal Chand Nirmal Kumar reported in (2003) 263 ITR 77 and Delhi High Court in CIT vs. Manoj Jain (2006) 287 ITR 285 and CIT v. Ashok Khetrapal (2007) 294 ITR 143. While expressing our respectful agreement with the said views, it has to be held that the determination of undisclosed income of Rs. 40,04,369 in respect of the building in question being solely on the basis of the report of the Departmental Valuation Officer was rightly interfered with by the learned Tribunal. The said conclusion of the learned Tribunal, therefore, will not be open to interference."

In the case of CIT v. Khushlal Chand Nirmal Kumar reported in [2003] 263 ITR 77 it is held by the Hon'ble Madhya Pradesh High Court as under-

"11. We have referred to the aforesaid clarification for the simple reason, Mr. Arya submitted that amendment was effected to section 15888 in the year 2002 with effect from 1-7-1995 and the amendment would be applicable to the present case as block period covers 10 years commencing 1986 to 1996. On a perusal of

the unamended and amended provisions and the CBDT Circular, we are of the considered view that there has been no specific effect as far as this facet is concerned. Emphasis has been given on the fact evidence must have been found during search and only thereafter, the question of gathering any material information would arise based on the search, inquiry, It is not disputed at the Bar, that during search in the premises of the assessee nothing was found with regard to the investment in the house. However, it is contended by Mr. Arya that the Valuation Report of the Departmental Valuation Officer was obtained and was confronted to the assessee but he was not able to give any explanation and, therefore, it should be accepted as evidence. We are afraid, the aforesaid submission does not commend acceptance in view of statutory provisions and law laid down in the case of Vined Danchand Ghodawat (supra) with which we have respectfully agreed, in view of the aforesaid, we do not find any substantial question of law involved in this appeal"

In the case of CIT v. Vinod Danchand Ghodawat [2001] 247 ITR 448 (Bom.) is held by the Hon'ble Bombay High Court as under

"Question No. 3. Whether in law, on the facts and in the circumstances of the case, the Tribunal was justified in deleting the addition of Rs. 2,49,350 made on account of unexplained expenses in construction of the residential bungalow at Jaysingpur, when the same was properly made by the Assessing Officer ?

The said question refers to addition of Rs. 2.49,350 made on account of unexplained expenses in construction of residential bungalow by the assessee. Here also, Chapter XV Bhas no application. The Tribunal, rightly, found that the addition is made on the basis of the report of the department's valuer According to the Assessing Officer, during the search it was found that the assessee had constructed a bungalow. It was found that the assessee had incurred expenses of Rs. 4.16 lakhs. The Assessing Officer thereafter referred the matter to the departmental valuer, who valued the property at Rs. 6.66 lakhs and, accordingly, the difference has been added to the income of the assessee as an undisclosed income. The above basis clearly shows that the department has not understood the scope of Chapter XIV-B. By no stretch of imagination, the impugned addition fell within Chapter XIV-B. There would be no finality if the department a permitted to add back to the income of the assessee on the basis of the departmental valuer's report obtained subsequent to the order of the regular assessment. Hence, the Tribunal was right in deleting the said addition. Accordingly, question No. 3 is answered in the affirmative, le, in favour of the assessee and against the department"

In the case of in CIT vs. Manoj Jain [2006] 287 ITR 285 it is held by the Hon'ble Delhi High Court as under-

"1. The Tribunal has, recorded a clear finding of fact that the search on the premises of the assessee did not lead to the seizure of any Incriminating evidence to suggest that any Income had not been disclosed or would not have been disclosed for tax purpose under the Income-tax Act, 1961. It has, on that finding, held that the Assessing Officer was not justified in making additions on the basis of the report of the Valuation Officer in regard to two of the properties purchased by the assessee. The reasoning of the Tribunal's order proceeds thus:

