

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "E", MUMBAI**

**BEFORE SHRI R.C. SHARMA(AM)
AND
SHRI AMARJIT SINGH (JM)**

**ITA Nos. 6797 & 8927/MUM/2010
Assessment Years: 2007-08 & 2008-09**

ACIT Central Circle 14
R.No. 102, 11th Floor,
Old CGO Annexe Building
Mumbai- 400020

Vs.

Shri Surendra S. Barmecha
7 C Ratan Milan,
Ghod Dod Road, Surat
Gujarat,

PAN No. AAAPB6520A

&

**ITA Nos. 9055/MUM/2010
Assessment Years: 2008-09**

Shri Surendra S. Barmecha
6/1910, Ambica Mansion
Jadkhadi, Mahinderpura
Surat

Vs.

ACIT Central Circle 14
Old CGO Building(Annex)
11th Floor, M.K. Road
Mumbai- 400020

PAN No. AAAPB6520A

&

**ITA Nos. 8928/MUM/2010
Assessment Years: 2008-09**

ACIT Central Circle 14
R.No. 102, 11th Floor,
Old CGO Annexe Building
Mumbai- 400020

Vs.

Shri Sangeet S. Barmecha
7 C Ratan Milan,
Ghod Dod Road, Surat
Gujarat,

PAN No. AAAPB6520A

(Assessee)

(Respondent)

Revenue by : Shri. H.N. Singh
Assessee By : Shri. B.V. Jhaveri

Date of Hearing : 07/09/2016

Date of pronouncement : 19/10/2016

ORDER

PER R.C. SHARMA, ACCOUNTANT MEMBER :

These are cross appeals filed by the Assessee and the Revenue against the order of Ld. CIT(A) for the AY 2007-08 & 2008-09, in the matter of order passed under section 143(3) r.w.s 153 A of the Act.

2. Rival contentions have been heard and records perused.

3. Brief facts of the case are that the assessee is a proprietor of M/s. Barmecha Exports and trading in Gold and Diamond jewellery. The assessee is also engaged in money lending business. A search & seizure u/s 132 was carried out in the premises of the assessee and his group concerns on 05/10/2007. During the course of search action, Rs. 4,88,950/- was found at the residence and Rs. 46,660/- was found at the business premises, out of which Rs. 3,00,000/- was seized as unexplained cash. In the course of the search papers were found from the business premises and residence which revealed that the assessee was also carrying on the business of money lending using the funds of the family. The said loose papers were collected and marked as BS-13 by the officers carrying out the search. Considering these loose papers the assessee prepared cash book (account) and arrived at a peak amount of investment of Rs. 13,09,871/- in A.Y. 07-08 and Rs. 44,44,820/- in A.Y. 08-09. The said amounts were offered by the assessee in his returns of income. The assessee's son, Mr. Saurabh Barmecha was also carrying on the business of dealing in jewellery in the name & style of M/s. Sangeeta Gems who had carried out certain unaccounted transactions in the previous year relevant to the A.Y. 07-08 for which papers were found. The said loose papers were collected and marked BS-9, BS-10, BS-12 & BS-13. Accordingly Mr. Saurabh Barmecha made a disclosure

of income of the peak amount of investment of Rs. 28,11,366/- in his return of income for A.Y. 07-08. Similarly, Smt. Sneha Saurabh Barmecha, proprietress of M/s. Balaji Jewels had also offered income of Rs. 23,49,670/- for A.Y. 2008-09. The assessee has made disclosure of Rs. 1,50,00,000/-, out of which Rs. 13,09,871/- has been disclosed for the relevant assessment year 2007-08 by the assessee and Rs. 30,16,511/- has been disclosed by the assessee's son Shri Saurav Barmecha for A.Y. 2007-08. Remaining disclosure has been made for other assessment years. In the AY 2007-08 the assessing officer made an addition of Rs. 41,81,369/- on account of unexplained investment u/s. 69 of the Act in the money lending business. The reason given by the Assessing Officer is recorded in para-5 of the impugned assessment order.

After considering the remand report sent by AO, the CIT(A) deleted the addition after having the following observations :

2.6.1 I have carefully and dispassionately considered the facts and circumstances of the case, the impugned assessment order, the contentions of page No. 67, the report of the Assessing Officer, rejoinder, written submission and arguments made by the learned AR before me. The assessee has already explained the modus operandi adopted which was explained by the - assessee during the course of search & seizure. He has also disclosed investment of Rs. 1.5 crore in the money lending business and has paid taxes thereupon. The assessee has not retracted the said disclosure of Rs. 1.5 crore. Learned AR has explained each and every entry recorded on the impugned page No. 67 of the Annexure BS-13 which may be reproduced as under:

"PG 40		SB 40
KJ 30	<u>-30</u>	<u>1/05</u>
11	10	
<u>15</u>		

96

4177

-1500 ST 3/05

2677

SANGEETA

KJ- 30

500 Mum 5/05
 2167
-750 ST 8/05 Ashish 11-77000 Int.
 1417 - 11 – 77000 Recd. 1/05
1100 ST 9/05 x x
 327”

2.6.2 Learned AR has argued that the assessee had given a cheque of Rs. 40 lakhs to Mr. Prakashchandra S. Gandhi (PG-40) on 07/03/2005 on interest. Therefore, for AY 2005-06, the assessee had debited the account of the said "PG" by the interest amount of Rs. 29,150/- and for AY 2006-07 by a sum of Rs. 2,80,000/-. The said loan was repaid by "PG" together with interest on 28th September 2007 and is recorded in assessee's balance sheet furnished along with the return of income for AYs. 2006-07 & 2007-08. Therefore, aforesaid account of "Mr. PG" was squared off prior to the date of search. Copies of confirmation of "PG" were forwarded to the Assessing Officer as additional evidence. No adverse comments on merits received from the Assessing Officer. Therefore, entry "PG- 40" is explained.

2.6.3 "SB-40" has been explained as Shri Surendra S. Barmecha (assessee) had given the said loan of Rs. 40 lakhs to "PG" which is reflected in his return of income for AY 2006-07 in the balance sheet. The said loan is also reflected in assessee's balance sheet for AY 2007-08 because out of the aforesaid loan of Rs. 40 lakhs, Rs. 30 lakhs has been repaid by "PG" on 3rd May 2007. Therefore, only a sum of Rs. 10 lakhs was outstanding as on 01-05-2007. Therefore the entry of "SB-40 "

-30 01/05/2004 is explained.

10

2.6.4 Mrs. Sangeeta Barmecha had lent Rs. 30 lakhs by account Payee cheque dated 21-03-2006 to M/s. Krishna Jewels (KJ -30) on interest. The said loan was repaid by the said "KJ" on 01-11-2007 and 02-02-2008 along with interest. Copies of confirmation from the said "KJ" were submitted as additional evidence and forwarded to the Assessing Officer

for his comments. No adverse comments received on merits from the Assessing Officer. On the facts and in the circumstances" KJ -30" is explained by the learned AR.

