

IN THE INCOME TAX APPELLATE TRIBUNAL

"G" BENCH, MUMBAI

BEFORE SHRI NARENDRA KUMAR BILLAIYA, ACCOUNTANT MEMBER

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA No. 5661/MUM/2024
(Assessment Year 2021-22)

ACIT, Central Circle – 6(1),

Room No.445, 4th Floor, BKC,

Mumbai – 400051

PAN : ABAPR6416N

..... Appellant

v/s

Sharad Nagnath Rajbhoj,

502 DSK Haiyali Phase-II,

Modi Baug, Shivaji Nagar,

Pune - 411005

..... Respondent

Assessee by : Shri Rashmikant Modi

Ms. Ketki Rajshirke

Revenue by : Shri Dr. Kishor Dhule, CIT-DR

Date of Hearing – 02/01/2025

Date of Order - 24/01/2025

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The Revenue has filed the present appeal against the impugned order dated 16/08/2024 passed under section 250 of the Income Tax Act, 1961 (*"the Act"*) by the learned Commissioner of Income Tax (Appeals)-54, Mumbai [*"learned CIT(A)"*], for the assessment year 2021-22.

2. In this appeal, the Revenue has raised the following grounds: –

"j. Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) has erred in deleting the addition made by the AO of Rs. 1,25,00,000/-u/s 69C of the Act by ignoring the fact that the detailed modus

operandi of the transactions related to transfer and posting of PWD engineers had been explained by Shri Shailendra Rameshchandra Rathi (one of key employee) working in office of Rucha sub-group and also digital evidences found from his iPhone, were corroborated with order for transfer and posting passed by the Gout. of Maharashtra, PWD Department?"

"ii. Whether on the facts of the case and in law, the Ld. CIT(A) erred in holding that the addition cannot be made by placing reliance on a statement of third party and on material found from the third party in the hands of the assessee in absence of any evidence linking such material to the assessee even though it is clearly seen from the search proceedings that the evidences found from iPhone of Shri Shailendra Rathi and he had explained the contents of the said documents during the search proceedings and these documents were further corroborated with order for transfer and posting passed by the Gout. of Maharashtra, PWD Department?"

"iii. Whether on the facts of the case and in law, the Ld. CIT(A) has erred in relying on such cases in which the facts are different from the present case?"

"iv. Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) has erred in deleting the addition of Rs. 5,00,000/- made by the AO u/s 69A of the Act by ignoring the fact that the assessee had not substantiated alleged transactions during the search proceedings as well as assessment proceedings even when the WhatsApp chat found between assessee and Shri Shailendra Rathi (one of key employee) of Rucha Sub-group."

3. The only issue arising for our consideration, in the present appeal, pertains to the deletion of additions made under section 69C and section 69A of the Act on account of the alleged cash transaction made by the assessee.

4. The brief facts of the case are that the assessee is an individual and for the year under consideration filed his return of income on 18/08/2021 declaring a total income of Rs.24,01,480. Subsequently, on the basis of material found and statements recorded during search action conducted under section 132 of the Act in the case of Rucha Group run by Shri Prashant Nilawar, GNP Group run by Shri Girish Pawar and Jairaj Group run by Shri Jairaj Shah, notice under section 148 of the Act was issued to the assessee on 14/03/2023 and proceedings under section 147 of the Act were initiated. In response to

the notice, the assessee filed its return of income on 11/04/2023 declaring income similar to the original return of income. During the search action, digital evidence relating to the transfer and posting of PWD Engineers was found in the phone of Shri Shailendra Rathi, one of the key employees of the Rucha Group at its Pune office. Explaining the image retrieved from the phone, Shri Shailendra Rathi in his statement recorded during the search action submitted that the same contains the name of the officials of PWD Engineers who had made full payments for the transfer. Further, another employee of Rucha Group, i.e., Shri Ravi Wadepalle, in his statement recorded under section 132(4) of the Act stated that some of the documents belonging to Rucha Group were kept at the premises of Shri Avish Atal. Accordingly, during search action at the premises of Shri Avish Atal, incriminating documents were found and seized. When these documents were confronted, Shri Ravi Wadepalle explained that they contained the details of cash paid by the PWD Engineers for their transfer to the desired location. Since the name, i.e. Sharad Rajbhoj (SE)/ S.N. Rajbhoj, appeared in the documents, the assessee was asked to explain the seized documents found during the search at Rucha Group and was also asked to explain the source of cash paid for obtaining the desired posting. In response, the assessee denied having paid any amount in relation to any transfer and posting in the PWD Department to any person at any point in time. The assessee further submitted that the transfer and posting in the PWD Department was strictly done as per the rules and regulations of Maharashtra Government Servants Regulation of Transfers and Prevention of Delay in Discharge of Official Duties Act, 2005. The assessee further submitted that no private person was involved in the entire process of