"As a result of the search on the assessee, no evidence was found which may represent wholly or partly income or property which has not been or would not have been disclosed for the purpose of Income-tax Act. The Assessing Officer merely for the reason to suspect that the consideration was understated resorted to an estimation of value in respect of two properties by the Departmental Valuation Officer Le., in respect of Property No. 188/B-14, Sector B, Rohini and Property No. 45/F-2, Sector 7, Rohini. The values estimated by the DVO have been taken as the basis for working out the undisclosed income of the block period. Chapter XIV-B which contained a special procedure for assessment of search cases is a self-contained code and no addition can be made on the basis of DVO's report when no evidence has been found during the course of search to establish that the assessee has paid more than the disclosed consideration in purchase of the properties or construction thereof or that it has received sale consideration more than disclosed in the regular accounts maintained by him or return of income filed in the regular course of business.

In view of the facts and legal positions as aforesaid, there was no justification in the action of the Assessing Officer in treating the undisclosed investment or profit in respect of the above two properties as well as the rest of the two properties bearing Nos. 13D/10, Sector 8, Rohini and 10D/12, Sector 8, Rohini whose valuation has been done by the Assessing Officer himself and treating the same as part of the peak for working out undisclosed income of the block period. The Assessing Officer himself is not an expert; the valuation of the property was a technical matter. The Assessing Officer is not entitled to make statements on technical matters for which there is no material on record, particularly when no evidence was found as a result of action under section 132(1) on the assessee regarding undisclosed income in respect of all the properties under consideration. Such a view stands fortified by the decision of the Apex Court in Saraswati Industrial Syndicate Ltd. v. CIT 237 ITR 1."

2. The above is in tune with the decision of this Court in CIT v. Ravi Kant Jain [20011 250 ITR 1411 and CIT v. Sudhish Kumar [2005] 146 Taxman 612 (Delhi).

3. No substantial question of law arises for our consideration. The appeal fails and ishereby dismissed"

In view of the above discussion cannot be said that the addition has been done in the assessment order on the basis of incriminating material unearthed during the course of search and seizure action.

The judgement of Hon'ble Supreme Court in the case of Abhisar Buildwell (supraj and UK. Paints (supral are squarely applicable to the facts of the case Accordingly, following the judgment of honorable Supreme Court the impugned addition made in assessment order u/s 153A cannot be sustained and is hereby deleted as the same is not made on the basis of incriminating material unearthed during the search. The addition, without basis of incriminating material unearthed during search, if any, could have been done by the learned assessing officer in re-assessment proceedings by issuance of notice under section 148 of the Act. Procedures are hand-made of justice and intended to subserve and facilitate the cause of justice. Without expressing opinion on the merits of the quantum issues, it is observed that as a general rule, rightful tax payable should be determined and the alternatives provided under the law should be allowed full play CBDT (ITJ Section) has issued Instruction No. 1 of 2023 dated 23-08-2023 vide F.No 279/Misc./M-54/2023-ITJ on the subject "Implementation of the judgment of the Hon'ble Supreme Court in the case of Pr.CIT (Central-3) v/s Abhisar Buildwell Pvt. Ltd. (Civil Appeal No. 6580 of 2021)-Instruction regarding The learned assessing officer is directed to implement the judgement of Abhisar Buildwell (supra) appropriately considering the said Instruction No. 1 of 2023 dated 23-08-2023 as per the facts of the case.
Accordingly, this ground of appeal of the appeal is allowed in above terms''

6.4 Before us both the parties supported the orders of the lower authority as favorable to them.

6.5 We have heard the both the parties and perused the materials available on record. In this case it is noted that an addition of Rs. 1,52,531/- (Rs.6,10,127 / 4 for one fourth share of the appellant) under section 69 was made as unexplained investment in construction of residential house property at 21, 22, 33, 34 at Shree Gopal Nagar, Gopalpura Bypass,

Jaipur. As against the declared construction of Rs.2,42,91,308/-, the AO relied on DVO valuation report estimating the construction cost at Rs.5,72,26,401/-. Details are tabulated as under:-