2.6.5 Thereafter the said Mrs. Sangeetci S. Barmecha lent Rs. 11 . lakhs by account payee cheque dated 21-03-2006 to Mr. Ashish Gandhi (Ashish) on interest. Interest was calculated at Rs. 77,000/- up to 31-03-2007. The said loan along with the said interest aggregating to Rs. 11,77,000/- was repaid by the said "Mr. Ashish" to Mrs. Sangeeta Barmecha on 3rd May 2007. Copies of confirmation from the said Mr. Ashish Gandhi were enclosed as additional evidence and forwarded to the Assessing Officer for his comments. The Assessing Officer has not commented adversely on the said evidences on merit. Therefore, the bottom right side of seized paper 67 of Anexure BS-13 is explained. This is further explained by the I balance sheet for FY 2005-06 and FY2006-07 of the said Mrs. Sangeeta Barmecha. These loans are reflected in the disclosed balance sheet of Mrs. Sangeeta Barmecha along with interest (net of TDS)

2.6.6 Mrs. Sangeeta Barmecha had lent Rs. 15 lakhs by account payee cheque on 21-03-2006 to M/s. Krishna Jewels (KJ) on interest which was repaid by the said "KJ" on 28-09-2007. Copies of confirmation from "KJ" were submitted as additional evidences and forwarded to the Assessing Officer" for his comments. These confirmations explained the entry of "15". This is further explained from the balance sheet for FY 2005-06 and 2006- 07 of the said Mrs. Sangeeta Barmecha. The impugned loan of Rs. 15 lakhs is duly reflected in her balance sheet along with interest (net of TDS).

2.6.7 Mrs. Surendra Bcrmechc received Rs. 30 lakhs from "PG" and Mrs. Sangeeta Barmecha (assessee's wife) received Rs. 11,77,000/- from "Ashish". Thus the assessee and his wife received in aggregate Rs. 41,77,000/-. This fact is recorded on page No. 67 of BS-13 as "4177".

2.6.8 The assessee and his wife are partners in M/s. Nav Mongal Corporation which was formed on 19-03-2007. The assessee invested capital of Rs. 27,50,000/- in the said M/s. Nav Mangal Corporation in the

month of May 2007. Therefore, the assessee had recorded the following entries on the said page No. 67 of BS-13 as reproduced below:

“4177

-1500 ST 3105

2677

- 500 Mum 5105

2167

-750 ST 6105

1417

Thereafter the assessee's wife gave a cheque of Rs. 11.50 lacs as her capital to M/s. Nav Mangal Corporation and therefore, the assessee recorded the following further facts on the said slip being 67 of BS-13 as under:

“ 1417

- 1100 ST 9105

327 “

2.6.9 The assessee had submitted copies of submissions of assessee's accounts and his wife's accounts in the books of M/s. Nav Mangal Corporation which were forwarded as additional evidence to the Assessing Officer for his comments. Leaned AR explained that the confirmation of accounts reveals that the assessee's account was credited by an sum of Rs. 27,50,000/- on 07/05/2007 as capital investment by the assessee. Similarly, the confirmation of account of Mrs. Sangeeta Barmecha in the books of accounts of M/s. Nav Mangal Corporation reveals that her account was credited by a sum of Rs. 11 lakhs on 02/05/2007 and by a sum of Rs. 11,50,000/- on 07/05/2007. These entries are explained in the return of income, computation of income and audited accounts of M/s. Nav Mangal Corporation for FY 2007-08. These documents were also forwarded as additional evidence to Assessing Officer for his comments. No adverse comments on merits received from the Assessing Officer. These are further explained by the balance sheet of the assessee for FY 2007-08, which was furnished along with the return of income for relevant assessment year 2008-09 and it records investment of the assessee in M/s. Nav Mangal Corporation at

Rs. 41,58,822/-. Similarly, the balance sheet of Mrs. Sangeeta Barmecha for FY 2007-08 records the investment made by her in M/s. Nav Mangal Corporation at Rs. 41,61,617/-.

2.6.10 Learned AR explained each and every entry recorded on the said page No 67 of Annexure BS-13. Learned AR has taken great pain and due diligence to explain that each figure recorded on page No. 67 of Annexure BS-13 are accounted by the assessee, his wife and his daughter-in-law in their regular books of accounts and the said entries in respect of loans given by account payee cheques or investments made through regular books of accounts in the partnership firm M/s. Nav Mangal Corporation in which assessee and his wife are partners. Learned AR explained that the figure of "4177" is properly explained and the incorrect conclusion made in an ex-parte manner by the Assessing officer is contrary to the said seized page No. 67 and contrary to the facts on record filed by the assessee and his family \ before the Assessing Officer in the form of balance sheet, audited accounts and other relevant documents as discussed above. therefore, the addition of Rs. 41,77,000/- made by the Assessing Officer AY 2007-08 is not sustainable and the same is reduced completely.

4. Against the above order of CIT(A), revenue is in further appeal before us and has taken ground with regard to violation of Rule 46A.

5. We have considered the rival contentions and carefully gone through the order of the authorities below and found from record that during the appellate proceeding the Ld. CIT(A) has called for remand report in respect of Page no.2 & 67 of Annexure BS-13 for which opportunity was not given to the assessee during the course of assessment proceeding. The copy of page 67 of Annexure BS-13 was forwarded by the Ld. CIT(A) to the AO for his comment. We find that assessee has furnished additional evidence in the form of confirmation of account from the third party in the books of the assessee as well as copy of the invoice and extract of books of account from third party. Before the Ld. CIT(A) assessee has explained reasons how he was prevented by sufficient cause in

not producing such evidences during the course of assessment proceeding. After considering the reasonable cause, the CIT(A) accepted the additional evidence and to give opportunity to the AO to examine the same, called a remand report from AO. After considering remand report as well as rejoinder filed by the assessee in reply to the remand report, the CIT(A) observed that confirmation of account reveals that assessee's account was credited by sum of Rs. 27,50,000/- on 07/05/2007 as capital investment by the assessee. Similarly the CIT(A) recorded a finding to the effect that as per confirmation of account of the Mrs. Sangeeta Barmecha in the books of M/s. Nav Mangal Corporation reveals that her account was credited by sum of Rs. 11,00,000/- on 02/05/2007 and by a sum of Rs. 11,50,000/- on 07/05/2007. We also found that these entries were duly explained in the return of income, computation of income and audited accounts of M/s Nav Mangal Corporation for AY 2007-08. In view of the detailed findings recorded by the CIT(A), after considering the remand report, which is as per material on record, no interference is required in the finding so recorded by the Ld. CIT(A) resulting in deletion of addition of Rs. 41,81,369/-. The findings so recorded by CIT(A) have also not been controverted by department by bringing any positive material on record.

In the AY 2008-09 the AO made the addition on account of unexplained stock found in excess and also on account of investment under section 69 in immovable property. Addition was also made by the AO on account of investment in money lending business.

