आयकर अपीलीय अधिकरण,'ए 'न्यायपीठ, चेन्नई।

IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH: CHENNAI

श्री एबी टी. वर्की, न्यायिक सदस्य एवं
श्री अमिता भशुक्ला, लेखासदस्यकेसमक्ष

BEFORE SHRI ABY T. VARKEY, JUDICIAL MEMBER AND
SHRI AMITABH SHUKLA, ACCOUNTANT MEMBER

ITA Nos. 2978 - 2984/Chny/2024
&
CO Nos. 11-17/Chny/2025
निर्धारण वर्ष**/Assessment Years: 2016-17 to 2022-23**

The DCIT, Central Circle-2(1), Chennai.		M/s Radiance Realty- Developers India Ltd., Radiance Towers, 1st Floor, 33 Feet Road, Anna Salai, Guindy, Chennai – 600 032.
		[**PAN: AACCN5152H**]
(अपीलार्थी**/Appellant)**		**(**प्रत्यर्थी**/Respondent/Cross Objector)**

ITA Nos.2971 - 2972/Chny/2024
निर्धारणवर्ष**/Assessment Years: 2021-22 & 2022-23**

M/s Radiance Realty Developers- India Ltd., Radiance Towers, 1st Floor, 33 Feet Road, Anna Salai, Guindy, Chennai – 600 032.	**v.**	The DCIT, Central Circle-2(1), Chennai.
[**PAN: AACCN5152H**]		
(अपीलार्थी**/Appellant)**		**(**प्रत्यर्थी**/Respondent)**

Assessee by	:	Mr.T.Banusekar, Advocate
Department by	:	Mr.Shivanand K Kalakeri, CIT
सुनवाईकीतारीख/Date of Hearing	:	27.02.2025
घोषणाकीतारीख /Date of Pronouncement	:	02.05.2025

आदेश / O R D E R

PER ABY T. VARKEY, JM:

These cross appeals by the Revenue and the assessee arise out of the orders of the Learned Commissioner of Income Tax (Appeals) - 19, Chennai [in short 'Ld. CIT(A)'] all dated 25.09.2024 against the orders passed by the Dy. CIT, Central Circle-2(1), Chennai [in short 'the AO'] for the Assessment Years [in short 'AYs'] 2016-17 to 2022-23. Since several issues involved are common, all the appeals for all the assessment years were heard together. Both the parties also argued them together raising similar arguments on these issues. Accordingly, for the sake of convenience and brevity, we dispose all the appeals by this consolidated order.

2. Before we advert to the grounds taken in the cross appeals, it would first be relevant to cull out the basic facts of the case and effect of law in brief in respect of certain AYs. Search u/s 132 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") was conducted against the assessee, on 14.02.2023. Consequent to the search, the AO issued notices u/s 148 of the Act for AYs 2016-17 to 2021-22, pursuant to which, the assessments under section (hereinafter referred to as "u/s.") 147/143(3) of the Act were completed all dated 27.03. 2024. Further, the AO also completed the scrutiny assessment for AY 2022-23 u/s 143(3) of

the Act on 27.03.2024. The summary of the additions/disallowances in Rupees made by the AO which are in dispute in the cross- appeals for AYs 2016-17 to 2022-23 are as follows: -

Sl.	Issues	AY 2016-17	AY 2017-18	AY 2018-19	AY 2019-20	AY 2020-21	AY 2021-22	AY 2022-23
1.	Addition of Unaccounted cash collected from customers for sale of flats	1,87,27,107	2,52,19,672	3,53,50,730	2,61,86,252	8,06,82,126	10,71,58,995	24,95,02,394
2.	Addition of cash collected from sale of plots in Project Residencia	-	-	-	-	-	79,09,970	23,38,625
3.	Addition u/s 43CA for short admission of business income	-	-	-	-	-	51,36,281	58,75,349
4.	Addition of Unaccounted scrap sales in cash	-	-	-	-	-	74,45,751	75,44,678
5.	Addition of bogus purchases from suppliers of steel	-	-	-	-	8,34,67,815	4,40,20,400	15,96,75,209
6.	Disallowance of salary paid to Viswanathan without any services	8,21,667	8,21,667	8,48,667	8,31,000	8,31,000	8,19,660	8,19,660
7.	Addition u/s 40A(3) & 37	-	-	5,00,00,000	-	-	-	-

3. It is noted that the reasoning given by the AO for making the above additions/disallowances were verbatim same across all AYs. Hence, for

the sake of convenience, and to avoid repetition of facts; we deem it fit to adjudicate each of the common issues across all AYs before us together.

4. Issue 1: Addition made on account of unaccounted cash collections from sale of flats

Ground Nos. 2 for the Revenue's appeal and Ground Nos.6 to 11of the assessee's cross-objection for AY 2016-17

Ground Nos. 2 for the Revenue's appeal and Ground Nos.5 to 10of the assessee's cross-objection for AY 2017-18

Ground Nos. 3 for the Revenue's appeal and Ground Nos. 10 to 15 of the assessee's cross-objection for AY 2018-19

Ground Nos. 2 for the Revenue's appeal and Ground Nos. 5 to 10 of the assessee's cross-objection for AY 2019-20

Ground Nos. 2 for the Revenue's appeal and Ground Nos. 5 of the assessee's cross-objection for AY 2020-21

Ground Nos. 2 for the Revenue's appeal and Ground Nos. 5 of the assessee's cross-objection for AY 2021-22

Ground Nos. 2 for the Revenue's appeal and Ground Nos. 2 of the assessee's cross-objection for AY 2022-23

4.1 These grounds relate to the additions made by the AO in relation to unaccounted cash collected from customers on sale of flats. The facts as noted are that, the assessee is engaged in the business of development of real estate having projects at Chennai, Bengaluru and Coimbatore. Search u/s 132 of the Act was carried out at the business premises of the

assessee on 14.02.2023 in which electronic datawas found and seized vide ANN/JNKK/RRDIL/ED/S. The Authorized Officer noted that, the electronic data seized from the possession of the employees, inter alia comprised of two excel sheets viz., (i) "Expense details- **EB**.xlsx in 'Kingston Data Traveler 16 GB Pen drive" and (ii) "project payables Final (**EB**).xlsx recovered from E-Drive'. It was further gathered from the WhatsApp conversations between the Customer Relationship Managers (‘CRMs’) that they were using a term "EB" for certain payments which are received in respect of the flat / plot sold / booked. Upon enquiry in the course of search, it was initially explained that the term ‘EB’ was an acronym for ‘Extra Budget’. Later on, the concerned employee Smt. Karthiga, CRM staff from whose possession this excel sheet was found, gave her sworn statement u/s 132(4) of the Act, in which while answering to Q.No.13 put forth to her, she had admitted that the term “EB” means “Extra Benefits” and further in response to Q.No.15, she stated that “EB” means payment received in cash and not recorded in tally and EB payments received were communicated to the accounts team for reporting purpose. The Authorized Officer noted that, this explanation was also corroborated by the WhatsApp conversation between Smt. Karthiga and Accounts staff, Ms. Pinki. The Authorized Officer is noted to have sought an explanation regarding this particular WhatsApp conversation at Q No. 17 and Smt. Karthiga is noted to have confirmed the conversation

between herself and Smt. Pinki and explained that, she had communicated to Smt Pinki that, on 17.11.2021, a customer of B1503 of Tower I of Suprema Project had given Rs. 15 Lakhs in cash and further on 24.11.2021, a customer of A1105 of Tower I of Suprema Project had given 8 Lakhs in cash and Smt. Pinki responded to it by stating "Bcs revised sent", in which the term 'BCS' stood for "Booking Cost Sheet".

4.2 In view of the above explanation, the Authorized Officer is noted to have analyzed the seized electronic data and gathered that the assessee was following a unique deceptive method to manage its unaccounted sale proceeds. The CRM staff would maintain excel records in which the cash component involved in sale of flats were separately mentioned as "EB" or "Extra Budget / Benefit". As and when the customers would pay the cash, the same would be communicated to the accounts staff who would then reduce the cash received from the "Booking Cost Sheet" as if the "Extra Budget" has been reduced, and such revised statement would be signed by the customer as an acknowledgment for the payment made. This modus operandi is noted to have been confirmed by another CRM Staff, Smt. Rajeshwari who also accepted that "EB" noting's denoted the cash receipts and that such term was used to avoid unwarranted attention. Likewise, Shri S Arjun who was the CRM for Bangalore project also

admitted to this modus operandi and submitted the details of "EB" or the cash received from customer towards the sales.

4.3 Thereafter, the Investigating team also confronted the CFO, Shri. Veera Kumar who also stated that EB means unaccounted cash receipts that are not entered in the tally and it is not accounted in the books of accounts of M/s. Radiance Realty Developers India Limited. In addition, he also stated about the entire process of collection of EB and reporting of the same to the Smt. Rajeswari, CRM (Head). He also submitted the copy of the collections made in the month of January 2023. Further, Shri. Veera Kumar while answering to Q. No. 17 and 18 in the recorded sworn statement stated that, the Kingston 16GB pen drive imaged and seized vide annexure ANN/JNKK/RRDIL/ED/8 was maintained by the accounts team and was predominantly used by him and the excel sheet named *'project payables final (EB)'* contains details of EB receipts i.e. the unaccounted cash receipts that were received from customers project wise and date wise.

4.4 All the above affirmations of the employees are noted to have been placed before the CEO, Shri. T.N. Madan, who also confirmed the statements of the above persons and admitted that cash received from the customers which were recorded as "EB"was not accounted in the books of accounts. Thereafter, the statement of the Managing Director,

Shri Varun Manian was recorded u/s 132(4) of the Act on 15.02.2023 who in his answer to Q. No. 21 also confirmed that EB means "Extra Budget" which comprises of cash component and other extra payments made. In addition, he also confirmed the depositions of Smt. Rajeswari, Smt. Pinki, Smt. Karthiga, Shri. TN Madan and others. Further, on compilation of the data from the seized material, the search team ascertained that the assessee had received a total amount of Rs. 83,23,20,157/- in cash,during the period from FY 2013-14 to 2022-23,which was termed as "EB" in the seized data. The relevant break-up is noted to be as follows: -

Asst Year	Unaccounted cash receipts from various projects
2015-16	Rs.1,97,05,945/-
2016-17	Rs.2,34,08,884/-
2017-18	Rs.3,12,40,213/-
2018-19	Rs.3,53,50,730/-
2019-20	Rs.3,27,32,815/-
2020-21	Rs.10,08,52,658/-
2021-22	Rs.13,39,48,744/-
2022-23	Rs.24,95,02,394/-
TOTAL	**Rs.83,23,20,157/-**

4.5 It is observed that, the above findings of the search team were alsoconfirmed by the Managing Director and the relevant excerpts of his statement recorded u/s 132(4) of the Act is noted as under: -

> "Q.31 Now I am showing you the signed statement of Mr.T N Madan, CEO of M/s Radiance Realty Developers India Ltd. Given during the search proceeding u/s 132 of the Income Tax Act, 1961 in the office premise of M/s Radiance Realty at Guindy, Chennai. Please go through it

and confirm the same. If you find any objection or any discrepancy in the statement of Mr. T N Madan, please mention the same and offer your explanation.

A.31 Yes Sir I have gone through the entire 15 page statement of Mr.T N Madan and I concur with the statement of Shri. Madan, CEO of M/s Radiance Realty Developers India Ltd. I admit that Rs. 83,23,20,157/- is the unaccounted sales of M/s Radiance Realty from FY 2013-14 to FY 22-23. And with respect to the Bogus purchase as stated by you, I request you to provide me 15 days time to reconcile the same."