transfer and posting and accordingly, the question of paying any amount to anyone does not arise. Further, the assessee also denied having knowledge of any person's name in the notice and the group on which the search was conducted. The assessee further submitted that there is no information in the documents recovered during the search action to identify the assessee as a person referred to therein. It is thus submitted that no link has been established between the assessee and the group searched to support the allegation made against the assessee.

5. The Assessing Officer ("AO") vide order dated 25/01/2024 passed under section 143(3) r/w section 147 of the Act disagreed with the submissions of the assessee and after placing reliance upon the statements recorded on oath under section 132(4) of the Act and the documents found during the search concluded that all the persons whose name is appearing in these documents are Engineers working with PWD. Further, the AO held that the name of persons mentioned in the document seized during the search contains the name of the assessee, and the parties whose statements were recorded during the search explained that the names mentioned in the seized documents are PWD Engineers. Further, the AO, by referring to the transfer and posting order dated 07/08/2020 passed by the Government of Maharashtra PWD transferring the assessee from District Satara to District Nashik, held that the assessee is working in PWD, which clearly establishes that the name mentioned in the seized documents is the name of the assessee only. The AO held that the documents seized from Shri Shailendra Rathi corroborated with the documents seized from the residence of Shri Avish Atal.

Further, by referring to the statement of Shri Ravi Wadepalle, the AO held that the amount paid by the assessee, which is written as "125" in the documents found during the search, represents cash paid by the assessee of Rs. 125 lakhs and, therefore, the explanation of the assessee merely denying the payment of cash is not acceptable. The AO further held that the assessee has not made any submission as to how his name appeared in both the evidence seized, i.e. evidence found from the mobile of Shri Shailendra Rathi and the premises of Shri Avish Atal. It was held that both the evidence found from different places corroborates with each other as both the evidence shows the identical amount paid by the assessee. Accordingly, the amount of Rs.1,25,00,000 was treated as unexplained expenditure as per the provisions of section 69C of the Act and added to the total income of the assessee. Further, on the basis of the chat between the assessee and Shri Shailendra Rathi found from the mobile of Shri Shailendra Rathi, the AO held that Shri Shailendra Rathi clearly stated that as per the instruction of the assessee, he had to deliver the amount of Rs.5 lakh to the assessee. Accordingly, the amount of Rs.5 lakh was treated as unexplained money under section 69A of the Act and added to the total income of the assessee.

6. The learned CIT(A), vide impugned order, partly allowed the appeal filed by the assessee and held that Shri Shailendra Rathi, who was alleged to be the employee of Rucha Group, is, in fact, a consultant to Rucha Group and not an employee. Further, the learned CIT(A) noted that the statement of Shri Shailendra Rathi was retracted post-search proceedings. The learned CIT(A) held that though the material was seized from the residential premises of Shri

Avish Atal, however, the statement of Shri Avish Atal was not discussed by the AO in the assessment order. The learned CIT(A) held that the addition has been made by the AO relying on the statement of the third party and on the basis of material found during the course of the search on the third party and it is also a fact that those statements were retracted subsequently. By referring to various judicial pronouncements, as noted from pages 28-41 of the impugned order, wherein it has been held that documents/material found from the premises of a third party or the statement of a third party cannot be relied upon to make additions in the hands of the assessee, the learned CIT(A) held that in the present case, there is no independent evidence corroborating such material/statement and linking such material to the assessee. The learned CIT(A) held that the entire addition of Rs.1,25,00,000 has been made by the AO relying on the statement of a third party, which in any case has been retracted. Further, the documents relied upon were also found during the search conducted on the third party. Thus, it was held that such material could have been a reason for starting an investigation, but the AO has simply relied on such material found from the premises of a third party and relied on the third party's statement to make the addition without corroborating it with any kind of independent evidence linking such material with the assessee. Accordingly, in the absence of any independent evidence linking the assessee with the material found from the third party or the third party's statement, the learned CIT(A) deleted the addition of Rs.1,25,00,000 made by the AO under section 69C of the Act. On similar reasoning, the learned CIT(A) also deleted the addition of Rs.5 lakh made by the AO under section 69A of the Act. Being aggrieved, the Revenue is in appeal before us.