6. Rival contentions have been heard and records perused.

7. Brief facts of the case are that the assessee is a resident individual and has disclosed income in his return under - heads - Income from House Property, Profit & Gains from business & Profession, Speculation Business, Capital Gains, and Income from other Sources. Search & seizure action u/s. 132 were carried out in the premises of assessee and his family concerns on 05-10-2007. The search resulted in seizure of various incriminating documents, cash and jewellery items as discussed by the AO in the relevant assessment order. During the

course of search cash of Rs. 4,88,950/- and Rs. 46,660/- found from the residence and business premises respectively . Out of such amount, cash of Rs. 3,00,000/-- was seized. No addition was made on account of cash found in the hands of the assessee by the AO. Regarding jewellery found, worth Rs. 1,33,91,371/- no addition was made by the AO because the assessee had already disclosed such jewellery under VDIS 1997 Scheme. Copies of the relevant VDIS Certificate and relevant valuation report were examined and accepted by the AO as discussed in para - 5 of the relevant assessment order. The AO made addition of 42,02,460/- on account of difference in stock as discussed on page-5, para-6 of the relevant assessment order.

With regard to addition of Rs. 42,02,460/- the AO has observed that in the balance sheet of M/s. Barmecha Exports as on 31- 03-2008, closing stock was disclosed at Rs. 35,85,250/-. He compared this figure with Panchanama dated 05-10-2007, wherein, Departmental valuers M/s. Jafferbhai S. Daginawala inventorized assessee's three family concerns' diamond stock and jewellery found in the course of search as on 02/05/2007 at Rs. 77,87,710/-. The AO added the difference of the aforesaid two figures because books of accounts and stock registers were not produced.

8. After considering the remand report Ld. CIT(A) deleted the addition after having the following observations:

3.3.1 I have carefully and dispassionately considered the facts and circumstances of the case, assessment order, written submissions, statement of facts, additional evidences, rejoinder filed by the AO and arguments made by the learned AR. The undisputed facts are that in the course of search, the authorized officers of the Department collected jewellery as well as stock of diamonds from the business premises at 6/1910 Jedhakhadi, Mahidharpura, Surat, where three business concerns were operating namely M/s Barmecha Exports, (Proprietor: Mr. Surendra S. Barmecha) (b) Mrs. Balaji Jewels, (Proprietor: Mrs. Sneha Barmecha) (c) M/s Sangeeta Gems, (Proprietor: Mr. Saurabh Barmecha). The Authorized Officers also collected diamond stock from Bank Locker and

all such diamond jewellery and stock were valued by the Department Valuer M/s. Jafferbhai S. Daginawala, vide his report dated 05-10-2007, which was signed by the Authorized Officer as well as by the assessee and the witnesses. When the assessee was confronted about the diamond stock (packets) found by the Authorized Officer during the course of such search & seizure action, the assessee vide question No. 25 in particular, and question Nos. 16 & 17 in general, replied that all diamond packets found in the said vault are part of the stock-in-trade of (a) M/s Barmecha Exports, (b) Mrs. Balaji Jewels, (c) M/s. Sangeeta Gems.

In the course of assessment proceedings, the assessee vide his letter dated 23/11/2009 gave a reconciliation of diamond stock belonging to the aforesaid three business concerns operating from the said premises. As per the explanation, the three family concerns of the assessee were having aggregate stock of diamonds weighing 871.25 cts. As on the date of search as per particulars given below:

<i>M/s. Barmecha Exports</i>	<i>- 527.83 cts</i>
<i>Proprietor: Mr. Surendra S. Barmecha (Page 251)</i>	
<i>Mrs. Balaji Jewels</i>	<i>-298.53 cts</i>
<i>Proprietor: Mrs. Sneha Barmecha (Page 250)</i>	
<i>M/s. Sangeeta Gems</i>	<i>-44.89 cts</i>
<i>Proprietor: Mr. Saurabh Barmecha (Page 249)</i>	<i>-----</i>
	<i><u>871.25 cts.</u></i>

3.3.2 During the course of search & seizure Department found diamond stock-in-trade weighing 598.06 cts. During the course of search & seizure as well as during the course of assessment proceedings, the appellant explained that the balance stock (273.19 cts.) was issued to brokers viz. Rameshbahi & others for offering the same for sale to other dealers in the market for such purposes Jangads were available in the office file as recorded in his statement u/s. 132(4) in Question No. 17. The AO has arbitrarily compared the actual stocks of three business concerns found on 05/10/2007 with the book value of only one concern M/s. Barmecha Exports that too on 31/03/2008. He has not given any reason for coming

to such irrational conclusion. I agree with the learned AR's reasoning that contrary to the facts on record, the stock of three business concerns as on the date of search (i.e. 05/10/2007) cannot be compared with the closing stock of only one business concern as on 31/03/2008. Such comparisons are arbitrary and unreasonable and therefore cannot be sustained. The AO should have taken the value of closing stock as on 05/10/2007 from the books of accounts of the aforesaid three business concerns operating from the same premises and the stock of which were found from the business premises as well as from the locker premises as explained by the appellant during the course of search and seizure and as per the addresses given in their respective returns of income available with the AO. Had he taken the correct value of stock in trade as per books of accounts on the date of search i.e. on 05/10/2007, it is the case of the learned AR that both cartage as well as value of stock in trade found during the course of search was fully explained and fully recorded in the books of accounts maintained by the appellant. The AO has not done so even though the books of accounts were seized by the Department and computer date back-up was available with the A.O. No addition would have been necessary. Secondly, if the AO decided to compare the value of stock in trade found during the course of search as on 05/10/2007 with the closing stock as on 31/03/2008, he should have fairly considered the closing stock of all three business concerns operating from the same premises and the stock of which were found by the search team from the business premises as well as from the bank locker. The balance sheets of the aforesaid three concerns i.e.(a) M/s. Barmecha Exporst, (b) Mrs. Balaji Jewels, (c) M/s. Sangeeta Gems were available with the AO and the value of closing stock as on 31/03/2008 of the aforesaid concerns are recorded in the balance sheet, Audit Report & Profit & Loss A/c as per particulars given below:

<i>M/s Barmecha Exports</i>	<i>Rs. 35,73,750 (361.38 cts.)</i>
<i>Mrs. Balaji Jewels</i>	<i>Rs. 25,47,303 9209.74 cts.)</i>
<i>M/s. Sangeeta Gems</i>	<i><u>Rs. 40,41,570/- (310.89 cts.)</u></i>
	<i>Rs. 101,62,623 (882.01 cts.)</i>

No addition was called for because the actual stock was less than the book value. Thirdly, even if he would have taken value of opening stock as on 01/04/2007 of all the three business concerns, stock of which were found from the business premises and bank lockers as established during the course of search & seizure operations, the value of such opening stock was Rs. 87,93,191/- (876.66cts.). Having regard to the facts and circumstances, the AO has erred in comparing the stock of three business concerns as on the date of search with the stock of only one business concern and that too on the date 31/03/2008. If he would have compared the actual stock-in-trade found during the course of search and seizure with the stock in trade recorded in the books of accounts of the three business concerns on the same date, then the entire stock was explained. No addition was needed. The AO should have seen the returns of income of three concerns for AY 2007-08 and 2008-09 and the seized records as well as statement given by the appellant during the course of search & seizure and then no addition was called for. Having regard to the facts and circumstances of the case, the diamond stock in trade found during the course of search & seizure as on 05/10/2007 is fully explained. The AO has drawn an unfair comparison, firstly, he has compared the value and the cartage on two different dates and secondly, he has compared the stock in trade of three business concerns with that of only one business concern. The addition made by the AO on such irrational comparison cannot be sustained and the same is therefore reduced to Nil. Ground No. 4 is therefore, allowed.