Financial Year	Cost of Construction (Rs.)		Difference	Assessee's Share 25%
	Declared by the assessee (Rs.)	Estimated by Valuation Cell (DVO) (Rs.)		
2011-12	450000	1060127	610127	152531
2012-13	7372136	17367561	9995425	2498856
2013-14	11077609	26097060	15019451	3754863
2014-15	5391563	12701653	7310090	1827523
	24291308	57226401	32935093	8233773

It is noted that AO failed in appreciating the facts of the case as well as the provisions of law in this regard. The impugned addition made is unjustified due to the following reasons :-

FIRST REASON : **NO ADDITION IN SEARCH, IF NO INCRIMINATING MATERIAL FOUND DURING SEARCH** : It is now a settled law that no addition can be made in search u/s 153A in respect of completed/unabated assessments, if no incriminating document found during search. Reliance is being placed on the judgment of **Hon'ble Supreme Court** in the case of **PCIT Vs. Abhisar Buildwell P. Ltd.** in Civil Appeal No. 6580 Of 2021 recently decided on 24.04.2023 wherein it was held as under :-

i. that in case of search under Section 132 or requisition under Section 132A, the AO assumes the jurisdiction for block assessment under section 153A;
ii. all pending assessments/reassessments shall stand abated;
iii. in case any incriminating material is found/unearthed, even, in case of unabated/completed assessments, the AO would assume the jurisdiction to assess or reassess the 'total income' taking into consideration the incriminating material unearthed during the search and the other material available with the AO including the income declared in the returns; and

iv. **in case no incriminating material is unearthed during the search, the AO cannot assess or reassess taking into consideration the other material in respect of completed assessments/unabated assessments**.

Meaning thereby, in respect of completed/unabated assessments, no addition can be made by the AO in absence of any incriminating material found during the course of search under Section 132 or requisition under Section 132A of the Act, 1961. However, the completed/unabated assessments can be re-opened by the AO in exercise of powers under Sections 147/148 of the Act, subject to fulfilment of the conditions as envisaged/mentioned under sections 147/148 of the Act and those powers are saved.

It is further noted that no incriminating material was found during search operations in respect of the construction of house property as is also evident from the assessment order passed u/s 153A wherein there is no mention about any incriminating material found for the relevant assessment year.

SECOND REASON : **NO ADDITION SOLELY ON THE BASIS OF DVO VALUATION REPORT AS IT IS MERE AN ESTIMATION/OPINION** : It is now a settled law that no addition can be made solely on the basis of DVO Valuation report (paper book page no. 151 to 169) as it is mere an estimation and mere an opinion of a person. In this regard, reliance is being placed on the judgment of **Hon'ble Gujarat High Court** in the case of **PCIT Vs. J. Upendra Constructions Pvt. Ltd.** in Civil Appeal No. 173-176/2015 decided on 30.03.2015 (judgment compilation page no. 38 to 45) wherein at para no. 4.1 & 5 it was held that as under :-

> *"4.1 At the outset, it is required to be noted that in the present case, the Assessing Officer made additions with respect to the difference in the cost of construction based upon and/or relying upon the DVO's report in the case of one M/s.Manjusha Estate Pvt.Ltd. from whom, the assessee subsequently got the project. It is true that in the present case, copy of the DVO's report was furnished to the assessee during the reassessment proceedings. However,* ***it is required to be noted that except the DVO's report, there was no further tangible material before the Assessing Officer. Therefore, solely on the basis of the DVO's report which, as per the catena of decisions of the Hon'ble Supreme Court as well as this Court, can be said to be the opinion of the DVO only, no addition can be made with respect to difference between the cost of construction determined by the DVO and shown by the assessee****.*
>
> *5. Under the circumstances and in the facts and circumstances of the case, it cannot be said that the learned Tribunal has committed any error in deleting the additions made by the Assessing Officer on account of*

difference of the cost of construction which was solely based upon the DVO's report."