7. We have considered the submissions of both sides and perused the material available on record. In the present case, there is no dispute regarding the fact that the assessee is an Engineer with the Public Works Department of the Government of Maharashtra. There is also no dispute regarding the fact that vide order dated 07/08/2020 the assessee was transferred from District Satara to District Nashik. As per the Revenue, the assessee paid a sum of Rs. 1,25,00,000 in cash to Rucha Group to facilitate his transfer and posting in the PWD department. In support of the aforesaid allegation, it is evident from the record that the Revenue has placed reliance on the documents found and statements recorded during the search action conducted under section 132 of the Act in the cases of Rucha Group, GNP Group and Jairaj Group. However, the assessee has denied the contents of the seized documents and the statements recorded during the search. As per the AO, during the aforesaid search action, incriminating digital evidence relating to the transfer and posting of PWD Engineers was found in the phone of Shri Shailendra Rathi. One of the images marked as page no. 2 of Exhibit-15 to the statement of Shri Shailendra Rathi, relied upon by the AO, is reproduced as follows: –

<i>Sr. No.</i>	<i>Name</i>	<i>Total Receivable</i>	<i>Recd Till Date</i>	<i>Balance Receivable</i>	<i>Remark</i>
15	...	...	...	...	...
16	...	...	...	...	...
17	<i>Sharad Rajbhoh (SE)</i>	<i>125</i>	<i>125</i>	<i>Nil</i>	

8. Further, on the basis of the statement of Shri Ravi Wadepalle, an employee of Rucha Group, recorded under section 132(4) of the Act premises of Shri Avish Atal were searched and some incriminating documents pertaining

to the transfer and posting of PWD Engineers were found and seized. The relevant extract of the documents seized from the residence of Shri Avish Atal, which has been relied upon by the AO, is reproduced as follows: –

Sr. No.	Name	Designation	Posting	Decided	Rec	Balance	Status	Co-ordinator	Category
8	...	...	...	...	...	...	...	...	...
9	...	...	...	...	...	...	...	...	...
10	S.N. RajbhoK	SE	Nashik	125	125	0.00	Done		A

9. We find that during the search, the statement of Shri Ravi Wadealle, an employee of Rucha Group, was recorded on oath under section 132(4) of the Act, the relevant portion of which relied upon by the AO is reproduced as follows: –

"Q.10 I am showing you loose paper folder A2 which is seized from the residence of Shri Avish Atal, i.e., from A-1304, Dioro, Lodha New Cuffe Parade, Wadala (E), Mumbai

- 400037. Please go through the said folder and confirm that the documents in this folder are the same as documents which were sent by you to be kept with Avish Atal.

Ans. Yes I confirm the same.

Q.13 Please refer to page numbers 39 to 42 of Annexure A2 and page numbers 87, 90 to 93, 95, 112, 149 to 166 of Annexure A3. Please explain the contents on these pages.

Ans. Sir these pages are pertaining to transfers and postings of officers (i.e., designations of Deputy Engineer, Executive Engineer, Superintendent Engineer and Chief Engineer) in the PWD Department, Maharashtra. If any officer wants a desired posting then they approach us. For posts in Mumbai and Pune, the amounts are higher while the amounts for other areas are lower. Once an officer approaches us, then we take details of the post/place which that officer wants. Then I give this list to Prashant Nilawar. I don't know what he does with this list. He then returns another list to me, which I give to the desk officer in PWD. Then this list is moved upwards and gets finalized. Sir, for getting these posts, the officers pay amounts in cash varying from Rs. 5 lakhs to Rs. 1 crores. Once the posting of the officer is confirmed in the transfer order, then the officer pays the cash amount to us. Sometimes he delivers the amount to us, sometimes we pick it up from him. The collection of these amounts is done by Sonu (Lalit) Mishra and Pawan Mishra. Then I don't know what is done with these amounts."

10. We further find that when the seized documents were confronted to Shri Shailendra Rathi, he stated on oath under section 132(4) of the Act, as follows: –

"these details were received from the office of PWD ministry, However, I am not sure about the exact person. These are the details of the amounts received in cash from various officers and contractors. The list has: been summarised as Sheet A and Sheet B. Sheet A is the detail of officers and contractors who had fully paid their amount receivable and Sheet B is the detail of officers and contractors from whom partial payment or no payment has been received."