9. We have considered rival contentions and carefully gone through the orders of the authorities below as well as the remand report sent by AO and the reply called by CIT(A), we found that after analyzing the stock kept with each of the firm, the CIT(A) after recording detailed finding reached to the conclusion that AO has drawn an unfair comparison. Firstly, he has compared value and the cartage on two different dates and secondly, he has compared the stock in trade of three business concerns with that of only one business concern. The CIT(A) further recorded a finding to the effect that as per the Balance Sheet of all the three concerns, the value of closing stock as on 31/03/2008 as recorded in the Balance

Sheet, Audit Report and Profit and Loss Account are correct and no addition was called for because the actual stock was less than the book value. The detailed finding was recorded by CIT(A) as per material on record. Accordingly, we do not find any reason to interfere in the finding so recorded by CIT(A) which resulted into deletion of addition made on account of difference in stock.

10. AO has also made addition of Rs.25,80,000 on account of unexplained investment in immovable property. The AO has dealt with this issue at para 7 at page 5-7 of his order. By the impugned order Ld. CIT(A) deleted the addition after having the following observation:

I have carefully and dispassionately considered the facts and circumstances of the case, relevant assessment order, written submissions made and arguments by the learned AR. Learned AR has vehemently argued that the AO has erred in law and in facts in making addition of Rs. 25,80,000/- because he has not followed the due process of law and has never confronted the assessee with the alleged statement recorded by him from one Shri Sunil Jayantibhai Shah, behind the assessee's back. For the first time, the reference of such statement was made in the assessee's assessment order without giving any opportunity to the assessee to furnish his rebuttal. Learned AR strongly contended that the AO has not followed the principles of natural justice and hence the statement of the said Shri Sunil Jayantibhai Shah, has no evidentiary value and entire addition made on the basis of said statement is to be reduced completely in the light of Honorable Supreme Court, Delhi High Court & M.P. High Court decisions in the cases of Kishenchand Chellaram v. CIT (supra), CIT v. SMC Share Brokers Ltd. (supra) and Prakash Chand Nahta v. CIT (supra) respectively. Therefore, the addition of Rs. 25,80,000/- on the said statement recorded by the AO without the knowledge and without giving an opportunity of rebutting the said statement is bad in law and therefore, addition based on such statement is to be reduced completely. Secondly, learned AR had furnished complete details of Account Payee Cheques paid by the assessee and his spouse at Rs. 39,80,000/- and Rs. 37,20,000/- respectively as

discussed in the preceding paragraphs. Learned AR has submitted that initially the assessee and his spouse jointly agreed to purchase approximately 3000 sq. ft. area of a building under construction by M/s. Sumangal Corporation at Surat. The assessee also made , cash payments of Rs. 11,00,000/- to the said builder on 17-08-2007 for providing strong room on 2nd floor for which extra beam was allowed in the ceiling of the first floor. Subsequently, the assessee and his spouse changed the plan and decided to purchase a smaller premise on 1st & 2nd floors of the building admeasuring only 2201 sq. ft. carpet area. As a result, the said builder refunded the difference amount of Rs. 14,80,000/- on 27-03-2008 by account payee cheque. In view of the said refund of Rs .. 14,80,000/-, the net payment made by the assessee and his spouse is worked out at Rs. 62,20,000/- from earlier Rs. 77,00,000/- (Rs. 77,00,0001-- minus Rs. 14,80,000/-). In addition, cash of Rs. 11,00,000/- was also paid for providing a strong room. In the relevant assessment year, the AO observed that though the assessee and his spouse have jointly made payment of Rs. 77,00,000/- to the said builder for booking the premises in the said building, the assessee and his spouse have recorded only Rs. 62,20,000/- in the books of accounts and the difference of Rs. 14,80,000/- was not recorded in the books of accounts. Therefore, the AO held that the assessee or his spouse had made unaccounted investment of Rs. 14,80,000/- by cheque and Rs. 11,00,000/- by cash in the said building being constructed by M/s. Sumangal Corporation at Surat. Learned AR has strongly contended that even the said Shri Sunil Jayantibhai Shah, in his statement recorded on 09-10-2007 has confirmed that the assessee and his spouse made payments aggregating to Rs. 77,00,000/- on booking the premises in "Union Square Building" being constructed by M/s. Sumangal Corporation at Surat. This fact exactly matches with payment details furnished by the assessee and his spouse in the course of assessment proceedings and therefore, there is no dispute that the assessee and his spouse had paid jointly Rs. 77,00,000/- to the said M/s. Sumangal Corporation. Subsequent to the statement of the said Shri Sunil Jayantibhai Shah, recorded on 09/10/2007, the assessee and his spouse changed the plan and instead

of 3000 sq.ft carpet area the appellant and her husband decided to buy only 2201 sq. ft.on 1st & 2nd floors. In these circumstances M/s. Sumangal Corporation refunded a sum of Rs. 14,80,000/- on 26-03-2008. The assessee and his spouse executed agreement for purchase of the said 1st & 2nd floor area on 19-03-2008 admeasuring 2201 carpet area which is duly registered with the Sub -Registrars of Assurances at Surat. The assessee had also furnished a copy of their bank statements to further confirm the receipt of refund of Rs .14,80,000/- from the said M/s. Sumangal Corporation, which is credited in her ABN Amro Bank Account on 27-03-2008. Even without these bank statements, the facts are clear as discussed in the preceding paragraphs. In respect of the investment of Rs. 11,00,000/- in cash made by the assessee, the same was reportedly disclosed by him while arriving at the peak credit of the money lending business. He has already disclosed Rs. 71,39,927/- in his hands and has paid the taxes along with the Return of income furnished u/s. 153A of the Act. This matter of taxation of peak credit is elaborately discussed in ground No. 6, where the peak offered by the assessee at Rs. 44,44,820/- has been enhanced by me to Rs. 91,59,410/-. Having regard to the facts and circumstances of the case, I find considerable force in the arguments of the learned AR I agree with him that assessee and his spouse paid Rs. 77,00,000/- by cheque which were fully disclosed and out of their disclosed bank accounts. Out of such payment of Rs. 77,00,000/- made by them, Rs. 14.80 lacs was received back by Account Payee Cheque due to purchase of a smaller flat (2201 sq. ft.) against booking of bigger flat (3000 sq. ft.) earlier for which payment of Rs. 77 lacs was made by the assessee and his spouse. Therefore, difference of Rs. 14.80 lacs (Rs. 77 lacs - Rs. 62.20 lacs) cannot be added. Secondly, the cash component of Rs. 11 lacs paid by the assessee has separately been assessed while working out the peak credit of unaccounted money lending business disclosed by him u/s. 132(4) of the Act and taxes paid alongwith return of income furnished u/s 153A of the Act. In my case, once the AO has verified the working of peak credit in the unaccounted money lending business at the time of disclosure u/s. 132(4) during the course of assessment proceedings and again during the course of remand

proceedings then there is no dispute. The impugned addition of Rs. 25,80,000/- is therefore deleted. Ground No. 5 is allowed.