In view of the above, it is found that the impugned addition made solely on the basis of DVO report without any other material on record is unjustified

THIRD REASON : **VALUATION REPORT OF REGISTERED VALUER IGNORED BY THE LD. AO AS WELL AS THE DISCREPANICES POINTED OUT BY THE APPELLANT IN DVO'S REORT NOT CONSIDERED BY LD. AO** :

It is noticed that that the AO not only ignored the valuation report of a registered valuer Mr. Purshottam Khandelwal at Rs. 2.80 Crores (paper book page no. 42 to 66) submitted during the assessment proceedings but also not considered various discrepancies pointed out by the assesseee during the assessment proceedings while making the impugned addition. The discrepancies pointed to the ld. A.O. during the assessment proceedings have been summarized as under:-

1. The DVO has used the CPWD rates for valuation whereas the registered valuer has used the State PWD rates.

   It is well settled by a number of decisions that for the purpose of valuation it is the State PWD rates which are to be applied and adopted in place of the CPWD rates and reliance in this regard is placed on the decision of the Hon'ble Supreme Court in the case of CIT, Ajmer v. Sunita Mansingha reported in 393 ITR 121 (SC) (judgment compilation page no. 46 to 48).

   Cost of construction as per CPWD method adopted by DVO is Rs. 36457400.33/- whereas by our registered valuer is Rs.13622368.44. So the major difference of Rs. 22835031.89/- is just because of valuation method used by DVO and our registered valuer. As per order of Supreme Court adopting state PWD rates are equally accepted in getting the valuation costs.

   2. The DVO has taken double height portion even in respect of internal water supply and sanitary installations whereas the same is not possible in the case of bathrooms.

   ITEMS NOT COVERED IN PAR

   There is a major difference in the valuation of Extra items Not covered under PAR as per the valuation report of the DVO and as per the independent valuation obtained done by the assessee. Details are as under:-

Extra cost taken by DVO	Rs. 2,07,69,001/-
Extra cost as per valuations obtained by assessee Valuation report of Shri Purshottam Khandelwal	Rs. 1,71,99,350/-

Detailed analysis of difference in valuation of Extra items taken by DVO and other valuers is as under:-

1. Boundary Wall - DVO has covered this as an extra item but it is part of construction and should be covered under standing calculation sheet. Rates of the Boundary have been taken by the above mentioned valuers as per PWD standard order X-3/2011 and are not in Extra items category.

2. Marble Flooring:- White Marble, Italian Marble, Indian marble and wooden flooring is separately being mentioned in the valuation sheets by the above mentioned valuer but no base has been provided by DVO as to how he had arrived at this lump sum amount. Wooden flooring is being used by the Assessee which is much cheaper then marble flooring but that is not mentioned in the calculation sheet of the DVO.

3. Wooden Cabinets:- The Assessee is himself in the business of Timber and plywood. The estimated cost taken by the DVO for the wooden cabinet is of high class plywood of renowned companies as against material of less value which has actually been used by the assessee. The dead stock of laminates which was not being sold has also been used by the assessee. With regard to timber, the assessee has done direct procurement as relevant from the bills. The assessee being in the same line of business since last number of years has been able to procure the material from its suppliers on much cheaper rate. Thus the rates adopted by DVO are totally unralistic

4. False Ceiling:- Cost of false ceiling by DVO is also on higher side as compared to the cost taken by above mentioned valuer. Since assessee is from the same field he had been able to save a lot of money in it.

5. Rates for bath fitting have already been taken at 12 % extra at the time of Calculation of the cost of Construction of the house by DVO. In the house Jaquar fitting is used and Assessee has bills for the same. Jaquar basic range has been used in the house and additional cost of Jaquar fitting is not more than Rs.400000/- as against Rs.1545000/- taken by DVO. No Base has been provided by the DVO in ascertaining how he had

arrived at the figure Rs.1545000/-. Basic cost of sanitary has already been included in the arriving of the cost of house. Only difference in cost should have been added to the basic sanitary cost. Further, no bathtubs have been used in the house. It is again submitted that already 12 % Extra cost has been taken by the DVO as mentioned in Abstract of Cost.