11. Further, another statement relied upon by the AO of Shri Javed Shaikh (one of the employees of Rucha Group) recorded under section 132 (4) of the Act is reproduced as follows: –

*"Q.10. What is your role and responsibility in M/s Rucha Consultancy LLP?
Ans. Sir, my duties in M/s. Rucha Consultancy LLP involves dealing with the PWD department of Maharashtra regarding liaisoning works. The major works assigned to me in this regard is to make deal between Our Clients (Contractor) and PWD -Department. On behalf of this service Rucha consultancy earned 0.5% to 1% commission on sanctioned amount from PWD Department. Also, I look into Transfer and Postings of Engineers in PWD Department. I also look into some land aggregation works which included site visits, collecting documents, search reports of the land deals that are to be finalised.*

Q.11 Please state to whom do you report in M/s Rucha Consultancy LLP and who gives you directions time to time regarding your work?

Ans. Sir, most of the time I report to Sh.Prashant Prakash Nilawar, the partner of Rucha Consultancy LLP and sometimes to legal advisers, Pankaj Gawande. I receive directions time to time from Sh. Prashant Prakash Nilawar.

Q.26. In response to Q.10, you have stated that you are also involved in the Transfer and Postings work. In this regard, please explain in detail the modus-operandi regarding Transfer and Posting in departments of Maharashtra Government.

Ans. Sir, Shri Prashant P Nilawar has good contacts in the PWD Department of Government of Maharashtra which he uses in getting the desired postings to the interested Engineers. The interested Engineers in the rank of Chief Engineers, Superintending Engineers and Executive Engineers, approach the Mantralaya and meet the Under Secretary/Deputy Secretary in administration. These engineers express their desired postings to the concerned officers in the Mantralaya. These Engineers subsequently contact Shri Prashant P Nilawar through WhatsApp / Facetime and just intimate that they have met the concerned officer in Mantralaya. List of all such interested Engineers who have communicated with Shri Prashant P Nilawar is made and then communicated to me through WhatsApp.

Subsequently, I meet the Deputy Secretary in the department and discuss to confirm that all the names in the list have been sent through his reference. Subsequently, the references of such Engineers are discussed and possibilities of their transfers to the desired posts are explored. Thus, from the said list the final list of Engineers is prepared who can be accommodated in the Annual General Transfers list.

Q.30 Please mention apart from you who is involved in Rucha Consultancy LLP in the process of Transfers and Postings.

Ans. Sir, apart from me Ravi Wadepalle is involved in Rucha Consultancy LLP in the process of transfers and postings."

12. From the perusal of the aforesaid statements recorded under section 132(4) of the Act, during the search proceedings, we find that all the statements, explaining the contents of the documents seized during the search proceedings, only explain the general *modus operandi* adopted by the Rucha Group, wherein it was alleged that the Group in connivance with certain officials in PWD department was involved in transfer and posting of PWD Engineers. It is pertinent to note that in none of the statements relied upon by the AO, which formed the basis for making the addition against the assessee, there is any mention of the transaction by these individuals with the assessee or any interaction with the assessee regarding his transfer and posting from District Satara to District Nashik. It is further pertinent to note that in his statement, Shri Ravi Wadepalle specifically mentioned that the amounts were collected by two individuals, i.e. Sonu (Lalit) Mishra and Pawan Mishra. However, it is evident from the record that there is no further examination of these individuals by the Department to find further the fact that the amount of Rs. 1,25,00,000 was paid by the assessee to facilitate his transfer and posting. At this stage, it is also relevant to note that Shri Ravi Wadepalle categorically stated that the officers pay amounts in cash varying from Rs. 5 lakh to Rs.1 crore. However, in the present case, it is alleged that

the assessee paid an amount of Rs. 1,25,00,000, which is in excess of the amount stated in the statement. We find that apart from the aforesaid statements and documents as noted above, there is no further examination by the Revenue to link the assessee to the material/statements found/recorded during the search proceedings. In order to support its contention, the AO has also placed reliance upon the transfer order dated 07/08/2020 passed by the Government of Maharashtra, transferring the assessee from District Satara to District Nashik. However, we are of the considered view that the transfer order cannot by itself be said to fall within the category of "*independent evidence*", which can be said to corroborate the documents found during the search as the said transfer order does not implicate the assessee. We are of the considered view that the documents found during the search proceedings, which were found at the premises of the third party and not the assessee, only raise suspicion against the assessee and, therefore, such a suspicion requires further corroboration by independent evidence, which may be in the form of an independent departmental enquiry, and the same is completely absent in the present case. Thus, it is evident that the sole basis for making the addition in the hands of the assessee were the statements recorded of the third party and documents found from the third party. From the perusal of the aforesaid statements, recorded during the search proceedings, it is further pertinent to note that it was alleged that the PWD Engineers contacted Shri Prashant P Nilawar, the partner of Rucha Consultancy LLP, through WhatsApp/FaceTime and informed about the desired postings. However, from the perusal of the assessment order, it is evident that Shri Prashant P Nilawar was neither examined nor any statement