11. We have considered rival contentions and found from record that as per Statement of Shri Sunil Jayantibhai Shah recorded by department on 09/10/2007, he has confirmed that assessee and his spouse made payment aggregating to Rs.77,00,000/- on booking the premises being constructed by Sumangal Corporation at Surat. This fact exactly matches with the payment details furnished by the assessee and his spouse in the course of assessment proceedings. We also found that subsequent to the statement of Shri Sunil Jayantibhai Shah, assessee and his spouse changed the plan and instead of 3000 sq.ft carpet area decided to buy only 2201 sq.ft on first and second floor. Accordingly Sumangal Corporation refunded a sum of Rs.14,80,000/- on 26/03/2008. Assessee and his spouse also executed the agreement for purchase of the said first and second floor area on 19/03/2008 admeasuring 2201 sq.ft carpet area which is duly registered with the Sub-Registrar. Assessee has also submitted a copy of three bank statements to further confirm the receipt of refund of Rs. 14,80,000/- from the said M/s. Sumangal Corporation. After recording detailed finding, CIT(A) has deleted the addition made on account of unexplained investment. The findings recorded by CIT(A) has not been controverted by learned DR, accordingly we do not find any reason to interfere in the order of the CIT(A) deleting addition made on account of unexplained investment in immovable property.

12. The AO has also made addition of Rs. 4,04,98,654/- by observing that seized lose paper identified as BS-13 contained details regarding assessee's money lending business which was not recorded in books of account. Before the Assessing Officer, the assessee furnished explanation in the form reconstructed Account No. C-9999 which form a part of the reconstructed cash book to explain money lending business and which was submitted during the post-search investigation and on this account, the assessee made disclosure of Rs. 44,44,820/- in unaccounted money lending business for the period between 01-

04-2007 till the date of search. After having the following observation the Ld. CIT(A) reduced / deleted the addition:

5.3.1 I have carefully and dispassionately considered the facts and circumstances of the case. The assessee has not disputed that he has been indulging in undisclosed money lending business, which was not recorded in his regular books of accounts. The assessee had disclosed peak investment of such unaccounted money lending business at Rs. 44,44,8201- in AY 2008-09. The assessee disclosed such peak amount and included the same in his return of income for AY 2008-09 and paid taxes thereon. Therefore, there is no quarrel with the proposition that the assessee had indulged in undisclosed money lending business which was not recorded in his regular books of accounts. The main dispute is regarding the quantum of peak investment to be worked out in respect of such undisclosed money lending business. Learned AO in his remand report sent vide letter No. ACIT/C.C.14/Remand Report/2010-11 dated 09-08-2010 which was forwarded by Addl. CIT, Central Range-3, Mumbai vide letter No. Addl. CIT/CR-3/Rem. Rep/2010-11/189 dated 31-08-2010 has discussed vide para No. 3 & 4 that the assessee was given sufficient opportunity of explaining the seized material. He had asked the assessee vide letter dated 07-08-2009 to produce ledger account, bank statement and confirmations, but the assessee did not comply. In rejoinder, learned AR has submitted that after the receipt of the notices u/s. 143(2) & 142(1) of the Act dated 30-01-2009, the assessee submitted details vide letter dated 28-04-2009 which are enclosed at pages 170 to 183 of the paper book. It was submitted that the assessee had given page-wise explanation in respect of each of the Annexure prepared in the course of search, viz. BS-I to BS-10 prepared as per Panchanama dated 05-10-2007 drawn at the office premises of the assessee at Surat. Secondly, the assessee gave page-wise explanation in respect of Annexure A-1 to A-3 prepared as per Panchanama dated .12-10-2007 drawn at the residence of the assessee at Mumbai. Therefore, the allegation of the AO to the fact that the assessee did not comply with the requirements of the notices is incorrect and contrary to the facts on record. Learned AR further argued

that if the AO was not satisfied with the explanation given vide his letter dated 06-10-2009, the AO ought to have called for further explanation from the assessee, but the same was not done. Therefore, assessee had reason to believe that his explanation in respect of seized material was satisfactory and no further explanation was required to be given.

5.3.2 Vide his reply dated 28-04-2009, the assessee explained pages 69 to 82 of BS-13 and submitted that these pages contained copies of ledger account of the parties relating to money lending business. Learned AR added that vide para 12 of the notice issued by the AO on 07-08-2009, the AO had made specific enquiry about the pages starting from page-64 and ending with page-9 which were properly and satisfactorily explained to the AO. If the AO wanted to make any addition on the basis of seized material on pages 69 to 82 of BS-13, he should have made a specific enquiry about those pages, which was not done by him. It is only while passing the assessment order, the AO referred to those pages and since he has not asked for any specific explanation, he made addition in respect of pages 69 to 82 of BS-13, learned AR reiterated that addition made by the AO on the pages 69 to 82 of BS-13 were made without calling for specific explanation from the assessee and therefore, the assessee was prevented by sufficient cause from producing before the AO such explanation and evidences which were relevant to the present ground of appeal. It was forcefully argued by the learned AR that the assessee has complied with the conditions of Rule 46A of the I.T. Rules 1962. Learned AR further drew attention to para-2 of the impugned assessment order, wherein, the AO has recorded that in response to notices issued u/s. 143(2) & 142(1) of the Act, Shri R.S. Lodha, C.A. attended from time to time and filed details called for. The above said categorical statement of the AO prove that the assessee had produced of the details called for by the AO which was certainly included bank statement and ledger accounts ,.- etc. without which the assessment cannot be completed. Learned AR prayed that the additional evidences may kindly be admitted as the same was necessary for disposal of the grounds of appeal and was within the requirement of Rule 46A. He also

relied on Honorable Bombay High Court decision in the case of Smt. Prabhavati S. Shah vs. CIT (231 ITR 1), wherein, their Lordships have held that it is clear from sub-sec. (4) and (5) of sec. 250 of the Income Tax Act 1961 that the powers of the Appellate Assistant Commissioner are much wider than the powers of an ordinary court. The powers conferred on the Appellate Assistant Commissioner u/s. 250(4) being a quasi-judicial power, it is incumbent on him to exercise the same, if the facts and circumstances justify. Their Lordships further observed that the assessee was never informed by the Income-tax Officer that the creditors were not available or unidentifiable. If she had been informed by the Income-tax Officer in the course of the assessment proceedings that he was not inclined to accept the loan as genuine because of non-availability of the creditors, the assessee could have tried to satisfy him about the genuineness of the loan by producing other evidence.