4.6 In light of the above seized electronic material, depositions of the employees, CFO, CEO & the Managing Director, the AO is noted to have reopened the income-tax assessments of the assessee by issue of notices u/s 148 of the Act. The assessee, in response to the notices, is observed to have filed the respective return(s) of income wherein it offered 20% of the above unaccounted sale proceeds by way of profit element embedded therein, to tax. The AO however in the course of the assessment issued show cause to the assessee, requiring it to explain as to why the entire unaccounted cash receipts in the respective financial year(s) under consideration had not been offered as income in its hands for the respective assessment year(s). The assessee in their reply dated 21.02.2024 is noted to have denied having received any unaccounted cash from customers on sale of flats. The assessee is noted to have also objected to the evidentiary value of the seized electronic material and its admissibility as well. The assessee further is found to have contended that, Smt. Karthiga from whose possession the electronic data was

seized, used to handle customer issues, loans, customizations, and feedback, and therefore according to the assessee, the data found on her laptop was of no relevance. With regard to the statement of Smt. Pinki, who confirmed the statement of Smt. Karthiga and also had WhatsApp conversation with her regarding collection of "EB" was submitted to have given such a statement under coercion and therefore the assessee urged that her statement was also not reliable. It was explained that, the employees would have misunderstood the regular individual cash collections of less than Rs. 2 lacs which was also accounted in the books of accounts to represent unaccounted cash and thus gave statements under mistaken belief and confusion. According to the assessee, the Managing Director, Shri Varun Manian had also retracted his statement in which he had also highlighted infirmities in the data found from possession of Smt. Karthiga and therefore it was submitted that the purported electronic data was not reliable.

4.7 The AO however is noted to have rejected the explanation put forth by the assessee and has set out his detailed reasons for the same in the impugned order. The AO is observed to have *inter alia* stated that, the persons whose statements had been recorded have deposed their answers while recording the statement u/s 132(4) of the Act with reference to the facts as per the seized material and thus their answers

were corroborated by the material seized in the course of search. The AO further held that the assessee was not able to disprove the facts with evidence and had rather relied only on bald retractions which did not have any basis. The AO also noted that the assessee was unable to disprove the contents of the seized material, as already discussed by us above. He further held that the statements recorded u/s 132(4) of the Act, carried evidentiary value and that empty retractions that too after a lapse of one year was invalid. The AO further noted that the assessee itself had offered 20% of the unaccounted cash receipts as their income. However, according to AO, the entire unaccounted cash sale receipts ought to be brought to tax and therefore added the following sums as undisclosed income of the appellant in the respective years impugned before us.

4.8 Aggrieved by the above order of the AO, the assessee is noted to have preferred an appeal before the Ld. CIT(A). On appeal, the Ld. CIT(A) is noted to have rejected the legal plea of the assessee objecting to the admissibility of the electronic evidence. The Ld. CIT(A) also upheld the AO's findings, in light of the seized material and the statements recorded u/s 132(4) of the Act, that the assessee was in receipt of unaccounted cash proceeds on sale of flats. However, the Ld. CIT(A) concurred with the assessee on the limited aspect that, the entire unaccounted sale proceeds could not be brought to tax as their income and that only the

profit element embedded therein was taxable. The Ld. CIT(A) accordingly estimated the profit element at 20% of the unaccounted cash receipts and deleted the balance 80% sum which was added by the AO. Aggrieved by this consolidated order of Ld. CIT(A), both the assessee and Revenue are now in appeal before us.

4.9 Heard both the parties. We first take up the assessee's plea regarding the admissibility of the electronic evidence relied upon by the AO to make the impugned additions. According to the assessee, the excel sheets found in the electronic data, the WhatsApp conversations between the employees were not admissible as it did not comply with Section 65B of the Indian Evidence Act, 1872. We find that, the lower authorities had rightly observed that, the Authorized Officer had followed the due procedures mandated in law and had also obtained the necessary certificates u/s 65B of the Act prior to the seizure of such electronic records. The AO is noted to have extracted the said certificate obtained u/s 65B of Indian Evidence Act, 1872 in the impugned order as well. Before us, the Ld. AR for the assessee was unable to controvert this certificate or point out the fallacy therein. We accordingly agree with the Ld. CIT(A) that there was no non-compliance with the provisions of Section 65B of the Indian Evidence Act, 1872 and therefore this preliminary contention of the assessee stands rejected.

4.10 The next plank of assessee's argument was that, the contents of the seized material were not reliable and that the Managing Director had retracted his statement and therefore no addition was otherwise permissible on account of undisclosed cash receipts from sale of flats. Assailing the action of lower authorities, the Ld. AR had argued that, the statements of Smt. Karthiga & Smt. Pinky which formed the main basis of the impugned addition was not reliable. He pointed out that, Smt. Karthiga was a customer relationship staff who was only involved in day-to-day miscellaneous tasks of handling and resolving the queries of the customers raised and obtaining customer feedbacks and therefore she could have been possibly been in charge of collecting on-monies from customers and that the Investigating Officers had forcibly made her admit to the same. Similarly, in respect of Smt. Pinky, it was argued that, she was a junior accounts staff who was not involved in the financial matters but was only aware about the collection of regular cash from customers etc. for accounting purposes, wherein individual transactions were less than Rs. 2 lacs viz., within the permissible limits and such cash was also accounted in the books of accounts. According to him, the Investigating authorities had confused the said employee during the course of search and coerced her into admitting that the cash collections were unaccounted for. He showed us that, due to the mental stress which she faced during search, she had soon after resigned from work as well. As far as the

statement of Managing Director was concerned, he showed us that, he had retracted his statement and therefore the same was no longer reliable. In so far as the contents of the excel sheet was concerned, the Ld. AR argued that these were mere estimates and that the term "EB" suggested extra budget allocated for the said flat and that there was no cash component in these loose sheets.

4.11 Having considered the aforesaid submissions put forth by the Ld. AR of the assessee, we note that, the same had been examined by AO, and he negated the said plea, by observing that, the persons whose statements were being relied upon, had deposed their answers while recording their statements u/s 132(4) of the Act with reference to seized material. Accordingly, it is not the case that their statements were bald or not backed by any material. Further, the AO has noted that, above mentioned two employees never retracted their statements and that even the Managing Director had retracted from his statement after a long gap of time. Accordingly, the AO had rightly observed that, the assessee's contention that, these statements were unreliable, was unacceptable. Moreover, before us also, the Ld. AR was unable to point out the mistaken fact admitted by the Managing Director in his statement which led to the retraction nor was the Managing Director able to disprove the facts admitted by him with relevant evidence. Hence, in our considered view,

such bald retraction was rightly ignored by the lower authorities. As noted by the lower authorities, the electronic data including whatsapp conversations and excel sheets indeed related to the assessee's business activities and pertained to the actual units sold and therefore the contents thereof could not be discarded. The notings therein suggests that, it contained detailed project and unit-wise data, and the "EB" heading, in light of the statements of the employee/s, suggests the assessee collected cash payments over and above the declared sale consideration. The assessee was neither able to offer plausible explanation for these "EB" notings nor was the assessee able to demonstrate the purported extra work carried out in relation to these units. We thus countenance the following findings of the Ld. CIT(A) rejecting the assessee's contention objecting to the reliability of these seized material and the statements given by the employees and Managing Director: -

> "6.5.16 The undersigned has carefully examined the above submission of the appellant. There is no doubt that during the course of search that incriminating material in the form of electronic devices were found and seized. The reliance of such electronic devices were upheld by the undersigned in this order. Now the issue before the undersigned is whether the AO is right in relying upon the statement recorded from the employees from whose possession incriminating evidences in the form of electronic devices containing excel sheets and the WhatsApp conversations between the employees. The AO in the assessment order has brought out and discussed the issue elaborately. As brought out by the AO, the evidences collected were not from any single employee. The search team was able to confront with various employees of the appellant company about the findings that emanated from the Laptop and the associated WhatsApp conversations by recording a statement from each of them. Finally, such statements were put forth before Shri.

> Varun Manian, the Managing Director of the Appellant Company. He confirmed the affirmation of his employees. On account of the above revelation of facts about the term "EB" used by the employees, the search team was able to understand the abbreviation of EB which stands for "Extra Budget" and the modus operandi in collecting the same from its customers. The evidences collected are not isolated ones. The evidences collected and statement recorded conclusively establish the fact about the collection of excess amount over and above the amount agreed in the agreements. The AO in the assessment order has made a clear finding upon each issue raised by the assessee company in relying such evidences. The undersigned is of the considered view that the AO has rightly rejected the submission of the assessee company in this regard."

4.12 Having held so above, now the next issue for our consideration is whether the entire value of these cash sales / receipts have to be brought to tax or only the profit element embedded therein has to be taxed. From the facts placed before us, it is noted that the assessee is engaged in the business of development of real estate. In the course of search, electronic data was found, more particularly excel sheets which *inter alia* contained details of cash proceeds received on sale of flats. Having perused these excel sheet on sample basis, it is noted that these notings suggested collection of cash from the customers towards sale of flats. From the admission of the Managing Director, it is observed that, he had only admitted to receipt of on-monies from sale of flats and nowhere had he stated that this entire receipt constitutes the undisclosed income of the assessee. Also, later on, in the return(s) of income filed in response to notice(s) issued u/s 148 of the Act, the assessee is noted to have

admitted and offered to tax 20% of the cash collections by way of the income element embedded therein and paid taxes thereon as well. The case of the Revenue however is that, the entire on-monies collected upon sale of flats ought to be brought to tax. According to us, however, it cannot be a matter of an argument in the given facts of the present case that, the amount as receipts/sales by itself would represent the income of the assessee. For this, we gainfully rely on the following findings rendered by the Hon'ble Gujarat High Court in the case of **CIT Vs President Industries (258 ITR 654).**

> "3. Having perused the assessment order made by the Assessing Officer, the order made by the Commissioner (Appeals) and the Tribunal, we are satisfied that the Tribunal was justified in rejecting the application under section 256(1). It cannot be a matter of an argument that the amount of sales by itself cannot represent the income of the assessee who has not disclosed the sales. The sales only represent the price received by the seller of the goods for the acquisition of which it has already incurred the cost. It is the realization of excess over the cost incurred thatonlyforms part of the profit included in the consideration of sales. Therefore, unless there is a finding to the effect that investment by way of incurring cost in acquiring goods which have been sold has been made by the assessee and that has also not been disclosed, the question, whether entire sum of undisclosed sale proceeds can be treated as income of the relevant assessment year answers by itself in the negative. The record goes to show that there is no finding nor any material has been referred to about the suppression of investment in acquiring the goods which have been found subject of undisclosed sales."

4.13 According to the Ld. CIT DR however, the search did not reveal incurrence of any expenses qua such cash collections and therefore, he argued that the AO had rightly brought the entire on-monies to tax. On

the other hand, the Ld. AR brought to our notice that, the assessee had demonstrated before the lower authorities that, they were required to incur expenses viz., (i) miscellaneous & incidental Expenses during registration process, (ii) provide additional amenities provided as per the customer's requirements, (iii) additional expenses for furnishing the flats like Welcome kits to the customers, Apartment activities etc. & (iv) make pooja arrangements during House-warming ceremonies. The Ld. AR further contended that, had the assessee collected such huge on-monies and not incurred any expenses, then such cash collections ought to have been found in the form of some unexplained investment or asset, in the course of search. We observe that, apart from these excel notings, the Investigating Officer didn't find any unaccounted cash or assets of such magnitude which would justify the addition of entire on-monies as income of the assessee. And as rightly pointed out by the Ld.AR that if the entire on-monies is treated as the income of the assessee, then the profits of the assessee would show unrealistic outcome. We therefore find merit in the assessee's plea that the entire cash receipts cannot be said to constitute its income.