recorded during the search proceedings. At this stage, it is also pertinent to note that the Revenue has not disputed the fact that the statements recorded during the search proceedings were subsequently retracted. Therefore, in the facts and circumstances of the present case, it becomes all the more necessary for the Revenue to substantiate the addition with independent evidence, which is completely lacking in the present case. As regards the contention of the Revenue that the documents found at the premises of Shri Shailendra Rathi are corroborated with the documents found at the premises of Shri Avish Atal, it is pertinent to note that during the search Shri Ravi Wadepalle admitted that the documents pertaining to Rucha Group are also kept at the residence of Shri Avish Atal. Thus, it is evident that both documents pertain to the Rucha Group which were kept at different places and the same cannot be treated as corroborating each other. Therefore, we agree with the findings of the learned CIT(A), based on various judicial pronouncements, that documents/material found from the premises of a third party or the statement of a third party cannot be relied upon to make additions in the hands of the assessee unless such material statement is corroborated by independent evidence linking such material to the assessee. Further, we find merits in the findings of the learned CIT(A) that such material could have been a reason for starting an investigation, however, the AO simply relied on material/statement found/recorded during the search proceedings without corroborating the same with any kind of independent evidence linking such material with the assessee. Thus, we are of the considered view that the AO did not make any attempt to confirm that such money was paid by the assessee and merely relied on the documents/statements found/recorded

during the search to make the impugned additions. Further, the decisions relied upon by the learned Departmental Representative in the case of B.Kishore Kumar v/s CIT, reported in [2015] 62 taxmann.com 215(SC) and in the case of Madhav Gems (P) Ltd. v/s ITO, reported in [2021] 434 ITR 684 (Guj.) are distinguishable on facts as in the present case there was no search on the assessee and there was no independent inquiry by the AO on the information received from the search on third party. Thus, the aforesaid decisions are not applicable to the present case.

13. Before concluding, gainful reference can be made to the decision in the case of ACIT v/s Miss Lata Mangeshkar, [1974] 97 ITR 696 (Bom.), wherein while dismissing the Revenue's appeal in a case wherein additions were made on the basis of documents seized and statements recorded from the third party, the Hon'ble Jurisdictional High Court observed as follows: –

"The Income-tax Officer came across a sort of a ledger maintained by the firm known as Vasu Films of Madras containing certain entries, which had been seized by the income-tax authorities from the premises of that firm at Madras, and relying on those entries he took the view that the assessee must have concealed her real income by not showing certain payments for which no receipts were passed by her and he made the additions of Rs. 60,550, Rs. 75,000 and Rs. 75,000 to the income returned in each of the three assessment years respectively. For drawing the inference that she must have received income without passing receipts the Income-tax Officer relied upon the two entries which appeared on one page of that ledger of Vasu Films, which read as follows:

"20-9-1962	16/8	To Lata Mangeshkar	800 W	plus L.F.	Rs.
			700 B	102	1,500
11-6-1963	16/5	To Lata		123	2,000
		B		123	2,000".

In the statements recorded of one N. Vasudev Menon, the managing partner of Vasu Films, and one C.S. Kumar, the firm's Bombay manager, the entries were explained by them by stating that the letter "W" put against the figures mentioned in the entries represented payment in "white" while the letter "B"