5.3.3 I have already admitted the additional evidences as discussed by me vide para 2.3.1 and 2.3.2 appearing in pages 12 & 13 of this appellate order. Therefore, AO's objection to the admission of additional evidence is overruled and the additional evidences have been admitted in the light of the Honorable Supreme Court decision given in the case of National Thermal Power Corporation Vs. CIT(supra) and Jute Corporation of India Ltd. Vs. CIT(supra) and in the light of the Bombay High Court decision in the cases of Smt. Prabhavati Shah vs. CIT(supra) and Ahmedabad Electricity Co. Ltd. Vs. CIT(supra)

5.3.4 Learned AR further argued that the AO did not raise specific queries in respect of pages 62 to 142 (as has been done by him for pages 64 to 9 of BS-13) before making addition on the basis of the said page? As argued earlier by the learned AR, the assessee was prevented by sufficient cause in not producing the evidences to explain pages 79, 80 back side of page 80, page 81, /, back side of page 81 and page 82 of BS-13. He contended that the addition of Rs. 1,08,38,630/- made by AO vide Tables appearing on page-9 of the impugned assessment order is factually wrong because these pages are duly reflected in the regular bank account of the assessee group as also in the regular books of

accounts of the assessee group. Learned AR has emphasized on the AO's observations in his remand report that the additional evidences in respect of the aforesaid pages (pages 79, both sides of pages 80 & 81 & page 82) were reflected in the regular bank accounts of the assessee and family members, Therefore, the AO accepted that no addition in respect of the entries recorded in the aforesaid pages can be made to the income of the assessee. Learned AR therefore, argued that the addition aggregating to Rs. 1,08,38,630/- made on the basis of the aforesaid pages 79, both sides of pages 80, 81 & page 82 may kindly be deleted.

5.3.5 I find considerable force in the arguments of the learned AR. The AO has himself accepted that the entries and explanations in respect of these pages are already reflected in the regular and disclosed bank accounts of the assessee and his family members. Therefore, addition of Rs. 1,08,38,630/- made on the basis of the aforesaid pages of Annexure BS-13 is deleted

5.3.6 The AO on page - 8 of the impugned assessment order has drawn a table on various seized loose sheets eg. Page No. 69, back of page No.70, page No. 71, back of page No. 71, back of page No. 72, page No. 74, page No. 76, page No. 77, back of page No. 77, page No. 78 and back of page No. 78 which were not recorded in the regular books of accounts. He added them and charged to tax. As discussed earlier, the AO has added a sum of Rs. 5,13,20,950/- which is the sum total of (a) the aforesaid entries recorded on Page No. 69, back of page No.70, both sides of page No. 71, back of page No. 72, page No. 74, page No. 76, both sides of page No. 77, and both sides of page No. 78 and (b) entries noted on loose sheets particularly on both sides of page No. 79, both sides of page No. 80, both sides of page No. 81 & 82 (Rs. 1,08,38,630/-). These entries are separately and regularly recorded in the disclosed bank account and regular books of accounts of the assessee. During the course of remand proceedings, the AO has examined the aforesaid entries mentioned at (b) and have reported as under:

I have carefully considered the assessee's submissions made vide letter dated 29-06- 2010 filed before your honor. The evidences filed in the form of extract of ABN-Amro Bank A/c. as referred in para 2(XVI) to (XXIV) of the assessee's letter dated 29-06- 2010 have been verified with the seized material and- the same appears to have been reflected"

It is further reported by the AO that the assessee was asked to furnish additional submissions / explanations by the AO during the course of remand proceedings which were made by the assessee vide letters dated 16-07-2010 and 26-07-2010. Assessee's learned AR vide letter dated 16-07-2010 submitted a chart explaining pages 69 to 82 of Annexure BS-13 which shows that some of the items have been considered in the peak amount worked out for money lending business in cash and offered as undisclosed income. Some of the entries relates to transactions already accounted. The AO examined the re-casted cash account from 01/04/2007 to 05-10-2007 and noticed that the revised peak investment is worked out at Rs. 91,59,410 (on 19-09-2007) as against original re-casted cash peak submitted during the course of search proceedings where the peak investment was worked out at Rs. 44,44,820/- only and the same was offered as undisclosed income of the assessee for AY 2008-09. Learned AO has reported in the remand report that now since the correct peak is enhanced at Rs. 91,59,410/- , the same should be considered instead of Rs. 44,44,820/- and the assessee's objection to the enhanced peak investment of Rs. 91,59,410/- should be rejected for the following reasons:

- 1. The re-casted cash-book is under the name of the assessee Mr. Surendra Barmecha and thus the peak amount belong to him only.*
- 2. The bifurcation of the disclosure made as submitted by the assessee group which is as discussed in the asstt. Order at para 9 clearly indicated that the disclosure of Rs. 23,50,000/- made by Sneha Barmecha and Sumit Barmecha were on a/c. of unaccounted investment in diamond business for the period 01/04/2007 to 04/10/2007. Thus the said amount of disclosure was not available to Mr. Surendra Barmecha for his money-*

lending business. Similarly, the disclosure in the case of Saurabh Barmecha was also on a/c. of unaccounted income from business which means not for money-lending business which is carried on by Surendra Barmecha.

3. On perusal of IT. records of Sumit Barmecha, it is noticed that in BIS of Y. E. 31.03.2008 the amount of Rs. 19,00,000/- has been shown as asset under 'Disclosure account'. This shows clearly that the amount was not given to Surendra Barmecha for money-lending business and can not be considered in the peak amount of cash book of Surendra Barmecha. Similar facts are in the case of other family members also.

Further, the assessee disclosed the peak amount at Rs. 44,44,820/- which was offered for tax only after well considering the amounts disclosed by other family members whose assessments have become final on this issue. The assessee has also not substantiated by documentary evidence its claim for correlation between the enhanced peak amounts of his cash book with amounts disclosed by the other family members. This is an after-thought argument which has no base. Hence, the revised peak amount is to be considered and the asstt. needs to be enhanced accordingly."

5.3.7 I have considered the facts and circumstances of the case. I agree with the aforesaid considered view of the learned AO. In view of the above, the peak investment has to be accordingly taxed at Rs. 91,59,410/- for the pages 69, back of page No. 70, both sides of page No. 71, 77 & 78, back of page No. 72, 74 & 76. As a result, there would be enhancement of Rs. 47,14,590/- (revised peak of Rs. 91,59,410 minus earlier peak of Rs. 44,44,820) in respect of table appearing on page-8. Learned AO is directed to tax the revised peak (Rs. 91,59,410/-) instead of earlier peak offered by the assessee in the return of income (Rs. 44,44,820/-). This will lead to enhancement of the peak investment offered by the assessee.

5.3.8 Regarding AO's objection regarding entries recorded in the seized loose papers, particularly Rs. 1,15,00,000/- from Mr. Saurabh Agra, Rs.