6. Main gate:- It is not Specifically Mentioned how DVO came to the figure of Rs.104133/- since old wooden planks have been used by the Assessee for building the gate.

7. Terrace flooring:- Precast terrazzo tiles have been used in terrace flooring which are quite cheap. DVO has not mentioned the rates used in arriving at the figure. But the above mentioned valuer have used proper BSR rates.

8. Extra cost for providing & fixing Italian marble Rs.3792452/- :- The extra cost taken by DVO in this respect is wrong as it is already included in the construction rate adopted and has not been incurred extra.

9. Wardrobe : The cost taken by DVO in this respect is wrong since the assessee is in the same trade, the entire wardrobe had been procured in-house.

10. Tube well:- It was already erected and came alongwith the land purchased in 2011. Rs.300000/- taken by DVO in this regard is wrong.

11. DEDUCTION FOR SELF SUPERVISION

The DVO has provided a deduction of 2.5% for self-arrangement whereas the above valuers have allowed deduction of 10%. The deduction of 10% is well justified in view of numerous decisions and we are placing reliance on the decision of the ITAT, Jaipur Bench “B”, Jaipur in the case of ITO, Kota v. Nitesh Maheshwari, Kota reported in 44 Tax World 131 in which the ITAT has allowed a deduction of 12% for self-supervision (judgment compilation page no. 49 to 54).

It is also pertinent to mention here that the assessee is engaged in the business of sale of construction material viz. Timer, Plywood, Sunmica etc, hence, the assessee is well conversant with various construction

persons/business viz. Architects, Builders, Contractors, Carpenters, Other Construction material suppliers etc. As a result, the assessee has taken good advantage of his contacts in construction line, material goods as well as construction services, resulting in further reduction in construction costs to a significant extent. Hence the assessee is further able to save around 10% of the construction costs in this regard.It is further noted that no discrepancy was pointed out by the AO in the registered valuer report, meaning thereby, it was duly accepted otherwise discrepancies have been pointed therein. Moreover, no further opportunity of being heard was provided in respect of variations pointed out in the case of registered valuer report and DVO report. Instead, the ld. AO made the addition without considering the objections raised by stating that the objections should have been raised before the DVO. Further, the A.O. generally mentioned in the remand report that there are various discrepancies in the valuer report but no specific discrepancy is mentioned in the remand report except PWD rate. However, the ld. CIT(A) considered this and allowed the ground of the assessee which is evident from Para No. 6.2 at page no. 44 of the ld. CIT(A) order. The learned CIT(A) after considering the assessment order, documents and judgments on record, remand report and submissions of

the assessee passed a detailed and reasonedorder and we do not find any infirmity in his order. Thus Ground No. 1 read with ground no. 4 of the Department is dismissed.

7.1 Ground No. 2 of the Department pertains to the addition of Rs.62,37,040/- on account of undisclosed income from Garden Mahaveer Paradise and this issue has been decided by the ld. CIT(A) in favour of the assessee by observing as under:-

> ‘’8.2 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:-
>
> I have decided the similar issue in the case of the appellant for the assessment year 2010-11 in the ground of appeal number four where the Ground of Appeal has been allowed. Material facts of the present appeal being para material with the fats of the appeal in the assessment year 2010-11, the findings of the appeal order in the case of assessment year 2010-11 in ground of appeal number four will apply mutatis mutandis to the present appeal for the assessment year 2011-12 and it is held accordingly.
>
> Accordingly, this ground of appeal is hereby allowed.

7.2 After hearing both the parties and perusing the materials available, it is noteworthy to mention that similar issue in the case of the department for the assessment year 2011-12 (ITA No. 469/JP/2024) has been dismissed and the decision taken therein shall apply mutatis mutandis in the ground of

appeal No. 2 of the Department. Thus, the Ground No. 2 read with ground no. of the Department is dismissed.

8.1 The Ground No. 3 of the Department relates to addition on account unexplained investment of Rs.1,63,26,661/- in respect of construction of Hotel property in the partnership firm M/s.Kalyan Hotel and Resorts.

8.2 While adjudicating this ground of appeal of the Revenue, the Bench noted that the ld. CIT(A) has allowed the ground of the assessee by observing as under:-

> ''9.2 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:-
>
> I have decided the similar issue in the case of the appellant for the assessment year 2010-11 in the ground of appeal number 2 where the Ground of Appeal has been allowed and relevant issue also decided in ground of appeal no.1 in the case of the appellant for the assessment year 2010-11. Material facts of the present appeal being para material with the facts of the appeal in the assessment year 2010-11, the findings of the appeal order in the case of assessment year 2010-11 in ground of appeal number 1 & 2 will apply mutatis mutandis to the present appeal for the assessment year 2012-13 and it is held accordingly.
>
> Accordingly, this ground of appeal is hereby allowed.

It is not required to repeat the facts of the case as the issue has already been disposed off (supra) against the Department and we concur with the

findings of the ld. CIT(A). Thus Ground No. 3of the Department is dismissed.

9.1 The Ground No.4 of the department pertains to the application of Judgements of Hon'ble Supreme Court in case of Abhisar Buildwell & U.K.Paints. vis a vis incriminating documents/ material.

9.2 After hearing both the parties and perusing the materials available on record, it is noted that incriminating material and not merely material should be found during the course of search for making addition in respect of unabated assessments. The term "incriminating" is a negative term which means "to provide evidence that somebody is guilty of a crime". There is no whisper about any incriminating material found during search in the assessment order or in the remand report. Moreover, it is pertinent to mention here that the AO in Notice u/s 142(1) dated 19.07.2019 (paper book page no. 335) at para no. 7 had asked :-

> *"Please explain whether any incriminating document/electronic device pertaining to you for this AY was found and seized. Please furnish explanation regarding the same and whether the details therein are reflected in the books of a/c"*

It is further noted from the query raised by the A.O. as to whether any incriminating material was found and seized during search. Hence, it is

evident that no incriminating material was found during search otherwise the AO would have directly asked queries by confronting the incriminating material. As far as construction bills are concerned, these are duly recorded and declared by the assessee as construction investment. These are in the nature of material and not incriminating material. Each and every material found during search cannot be treated as incriminating. The assessing authorities nowhere pointed out any specific bill / document which was not declared by the assessee. The ld.CIT(A) duly considered all submissions, judgments, material on record, AO's remand report and allowed the appeal of the assessee by passing a detailed and reasoned order to which we concur with his findings. Thus, the Ground No. 4 of the Revenue is dismissed.

10.1 As regards the C.O. of the assessee, the Bench feels that since the appeal of the department has been dismissed by us, therefore, it has relevance to consider the grounds of the CO for adjudication. Thus the solitary ground of the C.O. is dismissed.

11.0 In the result, the both the appeals of the Revenue as well as CO's of the assessee are dismissed

Order pronounced in the open court on 03/10/2024.

Sd/-	Sd/-
(डॉ.एस.सीतालक्ष्मी)	(राठोडकमलेशजयन्तभाई)
(Dr. S. Seethalakshmi)	(RATHOD KAMLESH JAYANTBHAI)
न्यायिकसदस्य / Judicial Member	लेखा सदस्य / Accountant Member

जयपुर / Jaipur
दिनांक / Dated:- 03/10/2024.

Mishra
आदेश की प्रतिलिपिअग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- The DCIT, Central Circle-1, Jaipur
2. प्रत्यर्थी / The Respondent- Shri Mahaveer Kumar Jain, Jaipur
3. आयकरआयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकरअपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
5. गार्डफाईल / Guard File [ITA No. 469 & 470/JP/2024]

आदेशानुसार / By order,

सहायकपंजीकार / Asst. Registrar