put against some items indicated payment in "black". The assessee was given an opportunity to cross-examine these persons. The Income-tax Officer accepted the entries as showing that payments had been received by the assessee for which receipts had not been passed by her and these payments were outside the books of account and he also relied upon the statements made by these two persons. The Appellate Assistant Commissioner confirmed the additions made by the Income-tax Officer. Before the Tribunal it was contended on behalf of the assessee that the entire evidence on which the lower authorities had relied merely created suspicion that the assessee might have accepted the payments in "black" but it did not take the place of proof. The Tribunal after appreciating all the pieces of evidence that were relied upon by the department in support of its case came to the conclusion that the evidence was not sufficient to prove even a single instance where the assessee could be said to have received money in "black" for which she did not pass a receipt. The other evidence was of a general character suggesting that the practice of receiving part remuneration in black was prevalent among cine stars which was of no avail to prove any specific instance against the assessee. The only specific evidence which required scrutiny was that furnished by the two entries and the statements of N. Vasudev Menon and C.S. Kumar. On a scrutiny of the two entries as well as the evidence of the two witnesses the Tribunal took the view that even that evidence did not carry the department's case any further and in that view of the matter the Tribunal deleted the additions made by the Income-tax Officer. The department has sought the reference to this court on three questions of law which are said to arise out of the Tribunal's order and out of the three questions which appear at page 6 of the application and in respect whereof rule has been issued, questions Nos. 2 and 3 are really dependent upon the answer to the first question as to whether on the facts and circumstances of the case the Tribunal was justified in ignoring the entries in the ledger of Vasu Films relating to the payment made by the said firm to the assessee.

In our view, the question has been framed by the department so as to give it a colour of a question of law, for, in our view, having regard to the manner in which the Tribunal has dealt with the said entries, it cannot be said that the Tribunal has ignored the entries in the ledger of Vasu Films relating to the so-called payments made by the firm to the assessee. In fact, the Tribunal has discussed these entries appearing in the ledger of Vasu Films and has given substantial reasons as to why it was not inclined to accept the entries as reliable entries for accepting the case of the department. inter alia, it pointed out that the ledger containing the said entries had not been produced before it, that no corresponding entries were there in the day-book of the relevant period and that Vasu Films did not rely on this ledger in the course of its own assessment proceedings but for its own assessment proceedings different set of books had been relied upon as genuine set of books. As regards the evidence of the two witnesses on which reliance was placed by the department, the Tribunal has pointed out that so far as N. Vasudev Menon was concerned, he had no personal knowledge of the actual payments made to the assessee and, therefore, his evidence could not carry the case of the department any further and so far as the Bombay manager, C.S. Kumar, was concerned it came to the conclusion that though he purported to say that he had made the payments in "black" to the assessee—payments corresponding to the entries to be found in the ledger—his evidence suffered from serious infirmities, which have been pointed out by the Tribunal in its reasons. It pointed out that as the Bombay

manager he used to receive amounts from Madras from out of which he used to make disbursements in Bombay but he maintained no account in respect of the same which made it difficult to rely on his evidence. The other serious infirmities in his evidence are to be found in paragraph 7 of the Tribunal's order. Mr. Joshi for the department had also mainly relied upon this evidence and did not press the other evidence which was of a general character. However, having regard to the reasons which have been given by the Tribunal for disbelieving the two witnesses and for rejecting the entries that were found in the ledger of Vasu Films, we feel that the conclusion reached by the Tribunal purely rests on the appreciation of evidence and no questions of law arise.

Mr. Joshi tried to urge before us that in paragraph 5 of its order the Tribunal has found fault with the entries appearing in the ledger on the ground that there were no corresponding entries in the day-book of the firm covering the same period and the Tribunal further observed that no attempt was made to explain the absence of relevant entries in the daybook and for that reason the Tribunal rejected the entries in the ledger on which reliance was placed. Mr. Joshi tried to urge that, after all, the entries in the ledger were the entries in a book which was not meant for being disclosed to the income-tax authorities because it contained the entries pertaining to the payment in "black" and the day-book for the relevant period that was available was a day-book meant for being produced before the taxing authorities as it contained entries pertaining to all legal and white payments and naturally in such day-book no corresponding entries would be found. So no importance should have been attached by the Tribunal to the absence of a day-book containing the corresponding entries. In the first place it must be pointed out that this is not the only reasons for rejecting the entries but the Tribunal has given other sufficient reasons for rejecting the same. But even with regard to this reason which has been given by the Tribunal, though it may be contended that since the entries in the ledger pertained to the payments in "black" no corresponding entries could be found in the day-book which was meant to be produced before the income-tax authorities, still the fact remained that the day-book from out of the other set of books (not intended to be produced) which must have contained the corresponding entries was not available and, in the absence of that, mere production of ledger entries would be of no avail, as there would be no guarantee about the truthfulness or genuineness of the entries in the ledger. Moreover, entries in books of account—whether in day-book or in the ledger—are merely corroborative evidence and in the absence of proper corroborative evidence the primary direct evidence would alone be required to be scrutinized and that evidence in this case consisted of the testimony of C.S. Kumar and the evidence of that witness was found to be thoroughly unreliable by the Tribunal. After all, the entries in the day-book or the ledger would be a corroborative piece of evidence and once the direct evidence of the person who is said to have made payments in "black" to the assessee is disbelieved, we do not think that any value could be attached to the entries in the ledger or to the entries in the day-book even if one had been produced. In the circumstances, we feel that the questions which are sought to be referred arise out of a finding of fact recorded by the Tribunal on pure appreciation of evidence."