10,00,000/- from Mr. Bhagchandji, Rs. 58,50,000/- from Mr. Navin Mama and Rs. 16,02,720/- from Kirti Kaka, it is noticed that the AO has given an opinion that the aggregate total of the aforesaid item of Rs. 1,99,52,720/- should be added, as unexplained cash credit u/s. 68 of the Act. However, the AO's opinion is not in accordance with the provisions of the Act and the same deserves to be rejected for the reasons that Section 68 is applicable only when an amount found credited in the books of the assessee [Baladin Ram. vs. CIT (1969) 71 ITR 427 (SC)]. It has been judicially held that the book maintained by a firm could not be treated as the books of partners of the firm so as to attract section 68 in the course or assessment of the individual partners [Smt. Shanta Devi vs. CIT (1988) 171 ITR 532 (P&H)] and Laxmi Narain Gupta vs. CIT (1980) 124 ITR 94 (Pat). Similarly, credits in the books maintained by the HUF cannot be o Tax under section 68 in the names of a coparcener of such HUF (Munshi Ram vs. CIT (1980) 126 ITR 48 (Del)). Secondly, where there are several credits and debits entries in one cash credit account and the source and nature of such credits are not satisfactorily explained, on logical consideration probabilities of human behaviour, the funds operated from such account will be-taken to be one and the same and hence to avoid multiple counting of the same sums, only the highest peak of the amounts in that account could be taken as unexplained cash credit. [Ref: CIT vs. G.M. Chennabasappa (1959) 35 ITR (261 (AP)]. In the present case enhanced peak of Rs. 91,59,410/- is taken as unexplained cash credit.

5.3.9 Having regard to the facts and circumstances of the case and for the reasons mentioned in the forgoing paragraph, Ground No. 6 is partly allowed. The AO is directed to tax enhanced peak investment of Rs. 91,59,410/- instead of original peak investment of Rs. 44,44,820/- declared in the return of income and assessed as such by the AO. This will result in enhancement of peak investment in undisclosed money lending business by Rs. 47,14,590/- (91,59,410 minus 44,44,820). As a result, the addition of Rs. 4,04,98,654 is reduced to Rs. 91,59,410/-. As a corollary, assessee gets a relief of Rs. 3,13,39,244/ -. Ground No. 6 is partly allowed accordingly.

13. We have considered rival contentions and found that addition was made by the AO on the basis of seized document BS-3 regarding assessee's money lending business, on the plea that same was not recorded in the regular books of accounts. By the impugned order CIT(A) after recording detailed finding at 4.3.1 to 4.3.9 deleted / reduced the addition after observing that assessee has disclosed peak amount and included the same in its return of income for the assessment year 2008-2009 and paid taxes there on. CIT(A) found that in view of the disclosure so made by the assessee, there is no dispute to the fact that assessee had indulged in undisclosed money lending business which was not recorded in his regular books of accounts. However, CIT(A) after calling the remand report facts and figures modified the order of AO and reduced addition to Rs. 91,59,410/-. The detailed finding so recorded by CIT(A) is as per material on record and same is also based on the remand report so sent by the AO. Nothing was pointed out by learned DR so as to persuade us to deviate from the findings so recorded by the CIT(A) resulting into reducing addition made on account of investment in money lending business. Accordingly, we do not find any reason to interfere in the order of CIT(A).

14. In the appeal filed by the assessee in the A.Y 2008-09 assessee is aggrieved for enhancement of peak from 53,30,056/- to Rs. 91,59,410/-.

15. Rival contentions have been heard and record perused.

16. In the course of assessment proceedings, the assessee had given cash account incorporating the transactions in the loose papers, BS-13, and arrived at the peak investment of Rs. 44,44,820/-. As the disclosure of income made by the assessee for A.Y. 2008-09 was Rs. 53,30,056/- which was higher than the peak investment of Rs. 44,44,820/- and therefore, the disclosed amount of Rs. 53,30,056/- was offered for taxation in the return of income filed by the assessee for A.Y. 2008-09. The AO referring pages 69 to 82 of BS-13 held that the assessee had earned undisclosed income of Rs. 5,13,20,950/-. On page 14 of the assessment order the AO observed:

Amount advanced for money lending as on 04/10/2007 was	Rs. 5,13,20,950/-
Less: Amount available with the assessee as on 31/03/2007	<u>Rs. 54,91,240/-</u> Rs. 4,58,29,710/-
Less: Amount disclosed by the assessee in his return of income for A.Y. 2008-09	<u>Rs. 53,30,056/-</u>
Amount added by the A.O.	<u>Rs. 4,04,98,654/-</u>

From the record we find that before the Commissioner (Appeals), the assessee had explained that the AO had never sought explanation in respect of pages 69 to 82 of BS-13 and therefore, the assessee adduced additional evidence before the Commissioner (Appeals) which was forwarded to the AO and remand report was obtained from the AO. In the additional evidence filed before the Commissioner (Appeals), the assessee had enclosed recast cash book (account) whereby the peak amount of investment from the loose papers, BS-13, was arrived at Rs. 91,59,410/-

17. There has also no dispute to the fact that three business concerns were operating from the same business premises at 6/1910, Ambika Mansion, Tadakhadi, Mahidherpura, Surat, namely, (a) M/s. Barmecha Exports, proprietor Mr. Surendra S. Barmecha, (b) M/s. Balaji Jewels, proprietor Mrs. Sneha Barmecha, and (c) M/s. Sangeeta Gems, proprietor Mr. Saurabh Barmecha. All the loose papers were seized from the aforesaid business premises and residential premises where the assessee, his son and daughter-in-law were carrying on business as well as residing jointly. In answer to question No. 8 the assessee had made disclosure of income of Rs. 1,50,00,000/- belonging to him and members of his family and accordingly, the assessee had given the bifurcation of the said disclosure of income and which is accepted by the A.O. Since the assessee is the head of the family and the case of the assessee is

treated as the only case arising out of the search and as the statement of the assessee was recorded wherein the disclosure of Rs. 1,50,00,000/- was made by the assessee for and on his behalf and on behalf of the members of the family, the recast cash book was given the name of the assessee, i.e., Mr. Surendra Barmecha. However, while making the addition in the hands of Mr. Saurabh Barmecha, the son and Mrs. Sneha Barmecha, the daughter-in-law, the officers of the Department have relied upon and referred to the statement of the assessee. Thus, at that time, the disclosure made by the assessee is considered as the disclosure for the whole family. Taking the same analogy, though the recast cash book was given the name of the assessee, son as well as the funds of the assessee's daughter-in-law were used by the assessee while carrying on the money lending business which was found from the seized papers. The said loose papers (BS-13) had papers belonging to Mr. Saurabh Barmecha and Mrs. Sneha Barmecha which are considered to arrive at the peak investment. It is clear from the above observations that the said peak is worked out without taking into account the undisclosed income offered for taxation in A.Y. 2007-08 by the assessee and his son, Mr. Saurabh of Rs. 13,09,871/- and Rs. 30,16,511/- respectively i.e., the aggregate amount of Rs. 43,26,382/- On perusal of the page 132 it is seen that the recast cash book was prepared from 01/04/2007 to 05/10/2007 and the opening balance is taken at Rs. NIL, whereas the assessee had undisclosed income of Rs. 43,26,382/- which was utilized in the unaccounted business of money lending business which was continued on 01/04/2007 till the date of the search.