4.14 The Ld. CIT, DR for the Revenue further contended that, the assessee was unable to provide the exact details of cash expenses incurred out of these cash collections and therefore the benefit of same

should not be given and thus the entire proceeds ought to be taxed as undisclosed income of the assessee. In this regard, we find that, on same set of facts, similar contention was raised by the Revenue before this Mumbai Tribunal in the case of **M/s. Prime Developers Vs ACIT (ITA Nos.175 – 178/Mum./2010 by order dated 22.03.2013)** viz., the set-off/benefitof expenses against on-monies shouldn't be allowed as the assessee was unable to substantiate the incurrence of expenses with evidences. This Tribunal is noted to have rejected this plea of the Revenue and upheld the assessee's plea for estimation of profit element embedded in on-monies by observing as under: -

> "42. Scope of Reasonable Expenditure: Assessee needs to expend in order to earn income/profit and it is basic and universal principle in any business. This principle applies to both accounted and unaccounted profits. In a case of unaccounted profits, due to its very nature of unaccounting, normally, the parties do not maintain evidences and therefore, evidencing such unaccounted evidences is impossibility. Probably, for this reason, the courts have taken conscious view that it is for the assessing authority to quantify reasonable expenditure considering the facts of the case and industry. Legally speaking, the judgments are uniform in asserting that entire sale proceeds should not be added as income. Hon'ble High court of Ahmadabad ruled in the case of Panna Corporation that the " assessee ought to have spent reasonable amount for the purpose of receiving such gross profit' (para 14 of Tax Appeal No 325 of 2000 dt. 16.6.2012). Further, Hon'ble High Court OF Madya Pradesh held in the case of President Industries 258 ITR 654 that ' entire sale proceeds of the assessee should not be added in his income'. Further, from the judgment in case of Panna Corporation (supra), it is settled proposition that there is no need for the assessee to demonstrate the genuineness of the claim of unaccounted expenditure in the cases of this kind. The underlined logic is that the unaccounted expenditure is always unevidenced and never maintained.Therefore, transferring onus on to the assessee in matters of this kind is not approved. Ex consequenti, it is for the AO allow necessarily reasonable

> deduction towards such unaccounted expenditure without demanding evidences, considering the nature of industry and also evidences relating to extents of net profits earned by the assessee. Considering the above legal position on the matter, we are of the clear-cut opinion, the AO's conclusions on this issue are certainly erroneous. In principle, we uphold the views of the CIT(A) in this regard. Therefore, relevant grounds raised in the revenue's appeals are dismissed."

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

4.16 We thus are in agreement with the Ld. CIT(A)that, in the facts and circumstance of the case, the entire value of on-monies receipts shouldn't be taxed but only the profit element embedded therein was to be taxed in its hands. On this aspect, it is noted that in the case of **ITO Vs. Anand Builders**, Tribunal in similar circumstances had held that, 8% of the unaccounted on-money could be taxed in place of the entire unaccounted on-money receipts since there is always the unaccounted payments. The above decision of this Tribunal is noted to have been upheld by the Hon'ble Gujarat High Court and the SLP filed against the judgment before the Hon'bleSupreme Court was also dismissed and reported in **265 ITR 37**. The relevant findings of Hon'ble Apex Court is noted to be as follows:

> "Dismissed the special leave petition filed by the Department against the judgment dated January 21, 2002 of the Gujarat High Court in ITA No. 52 of 2002 whereby the High Court dismissed the Department's appeal on the ground that no substantial question of law arose. The question of

> law raised in the appeal before the High Court was whether the Appellate Tribunal's finding while directing the Assessing Officer to tax only 8 per cent of the unaccounted on money receipt instead of fully taxing it, in the absence of any evidence of expenditure, could not be stated to be perverse."

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

4.18 We find that the Ld. CIT(A) had also rightly relied on the decision of the Hon'ble Kerala High Court in the case of **CIT v.C. Najeeb (411 ITR 487)** wherein also on similar facts and circumstances, the Hon'ble High Court had held that the profit element ought to be estimated on the unaccounted cash receipts discovered in relation to sale of flats in real estate projects. The relevant question of law raised by the Revenue as taken note is as follows: -

(i) Whether the Tribunal was correct in having directed levy of income tax only on 15% of the total receipts disclosed in proceedings under Section 158BC of the Income Tax Act, 1961 [for brevity, the Act]?

(ii) Ought not the Tribunal have found that when an undisclosed income is detected on search, then the entire income has to be treated as subject to levy of income tax?

4.19 And hisLordship Shri K. Vinod Chandran as then his Lordship was, has answered the question on behalf of DB as under:

"4. On the question of assessment, we notice that on search conducted what was recovered is the undisclosed receipts, which the assessee received by way of sale consideration in various projects undertaken by the assessee. The assessee was an Architect and builder, who constructs apartment complexes and sells them to purchasers. Specific details of such sale consideration received from certain purchasers were recovered at the time of search, on which basis the assessment proceedings were carried out under Section 158BC of the Act. Admittedly these were not returned nor did it find a place in the accounts. The Assessing Officer treated the entire sale consideration received by the assessee, as revealed from the materials recovered, as the undisclosed income and levied tax on it. In first appeal, the assessment order for the block period was confirmed.

5. The assessee was before the Tribunal. The Tribunal directed that only 15% of the total sales receipts be taken for the purpose of levy of income tax. This was after looking into the statement filed by the assessee as to the net profit from the four projects, in which, there was found suppression of sale consideration. The net profit worked out to 14.47% as per the statement of the assessee and the Tribunal directed adoption of 15% as profits and hence the undisclosed income for the purpose of levy of tax.

6. We do not see any infirmity in the said direction. We specifically notice sub-section (2) of Section 158B of the Act, which defines "undisclosed income" as including inter alia any income based on an entry in the books of accounts or other documents or transactions representing whole or part of the income, which has not been or would not have been disclosed for the purposes of this Act. The provision does not permit tax to be levied on the entire receipt of money by an

assessee and also does not deem undisclosed income to be the entire undisclosed receipts, revealed on search or otherwise.

7. Here, the sale consideration, which was detected on search and seizure, was not reflected in the books of accounts nor the profit returned as income for the subject years. The sale consideration was also for the purchase of apartments in different complexes, the development of which was promoted by the respondent/assessee. In such circumstances, the income of the assessee, which stood undisclosed, has to be determined for the purpose of levying income tax. The Tribunal, after looking into the net profit of the assessee in the different projects, directed 15% of the total undisclosed receipts to be taken as the undisclosed income. We are of the opinion that the said direction was perfectly in tune with the provision under Section 150BB of the Act and Section 158BH, which specifies that unless otherwise provided all the provisions of the Act, applicable to assessments under Chapter XIVB. We answer the questions of law framed in I.T.A. No. 1549 of 2009 in favour of the assessee and against the Revenue and we reject the appeal."

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

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

4.21 We note that the above decision has since been affirmed by the Hon'ble Bombay High Court in **ITA No. 1849 of 2011**.

4.22 For the reasons discussed in the foregoing and following the decisions (supra)in the given facts, we accordingly uphold theLd CIT(A)'s

view that only the profit element embedded in the on-monies ought to be assessed to tax.

4.23 Now we come to the issue of estimating the profits of the assessee. The Ld. CIT(A) is noted to have estimated the profit at 20% of the on-monies, as offered by the assessee in the return(s) of income, by observing as under:-

> "6.5.29 Now the issue before the undersigned is to ascertain what can be the profit that is embedded in such unaccounted cash receipts that can be attributed as additional business income. The search team has not come across any evidences relating to the expenses or any unaccounted investments relating to such unaccounted cash receipts.
>
> ….
>
> 6.5.31 As brought out by the appellant, the search has not resulted in identifying any unexplained expenditure or investment. Only the unaccounted cash receipts were found. In such a scenario, the best option available before the undersigned is to estimate the profit margin that can be attributed as additional business income for the respective assessment years. Naturally any estimation should have some basis. The Income Tax Act, 1961 provides certain presumptive provision(s) to tax income when books of accounts are not maintained. Some of these are envisaged in section 44AD, 44AAD of the Act wherein the income is allowed to be estimated upon percentage. The provisions of section 44AD allows to taxation @ 8% of total receipts as taxable income. Whereas in section 44AAD of the Act, tax is not a fixed rate; it is based on the presumptive income calculated at 8% or 6%, and then the individual tax rates are applied based on total receipts. Thus, the undersigned placing reliance upon the above judicial decisions of the view that only the profits embedded in such receipts should be taxed and not the entire receipts as a whole and therefore disagrees to the action of the AO in adding the entire cash receipts. During the course of appellate proceedings, the appellant has made a submission in this regard, the relevant extract of the same is reproduced here as under.
>
> > *"Further, without prejudice to the submissions that no addition is required and considering that no corroborative*

evidence has been brought forward by the Assessing Officer, an adhoc sum of Rs.4,99,00,479/- being 20% of the purported unaccounted cash receipts has already been offered by the appellant in the return of income filed u/s.148 in order to buy peace and avoid litigation. It is most humbly prayed that the adhoc sum of Rs.4,99,00,479/- being 20% of the purported unaccounted cash receipts may be accepted.

However, even if it is considered that the contention of the appellant that an adhoc 20% of the purported unaccounted cash receipts is not to be accepted, it is most humbly submitted that the Assessing Officer while computing the addition has not considered the sum of Rs.4,99,00,479/- offered in the return of income but has added the full amount as per the purported excel sheet to the tune of Rs.24,95,02,394/- while computing the total income of the appellant and therefore without prejudice to the above submissions, the disallowance at the least is to be reduced by Rs.4,99,00,479/- since the same has been already offered in the return of income."

6.5.32 On perusal of the assessment order(s) passed by the AO, it can be seen that the AO has specifically narrated about the admission of 20% upon such undisclosed cash receipts identified during the course of search. The details of the additional income and 20% of the undisclosed cash receipts are as under:

(Amount in Rs.)

A.Y.	Income return in original ROI /154*	Income Returned u/s 148 of the Act	Unaccounted income quantified on account of "EB"	Additional income admitted on account of EB	Addition made as unaccounted cash receipts
2015-16	8,00,06,030/-	8,39,47,221/-	1,97,05,945/-	39,41,191/-	1,57,64,756/-
2016-17	8,41,87,390/-	8,88,69,163/-	2,34,08,884/-	46,85,773/-	1,87,27,107/-
2017-18	6,81,27,989/-*	7,41,48,530/-	3,12,40,213/-	60,20,541/-	2,52,19,672/-
2018-19	21,32,86,450/-	21,32,86,450/-	3,53,50,730/-	0	3,53,50730/-
2019-20	20,70,08,700/-	21,35,55,260/-	3,27,32,815/-	65,46,563/-	2,61,86,252/-
2020-21	12,62,67,540/-	16,16,43,500/-	10,08,52,658/-	2,01,70,532/-	8,06,82,126/-
2021-22	12,67,18,340/-	16,26,97,990/-	13,39,48,744/-	2,67,89,749/-	10,71,58,995/-
2022-23	27,80,69,230/-	---	24,95,02,394/-	4,99,00,478	24,95,02,394/-

6.5.33 It is observed that for the AY 2018-19, the AO has brought on record the claim of the assessee about the admission of Rs. 70,70,146/-. In this regard the AR contended that during the course of

assessment proceedings, the Computation of total income was re-worked and the additional income offered was incorporated and the consequent taxes were paid, whereas in the assessment proceedings completed the re-working of additional income admitted was not considered by the AO. Further, the AR during the course of appellate proceedings, submitted that on the basis of the survey conducted on 24.01.2019, the AO issued a notice u/s 148 of the Act on 05.04.2022 and the assessee filed the return of income in response to the notice issued u/s 148 of the Act on 04.05.2022 which is before the date of search. Consequent to the search u/s 132 of the Act on 14.02.2023, the AO issued another notice u/s 148 of the Act, however, the assessee could not file any return in response to the second notice issued u/s 148 of the Act on account of technical glitches. Therefore, the assessee admitted 20% of the EB quantified during the course of search as additional income in the revised computation during the course of assessment proceedings before the AO.

6.5.34 Further for the AY 2022-23, the appellant has demonstrated the declaration of additional income and payment of consequent taxes, the same merits consideration. The assessee company has filed its return of income for the AY 2022-23 before the date of search and could not revise the return of income. As no other option was available to the assessee company to revise its return of income, the appellant has admitted additional income amounting Rs. 4,99,00,479/- during the course of assessment proceedings and filed revised computation, which has been brought on record by the AO in the assessment order.

6.5.35 In view of the above findings, discussions and judicial decisions, when the appellant has admitted voluntarily an amount of 20% of the undisclosed cash receipts as additional business income , which stands to be over and above the percentage prescribed in the presumptive sections of the Act as well as the percentage considered by various judicial forums (8%, 12.5%, 15% etc) the undersigned is of the considered view that the appellant company has adequately admitted its undisclosed income arising out of the unaccounted cash receipts collected from customers of various projects carried out by the appellant for the assessment years under consideration and therefore no further addition is warranted to the facts and circumstances of the case of the appellant company. Accordingly, all the grounds raised by the appellant upon this issue for all the years under consideration are hereby treated as allowed and the AO is directed to delete the addition(s) made in the respective assessment years as under:

AY 2015-16	AY 2016-17	AY 2017-18	AY 2019-20	AY 2020-21	AY 2021-22
Rs.1,57,64,756/-	Rs.1,87,27,107/-	Rs.2,52,19,672/-	Rs.2,61,86,252/-	Rs.8,06,82,126/-	Rs.10,71,58,995/-

> 6.5.36 For the AY 2018-19, the undersigned has observed that the appellant has not admitted additional income in the return of income filed in response to the notice u/s 148 of the Act for the AY 2018-19 due to certain technical glitches as brought out in para 6.5.33. As the appellant had no occasion to admit the additional income in the return of income filed, the appellant during the course of assessment proceedings has admitted additional income in its revised computation by admitting Rs. 70,70,146/- being 20% of unaccounted cash receipts, therefore, the undersigned is constrained to sustain (20% of Rs. 3,53,50,730/- of the addition made by the AO) Rs. 70,70,146/- and the AO is directed to delete the balance amount of Rs. 2,82,80,584/- for the AY 2018-19. Similarly for the AY 2022-23, the appellant company has not admitted additional income in the return of income filed u/s 139 of the Act, however the appellant, during the course of assessment proceedings has admitted additional income of Rs. 4,99,00,478/- being 20% of the unaccounted cash receipts from various projects for the AY 2022-23 in the revised computation. Therefore, the undersigned is constrained to sustain 20% of24,95,02,394/- of the addition amounting Rs. 4,99,00,478/- and the AO is directed to delete the balance amount of Rs. 19,96,01,916/- for the AY 2022-23."

4.24 The Ld. CIT, DR appearing before us was unable to controvert the above estimation exercise conducted by the Ld. CIT(A). We also note that, the Constitutional Courts in their wisdom have generally estimated profit element in the range of 8% to 12.5% on the cash receipts involved in the business of real estate. In light of the foregoing, we thus agree with the Ld. CIT(A) that the assessee's offer of 20% of the on-monies receipts in the return(s) of income filed u/s 148 of the Act was fair and reasonable. Hence, according to us, no further addition on the impugned issue is warranted. Overall, therefore, we uphold the above order of Ld.

CIT(A). Hence, the grounds taken by both the assessee and Revenue on this issue stands dismissed.

5 Issue 2: Addition made on account of cash collections from sale of plots in Project Residencia

Ground Nos. 6 for the Revenue's appeal and Ground Nos. 3 of the assessee's appeal for AY 2021-22

Ground Nos. 6 for the Revenue's appeal and Ground Nos. 3 of the assessee's appeal for AY 2022-23

5.1 These grounds relate to the addition made on account of cash on-monies received upon sale of plots in the project "Residencia". The facts as noted are that, the assessee had undertaken "RESIDENCIA" project which is a plotted development at Thaiyur consisting of 190 plots. In the course of search, the Investigating Officer found another excel sheet named "Project Payables Final (EB).xlsx" found in "E-Drive" of Smt Karthika's Laptop as well as in 'Kingston Data Traveller 16GB Pendrive', from which it was gathered that, the assessee had received payments towards "EB" viz., cash*(as already held by us above)*towards sale of certain plots, aggregating Rs.1,02,48,505/- across AYs 2021-22 & 2022-23. The AO is noted to have added the entire notings of cash on-monies by way of undisclosed income of the assessee. On appeal the Ld. CIT(A) restricted the addition to the profit element embedded in the on-monies

which was estimated at 12.5%. Now, both the assessee and Revenue are in appeal before us.

5.2 Heard both the parties. Following our findings rendered while adjudicating Issue No.1 above, we hold that the notings contained in the impugned excel sheet under the heading "EB" indeed denoted cash collections upon sale of plots. Likewise, we also hold that, the AO's action of adding the entire on-monies by way of income of the assessee was not justified and that only the profit element embedded therein ought to have been brought to tax. As noted by us, while adjudicating Issue No. 1 above, the judicial forums across India have generally estimated profit in the range of 8%-12.5% in relation to on-monies involved in real estate. Respectfully following the same, we thus countenance the Ld. CIT(A)'s action of estimating the profits embedded in the impugned cash receipts at 12.5%. Hence, we see no reason to interfere with the order of Ld. CIT(A) on this issue. Accordingly, these grounds raised by the Revenue and cross objections of the assessee are dismissed.

6. Issue 3: Addition u/s.43CA

Ground Nos. 6 for the Revenue's appeal and Ground Nos. 4 to 8 of the assessee's appeal for AY 2021-22

Ground Nos. 6 for the Revenue's appeal and Ground Nos. 4 to 8 of the assessee's appeal for AY 2022-23

6.1 This ground relates to addition made by way of deemed sales consideration in relation to plots sold at the project "Residencia" in terms of Section 43CA of the Act. Briefly stated the facts relating to this issue are that, the AO had observed that, the assessee had sold 23 plots out of the 190 plots at project "Residencia" which was below the guideline value of Rs.2500/- per sq.ft. The AO accordingly tabulated the actual sale consideration of these 23 plots and the deemed sales consideration as per guideline value in terms of Section 43CA of the Act and added the differential sum of Rs. 51,36,281/- & Rs. 58,75,349/- in AYs 2021-22 & 2022-23. On appeal, the Ld. CIT(A) observed that the AO had failed to allow the benefit of the tolerance limit of 10% set out in Section 43CA of the Act, which was increased to 20% for the period 12.11.2020 to 30.06.2021 in terms of first and second proviso to Section 43CA of the Act. The Ld. CIT(A) accordingly analyzed and compared the actual rates with the guideline rates, after allowing the benefit set out in first and second proviso to Section 43CA of the Act and found that the actual sale value of 15 plots fell within the tolerance limit and thus deleted the notional addition made u/s 43CA of the Act in relation thereto. Since the actual sale value of the remaining eight (8) [23-15] plots fell outside the tolerance limit, the Ld. CIT(A) accordingly re-computed and upheld the addition in respect to these plots, by observing as under: -

"The undersigned while analyzing the registered value / guide line value and the sale value in respect of the following cases, the sale value is lesser than 10% of the guide line value. The cases identified are as under.

Sl No	Customer Name	Plot No	Area in Sq. ft	Status	Rate	Sale Value	Sale Value of Plots Sold	Guideline value	DOR
1	Dr. A. Nisha	99	2550	SOLD	1800	4608000	4608000	2500	11-06-2020
2	Mithun Sai Sundar A	100	2182	SOLD	1800	3927600	3927600	2500	11-06-2020
3	Vijaya a	129	1382	SOLD	2113	2920166	2920166	2500	26-04-2021
4	Navuneetha Krishnan	103	2122	SOLD	2200	1668400	1668400	2500	16-09-2021
5	Anupriya	104	2180	SOLD	2200	4796000	4796000	2500	08-11-2021
6	Logu	2	1973	SOLD	2225	4389925	4389925	2500	28-10-2020
7	Logu	65	1651	SOLD	2225	3673475	3673475	2500	28-10-2020
8	Gurunathan	23	1208	SOLD	2248	2715584	2715584	2500	25-02-2021

In respect of those cases, the AO should have re- computed the sale consideration in respect of the cases which are below 10% of the guide line value (Rs. 2500/- per sq ft) i.e. Rs. 2250/- per sq ft to arrive at the Short admission of business income arising out of sale of plots in project Residencia as per the provisions of section 43CA of the Act for the AY(s) 2021-22 & 2022-23. The undersigned has worked out the sale consideration after providing 10% benefit as provided under the *proviso* to section 43CA (1) of the Act. Accordingly, the short admission is worked out for the AY 2021-22 at Rs. 41,37,325/- and for the AY 2022-23 is at Rs. 31,06,100/- as against the addition of Rs.51,36,281/- & 58,75,349/- contemplated by the AO. Therefore, out of the addition of Rs.51,36,281/- & 58,75,349/- for the AY(s) 2021-22 & 2022-23 a sum of Rs. 41,37,325/- & Rs. 31,06,100/- are hereby sustained and the AO is directed to delete the balance addition of Rs.9,98,956/- & Rs.27,69,249/- for the AY(s) 2021-22 & 2022-23 respectively."

6.2 Aggrieved by the above order of the Ld. CIT(A), both the assessee and Revenue are in appeal before us.

6.3 Heard both the parties. We first take up the addition made u/s 43CA of the Act in relation to the 15 out of the 23 plots which were deleted by the Ld. CIT(A). Before us, the Ld. CIT, DR appearing for the Revenue was unable to controvert the factual finding of the Ld. CIT(A) that, the actual sale rates of these 15 plots in question fell within the tolerance range of 10% (20% for the period 12.11.2020 to 30.06.2021) as set out in first & second proviso to Section 43CA of the Act. We thus see no reason to interfere with the order of the Ld. CIT(A) deleting additions to the extent of Rs. 9,98,956/- & Rs. 27,69,249/- in the AYs 2021-22 & 2022-23 respectively.

6.4 Now we take up the additions of Rs. 41,37,325/- & Rs. 31,06,100/- sustained by the Ld. CIT(A) in relation to the remaining eight (8) plots in AYs 2021-22 & 2022-23. It is not in dispute that, the actual sales value of these plots was lesser than the tolerance range of 10% set out in Section 43CA of the Act and therefore the AO was legally entitled to add the differential sum as deemed sales consideration of the assessee. The Ld. AR for the assessee has however asserted that, the lower authorities ought to have referred the matters to the DVO as mandated in Section 43CA(2) of the Act. According to Ld. CIT, DR however, the assessee had not raised such a plea before the AO and therefore the Ld. CIT(A) had rightly rejected the same. We however do not agree with this action of the

Revenue. It is noted that the Hon'ble Calcutta High Court in the case of **Sunil Kumar Agarwal vs. CIT (372 ITR 83)** has held that, even if the assessee has not requested for reference to DVO, but there exists difference between the actual sales value and the guideline value, then the AO is duty bound to made reference to the DVO. The Hon'ble High Court has further held that, an assessee's failure in raising such a reference plea is not fatal in income tax proceedings as the Assessing Officer has to make statutory reference to the DVO u/s 50C of the Act. The relevant findings of the Hon'ble High Court which are found to be applicable to the instant case before us, is as follows: -

> "8. For the aforesaid reasons, we are of the opinion that the valuation by the departmental valuation officer, contemplated under Section 50C, is required to avoid miscarriage of justice. The legislature did not intend that the capital gain should be fixed merely on the basis of the valuation to be made by the District Sub Registrar for the purpose of stamp duty. The legislature has taken care to provide adequate machinery to give a fair treatment to the citizen/taxpayer. There is no reason why the machinery provided by the legislature should not be used and the benefit thereof should be refused. Even in a case where no such prayer is made by the learned advocate representing the assessee, who may not have been properly instructed in law, the assessing officer, discharging a quasi judicial function, has the bounden duty to act fairly and to give a fair treatment by giving him an option to follow the course provided by law.
>
> 9. For the aforesaid reasons, the order under challenge is set aside.
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> 10. The impugned order including orders passed by the CIT(A) and the assessing officer are all set aside. The matter is remanded to the assessing officer. He shall refer the matter to the departmental valuation officer in accordance with law. After such valuation is made, the assessment shall be made de novo in accordance with law.

6.5 In view of the above therefore, we deem it appropriate to restore the instantissue back to the AO with a direction to refer the matters to the DVO and accordingly frame the assessment on this limited issue de novo and in accordance with law.

7 Issue 4: Addition made on account of unaccounted cash sales of scrap

Ground Nos. 4 for the Revenue's appeal and Ground Nos. 2 of the assessee's appeal for AY 2021-22

Ground Nos. 4 for the Revenue's appeal and Ground Nos. 2 of the assessee's appeal for AY 2022-23

7.1 These grounds relate to addition made by the AO on account of unaccounted sale of scrap. The facts as noted are that, in the course of search, a pen drive was found from the possession of Shri Ananda Padmanabhan, DGM, Purchase Department which inter alia contained another two excel sheets titled 'scrap material value sep20 to mar22.xlsx' (Path: E:\SCRAP)& 'Asset Material Details 21.09.20.xlsx' (Path: E:\SCRAP). Upon enquiry, Shri Ananda Padmanabhan explained that this excel sheet contained the data of scrap sales made during the period from September 2020 to March 2022 at the various project sites, which was usually collected in cash. According to him, only when the payment for scrap sold was received through banking channel, that it was accounted in the books of accounts and that the cash receipts upon sale of scrap was

not accounted for. Upon compilation of data found from the excel sheets, it was gathered that cash proceeds of Rs. 75,44,677/- and Rs.50,45,752/- were received in FYs 2020-21 & 2021-22 upon sale of scrap which was not disclosed in the books of accounts. The AO is noted to have added the aforesaid sum(s) to the assessable income for AYs 2021-22 & 2022-23. On appeal the Ld. CIT(A) is restricted the addition to 20% of the cash proceeds received from sale of scrap. Aggrieved by the order of Ld. CIT(A), both assessee and Revenue are in appeal before us.

7.2 We have heard both the parties. While adjudicating Issue No. 2 above, we have already upheld the evidentiary value of the contents of the excel sheets found in the pen drive found from the possession of Shri Ananda Padmanabhan and his statement recorded u/s 132(4) of the Act. It is also noted that, in the same excel sheet, there were notings of scrap sales whose payments were received in cheque and the same has been found to correlate with the entries in the regular books of accounts. This material fact corroborates the Revenue's case that the notings of scrap sales made in cash found on the same excel sheet cannot be ignored or treated as a dumb noting. Accordingly, the plea of the assessee that the impugned addition was based on loose sheets & statement(s) having no evidentiary value is hereby rejected.

7.3 Now we address the dispute relating to the income attributable in relation to the unaccounted proceeds received from sale of scrap. Having regard to the specific nature & magnitude of work of the assessee, numerous project sites, we agree with the assessee's alternative submission that, the scrap generated at project sites are usually sold the employee(s) working there and there is a likelihood that the actual scrap sale proceeds would not fully reach the coffers of the assessee. Reason being, there is no fixed or rationale basis for ascertaining the price of scrap. The scrap is usually valued by the vendor at the time of removal and the scrap price communicated by the employee(s) to the head office is generally accepted at its face value. It is common in such businesses that, the scrap is sold partly in cheque and cash and that, the cheque component ordinarily reaches the assessee and portion of the cash proceeds are siphoned off by the employee(s) selling the scrap. We thus find force in the assessee's submission that, the excel sheet found from the possession of employee, Shri Ananda Padmanabhan may have been maintained by him for his own personal records and it is not necessary that the cash notings found therein would have been fully passed on by him to the assessee. The Ld. AR further pointed out that, Shri Ananda Padmanabhan also left the company immediately post search without any explanation, which further strengthens the assessee's case that, these cash proceeds from scrap sale were never received by it. On this aspect,

we find that, the Ld. CIT(A) has examined the gamut of facts, as discussed in the foregoing, and accordingly estimated the addition on account of unaccounted sale of scrap at 20%, by observing as under: -

> "In the present case the facts reveals that there exists some scrap which were sold and a part of the sale consideration was brought into the books. The AR during the course of appellate proceedings, has made a strong plea that such sale of scrap are being generally usurped by the company staff itself and it was not generally insisted or monitored and pleaded that only a reasonable portion can be made as income. The undersigned has carefully examined the scenario brought out by the AR. In this back ground after considering all the facts and circumstances of the case, the undersigned is of the considered view that 20% of the addition made requires to be sustained and the balance 80% requires to be deleted. Thus, out of the addition of Rs. 74,45,751/- for AY 2021-22 and Rs. 75,44,678/- for AY 2022-23 a sum of Rs. 14,89,150/- for AY 2021-22 and Rs. 15,08,936/- for AY 2022-23 are hereby sustained and the AO is directed to delete the balance addition of Rs. 59,56,601/- for AY 2021-22 and Rs. 60,35,742/- for AY 2022-23 respectively."

7.4 According to us, on the given facts of the case, as discussed in the foregoing, the above findings of the Ld. CIT(A) doesn't warrant any interference. Accordingly, both the grounds raised by the Revenue and cross objections of the assessee are dismissed.

8. Issue 5: Addition made on account of bogus purchase of steel

Ground Nos. 3 for the Revenue's appeal and Ground Nos. 6 & 7 of the assessee's cross-objection for AY 2020-21

Ground Nos. 3 for the Revenue's appeal and Ground Nos. 6 & 7 of the assessee's cross-objection for AY 2021-22

Ground Nos. 3 for the Revenue's appeal and Ground Nos. 3 & 4 of the assessee's cross-objection for AY 2022-23

8.1 These grounds relate to the disallowance of purchases of steel made by the assessee from M/s PK Vaduvammal. The facts as noted are that, during the course of search, a pen drive was seized from the possession of Shri. Ananda Padmanabhan, DGM, purchase department of the assessee which contained a folder named "PKV" comprising of several excel sheets. Upon perusal of the excel sheets, the Investigating Officer suspected that M/s PK Vaduvammal was issuing bogus invoices of sale of steel to the assessee. When confronted, Shri. Ananda Padmanabhan in his statement recorded u/s 132(4) of the Act is noted to have stated that M/s PK Vaduvammal was genuinely supplying steel to the assessee but at the same time was also issuing bogus invoices. He is noted to have explained that, the genuine invoices were identifiable based on the corresponding transport challans and weighment slips and that the bogus invoices did not have these supporting documents. He thus is noted to have stated that, excel sheet contained details of the payments made through cheque for both genuine and bogus purchases and cash recovered from the supplier. ShriAnanda Padmanabhan is noted to have provided the details of bogus invoices booked in the name of M/s PK Vaduvammal, which aggregated to Rs.31,13,06,763/- for AY2020-21 to AY 2022-23 (infra) [*reference made by AO in respect of FY 2022-23 (AY 2023-24) is not considered/discussed, since it is not the relevant year before us*]. It is observed that, the search team had also confronted Shri. P.C.

Shyamsundar, Partner in M/s. PK Vaduvammal, who in his statement recorded u/s 131 of the Act, is noted to have confirmed the version of ShriAnanda Padmanabhan and also affirmed the following details of bogus invoices issued to the assessee.

AY	Amount (Rs)
2020-21	9,84,21,251/-
2021-22	5,32,10,303/-
2022-23	15,96,75,209/-
TOTAL	**31,13,06,763/-**

8.2 Though the assessee in the return(s) of income filed in response to notices u/s 148 of the Act is found to have, out of caution, admitted to 15% of the bogus purchases by way of the profit element embedded therein, but it contested the allegation of bogus purchases in its entirety levelled by the Revenue.

8.3 The AO, in the course of assessment, is noted to have show caused the assessee as to why the entire purchases value was not disallowed in the return(s) of income. In response, the assessee is found to have submitted that, the statement of Shri Ananda Padmanabhan was unreliable and that he had made false assertions before the search team and had thereafter left the assessee company without offering any explanation for doing so. The assessee controverted the statement of Shri Ananda Padmanabhan by submitting that, the purchases which were

being alleged to be bogus were supported by GST invoices whose payments were also discharged through proper banking channel. The assessee is noted to have furnished copies of the invoices, bank statements, GSTR returns etc. to substantiate the genuineness of the purchases. According to the assessee, the artificial bifurcation made in relation to the purchases made from M/s PK Vaduvammal to identify genuine & bogus purchases, by segregating the purchases which were supported by transportation challans and weighment slips and those purchases which were not supported by such documentation, was unjustified. According to the assessee, not all the transportation challans and weighment slips were maintained in the head office and that most of these documents were retained at the respective project sites and thus the reasoning given by Shri Anand Padmanabhan in his statement was based on mistaken / wrong assumption of fact. In so far as the statement of Shri P.C. Shyamsundar was concerned, the assessee submitted that it didn't getopportunity to cross-examine Shri. P.C. Shyamsundar and therefore the reliance being placed on this third-party statement was bad in law. The AO is noted to have given his detailed reasoning rejecting these contentions of the assessee and thereafter disallowed the entire value of purchases which was identified to be bogus in nature. On appeal, the Ld. CIT(A) though upheld in principle that the purchases identified by Shri Ananda Padmanaban and also confirmed by Shri. P.C. Shyamsundar,

Partner in the supplier M/s. PK Vaduvammal was bogus, but held that only the profit element embedded therein was to be brought to tax. The Ld. CIT(A) is found to have accepted the assessee's offer of 15% of the value of purchases as well as made an additional upward adjustment/addition of 2% of thevalue of purchase making it at 17% of the value of purchase. Being aggrieved by the order of the Ld. CIT(A), both the assessee and the Revenue are in appeal before us.

8.4 We have heard both the parties. From the facts placed before us, it is noted that, the search team had found electronic data which contained details of the purchases made by the assessee from M/s PK Vaduvammal. When enquired in the course of search, the employee of the assessee, Shri Ananda Padmanaban is noted to have also admitted and identified the bogus purchases made from M/s PK Vaduvammal and that he didn't retract from his statement. Thereafter, the search team made independent enquiry u/s 131 of the Act from the supplier as well, who also confirmed the statement of Shri P.C. Shyamsunder. We agree in principle with the submission of the Ld. AR that an admission/ statement alone is not sufficient to justify an addition but at the same time the onus is on the assessee to rebut the statement with corroborative evidence. On the given facts, it is noted that the assessee has only been able to furnish the relevant tax invoices, ledgers and bank statements in support of

purchases. The AO, on the other hand, is noted to have shown that, the supplier had also admitted to have issued bogus invoices and that these invoices were not supported by weighment slips and transportation challans and that the seized electronic data also suggested that these purchases were suspicious. Overall, therefore, we are in agreement with the authorities below that the assessee was unable to fully discharge the genuineness of the purchases which were identified to be bogus.

8.5 The next issue for consideration is whether the entire value of payments made to the suppliers was to be disallowed or only the profit element embedded therein was to be taxed in hands of the assessee. From the material available on record, we find that it is not the case that the supplier is a bogus or shell entity. M/s PK Vaduvammal is indeed a steel supplier and it is also not in dispute that the said supplier had genuinely supplied steel to the assessee. Instead, it is a case that some of the invoices issued by M/s PK Vaduvammalwere not fully backed by supporting documentation and therefore have been held to bogus. It thus appears to be a case that, the assessee would have purchased these materials from the grey market and obtained the bills/invoices from this supplier. In this regard, the Ld. AR has rightly pointed out that, the quantitative details, consumption of raw materials, construction of the buildings, corresponding sales and the book results have not been

rejected by the AO. It is also not the case of the Revenue that in the given facts of this case, the volume of purchases made by the assessee was excessive or that the steel shown to have consumed in the construction of real estate was unreasonably high. Rather, the AO is noted to have accepted the overall book results of the assessee. According to us therefore, it is a case where the purchases were indeed made for the business, but*albeit* from different parties in grey market, and the assessee had obtained invoices from M/s PK Vaduvammal in relation thereto. In this regard, we may gainfully refer to the decision of the Hon'ble Gujarat High Court in the case of **CIT Vs Bholanath Polyfab (P.) Ltd. (355 ITR 290)** wherein similar issue was involved. In that case also, it is noted that this Tribunal was of the opinion that the purchases might have been made from bogus parties but the purchases themselves were not bogus. Considering such a situation, this Tribunal was of the opinion that not the entire amount of purchases but the profit margin embedded in such amount would be subjected to tax. On appeal by the Revenue, the Hon'ble High Court is noted to have upheld this finding of the Tribunal.

8.6 We find that the above decision was followed with approval by the Hon’ble jurisdictional Madras High Court in the case of **CIT Vs SPL Infrastructure Limited (274 taxman 292)**. In the decided case, the

assessee was engaged in the business of development of civil infrastructure. The assessee had incurred expenses by way of payments made to sub-contractors. According to the AO, the assessee was unable to discharge the identity, credibility and genuineness of the Sub-Contractors and therefore disallowed the entire expenditure. On appeal the Tribunal restricted the disallowance to 10% of the expenditure incurred towards sub-contractors. Aggrieved by the action of the Tribunal, the Revenue had inter alia raised the following questions of law before the Hon'ble jurisdictional High Court.

> "(i) Whether the Tribunal was correct in restricting the disallowance to 10% of expenditure of Rs. 4,41,08,210/- incurred towards sub-contractors even though the assessee had failed to prove the identity, credibility and genuineness of the Sub-Contractors?
>
> (ii) Whether the Tribunal was right in not appreciating the findings of the Assessing Officer that the contractors were non-existent, in-experienced, incompetent and bogus and the assessee had claimed the said expenditure only to reduce the income and the tax incidence on the income."

8.7 The Hon'ble High Court noted that, since these sub-contractors were not verifiable, the possibility of inflation of expenses could not be ruled out but at the same timeagreed with the action of Ld. CIT(A) &Tribunal of not disallowing the entire expenses but restricting the same to 10%. The Hon'ble High Court observed that the disallowance of entire payments to sub-contractors would result in abnormal profitability and therefore countenanced the action of lower appellate authorities in

estimating the profit element embedded in such inflated expenses. The relevant findings taken note of by us is as follows: -

> "12. A bare perusal of the compared results of the Gross Profit and Net Profit by the Assessee given in para 7 of the Tribunal's order clearly shows that the said Gross Profit at the rate of 14.21% and Net Profit at the rate of 3.83% declared by the Assessee, with the addition of 10% agreed by the Assessee before the learned Commissioner of Income-tax (Appeals), resulted in a much better result of profits declared by the Assessee in the present Assessment Year viz., A.Y. 2010-11 as compared to the previous years. The Net Profit rate in the previous three years was less than 3%, whereas the Assessee himself declared the net profit at the rate of 3.83% before the aforesaid addition of 10% of Rs. 4,41,08,210/-. Therefore, the estimation of profit by the Appellate Authorities even on the premise taken by the Assessing Authority that some of the Sub-Contractors could not be produced before the Assessing Authority, does not result in any perversity in the findings of the learned Commissioner of Income-tax (Appeals) as well as the learned Tribunal.
>
> 13. It is well known that where the books of accounts maintained by the contractors are not accepted by the Department, the estimation of profit made on the basis of history of Gross Profit rate and Net Profit rate of the Assessee in the previous years or comparable cases of contractors can be made. Once such profit rates are compared, the additions on account of non-confirmation or non-production of the Sub-Contractors, etc. is totally irrelevant and cannot be made.
>
> 14. In the hierarchy of the fact-finding bodies created under the Income-tax Act, obviously the findings of the Assessing Authority stand superseded for all purposes, by the findings of the higher appellate authorities. Unless glaring perversity in the findings of the appellate authorities are pointed out and established by the Revenue in the Appeals filed by them under section 260A of the Act, there is nothing for the High Court or Constitutional Courts to do in such matters. The findings of fact arrived at by the Authorities below are binding on the High Court under section 260A of the Act, unless the perversity as aforesaid is clearly visible, established and proved.
>
> 15. As aforesaid, as against the perversity in these findings, we see a better taxable income finally taxed in the hands of the assessee, albeit with the agreement to disallowance to the extent of 10% of the payments made to the Sub-Contractors, which the assessee appears to

> have agreed under the compulsion of circumstances to avoid litigation and to buy peace.
>
> 16. In fact, the results declared by the Assessee of the net profit rate at the rate of 3.83% was much better as compared to previous three years and only marginally less than the previous two years of 2005-06 and 2006-07, which were at the rate of 4.20% and 3.94%. In these circumstances, no disallowance was called for. Still, if the Assessee agreed to such addition to apparently buy peace with the Department, we fail to understand as to why the Revenue has filed these Appeals to drag cases further in the High Court incurring the loss of man hours and cost of litigation. Such unnecessary litigation on the part of the Revenue Authorities deserves to be strongly deprecated, but, the Revenue Authorities do not seem to be seeing the sense behind this and keep on filing Appeals under section 260A of the Act, as a matter of routine."

8.8 We also gainfully refer to the decision of the Hon'ble Calcutta High Court in the case of **PCIT v. Sikaria Infra Projects (P.) Ltd. (165 taxmann.com 48)**. In the decided case, the assessee was also a contractor engaged in development of infrastructure. The AO is noted to have doubted the genuineness of purchases and held it to be bogus for being non-verifiable. The AO accordingly rejected the book results and estimated the income of the assessee at a much higher sum. On appeal, the Hon'ble High Court held that, even if the purchases were not verifiable, it was not in dispute that the assessee had indeed carried out civil construction and therefore would have made purchases otherwise. Accordingly, it held that only the profits could have been estimated by the AO which was determined at 8%. The relevant findings are as follows: -

> "3. Learned Counsel for the revenue/appellant submits that certain purchases disclosed by the assessee were found not variable and therefore the additions were lawfully made by the assessing officer.

Therefore, there was no occasion for the CIT(A) to apply a net profit rate based on the net profit disclosed by others in the same line of trade. He, therefore, submits that the appeal deserves to be allowed and the substantial question of law deserves to be answered in favour of the revenue.

….

6. We find that the respondent/assessee is a private limited company engaged in business of civil contract. During the assessment year 2009-10 the assessee executed two projects as 'sub contractor' on behalf of M/s. Hindustan Steel Works Ltd. and M/s. Engineering Projects of India Ltd. for construction of road under 'Prime Minister Gramin Sadak Yojana and construction of central jail at Vishalgarh, Tripura'. During the assessment year in question the assessee had made purchase of Rs.13,85,34,422/- from various parties which were claimed as deduction in its profit and loss account. The details of parties were furnished during the assessment proceedings. The assessing officer issued notice under Section 133(6) of the Income Tax Act, 1961 (hereinafter referred to such Act, 1961) to the parties for verification of the transaction with the assessee. Assessing officer found certain mismatch in the figure of purchase disclosed by the assessee from the parties and the reply received from the parties in response to notices under Section 133(6) of the Act, 1961. It was also found that several parties had not responded to the notices under Section 133(6) of the Act, 1961. Under the circumstances, the assessing officer rejected the books of accounts and the disclosed profit and determined total income at Rs.10,14,99,264/- as against the disclosed total income of Rs.85,49,460/-. The assessing officer made addition in income of Rs.9,29,49,804/-, as under:

(i) On account of inflated/bogus purchase from eight parties but notices under Section 133(6) of the Act, 1961: Rs.1,56,90,244/-.

(ii) On account of not producing eight parties by the assessee during assessment proceedings under Section 133(6) of the Act, 1961: Rs.66,54,040/-.

(iii)On account of no reply submitted by six parties to notices under Section 133(6) of the Act, 1961: Rs.2,16,21,174/-.

(iv)On account of no reply received from eleven parties pursuant to notices under Section 133(6) of the Act, 1961: Rs.4,89,43,299/-.

(iv)Penalty amount not disallowed by the assessee while computing its income: Rs.41,047/-.

Total Rs.9,29,49,804/-.

7. The CIT(A)-VI, Kolkata in appeal no. 264/CIT(A)-VI/Cir-6/11-12/Kol disposed of the appeal by a detailed order dated 9.11.2012 while determining the total income at Rs.1,79,98,687/- by appellant and net profit rate of 8% on the contract received of Rs.22,49,83,589/-. While affirming the best judgment assessment and after detailed discussion and reference to various judgments of Hon'ble Supreme Court, different High Courts and Tribunal in paragraphs 11 to 20 of its order, concluded in paragraph 21 and 22 as under:

….

10. It has not been disputed by the assessing officer that the assessee carried civil work and in view thereof he received a certain amount as consideration. The materials in execution of contract have not been disbelieved by the assessing officer. In this regard, the CIT(A) and ITAT have also recorded findings of fact. The ITAT has also noticed net profit rate of last seven years which ranged from 0.45% to 3.84%. The ITAT has also noticed net profit rate determined in matters of others in the same line of trade, to be about 4%. The assessee himself has agreed before the CIT(A) for net profit at the rate of 8% on the gross receipts under the contract. Learned Counsel for the appellant could not place any material before us on the basis of which determination of net profit at the rate of 8% in the line of trade of the respondent/assessee can be said to be perverse or insufficient under the facts and circumstances of the present case. The findings recorded by the CIT(A) and the ITAT for applying the net profit rate of 8% on the gross receipts under the contract, cannot be said to suffer from any apparent illegality in the facts and circumstances of the present case."

8.9 Applying the ratio decidendi laid down in the above decision (supra), if in the present case, the purchases from M/s. PK Vaduvammal were disallowed as done by AO, then the profits of the company before the disallowance and after the disallowance would throw distorted and incorrect results. In this case, we find that the genuinity of certain bills/invoice from M/s. PK Vaduvammal are under cloud, not the quantity of purchases, since it has been put to use as noted at Para No.8.5 (supra)

Hence, the AO's action of disallowing the purchases from M/s. PK Vaduvammal, in the facts of the instant case was unjustified. We thus agree with the Ld. CIT(A) that a reasonable profit qua such bogus purchases was to be brought to tax in the facts & circumstances of the case.

8.10 Our above view is also supported by the decision of Hon'ble Gujarat High Court in the case of **CIT v. Simit P. Sheth (356 ITR 451)**wherein the facts and circumstances involved were similar to the present case. In the decided case also, the purchase of steel made by the assessee were held to be bogus because though the assessee was unable to produce invoices and details of payments but was unable to demonstrate the movement of goods. The AO disallowed the entire purchases holding it to be bogus. On appeal, the Hon'ble High Court noted that, the corresponding sales, book results of the assessee had not been rejected and therefore it was held to be a case where purchases made from parties other than those mentioned in books of account, for which bogus invoices had been obtained from different parties. The Court thus held that, not entire purchase price but only profit element embedded in such purchases could be added to income of assessee. The relevant findings which are applicable to the present case as well, is as under: -

"5. We are broadly in agreement with the reasoning adopted by the Commissioner (Appeals) with respect to the nature of disputed purchases of steel. It may be that the three suppliers from whom the assessee claimed to have purchased the steel did not own up to such sales. However, the vital question while considering whether the entire amount of purchases should be added back to the income of the assessee or only the profit element embedded therein was to ascertain whether the purchases themselves were completely bogus and non-existent or that the purchases were actually made but not from the parties from whom it was claimed to have been made and instead may have been purchased from grey market without proper billing or documentation.

6. In the present case, the Commissioner of Income-tax (Appeals) believed that when as a trader in steel the assessee sold certain quantity of steel, he would have purchased the same quantity from some source. When the total sale is accepted by the Assessing Officer, he could not have questioned the very basis of the purchases. In essence, therefore, the Commissioner (Appeals) believed the assessee's theory that the purchases were not bogus but were made from the parties other than those mentioned in the books of account.

7. That being the position, not the entire purchase price but only the profit element embedded in such purchases can be added to the income of the assessee. So much is clear by the decision of this court. In particular, the court has also taken a similar view in the case of CIT v. Vijay M. Mistry Construction Ltd. [2013] 355 ITR 498 (Guj) and in the case of CIT v. Bholanath Poly Fab (P.) Ltd. [2013] 355 ITR 290 (Guj). The view taken by the Tribunal in the case of Vijay Proteins Ltd. v. Asstt. CIT [1996] 58 ITD 428 (Ahd.) came to be approved.

8. If the entire purchases were wholly bogus and there was a finding of fact on record that no purchases were made at all, counsel for the Revenue would be justified in arguing that the entire amount of such bogus purchases should be added back to the income of the assessee. Such were the facts in the case of Pawanraj B. Bokadia (supra).

9. This being the position, the only question that survives is what should be the fair profit rate out of the bogus purchases which should be added back to the income of the assessee. The Commissioner adopted the ratio of 30 per cent of such total sales. The Tribunal, however, scaled down to 12.5 per cent. We may notice that in the immediately preceding year to the assessment year under consideration the assessee had declared the gross profit at 3.56 per cent of the total turnover. If the yardstick of 30 per cent, as adopted by the Commissioner (Appeals), is accepted the

gross profit rate will be much higher. In essence, the Tribunal only estimated the possible profit out of purchases made through non-genuine parties. No question of law in such estimation would arise. The estimation of rate of profit return must necessarily vary with the nature of business and no uniform yardstick can be adopted."

8.11 We find that the above judgment was again followed by the coordinate Bench of Hon'ble Gujarat High Court in the case of **Pr.CIT Vs Sunil Mittal HUF (164 taxmann.com 709)** wherein also the principle of estimation of profit element in bogus purchases was upheld, by observing as under:-

"10. Considering the submissions made by learned advocate Mr.Sanghani as well as the finding of facts recorded by the CIT(A) and the Tribunal, it appears that so far as the Question No.1 is concerned, the CIT(A) has noted the fact that the Assessing Officer while making addition of the entire purchases has accepted the sales. Therefore, the CIT(A) considering the fact that the Assessing Officer could not have disallowed the entire purchases in absence of any finding on correctness of the amount paid/payable to creditors, the possibility of purchasing the goods from grey market at lower rates and recording the same at inflated price in books of account cannot be ruled out and hence, made an addition of gross profit @ 13.05%. The CIT(A), in support of its findings, relied upon the following decisions:

'(i) The CIT v. Simit P. Sheth [2013] 38 taxmann.com 385/219 Taxman 85/356 ITR 451 (Gujarat)

(ii) [Bombay HC WRIT PETITION NO.2860 OF 2012/NickunjEximp Enterprises (P.) Ltd. v. Assistant Commissioner of Income-tax [2014] 48 taxmann.com 20/229 Taxman 99 (Bombay)]

(iii) A decision of the Hon'ble Bombay High Court in the case of Pr. CIT v. Pinaki D. Panani [IT Appeal No. 1543 of 2017, dated 8-1-2020].

(iv) A decision of the Hon'ble Bombay High Court in the case of Usha Exports v. Asstt. CIT [Writ Petition No. 2506 OF 2019, dated 12-12-2019].

> 11. In view of the concurrent finding of facts arrived at by both CIT(A) and the Tribunal, we are of the opinion that no question of law, much less any substantial question of law arises from the impugned Judgment and Order of the Tribunal. The appeal, therefore, fails and is accordingly dismissed.

8.12 Identical view is noted to have been expressed by the Hon'ble Gujarat High Court in the case of **Pr.CIT Vs Late R.M. Jain (L/H L.R. Jain) in TA No. 721 of 2024 dated 25.03.2025**.

8.13 Following the above decisions (supra) which are found to be applicable on the given facts of the present case, we accordingly uphold the action of Ld CIT(A) that only the profit element embedded in these bogus purchases ought to be assessed to tax. Coming to the issue of estimation of the profits, on the given facts according to us, the Ld. CIT(A) has rightly estimated it at 17% of the value of purchase, which is found to be fair & reasonable and therefore, no further addition was warranted in this regard.

8.14 For the reasons set out above, we don't see any reason to interfere with the order of Ld. CIT(A) in this regard and thus uphold the same. Accordingly, these grounds of the Revenue and the cross objections of the assessee stands dismissed.

9. Issue 6: Addition on account of salary paid to Viswanathan without services

Ground Nos. 3 for the Revenue's appeal for AY 2016-17

Ground Nos. 3 for the Revenue's appeal for AY 2017-18

Ground Nos. 4 for the Revenue's appeal for AY 2018-19

Ground Nos. 3 for the Revenue's appeal for AY 2019-20

Ground Nos. 4 for the Revenue's appeal for AY 2020-21

Ground Nos. 5 for the Revenue's appeal for AY 2021-22

Ground Nos. 5 for the Revenue's appeal for AY 2022-23

9.1 These grounds relate to disallowance of salary paid to Smt. Laxmi Viswanathan. The facts as noted are that, in the course of search, the Authorized Officer had questioned Smt. Laxmi Viswanathan who in her statement averred that, though she was receiving salary of Rs.70,000/- per month but was not rendering any services to the company. Accordingly, the AO in the course of assessment show caused the assessee to explain as to why salary paid to Smt. Viswanathan should not be disallowed as she had admitted that she was not actually working for the assessee. In response, the assessee is found to have submitted that the statement was obtained from her under duress and coercion. According to the assessee, Smt.Viswanathan was educationally qualified viz., holding M.A. degree in literature from Stella Maris College and was

assisting the company with all literature works, content, project pitching, promotional material, company's website etc., being proficient in English language. Due to the digitization of work, she was given flexibility to work from home. The assessee submitted that, only because she was a family member, that the search team presumed that the salary was being paid to her, without her actually doing any work. The assessee also furnished Form 16 issued to Smt.Viswanathan and showed that regular PF contributions were also being from her monthly salary. The assessee further submitted that, having regard to her educational qualification and work profile, the salary being paid to her was commensurate to the market rates and that it was not excessive or unreasonable in terms of Section 40A(2) of the Act as well. The AO however rejected the contention of the assessee and disallowed the salary payment(s) made to her, by solely relying on the statement of Smt.Viswanathan wherein she had admitted that she was not rendering any services in lieu of the salary payment. Aggrieved by the action of the AO, the assessee preferred appeal before the Ld. CIT(A) who deleted the impugned disallowance.

9.2 Heard both the parties. The case of the Revenue is that, once Smt.Viswanathan had admitted in her statement that she was not doing any work for the assessee and that she was being paid salary because she was a family member, then the action of AO disallowing the salary

payment(s) was justified, since the salary expense(s) was not business but personal in nature. The Ld. AR has however has rightly pointed out that, disallowance could not have been solely based on the statement of Smt.Viswanathan and that some corroborative evidence ought to have been brought on record to justify the impugned disallowance. We note that, the Ld. CIT(A) had taken cognizance of the educational qualification of Smt.Viswanathan and the work profile explained by the assessee. The Ld. CIT(A) having regard to her work profile, also noted that her daily attendance was not necessitated and that she could have indeed worked from home as well. He also took note of the Form 16 issued by the assessee and the PF contributions made from the monthly salary. Having taken note of these contemporaneous material and evidences placed on record by the assessee disproving on fact the statement obtained by the search team from Smt.Viswanathan, we are in agreement with the following reasoning given by the Ld. CIT(A) deleting the disallowance of salary paid to Smt.Viswanathan. The relevant extracts are as under:-

> "6.8.6The undersigned has carefully examined the issue under consideration. As evident in the assessment order, the AO has attempted to disallow, the expenditure claimed towards salary without referring to any of the provisions of the Act. Obviously, the AO could have invoked the provisions of section 40A(2) of the Act. The provisions of Section 40A(2) of the Act, deals with disallowance of excessive or unreasonable payments made by an assessee to related parties. The section allows the AO to scrutinize payments made to specific persons or entities related to the assessee, to ensure that such payments are not excessive or unreasonable compared to the fair market value of goods,

services, or facilities provided. The AO has the authority to disallow any portion of the expenditure that is considered excessive or unreasonable in relation to:

- The fair market value of the goods, services, or facilities,
- The legitimate needs of the business, or
- The benefits derived by the assessee from such services.

6.8.7 The related persons or entities referred to under Section 40A(2)(b) of the Act include relatives, directors, partners, shareholders, or associated entities, where the relationship may lead to preferential or excessive payments. The intention behind Section 40A(2) of the Act is to prevent tax evasion by disallowing excessive payments made to related parties, which could otherwise reduce taxable profits. However, the AO is required to exercise judgment in a fair and reasonable manner, considering whether the payments genuinely exceed market norms or business needs.

6.8.8 In the instant case, the appellant has provided details of Smt. Viswanathan's qualifications and the nature of the services rendered. While the AO has dismissed these claims as vague, it is crucial to recognize that the work described—content creation and digital marketing support—is indeed a valid business activity that does not necessarily involve daily office attendance. The appellant has also submitted documentary evidence, such as Form 16 and proof of PF contributions, which substantiate the claim that Smt. Viswanathan was indeed an employee of the company.

The appellant has rightly pointed out that Section 40A(2) of the Act provides for disallowance only to the extent that an expenditure is considered excessive or unreasonable and not the entire amount paid as salary. In the present case the AO has not established that the salary paid to Smt. Laxmi Viswanathan was excessive compared to fair market rates for similar work. In the absence of such exercise, a blanket disallowance of the entire salary is not justified.

6.8.9 In the back drop of the above findings, it is clear that the AO's disallowance is based solely on the sworn statement recorded during the search and without any corroborative evidence. The undersigned is of the view that the AO has not demonstrated as to how the salary was excessive or unreasonable under Section 40A(2) of the Act. Accordingly, all the grounds raised by the appellant upon this issue are hereby treated as allowed and the AO is directed to delete the disallowance of salary expenses for all the years under consideration."

9.3 The above findings of the Ld. CIT(A) are noted to be supported by the **CBDT Instruction F.No. 286/98/2013-IT(Inv.II)** wherein the Board has also directed that no addition/ disallowance should not made solely based on admissions obtained in course of search unless there is some corroborative material found to back the same. In light of this CBDT Instruction(supra), we thus see no reason to interfere with the above findings of Ld. CIT(A) deleting the impugned disallowance(s) of salary. Accordingly, these grounds of the Revenue and cross objections of the assessee stands dismissed.

10. Issue 7: Disallowance u/s 40A(3) and 37

Ground Nos. 2 for the Revenue's appeal and Ground Nos. 8 of the assessee's cross-objection for AY 2018-19

10.1 This ground relates to addition of Rs.5,00,00,000/- made by the AO on the basis of the adhoc admission made by Shri Varun Manian in his statement recorded in the course of survey u/s 133A of the Act dated 24.01.2019. The facts as noted are that, a survey was conducted upon the assessee on 24.01.2019 in which he had agreed to offer a further sum of Rs.10.18 crores by way of additional income of the assessee, over and above the income already admitted, in order to cover any errors or omissions later on found in the course of assessment. The said offer inter alia included sum of Rs.5,00,00,000/- which was offered to tax in AY 2018-19. The assessee however in the return of income filed for AY 2018-

19 didn't offer the aforesaid sum to tax. The AO, in the course of assessment, required the assessee to explain as to why it didn't offer the additional sum of Rs.5 crores which it had admitted in the course of survey. After considering the submissions of the assessee, the AO rejected the same and held that this voluntary disclosure was given by the Managing Director without being under any duress or pressure and that once he had admitted to offer the impugned sum voluntarily on account of improper vouchers u/s 37 and/or cash expenses incurred beyond limits set out in Section 40A(3) of the Act, the assessee ought to have offered to tax the same. Accordingly, the AO added the impugned sum to the total income of the assessee. On appeal, the Ld. CIT(A) was pleased to delete the same. Now the Revenue is in appeal before us and the assessee has filed cross objections in support of the action of Ld.CIT(A).

10.2 Heard both the parties. The case of the Revenue hinges solely on the admission made by Shri Varun Manian in his statement recorded u/s 133A of the Act wherein he made a bald disclosure of Rs.5 crores in relation to AY 2018-19 on account of any errors or omissions which could be discovered u/s 37 / 40A(3) of the Act. It is trite law that the statement recorded u/s 133A of the Act (survey) cannot be equated with the statement recorded u/s. 132 (search) and evidentiary value of statement

recorded u/s 133A of the Act [survey] stands on a lower pedestal and the statement u/s. 133A of the Act cannot be even recorded on oath, which if recorded cannot be admissible/relied upon or acted upon. For this we rely on the decision of the Hon'ble Supreme Court in the case of **CIT vs Khader Khan Son (352 ITR 480)**wherein it has been held that section 133A does not empower any income tax authorities to examine any person on oath, hence any such statement lacks evidentiary value and any admission made during the survey cannot by itself be made the basis of addition. We thus countenance the following findings of the Ld. CIT(A) in this regard, which are as under:-

> "6.4.6 The undersigned has carefully examined the issue under consideration. While going through the assessment order, it can be seen that the AO has contemplated the disallowance only based upon the statement recorded u/s 133A of the Act. During the course of survey, the appellant has admitted to offer Rs. 10.18 Cr as additional income over and above the income already admitted and the additional income is made on the omissions and commissions made on the part of the assessee company with respect to the write off of loan, claim of certain expenses without proper supporting documents / proof and expenses made through cash above the prescribed limits in the statement recorded u/s 133A of the Act from Shri. Varun Manian, MD of the assessee company. In the present assessment proceedings, the only reason for the AO to make such a disallowance is that the appellant company has not admitted the agreed amount of Rs. 5 Crores in its return of income filed in response to the notice u/s 148 of the Act. Now the issue before the undersigned is whether the disallowance made u/s 40A(3) and 37 of the Act in the case of the appellant company is correct or not. Any disallowance u/s 40A(3) / 37 of the Act can be made only by making a specific findings with reference to any particular expenditure claimed, Obviously such disallowance cannot be made on the basis of the admission made during the course of survey. Further, the statement recorded u/s 133A cannot have any binding force unlike a statement recorded u/s 132(4) of the Act. In addition, as evident from

the assessment order passed by the AO for the AY 2018-19, it can be seen that the disallowance was not based upon any material evidence found during the course of survey but only based upon statement recorded u/s 133A of the Act.

6.4.7 As per the provisions of section 133A of the Act, the Authorised officer is not empowered to record the statement on oath. The section has empowered the Authorised officer to record statement which may be useful for, or relevant to, any proceedings under the Act. Obviously, such statement recorded cannot be taken as an evidence and used against the assessee. The AO while completing the assessment instead of relying upon the statement recorded must have attempted to bring cogent and corroborative evidence and a reasonable finding in making the addition. The AO at least should have verified the materials collected during the course of survey and satisfy himself before making the disallowance.

6.4.8 Further even if it is presumed that the assessee has admitted about the offering additional income in the statement recorded during the course of survey, the same cannot survive since the AO is not expected to record the statement u/s 133A of the Act. It is significant to bring on record upon the validity of statement recorded during the course of survey. The Hon'ble High Court of Kerala in the case of Paul Mathews & Sons vs Commissioner of Income Tax (2003) 263 ITR 101 (Ker.), has observed that "*though Section 133A of the Act enables an Income Tax authority to record statement of any person which may be useful in the course of the said proceedings but the same does not authorize him for taking any sworn statement*." The Hon'ble High Court had observed that a statement recorded u/s 133A of the Act is not to be given any evidentiary value because the officer recording such statement is not authorized to administer oath and take any sworn statement which alone has evidentiary value in the eyes of law. Also, the order of the ITAT, Raipur Bench in the case of Tikam Das Jivnani Vs. Assistant Commissioner of Income Tax, Smt. Neetu Sharma Vs. DCIT-1(1) & Smt. Asha Sharma Vs. DCIT-1(1) ITA Nos.351 & 352/RPR/2016 ITA No.28/RPR/2014 dated 11.10.2021, after relying on a host of judicial pronouncements, had held, that "*a statement recorded during the course of survey proceedings is not a conclusive piece of evidence by itself and it is open to the person who had made the admission to show that it is incorrect*."

6.4.9 The Hon'ble jurisdictional High Court in the case of CIT vs. S. Khader Khan & Son [2008] 300 ITR 157 Madras which has held that "*an admission made in the statement recorded during the course of survey cannot be the basis to make any addition*." The revenue preferred Civil

> appeal against the above order before the Hon'ble Apex Court. The Hon'ble Apex Court in this case as reported in [2013] 352 ITR 480 (SC) has *affirmed and held that "as an Income Tax Officer under section 133A is not empowered to examine any person on oath, therefore, any admission made in a statement recorded during the course of survey proceedings could not form a basis for making any addition."*
>
> 6.4.10 In view of the Hon'ble jurisdictional High Court's decision and subsequent affirming of the Hon'ble Apex Court in the case of CIT vs. S. Khader Khan & Son, the undersigned is of sincere view that the action of the AO relying upon the statement of the Appellant recorded during the course of survey u/s 133A of the Act and making disallowance is not legally tenable."

10.3 We also note that the Revenue was unable to correlate or link the impugned sum offered by assessee in the statement u/s 133A of the Act with any evidence or material found in the course of survey. Reading of the statement recorded u/s 133A of the Act shows that the impugned disclosure was given by the Managing Director, over and above the sums already admitted, to cover any errors/omissions which may be later found u/s.37 / 40A(3) of the Act, but no details was given in this regard. Instead, it was a bald disclosure given in the statement u/s 133A of the Act. Hence, once the assessee had retracted the statement and did not offer the impugned sum to tax, the onus was on the Revenue to justify the addition of the impugned sum with tangible material or evidence. We however note that, the AO had failed to do so. Instead of pointing out the expenses which were un-vouched for and therefore disallowable u/s 37 of the Act or the specific expenses which were paid in cash beyond the limit prescribed in Section 40A(3) of the Act, the AO solely relied on the

statement given u/s 133A of the Act to justify the impugned addition. According to us, such action of the AO was unjustified in light of the **CBDT Instruction No. 286/2/2003-IT(Inv) dated 10.03.2003** wherein the Board had instructed as follows:

> "Instances have come to the notice of the Board where assessee have claimed that they have been forced to confess the undisclosed income during the course of search and seizure and survey operation. Such confession, if not based upon credible evidence, are later retracted by the concerned assessee while filing returns of income. In these circumstances, such confessions during the course of search and seizure and survey operations do not serve any useful purpose. It is, therefore, advised that there should be focus and concentration on collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed before the Income Tax Department. Similarly, while recording statement during the course of search and seizure and survey operations no attempt should be made to obtain confession as to the undisclosed income. Any action on the contrary shall be viewed adversely.
>
> Further, in respect of pending assessment proceedings also. Assessing Officers should rely upon the evidences/materials gathered during the course of search/survey operations of thereafter while framing the relevant assessment orders."

10.4 Applying the above Circular to the assessee's case we find that except relying on the statement recorded u/s 133A of the Act, the AO did precious little to bring on record any material to justify his conclusion that the addition of Rs.5,00,00,000/- was warranted u/s 37/40A(3) of the Act. The AO was unable to point out even a single instance where any specific item of expense found to be un-vouched for or that any particular expense in excess of Rs.20,000/- had been paid in cash. Accordingly, we

countenance the above reproduced findings of the Ld. CIT(A) that the impugned addition made solely by relying on the bald admission made u/s 133A of the Act was not justified.

10.5 In this regard, we also gainfully refer to the decision of the Hon'ble Gujarat High Court in the case of **Dy.CIT Vs Narendra Garg (72 taxmann.com 355)**whichthough rendered in the context of an addition made by solely relying on the admission made u/s 132(4) of the Act, but is applicable with equal force to the facts of the present case as well. The relevant findings taken note of by us, is as follows:-

> "5. We have duly considered the rival contentions made by learned advocates for both the sides. It is true that the addition was made by the Assessing Officer pursuant to the statement recorded u/s 132(4) of the Act. The assessee has retracted from the said disclosure which has not been accepted by the revenue. It is required to be borne in mind that the revenue ought to have collected enough evidence during the search in support of the disclosure statement. It is a settled position of law that if an assessee, under a mistake, misconception or on not being properly instructed, is over-assessed, the authorities are required to assist him and ensure that only legitimate taxes are collected. The Assessing Officer cannot proceed on presumption u/s 134(2) of the Act and there must be something more than bare suspicion to support the assessment or addition. In the present case, though the revenue's case is based on disclosure of the assessee stated to have been made during the search u/s 132(4) of the Act, there is no reference to any undisclosed cash, jewellery, bullion, valuable article or documents containing any undisclosed income having been found during the search."

10.6 In fact, the case of the assessee before us is on much better footing as there is no admission made u/s 132(4) of the Act, which otherwise

carries evidentiary value. Rather, the impugned addition has been made based on admission made u/s 133A of the Act, which as held by us above, does not carry any evidentiary value.

10.7 Our above view is further supported by the decision of the Hon'ble Delhi High Court in the case of **CIT v. Dhingra Metal Works (328 ITR 284)**. In the decided case also, a survey was conducted upon the assessee and the partner had admitted to additional income in his statement u/s 133A of the Act to cover for discrepancies found in stock. Later on the assessee was able to reconcile the physical stock with the books of accounts and accordingly did not offer the additional income so disclosed in the return of income. The AO did not accept the plea of the assessee and made addition by relying upon the statement given during the course of survey. On appeal, the Hon'ble High Court upheld the order of the appellate authorities deleting the addition by holding that the addition could not have been made by solely relying on the statement obtained u/s 133A of the Act. The findings of the Hon'ble High Court which are relevant to the present case, are as under:-

> "11. From a reading of aforesaid section, it is apparent that it does not mandate that any statement recorded under section 133A of the Act would have evidentiary value. In our view, for a statement to have evidentiary value, the survey officer should have been authorized to administer oath and to record sworn statement. This would also be apparent from section 132(4) of the Act.
>
> …

12. From the aforesaid, it is apparent that while section 132(4) of the Act specifically authorizes an officer to examine a person on oath, section 133A does not permit the same.

….

14. Moreover, the word 'may' used in section 133A(3)(iii) of the Act clarifies beyond doubt that the material collected and the statement recorded during the survey is not a conclusive piece of evidence by itself.

15. In any event, it is settled law that though an admission is extremely important piece of evidence, it cannot be said to be conclusive and it is open to the person who has made the admission to show that it is incorrect.

16. Since in the present case, the respondent-assessee has been able to explain the discrepancy in the stock found during the course of survey by production of relevant record including the excise register of its associate company, namely, M/s. D.M.W.P. Ltd., we are of the opinion that the Assessing Officer could not have made the aforesaid addition solely on the basis of the statement made on behalf of the respondent-assessee during the course of survey."

10.8 For the reasons set out above, we thus uphold the order of Ld. CIT(A) deleting the impugned addition. Accordingly, the grounds raised by the Revenue and the cross objections of the assessee are dismissed.

11. Issue 8: Validity of reassessment u/s 148 of the Act.

Ground Nos. 1 to 5 of the assessee's cross-objection for AY 2016-17

Ground Nos. 1 to 4 of the assessee's cross-objection for AY 2017-18

Ground Nos. 1 to 9 of the assessee's cross-objection for AY 2018-19

Ground Nos. 1 to 4 of the assessee's cross-objection for AY 2019-20

Ground Nos. 1 to 4 of the assessee's cross-objection for AY 2020-21

Ground Nos. 1 to 4 of the assessee's cross-objection for AY 2021-22

11.1 These grounds raised in the cross-objections were not seriously contested by the assessee at the time of hearing and are therefore being dismissed as not pressed.

12. In the result, all the appeals of the Revenue and the assessee as well as the Cross-Objections of the assessee are dismissed.

Order pronounced on the 02nd day of May, 2025, in Chennai.

Sd/-	**Sd/-**
(अमिताभ शुक्ला)	**(एबी टी. वर्की)**
(AMITABH SHUKLA)	**(ABY T. VARKEY)**
लेखासदस्य**/ACCOUNTANT MEMBER**	न्यायिकसदस्य**/JUDICIAL MEMBER**

चेन्नई/Chennai,
दिनांक/Dated: 02nd May, 2025.
TLN, Sr.PS

आदेश की प्रतिलिपि अग्रेषित**/Copy to:**

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकरआयुक्त/CIT, Chennai / Madurai / Salem / Coimbatore.
4. विभागीयप्रतिनिधि/DR
5. गार्डफाईल/GF