14. Accordingly, in view of the aforesaid findings, we find no infirmity in the findings of the learned CIT(A) in deleting the addition of Rs.1,25,00,000 made by the AO under section 69C of the Act.

15. Further, as regards the addition of Rs.5 lakh made by the AO under section 69A of the Act, we find that the AO placed reliance upon the WhatsApp chat between the assessee and Shri Shailendra Rathi found from the mobile of Shri Shailendra Rathi. However, the assessee denied any such transaction having taken place between him and Shri Shailendra Rathi. It is evident from the record that during the assessment proceedings, the assessee sought a complete set of statements of Shri Shailendra Rathi to examine the same and also sought the opportunity to cross-examine Shri Shailendra Rathi. However, the AO merely on the statement of Shri Shailendra Rathi that the assessee asked him to deliver Rs. 5 lakh to Nashik made the additions in the hands of the assessee under section 69A of the Act. In further appeal, the learned CIT(A) deleted the addition, inter-alia, on the basis that in his statement Shri Shailendra Rathi stated that the transaction of delivering Rs.5 lakh could not take place and in any case, the entire statement was subsequently retracted by Shri Shailendra Rathi. The learned CIT(A) further noted that the WhatsApp chat had only an image of a Rs.5 note. Thus, on the basis that the said image was not corroborated with any independent evidence, the learned CIT(A) deleted the addition by placing reliance upon various judicial pronouncements as noted in pages 43-44 of the impugned order. The relevant findings of the learned CIT(A) are reproduced as follows: -

"7.3 It is seen that the whatsapp chat only has an image of a 5 rupee note and it does not have any reference to any sum of money as stated by Sh. Shailendra Rathi. The addition has been made only on the basis of the material found from Sh. Rathi and the statement of Sh. Shailendra Rathi, which has been retracted. The assessee has consistently denied of any such transaction having taken place. In fact, Sh. Shailendra Rathi in his statement has himself stated that the transaction could not take place. As already stated, while deciding the earlier ground, no addition can be made simply on the basis of a third party statement without corroborating it with independent evidence.

7.3.1 In the case of *Naren Premchand Nagda v. ITO* [ITA No. 3265 (Mum.) of 2015, dated 8.7.2016], a search was conducted at the premises of a builder. The statement of key person of the group was recorded who stated that the assessee had paid cash to the group. When the statement of the key person was put to the assessee, he denied of making any payment in cash. However, the department made addition by relying on the statement of key person of the group. The Hon'ble Mumbai ITAT relying on series of judicial pronouncements held in the case of *Naren Premchand Nagda v. ITO* (supra) that in the absence of any evidence found against the assessee, no addition can be made on the basis of documents found from the premises of third party and the statements recorded during the course of search conducted in third party premises. In this case the transaction of purchase of property by the assessee from the builder had not been denied by the assessee. Further, the cheque payment was also reflected in the seized notings. In spite of this, the addition made on the basis of notings in respect of cash transaction was not confirmed by the Hon'ble Mumbai ITAT.

7.3.2 In the case of *Jawaharbai Atmaram Hathiwala v. ITO* [2010] 128 TTJ 36 (Ahd.), addition was made by relying on seized material and statement of a third party without bringing any other evidence on record. The Hon'ble Ahmedabad Tribunal deleted the addition by observing that no evidence could be brought on record by the Revenue to show that in fact the assessee had paid 'on money' to the developers. No document containing signature of the assessee or handwriting of the assessee to corroborate the above making of payment by the assessee was found during the course of the search. Merely recording made by a third party or statement of a third party could not be treated as so sacrosanct so as to read as a positive material against the assessee. Therefore, addition in the hands of the assessee on account of 'on-money' was held to be not justified.

7.3.3 In the case of *Asstt. CIT v. Prabhat Oil Mills* [1995] 52 TTJ 533 (Ahd. - Trib.), the department relied upon certain notings in the seized diary found from the premises of third party and contended that the assessee had made sales outside the books of accounts. However, the assessee denied of having made any sales outside the books of accounts. The Hon'ble Ahmedabad Tribunal held that once the assessee denies the transaction, the onus was on the Assessing Officer to prove with corroborative evidence that the entries in the seized diary represented sales outside books of accounts. The Hon'ble Tribunal further held that mere entries in the accounts of third party was not sufficient to prove that assessee had indulged in transaction outside books of accounts.

7.3.4 Further, the Coordinate Bench of ITAT at Delhi in the case of Pramod Pandey v. Asstt. CIT [ITA No. 4295 (Delhi) of 2012, dated 6.12.2013] also held that presumption u/s 132(4A) or 292C of the Act could be taken only in the case of a person from whose possession the document or material has been found.

7.3.5 In the case of Straptex (India) (P.) Ltd. v Dy. CIT [2003] 84 ITD 320 (Mum- Trib.), the Hon'ble Mumbai ITAT also held that the presumption u/s 132(4A) is only in respect of the person in whose possession the books or documents are found. While utilizing such documents in the case of any other person, there could not be any presumption about the correctness of such books of accounts.

7.3.6 Also, the Hon'ble Kolkata ITAT in the case of Atul Tantia v DCIT (ITA No. 492/Kol/2021 order dated 28.03.2023) has also held that no addition can be made on the basis of messages from SMS or WhatsApp between two persons unless there is corroborative evidence on record. The relevant extracts are as under:

We have perused the decisions of the Co-ordinate Benches of the Tribunal and found that the ratio of law laid down is that no addition can be made on the basis of messages from SMS or WhatsApp between two persons unless there is corroborative evidences on record.

7.4 Thus it is seen that the Hon'ble Courts have clearly held that documents/material found from the premises of a third party or a statement of a third party cannot be relied upon to make additions in the hands of the assessee, unless such material or statement is corroborated by independent evidence linking such material to the assessee. In the present case it is seen that the addition of Rs. 5,00,000/- u/s. 69A of the Act has been made by the AO relying on the statement of a third party, which in any case has been retracted. Moreover, in his statement, the third party had stated that the transaction could not take place. Also, the addition has been made on the basis of material found being whatsapp chat during the course of the search conducted on a third party. The Hon'ble Courts have clearly held that no addition can be made on the basis of messages from SMS or WhatsApp between two persons unless there is corroborative evidence on record. The assessee has consistently denied having any knowledge of the contents of the impugned material. It is seen that while such material could have been a reason for starting an investigation, the AO has simply relied on such material found from the premises of a third party and relied on third party statement to make the addition without corroborating it with any kind of independent evidence linking such material with the assessee. As per the plethora of Court judgments discussed above, such an act is not permitted under the law. The Hon'ble Supreme Court in the case of Umacharan Shaw and Bros v CIT (1959) 37 ITR 271 held that suspicion, however strong, cannot take the place of evidence. Similarly, raising presumption itself does not amount to proof. Presumption, however strong, cannot take the place of evidence as held in the case of Pooja Bhatt 66 TTJ (Mum) 817 and in the case of D.M Kamani HUF 65 TTJ (Pat) 504. Thus, in the absence of any independent evidence linking the assessee with the material found from a third party or a third party statement, the addition made by the AO on the basis of such third party statement or material found from the third party cannot be sustained. The addition made

by the AO of Rs. 5,00,000/- u/s 69A is deleted and the ground of appeal is allowed."

16. From the perusal of the record, it is evident that the addition of Rs.5 lakh was made merely on the basis of the document found during the search on the third party and there was no attempt by the AO to link the same with the assessee by way of an independent evidence. Accordingly, in light of the decisions relied upon by the learned CIT(A) in the impugned order, we are of the considered view that the addition of Rs.5 lakh made under section 69A of the Act has rightly been deleted by the learned CIT(A). Before concluding, it is pertinent to note that the learned CIT(A) also took into consideration the decisions wherein it was held that the presumption under section 132(4A) of the Act could only be taken in the case of the person from whose possession the document or material has been found and since, in the present case, the documents were found from the possession of the third party, such a presumption cannot be extended to the assessee.

17. As a result, the impugned order under challenge before us is upheld and the grounds raised by the Revenue are dismissed.

18. In the result, the appeal by the Revenue is dismissed.

Order pronounced in the open Court on 24/01/2025

Sd/-
NARENDRA KUMAR BILLAIYA
ACCOUNTANT MEMBER

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 24/01/2025

Prabhat

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The PCIT / CIT (Judicial);*
- (4) *The DR, ITAT, Mumbai; and*
- (5) *Guard file.*

By Order

Assistant Registrar
ITAT, Mumbai