18. In view of the above discussion we restrict the enhancement of peak by Rs. 1003674/- [53,30,056 – 43,26,382] we direct accordingly. Thus, addition is upheld to the extent of Rs.10,03,674/-

ITA No. 8928 / M/ 2010 (Smt. Sangeeta Barmecha A.Y.2008-2009)

19. In this appeal Revenue is aggrieved for deleting the protective addition made in the hands of the assessee on the ground that the substantive addition was made in the hands of Shri Surendra Barmecha. The protective addition so

made in the hands of Smt. Sangeeta Barmecha was deleted by Ld. CIT(A) after observing as under:

“ 2.3.1 I have carefully and dispassionately considered the facts and circumstances of the case, relevant assessment order, written submissions made and arguments by the learned AR. Learned AR has vehemently argued that the AO has erred in law and in facts in making protective assessments of Rs. 25,80,000/- because the AO has not followed the due process of law and has never confronted the assessee with the alleged statement recorded by the AO from one Shri Sunil Jayantibhai Shah, behind the assessee's back. For the first time the reference of such statement was made in the assessee's assessment order without giving any opportunity to the assessee to furnish her rebuttal. The AO has not followed the principles of natural justice and hence the statement of the said Shri Sunil Jayantibhai Shah, has no evidentiary value and entire addition made on the basis of said statement is to be reduced completely in the light of Honorable Supreme Court, Delhi High Court & M.P. High court decisions in the cases of Kishenchand Chellaram V. CIT(supra), CIT vs. SMC Share Brokers Ltd. (supra) and Prakash Chand Nahta vs. CIT (supra) respectively. Therefore, the addition of Rs. 25,80,000/- on the said statement recorded by the AO without the knowledge and without giving an opportunity of rebutting the said statement is bad in law and therefore, addition based on such statement is to be reduced completely. Learned AR had furnished complete details of Account Payee Cheques paid by the assessee and her husband at Rs. 39,80,000/- and Rs. 37,20,000/- respectively as discussed in the preceding paragraphs. Learned AR has submitted that initially the assessee and her husband jointly agreed to purchase approximately 3000 sq. ft. area of a building under construction by M/s. Sumangal Corporation at Surat. The assessee's husband had also made cash payments of Rs. 11,00,000/- to the said builder on 17/08/2007 for providing strong room on 2nd floor for which extra beam was allowed in the ceiling of the first floor. Subsequently, the assessee and her husband changed the plan and decided to purchase a smaller premise on 1st & 2nd

floors of the building admeasuring only 2201 sq. ft. carpet area. As a result, the said builder refunded the difference amount of Rs. 14,80,000/- on 27/03/2008. In view of the said refund of Rs. 14,80,000/-, the net payment made by the assessee and her husband is worked out at Rs. 62,20,000/- from earlier Rs. 77,00,000/- (Rs. 77,00,000/- minus Rs. 14,80,000/-) In addition, cash of Rs. 11,00,000/- was also paid for providing a strong room. In the relevant assessment year, the AO observed that though the assessee and her husband have jointly made payment of Rs. 77,00,000/- to the said builder for booking the premises in the said building, the assessee and her husband have recorded only Rs. 62,20,000/- in the books of accounts and the difference of Rs. 14,80,000/- was not recorded in the books of accounts. Therefore, the AO held that the assessee or her husband had made unaccounted investment of Rs. 14,80,000/- by cheque and Rs. 11,00,000/- by cash in said building being constructed by M/s Sumangal Corporation at Surat. Learned AR has strongly contended that even the said Shri Sunil Jayantibhai Shah, in his statement recorded on 09/10/2007 has confirmed that the assessee and her husband made payments aggregating to Rs. 77,00,000/- on booking the premises in " Union Square Building" being constructed by M/s Sumangal Corporations at Surat. This fact exactly matches with payment details furnished by the assessee and her husband in the course of assessment proceedings and therefore, there is no dispute that the assessee and her husband had paid jointly Rs. 77,00,000/- to the said M/s. Sumangal Corporation. Subsequent to the statement of the said Shri Sunil Jayantibhai Shah, recorded on 09/10/2007, the assessee and her husband changed the plan and instead of 3000 sq. ft carpet area, the assessee and her husband decided to buy only 2201 sq. ft. carpet area on 1st and 2nd floors. In these circumstances, M/s. Sumangal Corporation refunded a sum of Rs. 14,80,000/- on 26/03/2008. The assessee and her husband executed agreement for purchase of the said 1st & 2nd floor area on 19/03/2008 admeasuring 2201 carpet area which is duly registered with the Sub-Registrars of Assurances as Surat. The assessee had also furnished a copy of her bank statement to further confirm the receipt of refund of Rs. 14,80,000/- from the said M/s. Sumangal Corporation, which

is credited in her ABN Amro Bank Account on 27/03/2008. Even without these bank statements, the facts are clear as discussed in the preceding paragraphs. In respect of the investment of Rs. 11,00,000/- in cash made by her husband Shri Surendra Barmecha, the same was disclosed by him while arriving at the peak credit of the money lending business. He has already disclosed Rs. 71,39,927/- in his hands and has paid the taxes along with the Return of income furnished u/s 153A of the Act. Having regard to the facts and circumstances of the case, I find considerable force in the arguments of the learned AR I agree with him that assessee and her husband paid Rs. 77,00,000/- by cheque which were fully disclosed and out of their disclosed bank accounts. Out of such payment of Rs. 77,00,000/- made by them, Rs. 14.80 lacs was received back by Account Payee Cheque due to purchase of a smaller flat (2201 sq. ft) against booking of bigger flat (3000 sq. ft) earlier for which payment of Rs. 77 lacs was made by the assessee and her husband. Therefore, difference of Rs. 14.80 lacs (Rs. 77 lacs – Rs. 62.20 lacs) cannot be added. Secondly, the AO has made the addition of Rs. 14.80 lacs in hands of the assessee's husband in a substantive manner. Therefore, the protective addition does not survive in the hands of the present assessee. Thirdly, the cash component of Rs. 11 lacs paid by the assessee's husband has separately been assessed in the hands of the assessee's husband, which have been disclosed by him u/s. 132(4) of the Act and taxes paid along with return of income furnished u/s/ 153A of the Act. In any case, once the AO has made assessment in the hands of assessee's husband in the substantive manner and there is no dispute about the hand in which the same is to be taxed, then the protective addition in the hands of the assessee cannot be sustained.

20. It is clear from the findings so recorded by the Ld. CIT(A) that protective addition so made in the hands of assesses was deleted on the plea that substantive addition have already been made in the hands of Shri Surindra Barmecha. Detailed findings so recorded by Ld. CIT(A) has not been controverted by the Ld. DR , accordingly we do not find any reason to interfere in the findings of Ld. CIT(A) resulting into deletion of protective addition.

21. In the result Revenue's appeals are dismissed whereas appeal of the assessee is partly allowed.

Order pronounced in the open court on 19/10/2016.

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER

sd/-
(R.C. SHARMA)
ACCOUNTANT MEMBER

Mumbai; Dated: 19/10/2016
AG (On Tour)

Copy of the Order forwarded to :

1. The Assessee
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai