IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH: BANGALORE

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SHRI KESHAV DUBEY, JUDICIAL MEMBER

ITA Nos.1163 to 1165/Bang/2023
Assessment Years: 2013-14 to 2015-16

ITO Ward-1 Hassan	**Vs.**	M/s. Ramachandra Setty & Sons SRS Building BM Road Hassan 573 201 **PAN NO : AAEFS4881R**
APPELLANT		**RESPONDENT**

ITA Nos.1166/Bang/2023
Assessment Year: 2017-18

ITO Ward-1 Hassan	**Vs.**	M/s. Ramachandra Setty & Sons SRS Building BM Road Hassan 573 201 **PAN NO : AAEFS4881R**
APPELLANT		**RESPONDENT**

ITA Nos.1156/Bang/2023
Assessment Year: 2017-18

M/s. Ramachandra Setty & Sons SRS Building BM Road Hassan 573 201 **PAN NO : AAEFS4881R**	**Vs.**	ITO Ward-1 Hassan
APPELLANT		**RESPONDENT**

Assessee by	:	Shri C. Ramesh, A.R.
Revenue by	:	Ms. Neera Malhotra, D.R.

Date of Hearing	:	15.05.2024
Date of Pronouncement	:	10.06.2024

O R D E R

PER CHANDRA POOJARI, ACCOUNTANT MEMBER:

ITA Nos.1163 to 1165/Bang/2023 filed by the revenue are against the orders of CIT(A)-2, Panaji dated 30.10.2023 for the assessment years 2013-14 to 2015-16 passed u/s 250 of the Income Tax Act, 1961 (in short "The Act"). ITA No.1156/Bang/2023 & ITA No.1166/Bang/2023 are cross appeals against different orders of CIT(A)-2, Panaji dated 30.10.2023 & 31.10.2023 respectively for the assessment year 2017-18 passed u/s 250 of the Act.

2. In first three appeals, the grounds are common except figures. Hence, we extract the grounds raised by the revenue in ITA No.1163/Bang/2024 as follows:

1. *The Order of the Learned CIT(A) is opposed to law and facts of the case*

2. *The CIT(A) erred in deleting the addition of Rs.2,00,00,000/- made by the assessing officer ignoring the fact that the additions made are based on admission of income in the statement given during the course of search U/s. 132(4) of the Act.*

3. *The CIT(A) erred in deleting the addition ignoring the fact that the additions made was based on estimate slips found during the course of search which means that there was material found during the search proceedings.*

4. *The CIT(A) erred in deleting the addition ignoring the fact that the assessee offered the additional income of Rs.2,00,00,000/- to tax in the statement U/s. 132(4) only after being confronted with the evidences found during the course of search.*

5. *The CIT(A) erred in giving relief to the assessee without going into the merits of the case.*

6. *For these and other grounds that may be urged upon, the order of the CIT(A) may be reversed and that assessment order to be restored.*

2.1 Thus, the revenue challenged the deletion of addition in these three assessment years as follows on the basis of judgement of Hon'ble Supreme Court in the case of PCIT Vs. Abhisar Buildwell Pvt. Ltd. reported in (2023) 149 taxmann.com 399 (SC) as follows:

Asst. Year	Amount (Rs.)
2013-14	2 Crores
2014-15	3.5 Crores
2015-16	4 Crores

3. In ITA No.1166/Bang/2023, the revenue has raised following grounds of appeal:

1. *The Order of the Learned CIT(A) is opposed to law and facts of the case*

2. *The CIT(A) erred in deleting the addition of Rs.4,11,86,426/- made by the assessing officer ignoring the fact that the additions made are based on admission of income in the statement given during the course of search U/s. 132(4) of the Act.*

3. *The CIT(A) erred in deleting the addition ignoring the fact that the additions made was based on estimate slips found during the course of search which means that there was material found during the search proceedings.*

4. *The CIT(A) erred in deleting the addition ignoring the fact that the assessee offered the additional income of Rs.4,11,86,426/- to tax in the statement U/s. 132(4) only after being confronted with the evidences found during the course of search.*

5. *The CIT(A) erred in giving relief to the assessee without going into the merits of the case.*

6. *For these and other grounds that may be urged upon, the order of the CIT(A) may be reversed and that assessment order to be restored.*

4. In ITA No.1156/Bang/2023, the assessee has raised following grounds of appeal for the AY 2017-18.

1. *The order of the learned Commissioner of Income Tax (Appeals)-2, Panaji, Goa is opposed to the facts of the case and law applicable to it.*

2. *The learned Commissioner of Income Tax (Appeals)-2, Panaji, Goa erred in holding that, stock of jewellery valued at Rs.1,36,73,613/- found at the residence of partners has to be considered as undisclosed investment U/s.69B and tax at the rate of 60% U/s.115BBE of the act, ignoring the fact that, these items were excess stock of the business but was kept at the residence and the said stock was offered to tax in the hands of firm and assessed as business income in the assessment and therefore should have been taxed as income under the provisions of section 28 of the act.*

3. *The learned Commissioner of Income Tax (Appeals)-2, Panaji, Goa, has erred in ignoring the position of law that, as far as the provisions of section 115BBE of the act is concerned the rate of taxation was at 30% upto 05.12.2016 and therefore the taxes payable on unexplained investment assessable U/s.69A of the act was at 30% upto that date and under the circumstances in respect of unaccounted investments quantified as on 24.06.2016 the taxes payable were at 30% and not at 60% as determined by the Assessing Officer.*

5. First, we adjudicate the revenue appeals in ITA Nos.1163 to 1166/Bang/2023. We will consider the facts in ITA No.1163/Bang/2023 which are follows:

6. The ld. D.R. submitted that for the A.Y.2013-14 to A.Y. 2015-16, the of Ld. CIT(A) decided the appeal "ONLY ON QUESTION OF LAW" and "NOT ON MERITS". Reliance placed by ld. CIT(A) on the decision of Hon'ble Supreme Court in the case of Pr. CIT, Central-3, Vs. Abhisar Buildwell (P) Ltd. (2023) is patently wrong as erroneous facts are stated in his orders in para 4.7 (AY 2013-14), para 4.8 (AY 2014-15) & para 4.8. (AY 2015-16). The Ld. CIT(A) has made similar erroneous statements in para 4.7 (AY 2013-14), para 4.8 (AY 2014-15) & para 4.8. (AY 2015-16) and the same is reproduced below:

"In view of the fact above, the claim of the appellant is accepted because in respect of completed/unabated assessments, no addition can be made by the AO in absence of any incriminating material found during the course of search u/s 132 of the Act………………………………………………………………………………………… ………………………………………………………………………………………..

This stand has been confirmed by Hon'ble Supreme Court of India in the case of Principal Commissioner of Income tax, Central-3 vs Abhisar Buildwell (P) Ltd. (2023) 149 Taxmann.com 399 (SC).

(Emphasis supplied)"

6.1 She submitted that the decision of Hon'ble Supreme Court in the case of Principal Commissioner of Income-tax, Central-3 vs Abhisar Buildwell (P) Ltd. (2023) 149 Taxmann.com 399 (SC)" is on completed/unabated assessments.

6.2 In this regard, the ld. D.R. reproduced the relevant Para 5, 8, 13 & 14(v) from the decision of Hon'ble Supreme Court as below:

- *PARA 5*

"5. We have heard learned counsel for the respective parties at length.

The question which is posed for consideration in the present set of appeals is, as to whether in respect of completed assessments/unabated assessments, whether the jurisdiction of AO to make assessment is confined to incriminating material found during the course of search under Section 132 or requisition under Section 132A or not, i.e., whether any addition can be made by the AO in absence of any incriminating material found during the course of search under section 132 or requisition under Section 132 A of the Act, 1961 or not."

- *PARA 8*

"8. For the reasons stated hereinbelow, we are in complete agreement with the view taken by the Delhi High Court in the case of Kabul Chawla (supra) and the Gujarat High Court in the case of Saumya Construction (supra), taking the view that no addition can be made in respect of completed assessment in absence of an incriminating material.

- *PARA 13*

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

- *PARA 14(v)*

"14. In view of the above and for the reasons stated above, it is concluded as under:
v) in case no incriminating material is unearthed during the search, the AO cannot assess or reassess taking into consideration the other material in respect completed assessments/unabated assessments. Meaning thereby, in respect of completed/unabated assessments, no addition can be made by the AO in absence

of any incriminating material found during the course of search under section 132 or requisition under section 132A of the Act, 1961. However, the completed/unabated assessments can be re-opened by the AO in exercise of powers under Sections 147/148 of the Act, subject to fulfilment of the conditions as envisaged/mentioned under sections 147/148 of the Act and those powers are saved."

(Emphasis supplied)

(iv) Whereas, in the case of the appellant, from A.Y.2013-14 to A.Y. 2015-16, no assessment was done. All original ROIs from A.Y.2013-14 to A.Y. 2015-16 WERE ONLY PROCESSED u/s 143(1).

(v) PROCESSING OF ROI u/s143(1) IS HELD NOT TO BE ASSESSMENT AS IT IS ONLY "AN INTIMATION".
In this regard, reliance is placed on the decision of Hon'ble Supreme Court of India in the case of Assistant Commissioner Of Income Tax vs Rajesh Jhaveri Stock Brokers Pvt. Ltd on 23 May, 2007 291 ITR 500, (2007). The relevant Para 13 from the decision of Hon'ble Supreme Court is reproduced below:

> *"13…………………………………………………………………………… ……………………………………………………………………may be noted above that under the first proviso to the newly substituted section 143(1), with effect from June 1, 1999, except as provided in the provision itself, the acknowledgment of the return shall be deemed to be an intimation under section 143(1) where (a) either no sum is payable by the assessee, or (b) no refund is due to him. rt is significant that the acknowledgment is not done by any Assessing Officer, but mostly by ministerial staff. Can it be said that any assessment is done by them? The reply_ is an emphatic no. The intimation under section 143(1)(a) was deemed to be a notice of demand under section 156, for the apparent purpose of making machinery provisions relating to recovery of tax applicable. By such application only recovery indicated to be payable in the intimation became permissible. And nothing more can be inferred from the deeming provision. Therefore there being no assessment under section 143(1)(a), the question of change of opinion, as contended, does not arise."*
>
> *(Emphasis supplied)*

(vi) Therefore, as the Ld.CIT(A), in his orders for A. Y. 2013-14 to A.Y. 2015-16 has The Ld. CIT(A) has made SIMILAR ERRONEOUS STATEMENTS IN PARA 4.7 (A.Y.2013-14). PARA 4.8 (A.Y.2014-15) & PARA 4.8 (A.Y.2015-16) and MISPLACED HIS RELIANCE on the decision of Hon'ble SC, as the decision of Hon'ble Court of India in the case of Principal Income-tax, Central-3 vs Abhisar Buildwell (P) Ltd. (2023) 149 Taxmann.com 399 (SC)" IS ON completed/unabated assessments and as NO assessments were made by the A.O in the case of appellant for the A. Y. 2013-14 to A.Y. 2015-16, the order of Ld. (A) BEING BAD IN LAW AND ON ERRONEOUS FACTS IS TO BE S ASIDE and order of A.O be restored."

7. The ld. A.R. for the assessee submitted briefly explaining the facts of the case stated that the assessee M/s. S. Ramachandra Setty & Sons, a partnership firm carrying on business of trading in gold jewellery and also silver articles. Action U/s.132 of the Act was conducted in the case of the assessee on 24.06.2016. For the A.Y.2013-14, there were no material seized evidencing any escapement of income. However, during the course of search a statement was recorded from Mr. R. Ravish, Managing Partner of the firm under the provisions of section 132(4) of the Act. Though there were no evidences relevant to A.Y.2013-14, the search party has taken a statement U/s.132(4) of the Act, wherein a declaration of Rs.2,00,00,000/- was recorded as undisclosed sales for the A.Y.2013-14, even though no incriminating material was found. The assessee, however has retracted his statement, vide letter dated 09.10.2018 filed on 12.10.2018 during the course of assessment proceedings for the reason that, there were no evidences or incriminating material in support of the declaration and hence no such income accrued for the A.Y. 2013-14**.** Further, the legal position in regard to the reliability of statement U/s.132(4) of the Act and also the justification for retraction have been brought out in a letter dated 02.11.2018 filed before the Assessing Officer.

7.1 The ld. A.R. for the assessee further submitted that, though the statement was recorded during the course of search on 24.06.2016, the retraction was only on 09.10.2018 during the course of the assessment proceedings for the reason that, the statement itself was recorded under pressure and coercion and declaration was quantified and obtained without any evidences, and under the circumstances the assessee apprehended that, if retraction is made immediately there could be further harassment and coercion from the department resulting in hinderance to the day to day activities of the business. Accordingly in the return filed

in response to notice U/s.153A of the act on 22.10.2017, no income was declared in regard to this declaration which was under duress and there was no material evidence in support of the same.

7.2 The ld. A.R. submitted that the Assessing Officer has concluded the assessment U/s.143(3) r.w.s 153A of the Act on 21.12.2018 wherein an addition of Rs.2,00,00,000/- has been made to the income declared. The Assessing Officer has made this addition relying solely on the statement recorded U/s.132(4) of the Act and without any supporting evidence to corroborate or any incriminating material for such quantification. The evidence relied upon for declaration U/s.132(4) of the Act by the search party relates to F.Y.2016-17 relevant to A.Y.2017-18 and not F.Y.2012-13 relevant to A.Y.2013-14. There was no incriminating material found during the course of search for the A.Y.2013-14.

7.3 The ld. A.R. submitted that the ld. CIT(A) has deleted the addition with elaborate discussions in paras 4.6 & 4.7 of his order which is extracted hereunder: -

> *"4.6 The rival submissions have been considered. It is a fact that the return for assessment year 2013-14 falls under the category of unabated assessment case as there were no pending assessment proceedings when the search was initiated on 24.06.2016. It is also a fact that there were no incriminating material relevant to A.Y.2013-14 found during the course of search. All the seized materials belong to A.Y.2017-18 based on which the admission was made by the appellant for A.Y.2013-14 on account of unaccounted sales. However, this statement was retracted later.*
>
> *4.7 In view of the fact above, the claim of the appellant is accepted because in respect of completed/unabated assessments, no addition can be made by the AO in the absence of any incriminating material found during the course of search U/s.132 of the Act. From the assessment order, it is clear that neither the assessment for AY.2013-14 was pending and was abated nor any incriminating material was found and nor that the search assessment was made on that basis. This stand has been confirmed by several judicial decisions highlighted by the appellant. The above position has been re-affirmed by the Hon'ble Supreme Court of*

India in the case of Principal Commissioner of Income Tax, Central-3, V. Abhisar Buildwell (P) Ltd (2023) 149 Taxmann.com 399 (SC), the conclusion of which is reproduced as under:

As per the provisions of Section 153A, in case of a search under section 132 or requisition under section 132A, the AO gets the jurisdiction to assess or reassess the 'total income' in respect of each assessment year falling within six assessment years. However, it is required to be noted that as per the second proviso to Section 153A, the assessment or re-assessment, if any, relating to any assessment year falling within the period of six assessment years pending on the date of initiation of the search under section 132 or making of requisition under section 132A, as the case may be, shall abate. As per sub-section (2) of Section 153A, if any proceeding initiated or any order of assessment or reassessment made under sub-section (1) has been annulled in appeal or any other legal proceeding, then, notwithstanding anything contained in sub-section (1) or section 153, the assessment or reassessment relating to any assessment year which has abated under the second proviso to sub-section (1), shall stand revived with effect from the date of receipt of the order of such annulment by the Commissioner. Therefore, the intention of the legislation seems to be that in case of search only the pending assessment/reassessment proceedings shall abate and the AO would assume the jurisdiction to assess or reassess the 'total income' for the entire six years period/block assessment period. The intention does not seem to be to re-open the completed/unabated assessments, unless any incriminating material is found with respect to concerned assessment year falling within last six years preceding the search. Therefore, on true interpretation of Section 153A of the Act, 1961, in case of a search under section 132 or requisition under section 132A and during the search any incriminating material is found, even in case of unabated/completed assessment, the AO would have the jurisdiction to assess or reassess the 'total income' taking into consideration the incriminating material collected during the search and other material which would include income declared in the returns, if any, furnished by the assessee as well as the undisclosed income. However, in case during the search no incriminating material is found, in case of completed/unabated assessment, the only remedy available to the Revenue would be to initiate the reassessment proceedings under sections 147/48 of the Act, subject to fulfilment of the conditions mentioned in sections 147/148, as in such a situation, the Revenue cannot be left with no remedy. Therefore, even in case of block assessment under section 153A and in case of unabated/completed assessment and in case no incriminating material is found during the search, the power of the Revenue to have the reassessment under sections 147/148 of the Act has to be saved, otherwise the Revenue would be left without remedy. If the submission on behalf of the Revenue that in case of search even where no incriminating material is found during the course of search, even in case of unabated/completed assessment, the AO can assess or reassess the income/total income taking into consideration the other material is

accepted, in that case, there will be two assessment orders, which shall not be permissible under the law.

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

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

7.4 He submitted that the ld. Commissioner of Income Tax (Appeals) has basically highlighted the fact that, for the A.Y.2013-14 there was no assessment pending which got abate and therefore in the absence of any incriminating material seized during the course of search no additions can be made and no assessment order could have been made under the provisions of section 143(3) r.w.s 153A of the Act.

7.5 Without prejudice to the above, the ld. A.R. submitted that for the assessment year 2013-14 & 2014-15, the assessment is already completed and it is not pending as on date of search i.e. on 24.6.2016 and he furnished the details as follows:

Assessment year	Date of filing of original return of income	Date of intimation u/s 143(1) of the Act	Due date for issuing notice u/s 143(2) of the Act
2013-14	24.09.2013	15.04.2014	13.09.2014
2014-15	27.09.2014	16.06.2015	30.09.2015

7.6 According to him, though there was no assessment u/s 143(3) of the Act by issuing notice u/s 143(2) of the Act, the time limit to issue notice u/s 143(2) of the Act has already lapsed as above for these two assessment years so as to issue notice u/s 143(2) of the Act. Consequently, no assessment could be framed u/s 153A of the Act as there was no seized material to reopen or reassess the assessment of the assessee for the assessment year 2013-14 & 2014-15. As such, these assessments to be quashed as ab-initio to assume jurisdiction u/s 153A of the Act.

8. We have heard the rival submissions and perused the materials available on record. There was a search in this case on 24.6.2016. Consequently, the assessment for the assessment year 2013-14 & 2014-15 are reopened by issuing notice u/s 153A of the Act on 13.3.2017 and the assessment for the assessment years 2013-14 & 2014-15 were framed u/s 143(3) r.w.s. 153A of the Act. The primary contention of the ld. A.R. is that in these two assessment years, the ld. AO made addition of Rs.2 Crores in the assessment year 2013-14 and Rs.3.5 Crores in the assessment year 2014-15 and these are not based on any seized material unearthed during the course of search u/s 132 of the Act and the addition is not supported by any material other than statement recorded u/s 132(4) of the Act. In the assessment year 2013-14, the ld. AO observed that an addition of Rs.2 Crores has been made on the basis of admission made by assessee u/s 132(4) of the Act on 24.6.2016. It is pertinent to reproduce the observations of the ld. AO as follows:

> ***"During the course of assessment proceedings on verification of the copies of the VAT assessment order for the financial year submitted by the VAT authorities u/s. 133(6) the additional turnover assessed for the month of July as per VAT order dated 24.04.2014 was determined at Rs.1,74,49,842/- as against Rs.1,52,97,186/-. According to the assessee the addition was an estimated addition on account of discrepancy in stock. Which means that there existed a discrepancy. Though the assessee has objected to the proposal to***

include the aforesaid amount as undisclosed turnover for A.Y 2013-14 without prejudice to the findings detected during search, it is noteworthy to mention that the partner Mr.Ravish was well aware of this order passed by the VAT authority on 29/04/2104 and he himself agreed to the discrepancy detected during search proceedings. Hence the declaration has been made on sound footing and the retraction is therefore totally baseless.

On the basis of the above discussion on the modus operandi observed to be followed by the said assessee's and discovery of authentic evidences as mentioned in the preceding paragraphs, a substantial amount of undisclosed/unaccounted income has been detected. The basis of arriving at the undisclosed income detected and admittance thereof has been discussed elaborately above.

Accordingly, the income of Rs.2,00,00,000/- on account of undisclosed sales is treated as the assessee's undisclosed income from business as per the findings during search and as declared u/s. 132(4).

Addition: Rs.2,00,00,000/-

Penalty proceedings u/s 271(1)(c) is initiated separately on the concealed income as detected above."

8.1 Similarly, for the assessment year 2014-15, the ld. AO made similar findings and finally made addition by stating as follows:

"On verification of the copies of the VAT assessment order for the financial year submitted by the VAT authorities u/s. 133(6) the total turnover assessed was Rs.23,30,63,402/- inclusive of VAT collected amounting to Rs.19,26,146/- as per the order u/s 39(1), 72(2) and 36 of the KVAT Act, 2003 dated 30.08.2017 as against the declared turnover of Rs.19,29,19,969/-. The assessee submitted that the order of the Commercial Tax Officer for the AY 2013-14 was appealed against the Joint Commissioner of Commercial Taxes (Appeals), Malnad Division, Shivamogga has passed an order in appeal No.KVAT/AP-65/2017-18, dated 02.11.2017 setting aside the enhanced assessed turnover. In this context it is worthwhile to mention that though the assessee has objected to the proposal to include the aforesaid amount as undisclosed turnover for AY 2014-15 without prejudice to the findings detected during search, it is noteworthy to mention that to mention that in this case the income Tax authorities had conducted a search prior to the passing of the asst order and the incriminating material on the basis of which the partner Mr. Ravish had voluntarily declared the undisclosed income, was seized by the department and not available with the commercial Tax authorities while passing the VAT order. Hence the setting aside of the VAT appellate authority is not applicable in this case.

> ***The declaration has been made on sound footing and the retraction is therefore totally baseless.***
>
> ***On the basis of the above discussion on the modus operandi observed to be followed by the said assessee's and discovery of authentic evidences as mentioned in the preceding paragraphs, a substantial amount of undisclosed/unaccounted income has been detected. The basis of arriving at the undisclosed income detected and admittance thereof has been discussed elaborately above.***
>
> ***Accordingly, the income of Rs.2,00,00,000/- unaccounted sales - is treated as the assessee's undisclosed income from business as per the findings during search and as declared u/s. 132(4).***
>
> ***Addition:2,00,00,000/-***
>
> ***Similarly the income of Rs.1,50,00,000/- being unaccounted URD purchases is treated as the assessee's undisclosed income from business as per the findings during search and as declared u/s. 132(4).***
>
> ***Addition: Rs.1,50,00,000/-"***

8.2 As seen from the above, the above addition is not based on any cogent material other than the statement recorded u/s 132(4) of the Act. The placing reliance by ld. AO on the VAT records is misplaced without verifying the above figures independently.

8.3 At this stage, it is appropriate to analyse the scope of section 153A of the Act. The scope of provisions of section 153A of the Act could be summarized as follows as per the order of the Mumbai Special Bench in the case of All Cargo Global Logistics Ltd. Vs. Deputy Commissioner of Income-tax (23 taxmann.com 103):-

Scenario	Scope of Section 153A
1. No return of income is filed by the assessee (whether or not time limit to file return of income has expired.	Since no return has been filed, the entire income shall be regarded as undisclosed income. Consequently, AO would have the authority/jurisdiction to assess the entire income, similar to jurisdiction in regular assessment u/s 143(3). No requirement to restrict to documents found during the course of search.

2. Return of Income just filed by the assessee – return yet to be processed u/s 143(1) – Time limit for issue of notice u/s 143(2) not expired.	Since return filed is even pending to be processed, the return would be treated as pending before the AO. Consequently, AO would have authority/jurisdiction to assessee the entire income, similar to jurisdiction in regular assessment u/s 143(3).
3. Return of Income filed by the assessee – return processed and intimation issued u/s 143(1) – Time limit for issue of notice u/s 143(2) not expired.	Since intimation is not akin to assessment and time limit for notice u/s 143(2) hs not expired, even though return has been processed, it will be case where return has not attained finality. Consequently, AO would have authority/jurisdiction to assess the entire income, similar to jurisdiction in regular assessment u/s 143(3).
4. Return of income filed by the assessee. Intimation passed or not u/s 143(1) and time limit for issue of notice u/s 143(2) has expired.	Return of income of the assessee shall be treated as having being accepted and attained finality. AO loses jurisdiction to verify the return of income Since, no assessment would be pending there would be no abatement of any proceedings. Accordingly, the scope of assessment u/s 153A would be restricted to incriminating material found during the course of search.
5. Notice u/s 143(2) issued and assessment pending u/s 143(3)	Pending regular assessment proceedings would abate and would converge/merge in proceedings u/s 153A. Accordingly the scope of assessment under section 153A would cover the pending return filed as well and would not be restricted to incriminating

	material found during the course of search.
6. Assessment u/s 143(3) completed.	Since regular assessment proceedings have been completed & are not pending, there would be no abatement of proceedings. AO loses jurisdiction to review the completed assessment. Accordingly, the scope of assessment u/s 153A would be restricted to incriminating material found during the course of search.
7. Proceedings u/s 147 pending where: (a) Assessment originally completed u/s 143(3) OR (b) No assessment earlier completed u/s 143(3)	Pending assessment/reassessment proceedings u/s 147 would abate and would converge/merge in proceedings u/s 153A. Accordingly, the powers of the AO, in both the cases, shall extent to: (a) Assess income that would validly be assessed in the pending proceedings u/s 147, and

8.4 In the light of above, it is to be noted that these two assessment years falls under category (4) in the above chart. Thus, it is appropriate to observe the facts of present case. As seen from the assessment order, the seized materials found during the course of search do not reflect any undisclosed income made by ld. AO and it is solely based on the statement recorded u/s 132(4) of the Act and unverified VAT records. In the case of assessment u/s 153A of the Act, the completed assessment can be tinkered if there is incriminating material found during the course of search. Therefore, in these two assessment years i.e. 2013-14 & 2014-15, there was no incriminating material suggesting these additions

made by ld. AO. Though the ld. AO is justified in issuing notice u/s 153A of the Act consequent to search action u/s 132(4) of the Act on 24.6.2016 to make an addition in case of completed assessment year, there should be a positive seized material/incriminating material found during the course of search action. In the absence of such seized material/incriminating material, ld. AO is precluded from making any additions.

8.5 Further, jurisdictional High Court in the case of Delhi International Airport Pvt. Ltd. In ITA No.322/2018 vide judgement dated 29.9.2021, wherein it was held as under:-

> *"30. Thus, it is clear that the Assessing Office: while passing the order under Section 153A read with Section 143[3] of the Act, ordinarily cannot disturb the assessment/reassessment order which has attained finality, unless the materials gathered in the course of the proceedings establishes that. the finalized assessments are contrary to the material unearthed during the, course of 153A proceedings, as held by the Co-ordinate Bench of this Court in the case of* ***IBC Knowledge Park (P) Ltd.,*** *supra. A concluded assessment could not be disturbed without there being any basis for doing so which is impermissible in law. Even in case of a searched person, the same reason would hold good. As observed in* ***Canara Housing Development Company*** *supra, the Assessing Officer is empowered to assess or reassess the total income of six assessment years i.e., the income which was returned in the earlier return, the income which was unearthed during search and also any income which was not disclosed in the earlier return or which was not unearthed during the search by separate assessment orders but in our considered view the completed assessments should be subject to the safeguards provided in* ***IBC Knowledge Park (P) Ltd.*** *supra.*
>
> > *"54. On a consideration of the relevant sections as well as judicial precedent referred to above, what emerges is that, Section 158BD of the Act deals with undisclosed income of a third party. However, insofar as the incriminating material of the searched person or other person detected during the course of search is concerned, the same can be considered during the course of assessment. Further, such incriminating material must relate to undisclosed income which would empower the Assessing Officer to upset or disturb a concluded assessment of the other person. Otherwise, a concluded assessment would be disturbed without there being any basis for doing so which is impermissible in law. Even in case of a searched person, the same reason would hold good as in case of any other person as observed by us, detection or the existence of incriminating material is a must for disturbing*

the assessment already made and concluded. But, at the same time, such can be at three stages: one, at the stage when. the re-assessment is initiated, the second, at the stage during the course of reassessment and third, at u stage where the reassessment is altered by a different assessment in respect of searched person or in respect of third party. In this regard, reference may be made to the decision of Apex Court in case of M/ s. Calcutta Knitwear (supra) and based on the said decision, the CJ3DT has also issued circular dated 31.12.2015 vide No.24/ 2015.The relevant extract of the circular for ready reference can be extracted as under:

"………………….""

As regards the pending assessments are concerned only one assessment shall be made separately for each assessment year on the basis of the income unearthed during search and any other material existing or brought on the record of the Assessing Officer. Even in the absence of any incriminating material abated „Assessment or reassessment could be done. The returns filed under Section 139 of the Act gets replaced by the returns filed under Section. 15:3A[I] of the Act. Pending proceedings in appeal, revision/application shall not abate subsequent to initiation of Section 153A proceedings. Further, recording of satisfaction under Section 153A may not be necessary unlike Section 153C of the Act which mandates recording of satisfaction.

For the reasons aforesaid, substantial question of law in ITA Ncs.322/2018 to 324/2018, 354/2018 and 355/2018, substantial question of law No.1 in ITA Nos.380/2018, 382/2018 to 385/2018 and 197/2021 to 199/2021 and substantial question of law Nos.1 and 2 in ITA No.381/2018 are answered in favour of the assessee and against the Revenue.

Substantial question of Law No.2 in ITA Nos.380/2018, 383/2018 to 385/2018 is squarely covered by the ruling of the coordinate Bench of this 'Court in ITA No.352/2018 and connecter? matters (DI) 25.05.2021) wherein the said substantial question of law has been answered ir favour of the assessee and against the Revenue.

Substantial question of law No.2 in ITA No.382/2018 and substantial question of law No.3 in ITA Nos.380/2018, 383/2018 to 385/2018 does not arise for our consideration since the same are not pressed by the Revenue.

Appeals stand disposed of accordingly."

8.6 Being so, in assessment year 2013-14 & 2014-15, the additions made by AO not based on any seized material found during the course of search action in the case of assessee. The

assessee in these cases filed original returns of income on 24.09.2013 & 27.9.2014 respectively. Time limit to issue a notice u/s 143(2) of the Act was on or before 13.09.2014 & 30.09.2015 respectively. No notice u/s 143(2) of the Act was issued to the assessee on or before 30.4.2014 & 30.9.2015 for AY 2013-14 & 2014-15 respectively. Being so, framing of assessment u/s 143(3) of the Act has already been concluded by operation of law on the date of search action i.e. on 24.6.2010. As held by Special bench in the case of All Cargo Global Logistics Ltd. Vs. DCIT (2012) 18 ITR (Trib) 106 (Mumbai)(SB) that in case of assessments that are abated, the AO retains the original jurisdiction as well as jurisdiction conferred on him u/s 153A of the Act for which assessment shall be made for each of 2 assessment years separately if there is seized/incriminating material, if any. In other cases, in addition to the income that has already been assessed, the assessment u/s 153A of the Act will be made on the basis of incriminating material, which in the context of relevant provisions means (i) books of accounts, other documents, found in the course of search but not produced in the course of original assessment, and (ii) undisclosed income or property discovered in the course of search. The argument of the Ld. Counsel is that in this assessment year, notice to issue u/s 143(2) was already lapsed as on the date of search, no assessment could be made without basis of incriminating material found during the course of search. We find force in the argument of Ld. Counsel for the assessee in this AY 2013-14 & AY 2014-15, the addition made by AO is not based on any seized material and the AO made additions in a routine manner which were disclosed to the department by way of regular return of income filed by the assessee and no incriminating material was found during the course of search and to come to conclusion that the expenses or allowances claimed by the assessee could be disregarded or income disclosed by the assessee could be

considered as taxable. Further, Hon'ble Karnataka High Court in the case of IBC Knowledge Park Pvt. Ltd. Vs. CIT (382 ITR 346) had held that "unless material seized during the course of search which suggest undisclosed income and are incriminating in nature, jurisdiction u/s 153C of the Act cannot be assumed. Further, in the case of Principal CIT Vs. Delhi International Airport Pvt. Ltd. in ITA No.322/2018 vide judgement dated 29.9.2021, the jurisdictional High Court followed the earlier judgement in the case of IBC Knowledge Park Pvt. Ltd. (supra). It is relevant to refer para 10 of the above judgement in the case of Delhi International Airport Pvt. Ltd. (supra) which reads as follows:-

> *"30. Thus, it is clear that the Assessing Officer while passing the order under Section 153A read with Section 143(3) of the Act, ordinarily cannot disturb the assessment / reassessment order which has attained finality, unless the materials gathered in the course of the proceedings establishes that the finalized assessments are contrary to the material unearthed during the course of 153A proceedings, as held by the Coordinate Bench of this Court in the case of IBC Knowledge Park (P) Ltd. supra. A concluded assessment could not be disturbed without there being any basis for doing so which is impermissible in law. Even in case of a searched person, the same reason would hold good………………….."*

8.7 Same view has been taken by Hon'ble Supreme Court in the case of Abhisar Buildwell (P) Ltd cited (supra). Accordingly, we quash the assessment for the assessment years 2013-14 & 2014-15 and the revenue appeals in ITA Nos.1163 & 1164/Bang/2024 are dismissed.

ITA No.1165/Bang/2023 (AY 2015-16):

9. In this appeal the revenue has raised the following revised grounds of appeal:

1. *The order of the Learned CIT(A) is opposed to law and facts of the case.*
2. *The CIT(A) erred in deleting the addition of Rs.4,00,00,000/- made by the Assessing Officer ignoring the fact that incriminating material was found during the course of search and a part of the same was shown and confronted to the assessee while recording his statement u/s 132(4) of the Act and the additions made are based on the response given by the assessee when confronted with the incriminating materials.*
3. *The CIT(A) erred in deleting the addition of Rs.4,00,00,000/- made by the assessing officer ignoring the fact that the additions made are based on undisclosed income admitted by the assessee when confronted with the incriminating material found during the course of search.*
4. *The CIT(A) erred in deleting the addition ignoring the fact that the assessee has offered additional income of Rs.4,00,00,000/- to tax in his sworn statement recorded u/s.132(4) of the Act after seeing the incriminating material found during the course of search which was shown and confronted to him.*
5. *The CIT(A) has placed reliance on decision of the Hon'ble Supreme Court in the case of Principal Commissioner of Income-tax Central-3 vs. Abhisar Buildwell (P) Ltd (2023) 149 Taxmann.com 399 (SC), wherein it is held that in case no incriminating material is unearthed during the search, the AO cannot assess or reassess taking into consideration the other material in respect of completed assessments/unabated assessments. Meaning thereby, that no addition can be made in the absence of any incriminating material found during the search. Additions have been made in this case based on the incriminating material found during the course of search. The CIT(Appeals) has, without getting into the merits of the case, held that the assessee is entitled to relief and has allowed the appeal of the assessee.*

6. *For these and other grounds that may be urged upon, the order of the CIT(A) may be revered and that assessment order to be restored.*

9.1 The crux of above grounds is deletion of addition of Rs.4 Crores by ld. CIT(A) on the reason that there was no seized material and the addition was solely based on the statement recorded u/s 132(4) of the Act is not proper and the judgement of Hon’ble Supreme Court in the case of PCIT Vs. Abhisar Buildwell (P) Ltd

(2023) 149 Taxmann.com 399 (SC), is not applicable to the facts of the case.

10. The contention of the ld. D.R. is that in this case, assessee had filed Return of Income for the assessment year 2015-2016 on 20.09.2015 declaring total income of Rs.89,39,000/-. A Search and Seizure action u/s.132 of the Income-tax Act, 1961 was carried out in the case of the assessee on 24.06.2016. Subsequent to the notice u/s.153A, the assessee filed Return of Income on 22.10.2017 declaring total income of Rs.89,39,000/-. Assessment was completed u/s.143(3) rws 153A on 21.12.2018, determining total income at Rs.4,89,39,000/-. A sum of Rs.3,00,00,000/- was added to the returned income on account undisclosed sales and a sum of Rs.1,00,00,000/- was added on account of unaccounted URD purchases.

10.1 She submitted that during the course of search, various incriminating documents and material were found and seized. Loose sheets inventorised and marked as 'A/SRS/04' contain loose sheets 113 in number. These loose sheets are actually estimate of sale figures given to customers who wish to purchase gold jewellery. The estimate itself serves as a proof of purchase of jewellery from the assessee in case the customer does not insist for a proper bill. The assessee was confronted with the evidence found. The assessee admitted unaccounted sales that are being made and accordingly voluntarily offered additional income as under —

On account of undisclosed sales —

Assessment Year	Undisclosed sales
2013-2014	Rs.2,00,00,000/-
2014-2015	Rs.2,00,00,000/-
2015-2016	Rs.3,00,00,000/-
TOTAL	Rs.7,00,00,000/-

On account of unaccounted URD Purchases -

Assessment Year	Unaccounted URD Purchases
2014-2015	Rs.1,50,00,000/-
2015-2016	Rs.1,00,00,000/-
TOTAL	Rs.2,50,00,000/-

10.2 In the Statement recorded u/s.132(4), the assessee admitted that a part of the sales is made through the estimate slips without a proper bill and corresponding entry into the sales register and voluntarily offered the undisclosed sales to tax. The assessee, however, retracted from the declaration made u/s.132(4) and no income was offered to tax on account of either undisclosed sales or unaccounted URD purchases in the Return of Income filed 22.10.2017. The retraction was rejected on the ground that the assessee had confirmed the declaration on three occasions vide statements recorded u/s.131 on 27.6.2016, 25.7.2016 and on 03.08.2016. The Assessing Officer proceeded to treat the undisclosed sales of Rs.3.0 crores and unaccounted URD purchases of Rs.1.0 crores as business income of the assessee as per findings during the search and as declared u/s.132(4).

10.3 She submitted that the assessee challenged the addition in appeal and the CIT(Appeals) has allowed the assessee's appeal. The CIT (Appeals) has held that the return for assessment year 2015-2016 falls under the category of unabated assessment case as there were no pending assessment proceedings when the search was initiated and that no incriminating material relevant to assessment year 20152016 was found during the course of search. The CIT(Appeals) has also observed that all the seized material belongs to assessment year 2016-2017 based on which the admission was made by the assessee for the assessment year 2015-2016 on account of undisclosed sales and unaccounted URD purchases and that the statement was also later retracted.

10.4 She further submitted that the CIT(Appeals) has relied upon the judicial decision of the Hon'ble Supreme Court in the case of PCIT, Central-3 Vs. Abhisar Buildwell (P) Ltd (2023) 149 Taxmann 399 (SC) wherein it is held that in case no incriminating material is unearthed during the search, the AO cannot assess or reassess taking into consideration the other material in respect of completed assessments/unabated assessments. Meaning thereby, in respect of completed/unabated assessments, no addition can be made by the AO in absence of any incriminating material found during the course of search u/s.132 or requisition u/s.132A of the Act. The CIT (Appeals) has, without getting into the merits of the case, held that the assessee is entitled to relief and has allowed the appeal of the assessee.

10.5 She submitted that the order of the CIT (Appeals) is not acceptable for the following reasons -

(a) Various incriminating documents and material were found and seized during the course of search action. Loose sheets inventoried and marked as 'A/SRS/04' contain loose sheets 113 in number. These 100 sheets are actually estimate of sale figures given to customers who wish to purchase gold jewellery. The estimate itself serves as a proof of purchase of jewellery from the assessee in case the customer does not insist for a proper bill.

(b) When confronted with the findings and the incriminating material found, which clearly evidenced that sales were being affected and a part of the sales were not at all accounted, the assessee admitted unaccounted sales that are being made and accordingly voluntarily offered additional income on account of undisclosed sales.

(c) The retraction of the declaration given is also not tenable as the statement was not given under any stress and that the claim of the assessee that the assessee had no time to look for evidences

is also not acceptable. The retraction is totally an afterthought as the declaration given was confirmed on three different occasions by Sri Ravish, before the DDIT(Inv), Unit-I, Mangalore vide statement recorded u/s.1312 on 27.06.2016, 25.07.2016 and again on 03.08.2016.

(d) The incriminating material found in the form of estimate slips was the basis on which the assessee voluntarily declared income on account of undisclosed sales. The estimates slips were also the basis on which the declaration on accounted purchases was made by the assessee.

(e) Section 153A empowers the Assessing Officer to assess or reassess the total income of six assessment years in question in separate assessment orders.

(f) Once the assessment is reopened, the Assessing Officer can take note of the income disclosed in the earlier returns, any undisclosed income found during search or any other income which is not disclosed in the earlier return which is not unearthed during the search, in order to find out the total income of each of the six assessment years and then pass the assessment order.

11. Further, she submitted that the assessment is pending and not completed as on the date of search. She submitted that for the assessment year 2015-16, assessee filed a return of income on 29.9.2015 and the same was processed u/s 143(1) of the Act vide intimation dated 5.5.2016. There was a time limit to issue a notice u/s 143(2) of the Act up to 30.9.2016 and the search took place on 24.6.2016. As such, time limit to issue a notice u/s 143(2) is available to the ld. AO. As such, it cannot be considered that intimation sent u/s 143(1) of the Act dated 5.5.2016 cannot be considered as an assessment as held by Hon'ble Supreme Court in the case of ACIT Vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd. (291

ITR 500). Accordingly, she submitted that there was no error in framing assessment u/s 153A of the Act. According to her, once the search took place u/s 132 of the Act, assessment has to be completed u/s 153A of the Act and ld. AO under statutory obligation to consider entire material in his possession whether it is seized material or the material produced by the assessee in the course of assessment so as to frame the assessment u/s 153A of the Act.

12. The ld. A.R. for the assessee submitted that the assessee M/s. S. Ramachandra Setty & Sons, a partnership firm carrying on business of trading in gold jewellery and also silver articles. Action U/s.132 of the act was conducted in the case of the assessee on 24.06.2016. For the A.Y.2015-16 there were no material is seized evidencing any escapement of income. However, during the course of search a statement was recorded from Mr. R. Ravish, Managing Partner of the firm under the provisions of section 132(4) of the act. Though there were no evidences relevant to A.Y.2015-16, the search party has taken a statement U/s.132(4) of the act wherein the following income was allegedly disclosed even though there was no incriminating material found.

Undisclosed sales	Rs.3,00,00,000/-
Unaccounted URD purchases	Rs.1,00,00,000/-
	Rs.4,00,00,000/-

12.1 The ld. A.R. submitted that the assessee however has retracted this statement for the reason that, there were no evidences or incriminating material in support of the declaration and hence no such income accrued for the A.Y.2015-16. Accordingly in the return filed in response to notice U/s.153A of the act on 22.10.2017, no income was declared in regard to this declaration which was under duress and there was no material supporting the same.

12.2 The ld. A.R. submitted that the Assessing Officer has concluded the assessment U/s.143(3) r.w.s 153A of the act on 21.12.2018 wherein a total addition of Rs.4,00,00,000/- has been made to the income declared. The Assessing Officer has made this addition relying solely on the statement recorded U/s.132(4) of the act and without any supporting evidence to corroborate or any incriminating material such quantification.

12.3 The ld. A.R. submitted that the ld. CIT(A) has deleted the addition with the following finding in paras 4.7 & 4.8 of the order which is extracted hereunder: -

> *"4.7 The rival submissions have been considered. It is a fact that the return for assessment year 2015-16 falls under the category of unabated assessment case as there were no pending assessment proceedings when the search was initiated on 24.06.2016. It is also a fact that there were no incriminating material relevant to A.Y.2015-16 found during the course of search. All the seized materials belong to A.Y.2017-18 based on which the admission was made by the appellant for A.Y.2015-16 on account of unaccounted sales. However, this statement was retracted later.*
>
> *4.8 In view of the fact above, the claim of the appellant is accepted because in respect of completed/unabated assessments, no addition can be made by the AO in the absence of any incriminating material found during the course of search U/s.132 of the Act. From the assessment order, it is clear that neither the assessment for AY.2015-16 was pending and was abated nor any incriminating material was found and nor that the search assessment was made on that basis. This stand has been confirmed by several judicial decisions highlighted by the appellant. The above position has been re-affirmed by the Hon'ble Supreme Court of India in the case of Principal Commissioner of Income Tax, Central-3, V. Abhisar Buildwell (P) Ltd (2023) 149 Taxmann.com 399 (SC),*
>
> *As per the provisions of Section 153A, in case of a search under section 132 or requisition under section 132A, the AO gets the jurisdiction to assess or reassess the 'total income' in respect of each assessment year falling within six assessment years. However, it is required to be noted that as per the second proviso to Section 153A, the assessment or re-assessment, if any, relating to any assessment year falling within the period of six assessment years pending on the date of initiation of the search under section 132 or making of requisition under section 132A, as the case may be, shall abate. As per sub-section (2) of Section 153A, if any proceeding initiated or any order of assessment or reassessment made under sub-section (1) has been annulled in appeal or any other legal proceeding, then, notwithstanding anything contained in sub-*

section (1) or section 153, the assessment or reassessment relating to any assessment year which has abated under the second proviso to sub-section (1), shall stand revived with effect from the date of receipt of the order of such annulment by the Commissioner. Therefore, the intention of the legislation seems to be that in case of search only the pending assessment/reassessment proceedings shall abate and the AO would assume the jurisdiction to assess or reassess the 'total income' for the entire six years period/block assessment period. The intention does not seem to be to re-open the completed/unabated assessments, unless any incriminating material is found with respect to concerned assessment year falling within last six years preceding the search. Therefore, on true interpretation of Section 153A of the Act, 1961, in case of a search under section 132 or requisition under section 132A and during the search any incriminating material is found, even in case of unabated/completed assessment, the AO would have the jurisdiction to assess or reassess the 'total income' taking into consideration the incriminating material collected during the search and other material which would include income declared in the returns, if any, furnished by the assessee as well as the undisclosed income. However, in case during the search no incriminating material is found, in case of completed/unabated assessment, the only remedy available to the Revenue would be to initiate the reassessment proceedings under sections 147/48 of the Act, subject to fulfilment of the conditions mentioned in sections 147/148, as in such a situation, the Revenue cannot be left with no remedy. Therefore, even in case of block assessment under section 153A and in case of unabated/completed assessment and in case no incriminating material is found during the search, the power of the Revenue to have the reassessment under sections 147/148 of the Act has to be saved, otherwise the Revenue would be left without remedy.

If the submission on behalf of the Revenue that in case of search even where no incriminating material is found during the course of search, even in case of unabated/completed assessment, the AO can assess or reassess the income/total income taking into consideration the other material is accepted, in that case, there will be two assessment orders, which shall not be permissible under the law.

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

in case no incriminating material is unearthed during the search, the AO cannot assess or reassess taking into consideration the other material in respect of completed assessments/unabated assessments. Meaning thereby, in respect of completed/unabated assessments, no addition can be made by the AO in absence of any incriminating material found during

the course of search under section 132 or requisition under section 132A of the Act, 1961. However, the completed/unabated assessments can be re-opened by the AO in exercise of powers under sections 147/148 of the Act, subject to fulfilment of the conditions as envisaged/mentioned under sections 147/148 of the Act and those powers are saved."

12.4 The ld. A.R. submitted that the ld. Commissioner of Income Tax (Appeals) has basically highlighted the fact that, for the A.Y.2015-16 there was no assessment pending which got abate and therefore in the absence of any incriminating material seized during the course of search no additions can be made and no assessment order could have been made under the provisions of section 143(3) r.w.s 153A of the act.

12.5 In the backdrop of the above facts, the stand of the Assessing Officer and the findings of the Commissioner of Income Tax (Appeals) in his order, the ld. A.R. submitted on each of the grounds of appeal of the revenue as under: -

GROUND NO.1 OF THE GROUNDS OF APPEAL

(a) The order of the Learned CIT(A) is opposed to law and facts of the case.

12.5.1 He relied on the findings of the ld. Commissioner of Income Tax (Appeals) in paragraph 4.7 & 4.8 extracted above. He further submitted that the ld. Commissioner of Income Tax (Appeals) has relied on the decision of Hon'ble Supreme Court in the case of Pr. Commissioner of Income Tax, Central-3 V. Abhisar Buildwell (P) Ltd (2023) 149 Taxmann.com 399 (SC). Hence, the ground that, the order is opposed to law and facts of the case does not sustain. In addition to the above, he requested to consider their submissions on the other grounds of appeal also.

GROUND NO.2 OF THE GROUNDS OF APPEAL

(b) The CIT(A) erred in deleting the addition of Rs.4,00,00,000/- made by the assessing officer ignoring the fact that the additions

made are based on admission of income in the statement given during the course of search U/s.132(4) of the Act.

12.5.2 He submitted that the revenue has taken up a ground that, the additions of Rs.4,00,00,000/- to the income declared was made solely on the basis of a statement given during the course of search and therefore the said addition could not have been deleted. He submitted that that, under law the statement given during the course of search U/s.132(4) of the act is to be corroborated on the basis of evidences and in the absence of such evidence no additions can be made.

12.5.3 The ld. A.R. further submitted that the assessee on verification of records has retracted on the statement for the reason that, the declaration above was not based on any evidence seized but was obtained only under pressure and coercion. Since, there is no evidence supporting the declaration made, merely on such declaration no addition could have been made. He relied on the decision laid down by the ITAT, Bangalore in ITA No.62 to 66/Bang/2023 in M/s. Yeshaswi Fish Meal and Oil Company V. DCIT, Central Circle-1, Mangalore, dated 01.09.2023. He further relied on the submissions above and the ratios laid down in the various decisions. It is a decided position of law that, merely on the basis of a statement recorded U/s.132(4) of the act without any supporting evidence no additions could be made to the income declared.

12.5.4 He submitted that the Commissioner of Income Tax (Appeals) rightly deleted the addition of Rs.4,00,00,000/- made by the Assessing Officer considering the position of law and also facts of the case. We rely on Commissioner of Income Tax (Appeals) findings and decision, hence the grounds of appeal of the revenue deserves to be dismissed.

GROUND NO.3 OF THE GROUNDS OF APPEAL

(c) The CIT(A) erred in deleting the addition ignoring the fact that the additions made was based on estimate slips found during the course of search which means that there was material found during the search proceedings.

12.5.5. The ld. A.R. submitted that the revenue has taken up a ground that, the additions made was based on estimate slips found during the course of search and has inferred that, there was material during the search proceedings. He denied the above findings of the Assessing officer. The issue involved in the present case is an addition of Rs.4,00,00,000/- for the A.Y.2015-16 which comprises of alleged undisclosed sales of Rs.3,00,00,000/- and undisclosed purchases of Rs.1,00,00,000/-. It is the case of the assessee that, there was no material seized during the course of search relevant for the A.Y.2015-16. In this connection, he extracted a statement recorded U/s.132(4) of the act on 24.06.2016 which forms the basis for the total addition of Rs.4,00,00,000/- to the income declared for the A.Y.2015-16.

<u>Basis for alleged undisclosed sales of Rs..3,00,00,000/-</u>

"Q.16: During the course of search proceedings today in your premises, loose sheets in exhibit marked A/SRS/04 containing loose sheets 113 in number. Serially numbered loose sheets from page 104 to page 113 contains estimates of sales figures. However, the same are not in your sales register. Please comment on the same.

Ans: A part of our sales is made through the above said format without a proper bill and corresponding entry into sales register as a lot of expenditure has to be incurred in cash for regular running of the business since the economy is semi-urban in nature. However, I understand the grave nature of the offence and hereby voluntarily offer the following amounts under undisclosed sales.

Sl. No.	*Asst. Year*	*Undisclosed sales*
01	*2013-14*	*2,00,00,000*
02	*2014-15*	*2,00,00,000*
03	*2015-16*	*3,00,00,000*
	Total	*7,00,00,000*

I request your learned self that since I have offered the said income voluntarily after understanding the nature of offence, I may be given immunity from penal proceeding."

Basis for Alleged unaccounted URD purchases

"Q.17: I am showing you exhibit marked A/SRS/04. Please take a look at the exhibit and explain the contents recorded in pages 98 to 101.

Ans: I have gone through the exhibit marked A/SRS/04 pages 98 to 101 contain details of various URD purchases made. A part of the URD purchase are not verifiable by me and accordingly I offered the following purchases as unexplained investments.

Sl. No.	*Asst. Year*	*Undisclosed purchases*
01	*2014-15*	*1,50,00,000*
02	*2015-16*	*1,00,00,000*
	Total	*2,50,00,000*

I request your learned self that since I have offered the said income voluntarily after understanding the nature of offence, I may be given immunity from penal proceeding."

12.5.6 He submitted that the Assessing Officer in para 5.1 of the order has scanned copies of evidences being loose slips in pages 108 to 113 of the seized material A/SRS/04 as the basis for quantification of the above alleged undisclosed sales of Rs.3,00,00,000/-for the A.Y.2015-16. He submitted that, all these loose slips are estimates and have dates of the transaction indicated therein. As could be seen from the dates, the transactions relate to F.Y.2016-17 relevant to A.Y.2017-18. Without prejudice to the fact that, these slips of papers are only estimates and not sales of the assessee and all the evidences relied upon relate to A.Y.2017-18 and not A.Y.2015-16.

12.5.7 He submitted that the addition of Rs.1,00,00,000/- being alleged undisclosed purchases is based on certain material in pages 98 to 101 of the seized material A/SRS/04. The relevant material is only a reconciliation of figures extracted from regular books maintained. The material is not incriminating and therefore

no addition of R.s1,00,00,000/- could have been made to the income declared towards undisclosed purchases.

12.5.8 He submitted that, there is no evidence for the A.Y.2015-16 and therefore the addition made above is erroneous and not as per the provisions of the act. The addition made is only on an estimate relying on certain material relatable to A.Y.2017-18 and not to A.Y.2015-16. The stand taken by the Assessing Officer that the addition made was on the basis of seized material is factually incorrect.

12.5.9 He submitted that the Commissioner of Income Tax (Appeals) rightly deleted the addition of Rs.4,00,00,000/- made by the Assessing Officer considering the position of law and facts of the case. He relied on Commissioner of Income Tax (Appeals) findings and decision, hence in the light of the above facts he submitted that, the ground taken up by the revenue is on misrepresentation of facts and hence the ground would not sustain.

GROUND NO.4 OF THE GROUNDS OF APPEAL

(d) The CIT(A) erred in deleting the addition ignoring the fact that the assessee offered the additional income of Rs.4,00,00,000/- to tax in the statement U/s.132(4) only after being confronted with the evidences found during the course of search.

12.5.10 The ld A.R. relied on his submissions to Ground No.2 & 3 above.

GROUND NO.5 OF THE GROUNDS OF APPEAL

(e) The CIT(A) erred in giving relief to the assessee without going into the merits of the case.

12.5.11 The ld. A.R. requested to consider his submissions to ground No.1 above wherein he has extracted the justification of the CIT(A) for allowing the relief. He submitted that the ld. CIT(A) has relied on a decision in the case of Pr. Commissioner of Income Tax, Central – 3, V. Abhisar Buildwell (P) Ltd of Hon’ble Supreme Court

cited (supra) and hence the ground taken up by the revenue does not sustain.

12.5.12 He further relied on the following decisions made before the ld. Commissioner of Income Tax (Appeals) which have been considered by the said authority for allowing relief. Relevant portions of the submissions extracted hereunder: -

> *2. We rely on the decision of Hon'ble Supreme Court in the case of Pr.Commissioner of Income Tax, Central IT, New Delhi V. Meeta Gutgutia (2018) 96 Taxmann.com 468 (SC), wherein the Hon'ble Supreme Court has dismissed the SLP filed against the order of the Delhi High Court in the same case holding that, in the absence of any incriminating material, invocation of section 153A of the act to reopen concluded assessments is not justified.*
>
> *In the present case there is no incriminating material for the A.Y.2015-16 seized. The return of income for the A.Y.2015-16 was filed on 29.09.2015 and there were no proceedings pending for the said year. Under the circumstances, in the light of the decision of Hon'ble Supreme Court above, we submit that, no proceedings U/s.153A of the act could have been initiated. The assessment order passed is therefore bad in law and deserves to be annulled.*
>
> *3. We also rely on the decision of Hon'ble Supreme Court in the case of CIT V. Jagadishprasad Mohanlal Joshi (2018) 99 Taxmann.com 288 (SC), wherein the SLP filed against the order of Bombay High Court in the same case has been dismissed.*
>
> *The Hon'ble Bombay High Court has held that, in the absence of any incriminating material, relying only on confessional statement no additions can be made.*
>
> *4. We also rely on the decision of High Court of Gujarath in the case of Pr.Commissioner of Income Tax, Ahmedabad V. Deepak Jashwanthlal Panchal (2017) 88 Taxmann.com 611 (Guj), wherein it is held that, only undisclosed income and undisclosed assets detected during search can be brought to tax in assessment year under the provisions of section 153A of the act.*
>
> *As recorded by the Assessing Officer in the assessment, the only material relied upon are certain estimates of the transactions stated to have been carried out during the F.Y.2016-17 relevant to A.Y.2017-18. There is no material for the A.Y.2015-16. There is no evidence of either undisclosed asset or undisclosed income. Hence, we submit that, no additional income could have been brought to tax for the A.Y.2015-16.*
>
> *5. We rely on the decision of ITAT, Bangalore Bench 'C' in the case of BMM Ispat Ltd V. DCIT, Central Circle – 1(2), Bangalore (2018) 93 Taxmann.com 76 (Bangalore Trib), wherein in the context of the provisions of section 153A of the act, the Hon'ble Tribunal has held as under in para 3.4.5 of its order. The said paragraph is extracted hereunder: -*

*"**3.4.5** In the case on hand, the assessment for Assessment Year 2005-06 has been completed as the time limit for issue of notice had expired on 30-9-2006; before the date of search on 28-9-2010. Therefore, since no assessment was pending, there was no question of abatement of assessment. Respectfully, following the decisions of the Hon'ble Karnataka High Court in the case of IBC Knowledge Park (P.) Ltd. (supra), we hold that for Assessment Year 2005-06 no assessment had abated and therefore the assessment under Section 143(3) r.w.s. 153A of the Act could have been made based only on incriminating documents / material found and seized in the course of search. That clearly not being the factual matrix in the case on hand, since no incriminating material was found / seized the order of assessment for Assessment Year 2005-06 passed under Section 143(3) r.w.s. 153A of the Act vide order dt.14-3-2013 is cancelled. Consequently, the original assessment and income returned as per the original return of income filed on 19-09-2005 at Rs.2,66,06,899 stands restored. Assessee's appeal is allowed in terms of Grounds 1, 2, 4, 5, 7 and 8."*

We submit that, the facts of the appellant are similar to the facts narrated above in as much as the appellant had filed return of income for the A.y.2015-16 on 29.09.2015 declaring total income of Rs.89,39,000/-. There was no action on the return. The time limit for issue of notice U/s.143(2) of the act had expired as on the date of search. There were no proceedings pending disposal and hence nothing had abated. Under the circumstances, an order U/s.143(3) r.w.s 153A of the act can be made only on the basis of incriminating documents/ material found and seized during the course of search. In the absence of any such material no assessments could have been made under the provisions of section 153A of the act. The action of the Assessing Officer is in contravention of the ratio laid down by the jurisdictional Tribunal.

6. We rely on the decision of ITAT Ahamadabad Bench 'SMC' in the case of M/s.Priya Holdings (P) Ltd V. Assistant Commissioner of Income Tax, Central Circle – 2(1), Ahamadabad wherein it is held that, unless there is incriminating material no proceedings can be initiated U/s.153A of the act. The Hon'ble Tribunal has held as under in para 6.3 of the order

"6.3 The legal issue emanating on such facts that in the absence of any incriminating material/evidence, no addition can be sustained under S.153A is no longer res integra in view of the decision of the Hon'ble jurisdictional High Court in the case of Saumya Construction (P) Ltd and Devangi Alias Roopa in Tax Appeal No.54 of 2017 order dated 02.02.2017. Similar view was earlier taken by the Hon'ble Delhi High Court in the case of Kabul Chawla."

In the light of the above ratio, we submit that, for the facts of the appellant proceedings U/s.153A of the act could not have been

initiated and the additions made without corroborative evidences would not sustain.

7. We rely on the decision of High Court of Gujarat in the case of Pr.Commissioner of Income Tax-4 V. Saumya Construction (P) Ltd (2017) 81 Taxmann.com 292 (Guj)

The Hon'ble High Court of Gujarath has held that, unless there is incriminating material found during the course of search no addition can be made in a proceedings U/s.153A of the act. It is further held that, the material collected later cannot be basis for addition.

While doing so the Hon'ble High Court of Gujarath has relied on the following decisions wherein similar ratio has been laid down.

i) Pr. CIT V. Desai Construction (P) Ltd (2016) 387 ITR 552/(2017) 81 Taxmann.com 271 (Guj)
ii) CIT V. Deepak Kumar Agarwal (2017) 86 Taxmann.com 3/251 Taxman 22/398 ITR 586 (Bom)
iii) CIT V. Gurinder Singh Bawa (2016) 386 ITR 483/(2017) 79 Taxmann.com 398 (Bom)
iv) CIT V. Kabul Chawla (2016) 380 ITR 573/234 Taxmann 300/61 Taxmann.com 412.

8. We also rely on the decision of Hon'ble High Court of Delhi in the case of Pr.CIT V. Dharmpal Premchand Ltd (2018) 408 ITR 170 (Delhi), wherein it is held that, in the absence of any incriminating material found during the course of search no addition can be made in a proceedings initiated under the provisions of section 153A of the act."

12.5.13 The ld. A.R. submitted that the Commissioner of Income Tax (Appeals) rightly deleted the addition of Rs.4,00,00,000/- made by the Assessing Officer considering the legal facts of the case. He relied on Commissioner of Income Tax (Appeals) findings and decision; hence he requested us to consider the submissions above and dismiss the grounds of appeal by the revenue.

13. We have heard the rival submissions and perused the materials available on record. The assessment in this case was to be completed u/s 153A of the Act and the AO was under a statutory obligation to consider entire material irrespective of the place from where it was found whether assessee's own place or some other place. There cannot be two assessments in case of searched party, one u/s 153A of the Act and another u/s 153C of the Act. At this

point, it is appropriate draw support from judgement of jurisdictional High Court in the case of Canara Housing Development Company Vs. DCIT (274 CTR 122), wherein held as follows:-

> *"10. Section 153A of the Act starts with a non obstante clause. The fetters imposed upon the Assessing Officer by the strict procedure to assume jurisdiction to reopen the assessment under Sections 147 and 148, have been removed by the non obstante clause with which sub-section (1) of Section 153A opens. The time-limit within which the notice under Section 148 can be issued, as provided in Section 149 has also been made inapplicable by the non obstante clause. Section 151 which requires sanction to be obtained by the Assessing Officer by issue of notice to reopen the assessment under Section 148 has also been excluded in a case covered by Section 153A. The time-limit prescribed for completion of an assessment or reassessment by Section 153 has also been done away with in a case covered by Section 153A. With all the stops having been pulled out, the Assessing Officer under Section 153A has been entrusted with the duty of bringing to tax the total income of an assessee whose case is covered by Section 153A, by even making reassessments without any fetters, if need be. Therefore, it is clear even if an assessment order is passed under Section 143(1) or 143(3) of the Act, the Assessing Officer is empowered to reopen those proceedings and reassess the total income taking note of the undisclosed income, if any, unearthed during the search. After such reopening of the assessment, the Assessing Officer is empowered to assess or reassess the total income of the aforesaid-years. The condition precedent for application of Section 153A is there should be a search under Section 132. Initiation of proceedings under Section 153A is not dependent on any undisclosed income being unearthed during such search. The proviso to the aforesaid section makes it clear the Assessing Officer shall assess or reassess Lhe total income in respect of each assessment year falling within such six assessment years. If any assessment proceedings are pending within the period of six assessment years referred to in the aforesaid sub-section on the date of initiation of the search under Section 132, the said proceeding shall abate. If such proceedings are already concluded by the Assessing Officer by initiation of proceedings under Section 153A, the legal effect is the assessment gets reopened. The block assessment roped in only the undisclosed income and the regular assessment proceedings were preserved; resulting in multiple assessments. Under Section 153A, however, the Assessing Officer has been given the power to assess or reassess the total income of the six assessment years in question in separate assessment orders. The Assessing Officer is empowered to reopen those proceedings and reassess the total, income, taking note of the undisclosed income, if any, unearthed during the search.*

He has been entrusted with the duty of bringing to tax the total income of an assessee whose case is covered by Section 153A, by even making reassessments without any fetters. This means that there can be only one assessment order in respect of each of the six assessment years, in which both the disclosed and the undisclosed income would be brought to tax. When once the proceedings are initiated under Section 153A of the Act, the legal effect is even in case where the assessment order is passed it stands reopened. In the eye of law there is no order of assessment. Re-j opened means to deal with or begin with again. It means the Assessing Officer shall assess or reassess the total income of six assessment years. Once the assessment is reopened, the assessing authority can take note of the income disclosed in the earlier return, any undisclosed income found during search or and also any other income which is not disclosed in the earlier return or which is not unearthed during the search, in order to find out what is the "total income" of each year and then pass the assessment order. Therefore, the Commissioner by virtue of the power conferred under Section 263 of the Act gets no jurisdiction to initiate proceedings under the said provision because the condition precedent for initiating proceedings under Section 263 is any order passed under the Act by the Assessing officer is erroneous insofar as it is prejudicial to the interest of the revenue. Once the order passed by the Assessing officer gets reopened, there is no order which can be said to be erroneous insofar as it is prejudicial to the-interest of the revenue which confers jurisdiction on the Commissioner to exercise the power of the jurisdiction."

13.1 Further in the present case, return of income filed by assessee that was processed u/s 143(1) of the Act and the time limit for issue of notice u/s 143(2) of the Act not expired which is available up to 30.9.2016 and the intimation is not akin to assessment and time limit for notice u/s 143(2) of the Act is not expired, even though return has been processed, it will be a case where return has not been attained finality Consequently, ld. AO would have authority/jurisdiction to assess the entire income similar to jurisdiction in regular assessment u/s 143(3) of the Act as held by All Cargo Logistics Ltd. cited (supra). As such, the quashing of assessment by ld. CIT(A) is not possible.

13.2 Hence, the assessment was pending as on the date of assessment since the search took place on 24.6.2016 return was

filed for this assessment year u/s 139(1) of the Act on 29.9.2015. The same was processed u/s 143(1) of the Act on 5.5.2016 there was a time limit to issue notice u/s 143(2) of the Act up to 30.9.2016. Hence, on the date of search i.e. 24.6.2016 there is a time limit to issue notice u/s 143(2) so as to complete the assessment u/s 143(3) of the Act. Hence, this assessment cannot be said that assessment has not been pending on this date and the assessment is not abated. As discussed earlier, in the table clause (3) mentioned in para 8.3 of this order is applicable to the facts of the case, which reads as follows:

3. Return of Income filed by the assessee – return processed and intimation issued u/s 143(1) – Time limit for issue of notice u/s 143(2) not expired.	Since intimation is not akin to assessment and time limit for notice u/s 143(2) hs not expired, even though return has been processed, it will be case where return has not attained finality. Consequently, AO would have authority/jurisdiction to assess the entire income, similar to jurisdiction in regular assessment u/s 143(3).

13.3 Being the assessment year 2015-16 falls under the above clause the assessment cannot be cancelled by applying the judgement in the case of Abhisara Buildwell Pvt. Ltd. cited (supra). To that extent ld. CIT(A) not justified. Since there is a time limit to issue notice u/s 143(2) of the Act though return was processed it will be the case where the return has not attained finality. As such assessment is pending and it is not a concluded assessment, the ld. AO validly assumed jurisdiction u/s 153A of the Act consequent to search action u/s 132 of the Act so as to frame the assessment u/s 153A of the Act.

13.4 Coming to the merit of the addition made by ld. AO, addition was made towards unaccounted sales at Rs.3 Crores and similar unaccounted URD purchases at Rs.1 Crore totaling Rs.4 Crores, which is based on the statement recorded u/s 132(4) of the Act.

13.5 To come to the above conclusions herein above, the ld. AO relied on the following seized material which are in the form of loose sheets.

(1) Seized from the office premises of **Mr.RajagopalSetty and Mr. R Ravish,** Vajarangi, 2nd Cross Road, Sampige Road, K R Puram, Hassan, on 24.06.2016:-

Sl. No.	Exhibit No.	No. of pages	Description
1	SRS/1	157	Loose Sheets containing Sale Deed
2	SRS/2	240	Loose Sheets containing Sale Deed
3	SRS/3	95	Loose Sheets containing deed of reconstitution of partnership of M/s Cauvery associates.
4	SRS/4	121	Loose Sheets containing Sale Deed
5	SRS/5	39	Loose Sheets containing Deed of partnership with Cauvery Associates
6	SRS/6	157	Loose Sheets containing valuation report and lease agreement.
7	SRS/7	95	Loose Sheets containing sale deed and land details
8	SRS/8	199	Loose Sheets containing Sale Deed
9	SRS/9	70	Loose Sheets containing Sale Deed
10	SRS/10	369	Loose Sheets containing Sale Deed
11	SRS/11	268	Loose Sheets containing Sale Deed
12	SRS/12	92	Hiring Bill Book
13	SRS/13	92	Hiring Bill Book
14	SRS/14	43	Expenses Receipt from 15.4.2014 to 26.3.15
15	SRS/15	01(Hard Disk)	Master copy – Ravish Mobile data – Lap top data back up
16	SRS/16	12	Loose Sheets containing P&L account and Capital Account of R Ravish
17	SRS/17	11	Loose Sheets containing letter to ITO Hassan for assessment of R Ravish from CA
18	SRS/18	14	Images/ Photographs of Barren Land taken during search operations

(2) Seized from **M/s S. Ramachandra Setty & Sons, SRS Jewellers**, BM Road, Hassan, on 24.06.2016 during the course of Search U/s 132:-

Sl. No.	Exhibit No.	No. of pages	Description
1	A/SRS/1	137	Purchase bills along with CD Named SRS Jewellers
2	A/SRS/2		Hard Disk of Accounts system Image
3	A/SRS/3	138	Asset File of Savitha containing sale deed.
4	A/SRS/4	113	Loose Sheets found in premise comprising sale deed, copies of cheque, ledger of stock.
5	A/SRS/5	8	Ramdev Graphic File Asset file of R Rajagopal Shetty containing sale deed.
6	A/SRS/6	96	R. Ravish Graphic file and Asset File and land details containing sale deed.
7	A/SRS/7	142	R Rajagopal Shetty Asset File and land details file containing sale deed.
8	A/SRS/8	33	R Rajath Asset File land details file containing sale deed.
9	A/SRS/9	40	Rahul Asset File and land details file.
10	A/SRS/10	65	Workers Memo from the period of 2.4.16 – 11.4.16
11 to 110	A/SRS/11 to 110		Cash Bill Book for various periods
111	A/SRS/111	7	Arun Gold Students Notebook containing sale details file.
112	A/SRS/112	189	Chit Ledger for the period of 21.6.16 – 21.6.16

For better understanding, we reproduce the loose sheets relevant as follows:

ESTIMATE (113)
Ph.: 08172 268353
265005
SRS Jewellers, B.M.Road, HASSAN - 573 201
Date 5|5|16

Baby chain – 5.000

(X2800)

121.000

ESTIMATE (112)
Ph.: 08172 268353
265005
SRS Jewellers, B.M.Road, HASSAN - 573 201
Date 7|5|16

Baby Ring 1.500

(2800/-)

4200

ESTIMATE
Ph.: 08172 268353
265005
(111)
SRS Jewellers, B.M.Road, HASSAN - 573 201
Date 9|5|16

Kondlatlolake 1.400

(X2800)

3920

ESTIMATE (110)

Ph : 08172 268353
265005

SRS Jewellers, B.M.Road, HASSAN - 573 201

Date 10/5/16

Studs - 3.800

x 2800/-

10640

ESTIMATE (109)

Ph : 08172 268353
265005

SRS Jewellers, B.M.Road, HASSAN - 573 201

Date 12/5/16

Thali . 4.500

(X2800)

12.600

ESTIMATE (108)

Ph : 08172 268353
265005

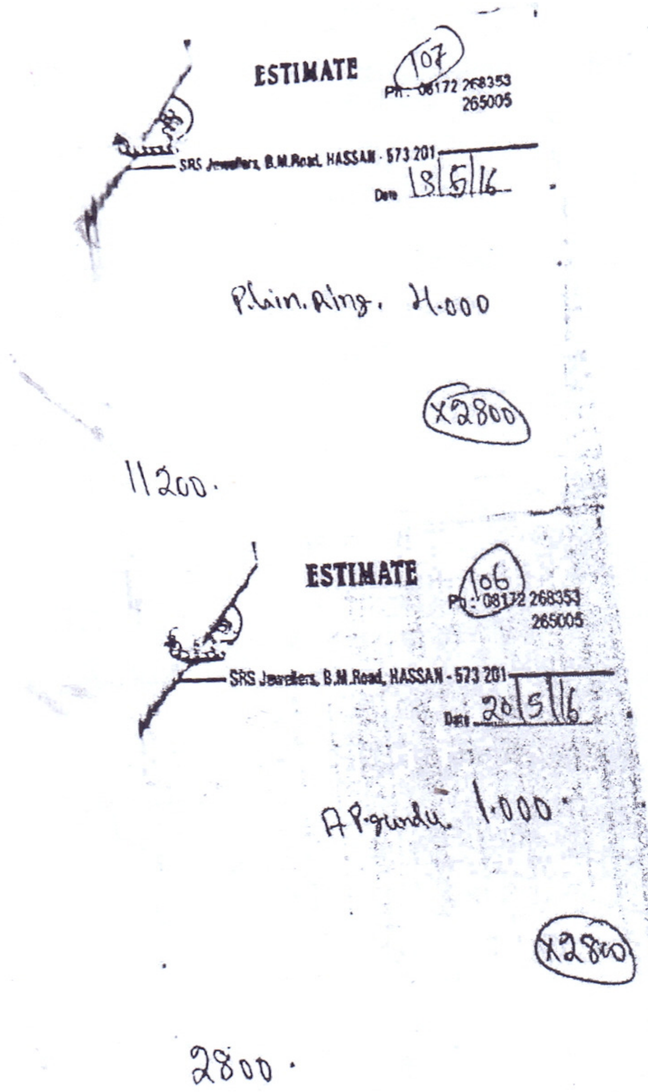
SRS Jewellers, B.M.Road, HASSAN - 573 201

Date 14/5/16

Kasu - 3.000

(X2800)

8400


ESTIMATE
107
Ph: 08172 268353
265005
SRS Jewellers, B.M.Road, HASSAN - 573 201
Date 18/5/16
Plain.Ring. 4.000
X2800
11200.

ESTIMATE
106
Ph: 08172 268353
265005
SRS Jewellers, B.M.Road, HASSAN - 573 201
Date 20/5/16
A.P.gundu. 1.000
X2800
2800.

13.6 Thus, he arrived at the undisclosed sales at Rs.3 crores and unaccounted purchases at Rs.1 crore totalling of Rs.4 crores and made these additions in the assessment year 2015-16. Further, ld. AO relied on the statement recorded u/s 132(4) of the Act where he considered the above loose slips while recording the statement on 27.6.2016 u/s 132(4) of the Act wherein Mr. R. Ravish has stated as follows:

Answer to question 16 of the statement recorded from Mr.Ravish in the busin premises is reproduced below:

"Q16: During the course of search proceedings today in your premises, loose sheets in exhibit marked A/SRS/04 containing loose sheets 113 in number. Serially numbered loose sheets from page 104 to page 113 contains estimates of sales figures. However, the same are not in your sales register. Please comment on the same.

Ans: A part of our sales is made through the above said format without a proper bill and corresponding entry into sales register as a lot of expenditure has to be incurred in cash for regular running of the business since the economy is semi-urban in nature. However, I understand the grave nature of the offence and hereby voluntarily offer the following amounts under undisclosed sales.

Sl.No	Asst. Year	Undisclosed sales
01	2013-14	2,00,00,000
02	2014-15	2,00,00,000
03	2015-16	3,00,00,000
Total		7,00,00,000

I request your learned self that since I have offered the said income voluntarily after understanding the nature of offence, I may be given immunity from penal proceedings."

153A/M/s. Ramac...

From the above statement, it is seen that the entire undisclosed sales of Rs 3,00,00,000/- was admitted in the statement recorded U/s 132(4) and offered to tax as income from other sources. On the basis of the above statement, the assessee agreed to offer the undisclosed income detected, to tax as per the above year-wise break up .The above findings has been confirmed by the, assessee Shri. Ravish, the managing partner of the firm, during search proceedings. However in the return of income filed in response to the notice u/s 153A, the income has not been admitted.

...ld that has been made by ... the

13.7 In question No.17 also he answered as follows:

Answer to question 17 of the statement recorded from Mr.Ravish in the business premises is reproduced below:

"Q.No.17: *I am showing you exhibit marked A/SRS/04. Please take a look at the exhibit and explain the contents recorded on pages 98 to 101.*

I have gone through the exhibit marked A/SRS/04. Pages 98 to 101 contain details of various URD purchases made. A part of the URD purchases are not verifiable by me and accordingly, I offer the following purchases as unexplained investments-

Sl.No.	Asst.Year	Undisclosed purchases
1.	2014-15	1,50,00,000
2.	2015-16	1,00,00,000
Total		2,50,00,000

13.8 However, the same has not offered for taxation by assessee in his return of income filed u/s 153A of the Act. The assessee stated that the statement was made during the course of search action in statement recorded u/s 132(4) of the Act has no evidentiary value which was not supported by any material evidence in support of the declaration obtained from the assessee and the same has been made without understanding position of law and also mistaken impression of facts. Further, the search procedure went on for a long period without any break and the partner was under great pressure and stress. The statement has been given under stress and in the absence of any corroborative evidence no addition could be made. To make an addition, the ld. AO shall have sufficient material in the form of incriminating/seized material. In the present case, the case of the assessee is that there were no corresponding seized material to make an addition of Rs.4 crores as

discussed above in the assessment year 2015-16. The addition is based on statement recorded u/s 132(4) of the Act supported by the unsubstantiated loose slips, which do not have no evidentiary value.

13.9 Moreover, the statements of Mr. R. Ravish have been recorded post search. They do not have any evidentiary value. Reliance is placed on the decision of the Hon'ble Bombay High Court in Commissioner of Income-tax v. Shankarlal Bhagwatiprasad Jalan [2017] 84 taxmann.com 275 (Bombay) wherein it was held as under:

-*"A bare reading of Section 132(4) of the Act indicates that an authorized officer is entitled to examine a person on oath during the course of search and any statement made during such examination by the such person (the person being examined on oath) would have evidentiary value under Section 132(4) of the Act. The Karnataka High Court in Chief CIT v. Pampapathi [20081 175 Taxman 318/ [20091 310 ITR 64 in the context of facts before it viz. the search on the Assessee therein was completed on 13th December, 1994. On 25th January, 1995, a letter was written by the Assessee therein making certain self-incriminating statement which the Revenue sought to rely upon as being a statement made under Section 132(4) of the Act. The Revenue's contention was negatived. This by inter-alia holding that the letter dated 25th January, 1995 is not recorded on oath by the authorized officer during the course of search. Therefore, it cannot be of an evidentiary value in terms of Section 132(4) of the Act. The facts in the present case are identical."*

13.10 Therefore, the statements recorded post-search do not have any evidentiary value. The same do not have any value unless there is any other tangible evidence to corroborate what is stated therein. The assessing officer relied upon these statements to corroborate what is found in the seized material. When these statements itself do not have any evidentiary value, they cannot be relied upon to corroborate what is stated in the seized material. This is without prejudice to the contention that the statements recorded during the course of search are rebuttable.

13.11 In a nutshell, the statements cannot be relied upon on the reason that:

- There is no documentary evidence to support the statements of Mr. R. Ravish.

13.12 The AO relied on certain scribblings and loose sheets to issue the assessment order. A perusal of the seized material which is extracted in the assessment order and the reply to the queries from the statement of Mr. R. Ravish which is relied upon would show that they are not conclusive evidence to hold that the assessee has earned any undisclosed income. The conclusions drawn by the AO cannot be inferred from the seized material. The conclusion drawn by the AO cannot be deduced either from the seized material or from the statement of Mr. R. Ravish. The seized material does not mention anything about the alleged unaccounted transactions by the assessee nor the details of when such alleged undisclosed sales or unaccounted purchases. There is no mentioning of any details in these loose slips. They are mere loose slips cannot be treated as incriminating material to sustain the addition. There is nothing in the loose sheets to evidence the undisclosed sales or unaccounted purchases.

13.13 The AO extracted the loose sheets in page Nos.5 to 8 in the assessment order and confronted the same to Mr. R. Ravish. The reply of Mr. R. Ravish is reproduced at page 9 of the assessment order vide question No.16 and he offered an amount of Rs.3 crores towards undisclosed sales and answered question No.17 reproduced in page Nos.10 & 11 of the assessment order, he offered an amount of Rs.1 crore towards unaccounted purchases. It is not known who has written in these loose slips and what details it contains. It was mentioned therein that estimate with some random figures. These details therein cannot be presumed as unaccounted sales or unaccounted purchases. These are dumb sheets which have no relevance and its authenticity to rely upon on its face value. Such loose sheets and scribblings cannot be the primary evidence to base the assessment upon. These sheets also cannot be relied upon to hold that the assessee has earned any

undisclosed income by way of unaccounted sales or unaccounted investments in the form of unaccounted purchases.

13.14 Further, in reading the above, it cannot be inferred that the unaccounted transactions have taken place in the hands of assessee and it's not in good faith to presume it to be the unaccounted transaction. From this sheet of seized material, it can also be seen there are various figures mentioning that it is estimate and in such scenario it would not be prudent to assume as per the whims and fancy of the AO that the said figures mentioned therein is the undisclosed transactions of the assessee to make an addition basing the decision on such loose sheets trough it is a dumb document and not to be considered while making such assessment in search cases as they are not preliminary evidence to prove that any unaccounted transactions has been carried on by the assessee.

13.15 The said loose sheets extracted herein above in earlier para as contains any details about the unaccounted transaction made by the assessee and any proof of such alleged transactions carried on by the assessee. There is no information regarding details of such unaccounted transactions. How one can presume that the assessee carried unaccounted sales and unaccounted purchases solely based on the loose slips? The AO's conclusion does not emerge from the perusal of the said loose sheets. The observations of the AO are perverse and devoid of merits. There is nothing in these loose slips which would enable a person to arrive at unaccounted income of the assessee. A perusal of the said loose slips would show that there are some rough notings. They contain certain figures mentioned as estimates. Nothing can be made out as to what, those entries are all about. These loose slips do not even contain any details or name of the parties to whom the goods are sold or service rendered. Even regarding unaccounted purchase there is no mention of any parties therein. The investigating team also not collected any details of the parties involved therein, so as to

make sales and purchase and the payment or receipt of cash or cheque corresponding to these transactions. These loose slips cannot be incriminating material or evidence to support the contention of the AO that there were unaccounted transactions carried on by the assessee. This is a mere case of guess work of investigating team as well as assessing officer as there is no concrete evidence to-prove such unaccounted transactions. The AO has hastily presumed that these loose slips contain details of unaccounted sales and purchases by extracting answer to question No.16 & 17 vide statement recorded u/s 132(4) of the Act. In our opinion, the additions were made as per AO's discretion and arrived at an imaginary amount by treating the unaccounted transactions. This addition has no legs to stand alone as such it was not based on any corroborative material other than statement recorded u/s 132(4) of the Act.

13.16 The ld. AO has merely relied upon the loose papers, obscure notings made in certain note books, statement of Mr. R. Ravish and has come to the above conclusion. The conclusions drawn by him are not forthcoming from the documents and statements. The AO has made his own analysis below each extract of the seized material. The analysis is not supported by any corroborative evidence.

13.17 The Tribunal in the case of Sri Y. Siddaiah Naidu, Tirupathi vs. Asst. Commissioner of Income-Tax 2015 {2} TMI 403 - ITAT HYDERABAD held that it is very much clear that from such notings, it cannot be deduced whether they are receipt or payments nor it can be concluded whether they are in relation to any particular transaction. In these circumstances, no addition can be made on the basis of such document.

13.18 In the case of CIT v. M/S Khosla Ice & General Mills 2013 (1) TMI 451 - Punjab & Haryana High Court, the Hon'ble Court held that assessee rightly contended that the impugned document was a non-speaking document in as much as it does not contain any intelligible narration in support of the inference drawn by the Assessing Officer that it reflected unaccounted transactions carried out by the assessee outside the regular books of account. When a dumb document, is to be made the basis to fasten tax liability on the assessee, the burden is on the AO to establish with corroborative evidence that the nature of entries contained therein reflect income and also that such income was in the control of the assessee. Thus, AO has to establish, with necessary corroborative evidence, that various entries contained in the seized document reflect unaccounted transactions effected by the assessee. Considering the entirety of circumstances, in the absence of any material to support the nature and ownership of the entries found in the seized document, no addition is permissible in the hands of the assessee as undisclosed income by merely arithmetically totaling various figures jotted down on such document.

13.19 The seized material which is placed on record shows certain receipt entries and it is very strange to believe that the assessee has authorised any person to write it as it does not contain any attestation from the assessee side being not having any name or seal of the assessee. Being so no credence to be given to this document.

13.20 The Bangalore Tribunal in the case of Kirloskar Investments Finance Ltd. v. Assistant Commissioner of Income-tax [1998] 67 ITD 504 (Bang.) held that the provision of the copy of the statement or letters is not sufficient opportunity. Oral evidence of persons concerned with the transaction are important piece of evidence and before it could replace the written evidence, the party

against whom such oral evidence is being used must be allowed the opportunity of examining the person because, both the types of evidences need to weighed properly before rejecting one for the other.

13.21 The seized material shows vague figures presumed by the AO to be unaccounted transactions. These are unsigned documents and not supported by any corroborative material. Further the alleged parties to the transactions were not examined or cross-examined. At this point, it is appropriate to rely on the judgment of the Mumbai Bench in the case of ACIT v. Layers Exports P. Ltd *[2017]* 53 ITR (Trib) 416 (Mumbai), wherein it was held that no addition could be simply made on the basis of uncorroborated notings in the loose papers found during the search because addition on account of alleged payment made simply on the basis of uncorroborated noting and scribbling on loose sheets made by some person have no evidentiary value and is unsustainable and bad in law.

13.22 The Hon'ble Supreme Court in Common Cause (A Registered Society) v. UOI *[2017]* 394 ITR *220* (SC) observed with regard to evidentiary value that entries in books of account are not by themselves sufficient to charge any person with liability, the reason being that a man cannot be allowed to make evidence for himself by what he chooses to write in his own books behind the back of the parties. There must be independent evidence of the transaction to which the entries relate and in absence of such evidence no relief can be given to the party who relies upon such entries to support his claim against another. In Hira Lal v. Ram Rakha the High Court, while negativing a contention that it having been proved that the books of account were regularly kept in the ordinary course of business and that, therefore, all entries therein should be considered to be relevant and to have been proved, said that the rule as laid down in Section 34 of the Act that entries in the books of

account regularly kept in the course of business are relevant whenever they refer to a matter in which the Court has to enquire was subject to the salient proviso that such entries shall not alone be sufficient evidence to charge any person with liability. It is not, therefore not enough merely to prove that the books have been regularly kept in the course of business and the entries therein are correct. It is further incumbent upon the person relying upon those entries to prove that they were in accordance with facts. It is apparent from the aforesaid discussion that loose sheets of papers are wholly irrelevant as evidence being not admissible under Section 34 of Evidence Act so as to constitute evidence with respect to the transactions mentioned therein being of no evidentiary value. The entire prosecution based upon such entries which led to the investigation was quashed by the Court. There has to be some relevant and admissible evidence and some cogent reason, which is prima facie reliable and that too, supported by some other circumstances pointing out that the particular third person against whom the allegations have been levelled was in fact involved in the matter or he has done some act during that period, which may have co-relations with the random entries. In case we do not insist for all these, the process of law can be abused against all and sundry very easily to achieve ulterior goals and then no democracy can survive in case investigations are lightly set in motion against important constitutional functionaries on the basis of fictitious entries, in absence of cogent and admissible material on record, lest liberty of an individual be compromised unnecessarily. In view of the above, reliance on Seized material for making addition cannot be sustained.

13.23 The Delhi Tribunal in Vijay Kumar Aggarwal v. ACIT 2Q17 (5) TMI 1354 held that it is clear that the presumption of facts u/s 292C of the Act is rot a mandatory or compulsory presumption but a discretionary presumption. Since, the word used in the said Section is "may be" and not "shall". Secondly, such a presumption is rebuttable

presumption and not a conclusive presumption because it is a presumption of fact not a presumption of law. In the present case, the assessee from the very beginning stated that the documents found during the course of search did not belong to him.

13.24 Therefore, the addition made by the AO is only on the basis of surmises and conjecture without bringing any cogent material on record to substantiate that the assessee was engaged in the business of gold and jewellery and the AO had not brought any material on record to substantiate that the denial of the assessee was false. Unless the burden of proving that the materials and cash belong to the assessee, is discharged those materials can neither be seized under section 132 nor relied upon to make assessment under section 153A. Therefore, the seizure of such material is illegal. The AO cannot rely upon such material whose seizure is illegal and the hence, assessment is void ab initio. Therefore, addition made on account of such seized material is not sustainable,

13.25 The Hon'ble Supreme Court in Andaman Timber Industries v. Commissioner of Central Excise, 281 CTR 241 (SC) held as follows: -

"Not allowing the assessee to cross-examine the witness by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity u>as sought by the assessee. However, no xuch opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. (Para 6). Assessee had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross- examination. That apart, the Adjudicating Authority simply relied upon the price-list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price-list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the

cross-examination and make the remarks as mentioned above, (para 7) If the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the Show-Cause Notice, (para 8)"

13.26 The Delhi Tribunal in the case of Veena Gupta v. ACIT in ITA No.5662/Del/2018 dated 27.11.2018 relying on the above judgment of Hon'ble Supreme Court in the case of Andaman Timber Industries (supra) quashed the assessment order on the reason of not providing cross-examination of witnesses whose statements were recorded.

13.27 Further, the Hon'ble Supreme Court in the case of CIT v. Odeon Builders (P.) Ltd., 418 ITR 315 (SC) head-note is as follows:

"Section 37(1) of the Income-tax Act, 1961 - Business expenditure - Allowability of (Bogus purchase) - Certain portion of purchases made by assessee was disallowed - Commissioner (Appeals) found that entire disallowance was based on third party information gathered by Investigation Wing of Department, which had not been independently subjected to further verification by Assessing Officer and he had not provided copy of such statements to assessee, thus, denying opportunity of cross examination to assessee, who on other hand, had prima facie discharged initial burden of substantiating purchases through various documentation including purchase bills, transportation bills, confirmed copy of accounts and fact of payment through cheques, VAT Registration of sellers and their Income-tax Return - He held that purchases made by assessee was acceptable and disallowance was to be deleted - Tribunal dismissed revenue's appeal - High Court affirmed judgments of Commissioner (Appeals) and Tribunal being concurrent factual findings - Whether no substantial question of law arose from impugned order of Tribunal - Held, yes [Para 4] [In favour of assessee]"

13.28. The Hon'ble High Court of Karnataka in Kothari Metals v. ITO, 377 ITR 581 (Karn) held as under: -

"Held, allowing the appeal, that the non-furnishing the reasons for re-opening an already concluded assessment goes to the very root of the matter. Since such reasons had not been furnished to the assessee, even though a request for them had been made, proceedings for the re-assessment could not have been taken further on this ground alone.

Besides this, the statement of some other person which was recorded was the basis of reassessment and the assessee was asked to explain it but the statement was itself not furnished to the assessee. As such, besides non-furnishing of the reasons

for re-opening there was also a gross violation of the principles of natural justice. The reassessment was not valid."

13.29. The Hon'ble Calcutta High Court in the case of CIT v. Eastern Commercial Enterprises, 210 ITR 103 (Cal) held as follows:

"8. We have considered the contesting contentions of the parties. It is true that Shri Sukla has proved to be a shifty person as a witness. At the earlier stages, he claimed all his sales to be genuine but before the Assessing Officer in the case of the assessee, he disowned the sales specifically made to the assessee. This statement can at the worst show that Shri Sukla is not a trustworthy witness and little value can be attached to what he stated either in his affidavits or in his examination by the Assessing Officer. His conduct neutralises his value as a witness. A man indulging in double-speaking cannot be said by any means a truthful man at any stage and no court can decide on which occasion he was truthful. If Shri Sukla is neutralised as a witness what remains is the accounts, vouchers, challans, bank accounts, etc. But we would observe here that which way lies the truth in Shri Sukla's depositions, could have been revealed only if he was subjected to a cross-examination by the assessee. As a matter of fact, the right to cross-examine a witness adverse to the assessee is an indispensable right and the opportunity of such cross- examination is one of the corner-stones of natural justice. Here Shri Sukla is the witness of the Department. Therefore, the Department cannot cut short the process of taking oral evidence by merely having the examination-in-chief. It is the necessary requirement of the process of taking evidence that the examination-in-chief is followed by cross-examination and re-examination, if necessary.

9. It is not just a question of form or a question of giving an adverse party its privilege but a necessity of the process of testing the truth of oral evidence of a witness. Without the truth being tested no oral evidence can be admissible evidence and could not form the basis of any inference against the adverse parties. We have also examined the records and we find that this Shri Sukla was examined by a number of officers. The Assistant Director of Investigation examined him on August 4, 1987, and in reply to question No. 2 in that deposition he confirmed that he was a dealer in lubricating oil since 1977. In reply to question No. 3, he confirmed having been assessed to income-tax. Again, in reply to question No. 4, he explained that he used to purchase lubricating oil from different garages as well as through various brokers. Such lubricating oil was processed by him in his factory for sale. All payments were received by him through account payee cheques. In reply to question No. 5, he stated that he had seven full-time employees whose names are mentioned by him. He also claimed to have maintained books of account like sales books, purchase books, cash books and sale bills. In reply to question No. 18, he, on his own, stated that his big customers were the Reliance Oil Mills and Eastern Commercial Enterprises, the assessee, in the present reference. As for his cash withdrawals, he explained that his business required ready cash for purchase of raw materials which explained his large drawings of cash from the bank. Learned counsel then cited a host of decisions to bring home the point that no evidence or document can be relied upon unless it is shown to the assessee.

Similarly, the requirement of cross-examination as the requirement of the rules of natural justice has been underlined by the Bombay High Court in Vasanji Ghela and Co. v. CST [1977] 40 STC 544. It is trite law that cross-examination is the sine qua non of due process of taking evidence and no adverse inference can be drawn against a party unless the party is put on notice of the case made out against him. He must be supplied the contents of all such evidence, both oral and documentary, so that he can prepare to meet the case against him. This necessarily also postulates that he should cross-examine the witness hostile to him.

10. In any case, we have nothing to rely upon to come to a decision this way or the other. The first thing is that which of the statements of Shri Sukla is correct, is anybody's guess. Therefore, it is necessary to delve out the truth from him and for that matter a cross-examination is necessary. Secondly, if the statement of Shri Sukla as a witness against the adverse party, the assessee, is relied upon as truthful, still remains the question of estimation of the profit. The assessee no doubt has given a comparative instance of gross profit rate but it is also necessary for the Department to come to a finding as to the norm of the gross profit on the basis of comparative cases. Therefore, it is the duty of the Assessing Officer to counter the comparative statement cited by the assessee before he can have the option to estimate the gross profit. Again, it is the comparative instance that alone can be the foundation of such estimate in case the accounts are really found to be unreliable and requiring to be rejected. Therefore, in the interest of justice for both the parties, the assessee and the Revenue, it is necessary for us to direct the Tribunal to remand the case to the Assessing Officer for reconsidering the whole matter in the light of the observations made by us in the foregoing and redo the assessment accordingly. All opportunities should be given to the assessee in order to lead any evidence that the assessee may feel necessary to rebut the case against him. As a result, we decline to answer the question."

13.30 No assets commensurate with the alleged undisclosed income is found by the AO. The unbounded loose sheets having jottings are not speaking either by itself or in the company of others and not corroborated by enquiry, cannot be the basis of any inference so as to sustain the addition.

13.31. The unsubstantiated and uncorroborated seized material alone cannot be considered as conclusive evidence to frame these assessments. The words "may be presumed" in section 132(4) of the Act given an option to the AO concerned to presume these things, but it is rebuttable and it does not give a definite authority and conclusive evidence. The assessee is having every right to rebut the same. The entire case depends upon the rule of evidence. There is no conclusive presumption with regard to unsubstantiated seized material to come to the conclusion that

assessee has unaccounted transactions. In the present case, the assessee categorically denied unaccounted transactions. The AO cannot draw inference on the basis of suspicion, conjectures and surmises. Suspicion, however strong, cannot take place the material in place of evidence brought on record. The AO should act in a judicial manner, proceed in a judicial spirit and come to the judicial conclusions. The AO is required to act fairly as a reasonable person, not arbitrarily and capriciously. The assessment u/s153C of the Act should have been supported by adequate material and it should stand on its own leg. This notebook or loose sheets found during the course of search is only circumstantial evidence and not full proof evidence to sustain the addition. No addition can be made in the absence of any corroborative material. If it is circumstantial evidence in the form of loose sheets and notebook, it is not sufficient to come to the conclusion that there is conclusive evidence to hold that assessee has any unaccounted transactions. The notes in the diary/loose sheets are required to be supported by corroborative material. Since there was no examination or cross-examination of persons concerned, the entire addition in the hands of the assessee on the basis of uncorroborated writings in the loose papers found during the course of search cannot be sustained. The evidence on record is not sufficient to uphold the stand of AO that assessee has unaccounted transactions.

13.32. There are various loose sheets, scribblings and jottings having no signature or authorization from the assessee's side. These are unsubstantiated documents and there is nothing to suggest any undisclosed assets of assessee found during the course of search. More so, it does not show any recovery of the undisclosed assets in the form of landed property, building, investments, money, bullion, jewellery or any kind of movable or immovable assets.

13.33. Being so, the seized material relied by the assessing officer for sustaining addition is not speaking one in itself and also not speaking in conjunction with some other evidence which the authorities found during the course of search or post search investigation. Thus, the well settled legal position is that a non-speaking document without any corroborative material, evidence on record and finding that such document has not materialised into transactions giving rise to income of the assessee which had not been disclosed in the regular books of accounts of the assessee has to be disregarded for the purpose of assessment to be framed pursuant to search and seizure action. In these cases, moreover the documents are relied upon by the AO without confronting to any parties i.e seller or buyer of unaccounted transactions. These documents cannot bring assessee into tax net by merely pressing to service the provision of Sec 132(4A) r.w.s Sec 292C of the IT act, which creates deeming fiction on the assessee subject to search wherein it may be presumed that any such document found during the course of search from the possession and control of such document are true. What has to be noted here is that deemed presumption cannot bring such a document in the tax net and the presumption is rebuttable one and the deemed provisions have no help to the department. Therefore, in these cases addition is made by AO on arbitrary basis relying on the loose papers, containing scribbling, rough and vague noting's in the absence of any corroborative material and this material cannot be considered as transactions carried on by assessee giving rise to income which are not disclosed in the regular books of accounts by assessee. We place reliance on the following judgements in support of our above findings:

(i) CIT vs D.K.Gupta 174 Taxman 476 (Delhi)

(ii) Ashwini Kumar vs ITO 39 ITD 183 (Delhi)

(iii) S.P.Goyal vs DCIT (Mum) (TM) 82 ITD 85 (MUM)

(iv) D.A.Patel vs DCIT 72 ITD 340 (Mum)

(v) Amarjeet Singh Bakshi (HUF) vs ACIT 86 ITD 13 (Delhi) (TM)

(vi) Nagarjuna Construction Co Ltd vs DCIT 23 Taxman.com 239

(vii) CIT vs C.L.Khatri 174 Taxman 652

(viii) T.S.Venkatesan vs ACIT 74 ITD 298

(ix) CIT vs Atam Valves Pvt Ltd 184 Taxman 6 (P&H)

13.34. Thus, placing reliance on the seized material is not proper and all the additions on the basis of the above loose slips should be deleted in the assessment year 2015-16 since;

(i) there is no documentary evidence either to support the statements of Mr. R. Ravish or of the parents of the students; and

ii) the seized material is in the form of various loose sheets, scribblings, and jottings having no signature or authorization from the assessee's side. These are unsubstantiated documents and there is nothing to suggest any undisclosed assets of assessee found during the course of search. More so, search action not resulted in recovery of any undisclosed assets in the form of landed property, building, investments, money, bullion, jewellery or any kind of movable or immovable assets.

13.35 Further, we find that Hon'ble Delhi High Court in the case of PCIT Vs Best Infrastructure Private Limited, 397 ITR 82 has held that statement under section 132(4) in the itself does not constitute incriminating material. The relevant finding of the Hon'ble High Court is reproduced as under:

> *"38. Fifthly, statements recorded under Section 132 (4) of the Act of the Act do not by themselves constitute incriminating material as has been explained by this Court in* ***Commissioner of Income Tax v. Harjeev Aggarwal*** *(supra). Lastly, as already pointed out hereinbefore, the facts in the present case are different from the facts in* ***Smt. Dayawanti Gupta v. CIT*** *(supra) where the admission by the Assessees themselves on critical aspects, of failure to maintain accounts and admission that the seized documents reflected transactions of unaccounted sales and purchases, is non-existent in the present case. In the said case, there was a factual finding to the effect that the Assessees were habitual offenders, indulging in clandestine operations*

> *whereas there is nothing in the present case, whatsoever, to suggest that any statement made by Mr. Anu Aggarwal or Mr. Harjeet Singh contained any such admission."*

13.36 As per section 31 of Indian Evidence Act, 1878, admissions are not conclusively proved as against admitted proof. In the absence of rebuttable conclusion, admission bind the maker when these are not rebutted or retracted. An admission is an extremely important piece of evidence but it cannot be said that it is conclusive and the maker can show that it was incorrect. In our opinion admission made by the assessee will constitute a relevant piece of evidence but if the assessee contends that in making the admission, he had proceeded on a mistaken understanding or on misconception of facts or untrue facts, such admission cannot be relied upon without considering the aforesaid contention. In our opinion, the voluntary admission are not conclusive proof of the facts admitted and may be explained or shown to be wrong but they do raise an estoppel and shift the burden of proof to the person making the admission. It is to be noted that, unless shown or explained to be wrong, they are an efficacious proof of the facts admitted. Thus, the burden to prove "admission" as incorrect is on the maker and in case of failure of the maker to prove that the earlier stated facts were wrong, these earlier statements are suffice to conclude the matter. If retraction or proved sufficiently, the earlier stated facts lose their effect and relevance as binding evidence and the authorities cannot conclude the matter on the basis of the earlier statements alone. However, bald retraction of earlier admission will not be enough after retraction. Such statements cannot automatically become nullified. If the assessee proves that the statement recorded was involuntary and it was made under coercion, the statement has no legal validity.

13.37 Further, there was a CBDT circular file no.286/98/2013-IT (Inv.II) dated 18.12.2014 which states as under:

> *"Instances/complaints of undue influence/coercion have come to notice of the CBDT that some assessees were coerced to admit undisclosed income during Searches/Surveys conducted by the Department. It is also seen that many such admissions are retracted in the subsequent proceedings since the same are not backed by credible evidence. Such actions defeat the very purpose of Search/Survey operations as they fail to bring the undisclosed income to tax in a sustainable manner leave alone levy of penalty or launching of prosecution. Further, such actions show the Department as a whole and officers concerned in poor light.*
>
> *2. I am further directed to invite your attention to the Instructions/Guidelines issued by CBDT from time to time, as referred above, through which the Board has emphasized upon the need to focus on gathering evidences during Search/Survey and to strictly avoid obtaining admission of undisclosed income under coercion/undue influence.*
>
> *3. In view of the above, while reiterating the aforesaid guidelines of the Board, I am directed to convey that any instance of undue influence/coercion in the recording of the statement during Search/Survey/Other proceeding under the IT Act, 1961 and/or recording a disclosure of undisclosed income under undue pressure/coercion shall be viewed by the Board adversely."*

From the above Circular, it is amply clear that the CBDT has emphasized on its officers to focus on gathering evidences during search/survey operations and strictly directed to avoid obtaining admission of undisclosed income under coercion/under influence. Keeping in view the guidelines issued by the CBDT from time to time regarding statements obtained during search and survey operations, it is undisputedly clear that the lower authorities have not collected any other evidence to prove that the impugned income was earned by the assessee.

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13.38 At this stage, it is pertinent to refer to the judgment of the Supreme Court in the case of Vinod Solanki (2009) (233) ELT 157 observed as under :

> *"22. It is a trite law that evidences brought on record by way of confession which stood retracted must be substantially corroborated by other independent and cogent evidences, which would lend adequate assurance to the Court that it may seek to rely thereupon. We are not oblivious of some decisions of this Court wherein reliance has been*

*placed for supporting such contention but we must also notice that in some of the cases retracted confession has been used as a piece of corroborative evidence and not as the evidence on the basis whereof alone a judgment of conviction and sentence has been recorded. [see Pon Adithan vs. Dy.
Director, Narcotics Control Bureau (1999) 6 SCC 1]* ....

13.39 In case of Romesh Chandra Mehta vs. State of West Bengal (1969) 2 SCR 461 although Hon'ble Court held that any statement made under ss. 107 and 108 of the Customs Act by a person against whom an enquiry is made by a customs officer is not a statement made by a person accused of an offence, but as indicated hereinbefore, he being an officer concerned or the person in authority, s. 24 of the Indian Evidence Act would be attracted.

13.40 It has been similarly held by the Hon'ble Supreme Court in the case of K.T.M.S. Mohd. & Anr. vs. Union of India (1992) (197 ITR 196) as under:

"We think it is not necessary to recapitulate and recite all the decisions on this legal aspect. But suffice it to say that the core of all the decisions of this Court is to the effect that the voluntary nature of any statement made either before the customs authorities or the officers of Enforcement Directorate under the relevant provisions of the respective Acts is a sine qua non to act on it for any purpose and, if the statement appears to have been obtained by any inducement, threat, coercion or by any improper means, that statement must be rejected brevi manu. At the same time, it is to be noted that, merely because a statement is retracted, it cannot be recorded as involuntary or unlawfully obtained. It is only for the maker of the statement who alleges inducement, threat, promise, etc. to establish that such improper means have been adopted. However, even if the maker of the statement fails to establish his allegations of inducement, threat, etc., against the officer who recorded the statement, the authority, while acting on the inculpatory statement of the maker, is not completely relieved of his obligation at least subjectively to apply its mind to the subsequent retraction to hold that the inculpatory statement was not extorted. It thus boils down to this that the authority or any Court intending to act upon the inculpatory statement as a voluntary one should apply its mind to the retraction and reject the same in writing. It is only on this principle of law that this Court, in several decisions, has ruled that, even in passing a detention order on the basis of an inculpatory statement of a detenu who has violated the provisions of the Foreign Exchange Regulation Act or the Customs Act, etc., the detaining authority should consider the subsequent

retraction and record its opinion before accepting the inculpatory statement lest the order be vitiated. Reference may be made to a decision of the Full Bench of the Madras High Court in Roshan Beevi vs. Jt. Secretary to the Government of Tamil Nadu, Public Deptt. etc. (1983) Mad LW (Crl.) 289 : (1984) 15 ELT 289 : AIR 1984 NOC 103, to which one of us (S. Ratnavel Pandian, J.) was a party."

13.41 In our opinion, the above additions cannot be made solely based on the statements recorded u/s 132(4) of the Act. Reliance is placed on following decisions:

- The Hon'ble Delhi High Court in Commissioner of Income-tax v. Harjeev Aggarwal [2016] 70 taxmann.com 95 (Delhi) held as under:

"21. A plain reading of Section 132 (4) of the Act indicates that the authorized officer is empowered to examine on oath any person who is found in possession or control of any books of accounts, documents, money, bullion, jewellery or any other valuable article or thing. The explanation to Section 132 (4), which was inserted by the Direct Tax Laws (Amendment) Act, 1987 w.e.f. 1st April, 1989, further clarifies that a person may be examined not only in respect of the books of accounts or other documents found as a result of search but also in respect of all matters relevant for the purposes of any investigation connected with any proceeding under the Act. However, as stated earlier, a statement on oath can only be recorded of a person who is found in possession of books of accounts, documents, assets, etc. Plainly, the intention of the Parliament is to permit such Examination only where the books of accounts, documents and assets possessed by a person are relevant for the purposes of the investigation being undertaken. Now, if the provisions of Section 132(4) of the Act are read in the context of Section 158BB(1) read with Section 158B(b) of the Act, it is at once clear that a statement recorded under Section 132(4) of the Act can be used in evidence for making a block assessment only if the said statement is made in the context of other evidence or material discovered during the search A statement of a person, which is not relatable to any incriminating document or material found during search and seizure operation cannot, by itself, trigger a block assessment. The undisclosed income Of an Assessee has to be computed on the basis of evidence and material found during search. The statement recorded under Section 132(4) of the Act may also be used for making the assessment, but only to the extent it is relatable to the incriminating evidence/ material unearthed or found during search. In other words, there must be a nexus between the statement recorded and the evidence/ material found during search in order to for an assessment to be based on the statement recorded."

- In Dr. E.G. Memorial Trust v. CIT (Exemption), Kolkata2017 (11) TMI 1586

- ITAT Kolkata, the Tribunal held as under: -

> *"6. We have carefully considered the entire gamut of facts, rival contentions raised by the parties before us and also the material referred to during the course of hearing. In the instant case originally Id. CIT(Bx) cancelled the registration certificate u/s. 12A of the Act vide order dated 22-2-2016. Against the order of Ld, CIT(Ex) assessee preferred an appeal who directed the Revenue to provide an opportunity of cross-examination to assessee. Accordingly, appeal was allowed for statistical purpose."*

13.42 We further rely in the case CIT Vs. S. Khader Khan Son reported in 352 ITR 480 (SC) where the Hon'ble Supreme Court has held that:

-*"Section 133A does not empower any IT authority to examine any person on oath, hence, any such statement has no evidentiary value and any admission made during such statement cannot, by itself, be made the basis for addition."*

13.43 We also rely on the decision of the Hon'ble Tribunal in the case of Kamla Devi S. Doshi v. Income-tax Officer [2017] 88 taxmann.com 773 (Mumbai - Trib.) / [2017] 57 ITR(T) 1 (Mumbai - Trib.) held as under: -

> *"We however are unable to persuade ourselves to subscribe to the view that such information arrived at on the basis of the stand-alone statement of the aforesaid person, viz. Sh. Mukesh Chokshi (supra), falling short of any corroborative evidence would however justify drawing of adverse inferences as regards the genuineness of the share transactions in the hands of the assessee. We though are also not oblivious of the settled position of law, as per which a very heavy onus is cast upon the assessee to substantiate the LTCG on sale of shares, as projected by her in the return of income for the year under consideration. Thus, to be brief and explicit, though the reopening of the case of the assessee in the backdrop of the aforesaid factual matrix cannot be faulted with, however such stand-alone information, i.e., the statement of Sh, Mukesh Chokshi (supra), cannot be allowed to form the sole basis for dislodging the claim of the assessee in respect of the LTCG reflected by her in the return of income for the year under consideration. We would not hesitate to observe that the lower authorities which have rushed through the facts to arrive at a conclusion on the basis of principle of preponderance of human probability, had however absolutely failed to appreciate that the said principle could have been validly applied only on the basis of a considerate view as regards the facts of the case in totality, and not merely on the basis of the standalone statement of the aforesaid third party, viz. Sh. Mukesh Choksi."*

13.44 We rely on the judgement of the Hon'ble Gujarat High Court in the case of Kailashben Manharlal Chokshi v.

Commissioner of Income-tax [2008] 174 Taxman 466 (Gujarat) held as under:"-

> *"26. In view of what has been stated hereinabove we are of the view that this explanation seems to be more convincing, has not been considered by the authorities below and additions were made and/or confirmed merely on the basis of statement recorded under section 132(4) of the Act Despite the fact that the said statement was later on retracted no evidence has been led by the Revenue authority. We are, therefore, of the view that merely on the basis of admission the assessee could not have been subjected to such additions unless and until, some corroborative evidence is found in support of such* admission. *We are also of the view that from the statement recorded at such odd hours cannot be considered to be a voluntary statement, if it is subsequently retracted and necessary evidence is led contrary to such admission. Hence there is no reason not to disbelieve the retraction made by the Assessing Officer and explanation duly supported by the evidence. We are, therefore, of the view that the Tribunal was not justified in making addition of Rs. 6 lakhs on the basis of statement recorded by the Assessing Officer under section 132(4) of the Act. The Tribunal has committed an error in ignoring the retraction made by the assessee."*
>
> *"16.4 We have duly considered the contention of the assessee and also perused the documentary evidences produced by the* assessee. *On perusing the facts, it is apparent that the addition is made based on the general practice of cash payments made outside the books of accounts in the case of immovable property transactions. The AO was of the opinion that there are ample instances that cash payments are made outside the books of accounts in effecting money lending transactions and therefore, the statement made by Mr, R. Ravish can be relied and the addition sustainable. However, we do not subscribe to this view of the AO. In order to establish that the assessee had paid amount outside the books of accounts for effecting money lending transactions substantial evidence has to be placed on record which is absent in this case. It would be unjust if an addition is made on the assessee based on a statement made by third party without further making inquiries and collecting evidence. Therefore, we hereby request to delete the additions made by the Ld. AO in the concerned AY's.*
>
> *This entire question is based on facts and therefore, no interference is necessary."*

13.45 Thus, it is settled position of law that onus lies upon the Department to collect cogent evidence to corroborate the notings on the loose sheets. The additions cannot be made merely on the basis of notings on the loose sheet papers which are in the

nature of “dumb documents” having no evidentiary value. The onus lies on the Department to collect the evidence to corroborate the notings on the loose sheets. In the present case, it is undisputed position that as a result of search and seizure action in the case of respondent- assessee and its group companies, no material whatsoever was seized and found indicating payment of on-money consideration at the time of purchase of the lands. Reliance in this regard can be placed on the following decisions:

(i) Pr.CIT vs. Umesh Ishrani (2019) 108 taxmann.com 437 (Bom)

(ii) CIT vs. Atam Valves (P.) Ltd. (2009) 184 Taxman 6 (P&H)

(iii) CIT vs. Maulikkumar K. Shah (2008) 307 ITR 137 (Guj)

(iv) CIT vs. C.L. Khatri (2006) 282 ITR 97 (MP)

(v) Pr.CIT vs. Kamlesh Prahladbhai Modi (2018) 94 taxmann.com 356 (Guj)

(vi) CIT vs. Shri Girish Chaudhary (2008) 296 ITR 619 (Del)

(vii) CIT vs. Vivek Aggarwal (2015) 56 taxmann.com 7 (Del)

(viii) CIT vs. Salek Chand Agarwal (2008) 300 ITR 426 (All)

(ix) CIT vs. Dinesh Jain (HUF) 352 ITR 629 (Del)

13.46 We find that the conclusions reached by the Assessing Officer are merely based on presumptions and assumptions without bringing corroborative material on record. It is settled position of law that no addition in the assessment can be made merely based on assumptions, suspicion, guess work and conjuncture or on irrelevant inadmissible material. Reliance can be placed in this regard on the following decisions:

(i) Dhirajlal Girdharilal vs. CIT (1954) 26 ITR 736 (SC)

(ii) Dhakeswari Cotton Mills Ltd. vs. CIT (1954) 26 ITR 775 (SC)

(iii) CIT vs. Maharajadhiraja Kameshwar Singh of Darbhanga (1933) 1 ITR 94 (PC)

(iv) Lalchand Bhagat Ambica Ram vs. CIT (1959) 37 ITR 288 (SC)

(v) Umacharan Shaw & Bros vs. CIT (1959) 37 ITR 271 (SC)

(vi) Omar Salay Mohamed Sait vs. CIT (1959) 37 ITR 151 (SC)

13.47. Further, the Hon'ble Delhi High Court in the case of CIT vs. Dinesh Jain (HUF), 352 ITR 629 after referring to the decision of the Hon'ble Supreme Court in the case of Lalchand Bhagat Ambica Ram vs. CIT (1959) 37 ITR 288 (SC) held that no addition can be made taking into account notorious practice prevalent in the similar trade. The relevant findings vide para 14 and 15 are as under:

> "..........
>
> *14. In Lalchand Bhagat Ambica Ram Vs. Commissioner of Income Tax, Bihar and Orissa (1959) 37 ITR 288, the Supreme Court disapproved the practice of making additions in the assessments on mere suspicion and surmise or by taking note of the notorious practices prevailing in trade circles. At page 299 of the report, it was observed as follows:*
>
>> "*Adverting to the various probabilities which weighed with the Income-tax Officer we may observe that the notoriety for smuggling food grains and other commodities to Bengal by country boats acquired by Sahibgunj and the notoriety achieved by Dhulian as a great receiving centre for such commodities were merely a background of suspicion and the appellant could not be tarred with the same brush as every arhatdar and grain merchant who might have been indulging in smuggling operations, without an iota of evidence in that behalf."*
>
> *15. This takes care of the argument of Mr. Sabharwal that judicial notice can be taken of the practice prevailing in the property market of not disclosing the full consideration for transfer of properties".*

13.48. The Hon'ble Supreme Court in the case of K.P. Varghese vs. ITO (1981) 131 ITR 597 (SC) held that the capital gains is intended to tax the gains of assessee not what an assessee

might have gained and what is not gained cannot be computed as gain and the assessee cannot fastened with the liability on a fictional income. Similarly, the Hon'ble Supreme Court in the case of CIT Vs. Shivakami Co. (P.) Ltd. (1986) 159 ITR 71 (SC) held that unless there is evidence that more than what was stated was received, no higher price can be taken to be the basis for making addition.

13.49 Further, the ld. AO cannot solely rely on the statement recorded u/s 132(4) of the Act as recently held by Hon'ble Delhi High Court in the case of PCIT Vs. Pavitra Realcon Pvt. Ltd. reported in ITA No.579/2018 dated 29.5.2024, wherein held as under:

> *"17. We have heard the learned counsels appearing on behalf of the parties and perused the record.*
>
> *18. The primary grievance which arises in the present appeals pertains to whether the ITAT was right in deleting additions made under Section 68 of the Act by holding that no assessment could have been made on mere presumption of existence of incriminating material.*
>
> *19. Undisputedly, during the period of search, no incriminating material appears to have been found. However, the Revenue proceeded to issue notice under Section 143(2) of the Act on the pretext of the statements of the Directors of the respondent-assessee companies recorded under Section 132(4) of the Act and material seized from the search conducted on Jain group of companies. The assessment order was also passed under Section 143(3) read with Section 153C of the Act making additions under Section 68 of the Act.*
>
> *20. However, it is an undisputed fact that the statement recorded under Section 132(4) of the Act has better evidentiary value but it is also a settled position of law that addition cannot be sustained merely on the basis of the statement. There has to be some material corroborating the content of the statements.*
>
> *21. In the case of **Kailashben Manharlal Chokshi v. CIT**[1], the Gujarat High Court held that the additions could not be made only on the basis of admissions made by the assessee, in the absence of any corroborative material. The relevant paragraph no. 26 of the said decision has been reproduced hereinbelow: -*

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

*22. Further, the position with respect to whether a statement recorded under Section 132(4) of the Act could be a standalone basis for making assessment was clarified by this Court in the case of **CIT v. Harjeev Aggarwal**[2], wherein, it was held that merely because an admission has been made by the assessee during the search operation, the same could not be used to make additions in the absence of any evidence to corroborate the same. The relevant paragraph of the said decision is extracted herein below:-*

> *"**20.** In our view, a plain reading of section 158BB(1) of the Act does not contemplate computing of undisclosed income solely on the basis of a statement recorded during the search. **The words "evidence found as a result of search" would not take within its sweep statements recorded during search and seizure operations.** However, the statements recorded would certainly constitute information and if such information is relatable to the evidence or material found during search, the same could certainly be used in evidence in any proceedings under the Act as expressly mandated by virtue of the Explanation to section 132(4) of the Act. **However, such statements on a stand alone basis without reference to any other material discovered during search and seizure operations would not empower the Assessing Officer to make a block assessment merely because any admission was made by the assessee during search operation.***
>
> *[Emphasis supplied]*

23. In our opinion, the Act does not contemplate computing of undisclosed income solely on the basis of statements made during a search. However, these statements do constitute information, and if they relate to the evidence or material found during the search, they can be used in proceedings under the Act, as specified under Section 132(4) of the Act. Nonetheless, such statements alone, without any other material discovered during the search which would corroborate said statements, do not grant the AO the authority to make an assessment.

24. Coming to the findings of the ITAT with respect to incriminating material in the case of M/s Pavitra Realcon Pvt. Ltd and M/s Delicate Real Estate Pvt. Ltd, it is seen that the ITAT has explicitly held in paragraph no. 18 that no addition has been made on the basis of any incriminating material found during the course of search. Further, the ITAT relied on the decision of the Supreme Court in the case of ***CIT v. Sinhgad Technical Education Society***[1] *and held as follows: -*

> *"18. Further, while writing the order it has come to our notice that the Hon'ble Apex Court in the case of Sinhgad Technical Education Society has held that section 153C can be invoked only when incriminating materials assessment year-wise are recorded in satisfaction note which is missing here. Therefore, the proceedings drawn u/s 143(3) as against 153C are invalid for want of any incriminating material found for the impugned assessment year.*
>
> *19. In view of the above, the additional grounds raised by the assessee in the case of M/s Pavitra Realcon Pvt. Ltd. And M/s Delicate Real Estate Pvt. Ltd. are accepted. Since the assessee succeeds on this legal ground, we refrain ourselves from adjudicating the issue on merit as far as these two cases are concerned."*

25. Also, the Supreme Court in the case of ***CIT v. Abhisar Buildwell (P) Ltd.***[4]*, has clarified that in case no incriminating material is found during the search conducted under Section 132 of the Act, the AO will have no jurisdiction to make an assessment. The relevant paragraph is reproduced herein below: -*

> *"36.4. In case no incriminating material is unearthed during the search, the AO cannot assess or reassess taking into consideration the other material in respect of completed assessments/unabated assessments. Meaning thereby, in respect of completed/unabated assessments, no addition can be made by the AO in absence of any incriminating material found during the course of search under Section 132 or requisition*

> *under Section 132-A of the 1961 Act. However, the completed/unabated assessments can be re-opened by the AO in exercise of powers under Sections 147/148 of the Act, subject to fulfilment of the conditions as envisaged/mentioned under Sections 147/148 of the Act and those powers are saved."*
>
> *[Emphasis supplied]*

*26. This Court in the case of **CIT v. Kabul Chawla**[5], has explicitly noted that the information/material which has been relied upon for assessment has to relate with the assessee. The relevant portion of the said decision is extracted herein below: -*

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

*27. Recently, this Court, in the case of **Saksham Commodities Limited v. Income Tax Officer, Ward 22(1), Delhi & Anr**[6], while relying upon the decision of the Supreme Court in Abhisar Buildwell (supra) and this Court's decision in the case of **CIT v. RRJ Securities Ltd.**[7], upheld the position of law that the AO would not be justified to assess income in case no incriminating material is found during the search. The relevant paragraph is reproduced herein below: -*

> ***"54. In any case, Abhisar Buildwell, in our considered opinion, is a decision which conclusively lays to rest any doubt that could have been possibly harboured. The Supreme Court in unequivocal terms held that absent incriminating material, the AO would not be justified in seeking to assess or reassess completed assessments. Though the aforesaid observations were rendered in the context of completed assessments, the same position would prevail when it comes to assessments which abate pursuant to the issuance of a notice under Section 153C.*** *Here too, the AO would have to firstly identify the AYs' to which the material gathered in the course of the search may relate and consequently it would only be those assessments which would face the spectre of abatement. The additions here too would have to be based on material that may have been unearthed in the course of the search or on the basis of material requisitioned. The statute thus creates a persistent*

and enduring connect between the material discovered and the assessment that may be ultimately made. The provision while speaking of AYs' falling within the block of six AYs' or for that matter all years forming part of the block of ten AYs', appears to have been put in place to cover all possible contingencies. The aforesaid provisions clearly appear to have been incorporated and made applicable both with respect to Section 153A as well as Section 153C ex abundanti cautela. Which however takes us back to what had been observed earlier, namely, the existence of the power being merely enabling as opposed to a statutory compulsion or an inevitable consequence which was advocated

*****

56. We also bear in mind the pertinent observations made in RRJ Securities when the Court held that merely because an article or thing may have been recovered in the course of a search would not mean that concluded assessments have to "necessarily" be reopened under Section 153C and that those assessments are not liable to be revised unless the material obtained have a bearing on the determination of the total income. ***This aspect was again emphasised in para 38 of RRJ Securities with the Court laying stress on the existence of material that may be reflective of undisclosed income being of vital importance. All the aforenoted judgments thus reinforce the requirement of incriminating material having an ineradicable link to the estimation of income for a particular AY."***

[Emphasis supplied]

28. So far as the submission made by the learned counsel for the Revenue that the AO acted on a bona fide belief that the date of search has to be taken as the date of initiation of proceedings under Section 153C of the Act is concerned, it is apposite to refer to our decision in the case of ***CIT v. Ojjus Medicare (P) Ltd.***[8] *This Court, in the said case, reiterated the already settled law that the date of initiation of assessment proceedings under Section 153C would be calculated from the date of handing over of the books of accounts, documents or assets seized to the jurisdictional AO of the non-searched person. The relevant paragraphs of the said decision are extracted herein below: -*

"K. SUMMARY OF CONCLUSIONS

119. *We thus record our conclusions as follows:*

A. Prior to the insertion of Sections 153A, 153B and 153C, an assessment in respect of search cases was regulated by Chapter XIVB of the Act, comprising of Sections 158B to 158BI and which embodied the concept of a block assessment. A block assessment in search cases undertaken in terms of the

provisions placed in Chapter XIVB was ordained to be undertaken simultaneously and parallelly to a regular assessment.

Contrary to the scheme underlying Chapter XIVB, Sections 153A, 153B and 153C contemplate a merger of regular assessments with those that may be triggered by a search. On a search being undertaken in terms of Section 153A, the jurisdictional AO is enabled to initiate an assessment or reassessment, as the case may be, in respect of the six AYs' immediately preceding the AY relevant to the year of search as also in respect of the "relevant assessment year", an expression which stands defined by Explanation 1 to Section 153A. Of equal significance is the introduction of the concept of abatement of all pending assessments as a consequence of which curtains come down on regular assessments.

B. *Both Sections 153A and 153C embody non-obstante clauses and are in express terms ordained to override Sections 139, 147 to 149, 151 and 153 of the Act. By virtue of the 2017 Amending Act, significant amendments came to be introduced in Section 153A. These included, inter alia, the search assessment block being enlarged to ten AYs' consequent to the addition of the stipulation of "relevant assessment year" and which was defined to mean those years which would fall beyond the six year block period but not later than ten AYs'. The block period for search assessment thus came to be enlarged to stretch up to ten AYs'. The 2017 Amending Act also put in place certain prerequisite conditions which would have to inevitably be shown to be satisfied before the search assessment could stretch to the "relevant assessment year". The preconditions include the prescription of income having escaped assessment and represented in the form of an asset amounting to or "likely to amount to" INR 50 lakhs or more in the "relevant assessment year" or in aggregate in the "relevant assessment years".*

C. *Section 153C, on the other hand, pertains to the non-searched entity and in respect of whom any material, books of accounts or documents may have been seized and were found to belong to or pertain to a person other than the searched person. As in the case of Section 153A, Section 153C was also to apply to all searches that may have been undertaken between the period 01 June 2003 to 31 March 2021. In terms of that provision, the AO stands similarly empowered to undertake and initiate an assessment in respect of a non-searched entity for the six AYs' as well as for "the relevant assessment year". The AYs', which would consequently be thrown open for assessment or reassessment under Section 153C follows lines pari materia with Section 153A.*

D. ***The First Proviso to Section 153C introduces a legal fiction on the basis of which the commencement date for computation of the six year or the ten year block is deemed to be the date of receipt of books of accounts by the jurisdictional AO. The identification of the starting block for the purposes of computation of the six and the ten year period is governed by the First Proviso to Section 153C, which significantly shifts the reference point spoken of in Section 153A(1), while defining the point from which the period of the "relevant assessment year" is to be calculated, to the date of receipt of the books of accounts, documents or assets seized by the jurisdictional AO of the non-searched person. The shift of the relevant date in the case of a non-searched person being regulated by the First Proviso of Section 153C(1) is an issue which is no longer res integra and stands authoritatively settled by virtue of the decisions of this Court in SSP Aviation and RRJ Securities as well as the decision of the Supreme Court in Jasjit Singh. The aforesaid legal position also stood reiterated by the Supreme Court in Vikram Sujitkumar Bhatia. The submission of the respondents, therefore, that the block periods would have to be reckoned with reference to the date of search can neither be countenanced nor accepted.***

E. *The reckoning of the six AYs' would require one to firstly identify the FY in which the search was undertaken and which would lead to the ascertainment of the AY relevant to the previous year of search. The block of six AYs' would consequently be those which immediately precede the AY relevant to the year of search. In the case of a search assessment undertaken in terms of Section 153C, the solitary distinction would be that the previous year of search would stand substituted by the date or the year in which the books of accounts or documents and assets seized are handed over to the jurisdictional AO as opposed to the year of search which constitutes the basis for an assessment under Section 153A.*

F. *While the identification and computation of the six AYs' hinges upon the phrase "immediately preceding the assessment year relevant to the previous year" of search, the ten year period would have to be reckoned from the 31st day of March of the AY relevant to the year of search. This, since undisputedly, Explanation 1 of Section 153A requires us to reckon it "from the end of the assessment year". This distinction would have to necessarily be acknowledged in light of the statute having consciously adopted the phraseology "immediately preceding" when it be in relation to the six year period and employing the expression "from the end of the assessment year" while speaking of the ten year block."*

[Emphasis supplied]

29. It is thus seen that in order to determine block of six AYs, one must first identify the FY in which the search occurred, leading to the identification of the AY relevant to the previous year of the search. The block of six AYs will then be those immediately preceding the AY relevant to the search year. For a search assessment under Section 153C of the Act, the only difference is that the previous year of the search is replaced by the date or year in which the seized books of accounts, documents, and assets are handed over to the jurisdictional AO, rather than the year of the search, which is the basis for an assessment under Section 153A of the Act. Therefore, the relevant AY in the present case would come under the block of six AYs immediately preceding the AY in which the satisfaction note was recorded by the AO of the respondent-assessee companies.

30. Further, in the case of M/s Design Infracon Pvt. Ltd., the ITAT held that there is violation of principles of natural justice as neither the statement of owner of Jain group of companies was provided to the said company, nor the opportunity of cross-examination was given. The ITAT in paragraph no. 23 has held as under: -

> *"23.Now, coming to Design Infracon (P) Ltd., we find from the material available on record that there is brazen violation of principles of natural justice inasmuch as neither the statement of Mr. Jain recorded at the time of search nor his cross-examination was provided to the assessee by both the lower authorities despite specific and repeated requests made by the assessee in this regard. The Hon'ble Supreme Court in the case of M/s Andaman Timber Indusgies vs. CCE reported in 281 CTR 241 has held that not giving opportunity of cross-examination makes the entire proceedings invalid and nullity. The Co-ordinate Bench of the Tribunal in the case of Best City Infrastructure Ltd. (supra) has also held that not providing opportunity of cross-examination makes the addition invalid. It has come to our notice that the Hon'ble Delhi High Court recently has upheld the said decision as reported in 397 ITR 82."*

31. On this aspect, it is beneficial to refer to the decision of the Supreme Court in the case of ***Andaman Timber Industries v. CCE***[9]*, wherein, it was held that not providing the opportunity of cross- examination to the assessee amounts to gross violation of the principles of natural justice and the same will render the order passed null and void. The relevant paragraph of the said decision is extracted herein below: -*

> ***"6. According to us, not allowing the assessee to cross-examine the witnesses by the adjudicating authority though the statements of those witnesses were made the basis of the***

> ***impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected.*** *It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the adjudicating authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the adjudicating authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the adjudicating authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their exfactory prices remain static. It was not for the Tribunal to have guesswork as to for what purposes the appellant wanted to crossexamine those dealers and what extraction the appellant wanted from them."*
>
> *[Emphasis supplied]*

32. Additionally, the Supreme Court in the case of ***State of Kerala v. K.T. Shaduli Grocery Dealer***[2]*, held that tax authorities being quasi- judicial authorities are bound by the principles of natural justice. The relevant paragraph is extracted herein below: -*

> ***"2. Now, the law is well settled that tax authorities entrusted with the power to make assessment of tax discharge quasi-judicial functions and they are bound to observe principles of natural justice in reaching their conclusions.*** *It is true, as pointed out by this Court in Dhakeswari Cotton Mills Ltd. v. CIT [AIR 1955 SC 154 : (1955) 1 SCR 941 : (1955) 27 ITR 126] that a taxing officer "is not fettered by technical rules of evidence and pleadings, and that he is entitled to act on material which may not be accepted as evidence in a court of law", but that does not absolve him from the obligation to comply with the fundamental rules of justice which have come to be known in the jurisprudence of administrative law as principles of natural justice. It is, however, necessary to remember that the rules of natural justice are not a constant: they are not absolute and rigid rules having universal application. It was pointed out by this Court in Suresh Koshy George v. University of Kerala [AIR 1969 SC 198 : (1969) 1 SCR 317*

> *: (1969) 1 SCJ 543] that "the rules of natural justice are not embodied rules" and in the same case this Court approved the following observations from the judgment of Tucker, L.J. in Russel v. Duke of Norfolk [(1949) 1 All ER 109] :"There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case."*

[Emphasis supplied]

33. Further, the argument of learned counsel for the Revenue that this mistake is curable under Section 292B of the Act lacks merit as the plain language of the said Section makes it abundantly clear that this provision condones the invalidity which may arise merely by mistake, defect or omission in notice. The said Section reads as under: -

> *<u>292-B. Return of income, etc., not to be invalid on certain grounds.—</u>No return of income, assessment, notice, summons or other proceeding, furnished or made or issued or taken or purported to have been furnished or made or issued or taken in pursuance of any of the provisions of this Act shall be invalid or shall be deemed to be invalid merely by reason of any mistake, defect or omission in such return of income, assessment, notice, summons or other proceeding if such return of income, assessment, notice, summons or other proceeding is in substance and effect in conformity with or according to the intent and purpose of this Act.*

*34. Reliance can also be placed upon the decision in the case of **CIT v. Micron Steels P. Ltd.**[11], whereby, it was held that the jurisdictional defects cannot be cured under Section 292B of the Act and they render the entire proceedings null and void.*

35. In the present case, it is seen that the Revenue has failed to allude to any steps which were taken to determine that the seized material belonged to the respondent-assessee group. Notably, the satisfaction note has also been prepared in a mechanical format and it does not provide any details about the incriminating material. Therefore, a failure on the part of the Revenue to manifest as to how the material gathered from the search of Jain group of companies belonged to the respondent-assessee group and the same is incriminating, vitiates the entire assessment proceedings.

36. Accordingly, we find no reason to intermeddle with the order of the ITAT which has rightly set aside the assessment order and deleted the additions made therein.

37. In view of the aforesaid and on the basis of the findings of fact arrived at before the authority, these appeals do not raise any substantial question of law and consequently, they stand dismissed. Pending applications, if any, are also disposed of."

13.50 The ratio that emerges from the aforesaid decisions is that a sworn statement cannot be relied upon for making any addition and must be corroborated by independent evidence for the purposes of making assessments.

13.51 In view of the above discussion, we are of the opinion that addition cannot be made on the basis of statement recorded u/s 132(4) of the Act supported by the unsubstantiated loose slips. Accordingly, the addition is deleted though we are not agreed with the order of the ld. CIT(A) on deletion of addition.

13.52 Accordingly, we delete both the additions made by ld. AO.

14 In the result, appeal of the revenue for the assessment year 2015-16 in ITA No.1165/Bang/2023 is dismissed.

ITA Nos.1166 & 1156/Bang/2023: (AY 2017-18):

15. ITA No.1166/Bang/2023 & ITA No.1156/Bang/2023 are cross appeals for the AY 2017-18.

15.1 The revenue in ITA No.1166/Bang/2023 has raised the following revised grounds of appeal:

1. *The Order of the Learned CIT(A) is opposed to law and facts of the case.*
2. *The CIT(A) erred in holding that the additions/adjustments made with regard to undisclosed stock admitted by the assessee to the extent of Rs.4,11,86,426/- should be considered as undisclosed business incomes to be taxed at normal—rates and not u/s.115BBE.*
3. *The CIT(A) has erred in not considering the fact that during the course of search various incriminating documents and material were found*

and seized. The material found and seized related to various business concerns and investments made by the family members who are partners in the assessee-firm. The search and seizure operation unearthed large scale suppression in the income generated and investments. The assessee, when •confronted with the evidence found, voluntarily admitted the discrepancies and offered Rs.5,48,60,039/- as undisclosed stock, unaccounted investments and unaccounted sales. The CIT(A), while upholding that the additions of Rs.1,36,73,613/-, being undisclosed investments, are to be taxed u/s.115BBE has erred in holding that the balance of Rs.4,11,86,426/- is to be taxed at normal rates.

4. *The CIT(A) erred in holding that the investments of Rs.1,36,73,613/- only are to be taxed u/s.115BBE and the balance of Rs.4,11,86,426/- should be taxed at normal rates, despite the fact that the entire amount of declaration of Rs.5,48,60,039/- has been generated using the same modus operandi and invested in gold.*
5. *The CIT(A) erred in holding that the investments of Rs.1,36,73,613/- only are to be taxed u/s.115BBE and the balance of Rs.4,11,86,426/- should be taxed at normal rates, ignoring the fact that the entire declaration of Rs.5,48,60,039/- has been made voluntarily by the assessee.*
6. *The CIT(A) ought to have appreciated the fact that even though the sources for investment made by the assessee are from income generated from jewellery business, the investments made partakes the character of undisclosed income.*
7. *The CIT(A) erred in giving relief to the assessee without going into the merits of the case.*
8. *For these and other grounds that may be urged upon, the order of the CIT(A) may be revered and that assessment order to be restored.*

15.2. The assessee in ITA No.1156/Bang/2023 has raised the following grounds of appeal:

1. *"The order of the learned Commissioner of Income Tax (Appeals)-2, Panaji, Goa is opposed to the facts of the case and law applicable to it.*

2. *The learned Commissioner of Income Tax (Appeals)-2, Panaji, Goa erred in holding that, stock of jewellery valued at Rs.1,36,73,613/- found at the residence of partners has to be considered as undisclosed investment U/s.69B and tax at the rate of 60% UIs. 115BBE of the act, ignoring the fact that, these items were excess stock of the business but was kept at the residence and the said stock was offered to tax in the hands of firm and assessed as business income in the assessment and therefore should have been taxed as income under the provisions of section 28 of the act.*

3. *The learned Commissioner of Income Tax (Appeals)-2, Panaji, Goa, has erred in ignoring the position of law that, as far as the provisions*

of section 115BBE of the act is concerned the rate of taxation was at 30% upto 05.12.2016 and therefore the taxes payable on unexplained investment assessable U/s.69A of the act was at 30% upto that date and under the circumstances in respect of unaccounted investments quantified as on 24.06.2016 the taxes payable were at 30% and not at 60% as determined by the Assessing Officer."

16. The ld. A.R. for the assessee submitted that the assessee M/s. S. Ramachandra Setty & Sons, a partnership firm carrying on business of trading in gold jewellery and also silver articles. Action U/s.132 of the act was conducted in the case of the respondent on 24.06.2016. During the course of search there were some excess stock and also some loose slips of paper were found. On the basis of this, the assessee made declaration of undisclosed income under the provisions of section 132(4) of the act. A return of income was filed on 22.10.2017, declaring total income of Rs.6,59,91,240/- as business income wherein the following income which was quantified and declared in the statements recorded U/s.132(4) of the act during the course of search has been declared in the profit & loss account.

Stock with gold smith	1,59,69,750/-
Business Stock at residence	93,63,957/-
Excess stock in shop	1,52,07,375/-
Business stock at residence seized	1,36,73,614/-
Sale of silver (Deficit stock)	6,45,344/-
Gross profit on URD purchases	8,37,297/-
Sale of gold	89,600/-
	5,57,86,937/-

16.1 Assessment has been concluded U/s.143(3) of the act on 21.12.2018 accepting the income declared in the return filed. The income quantified during the course of search for the current year was declared in the return filed and accepted in the assessment also. Though the Assessing Officer has accepted the income

declared, as far as the following income declared is concerned, provisions of section 115BBE of the act has been invoked and taxes have been levied at 60%. The Assessing Officer has held the following income as assessable under the provisions of section 69B of the act.

	Rs.	
Stock with gold smith	1,59,69,750/-	
Undisclosed stock	93,63,957/-	
Undisclosed stock (at Shop)	1,52,07,375/-	
Undisclosed stock (Residence)	1,36,73,614/-	
Undisclosed sale of silver	6,45,344/-	
	----------------------	5,48,60,039/-

16.2 It is the case of the assessee that the above income is assessable under the head business and not under any of the provisions like 68/69A, B, C, D contemplated for the purposes of the provisions of section 115BBE of the act. It is also the contention of the assessee that, the provisions of section 115BBE of the act was amended by taxation law second amendment act 2016 which is w.e.f 05.12.2016. In the case of the appellant the above income was quantified during search conducted on 24.06.2016 and much before the Taxation Law Second Amendment Act 2016 came to being, as such the rate of 60% which came into force from 05.12.2016 could not have been applied, but the rate of 30% which was in existence as on 24.06.2016 should have been levied.

16.3 The ld. A.R. submitted that on appeal the ld. CIT(A) has disposed off the appeal in ITA No.CIT(A)-2/PNJ/10207/2018-19, dated 31.10.2023 partly allowing the appeal. The relief allowed in the appeal is as under: -

1. *The Hon'ble CIT(A) has held that, the following income being unaccounted stock of gold and silver as business income under the provisions of section 28 of the act and taxes are to be levied at normal rates. (para 5.10 of the order)*

Stock with gold smith	*1,59,69,750/-*
Business Stock at residence	*93,63,957/-*
Excess stock in shop	*1,52,07,375/-*
Undisclosed sale of silver	*6,45,344/-*

	4,11,86,426/-
	--------------------

2. *The Hon'ble CIT(A) has held that, the uncounted sale of silver of Rs.6,45,344/- being sale proceeds of silver offered for tax is to be taxed at regular rates under the provisions of section 28 of the act.*

3. *The Hon'ble CIT(A) has held that, the following income being excess business stock found at the residence is to be assessed U/s.69B of the act and taxes are to be levied at 60% as contemplated U/s.115BBE of the act on a presumption that, this investment represents personal investment and therefore not to be considered as business income. (para 5.11 of the order)*

Gold Jewellery at residence seized	*1,36,73,614/-*

Aggrieved by the order of the ld. CIT(A) both the revenue and also the respondent are in appeal.

<u>Revenue Appeal in ITA/1166/Bang/2023</u>

16.4 The ld. A.R. submitted that the revenue had filed certain grounds of appeal originally on which submissions have been made in AR's letter dated 21.02.2024. The revenue has now been filed revised grounds of appeal and the ld. A.R. submitted his written submissions on each of the revised grounds of appeal in the following paragraphs.

GROUND NO.1 OF THE REVISED GROUNDS OF APPEAL

(a) The order of the Learned CIT(A) is opposed to law and facts of the case.

16.4.1 He submitted to kindly consider his submissions on the other grounds of appeal filed hereunder.

GROUND NO.2 OF THE REVISED GROUNDS OF APPEAL

(b) The CIT(A) erred in holding that the additions/adjustments made with regard to undisclosed stock admitted by the assessee to

the extent of Rs.4,11,86,426/- should be considered as undisclosed business income, to be taxed at normal rates and not U/s.115BBE.

16.4.2 The ld. A.R. submitted that as explained while elaborating on facts, the Assessing Officer has brought to tax the following items of income declared as taxable under the provisions of section 115BBE of the act.

	Rs.	
Stock with gold smith	1,59,69,750/-	
Undisclosed stock	93,63,957/-	
Undisclosed stock (at Shop)	1,52,07,375/-	
Undisclosed sale of silver	6,45,344/-	
	----------------------	4,11,86,426/-
Undisclosed stock (Residence)		1,36,73,614/-

	5,48,60,039/-	

16.4.3 He submitted that the ld. CIT(A) has held that, the stock valued to the extent of Rs.4,05,41,082/- and undisclosed sale of silver of Rs.6,45,344/- totally amounting to Rs.4,11,86,426/- as detailed below to be brought to tax under the provisions of section 28 of the act and stock at residence valued at Rs.1,36,73,614/- to be taxed under the provisions of section 115BBE of the act.

	Rs.	
Stock with gold smith	1,59,69,750/-	
Undisclosed stock	93,63,957/-	
Undisclosed stock (at Shop)	1,52,07,375/-	
Undisclosed sale of silver	6,45,344/-	
	----------------------	4,11,86,426/-

16.4.4 He submitted that the Assessing Officer has now taken a ground that, this amount of Rs.4,11,86,426/- is also to be taxed under the provisions of section 115BBE of the act at higher rates.

The amount of Rs.4,11,86,426/- comprises of the following two items.

Unaccounted stock	4,05,41,082/-	
Unaccounted sale of silver	6,45,344/-	
	--------------------	4,11,86,426/-

He submitted that the assessee's submissions on the ground of the Assessing Officer are in the following paragraphs.

Unaccounted stock – Rs.4,05,41,082/-

16.4.5 He submitted that the ld. CIT(A) has held that, the following income is to be taxed U/s.28 of the act.

	Rs.	
Stock with gold smith	1,59,69,750/-	
Undisclosed stock	93,63,957/-	
Undisclosed stock (at Shop)	1,52,07,375/-	
	----------------------	4,05,41,082/-

The findings of the CIT(A) are on paragraphs 5.5 to 5.9 of the order are extracted hereunder: -

"5.5 Section 69B of the Act empowers the AO to treat any bullion, jewellery or other valuable found in any financial year as unexplained investment in the hands of the assessee if the AO finds that the amount expanded on making such investments or in acquiring such bullion, jewellery and other valuables exceeds the amount recorded in the books of account maintained by the assessee for any source of income, and the assessee offers no explanations about such excess amount or the explanation offered by him, in the opinion of the AO, is not satisfactory. Therefore, it appears that the power of the AO U/s.69B is not an absolute one. It is subject to the satisfaction of the AO where explanation is offered. It therefore, provides for an opportunity to the assessee to explain the source of such investment. Once an explanation is offered, it is incumbent upon the AO to consider the same and form an opinion whether the explanation is satisfactory or not. The opinion so found must be reasonable and based on the material found and shall not be perverse. The AO is empowered to examine the materials found or produce by the assessee and conduct necessary enquiries to arrive at an opinion. But the assessee has the right to question the findings and counter the conclusions arrived at by the AO. The assessee may point out the perversity in the finding. It may point out that particular material was not considered or the enquiry made was not reasonable or was half heartedly done. The onus lies and shifts based on the rate of the evidence

on the side of the assessee and the AO. If the conclusion of the AO is adverse, it is incumbent on the AO to intimate or show cause the assessee on the proposed action.

5.6 In this case, it is seen from the assessment order that the appellant was not confronted about invoking section 69B of the act. Without any hint, the AO concluded that the unaccounted stock in the books of the appellant on the date of the search represent undisclosed investment of the appellant and taxed accordingly. In doing so, the AO had not sought any explanation regarding the source of such investment. On the contrary, the appellant had repeatedly stated during the search and afterwards that the unaccounted stock is part of its business activities and therefore, represents the unaccounted business income of the appellant. The AO used the work "undisclosed investment" in the assessment order interchangeably which was not found in the statement of the appellant. In any case, the terms unaccounted income or undisclosed investment made on material difference to the appellant at the time of search since the tax rate applied in both the cases (either U/s.28 or U/s.69B) are the same. But the taxation landscape for additions U/s.68, 69A, 69B, 69C and 69D changed due to the implementation of taxation law (second amendment) Act 2016 w.e.f. 05.12.2016. While the appellant may not be aware or anticipate the invocation of section 69B of the act based on the findings during the search, it is incumbent upon the AO to have confronted with the proposal to invoke section 69B instead of taxing under the head business income. This had not happened in this case and the addition was made at the back of the appellant.

5.7. Even ignoring the above technical issue, if we look at the merits of the case, there is force in the argument of the appellant that the addition mentioned above should be considered as undisclosed business income. The evidences/ incriminating material found and seized during the search have been discussed in the assessment order and they point out that the appellant had either issued business stock (gold bullion or old gold) to the goldsmiths for manufacture of jewellery or the finished goods (manufacture jewellery) were found in excess in the office premises. In either case, the unaccounted stock detected were part of the business activity and are intrinsically linked. Treating such unaccounted stock as unexplained investment requires some investigation or finding on the part of the AO to prove that there is no direct nexus nor connection between the investment made and the source of such investment i.e., the business activity of the appellant or distinguish the excess stock from the accounted stock of the business. However, the AO had not brought on record any evidence or material to establish that the appellant had generated income outside its reported business activity and made investments therefrom.

5.8 The following judgments cited below are also referred to and relied upon to arrive at the conclusion.

- *ACIT, Central Circle-2(1) Karsangiribuddhgiri Goswami (2021) 127 Taxmann.com 699 (Ahmedabad-Trib)*
- *Jain Plywood and another V. DCIT and another (Hon'ble ITAT, Chandigarh) (2023) 68 CCH 0287 Chd Trib.*
- *Principal Commissioner of Income Tax V Deccan Jewellera (P) Ltd (2021) 132 Taxmann.com 73 (Andhra Pradesh)*
- *CIT V. S.K.Srigiri & Bros (2008) 171 Taxman 264 (Karnataka)*
- *Overseas Leathers V. DCIT (2023) 152 Taxmann.com 595 (Chennai-Trib)*

5.9 It is also incomprehensible that any assessee would invest in business stock the unexplained money earned from other sources because at some point of time, the income earned out of such business stock has to be offered to tax and thus there is no apparent advantage or logic to invest the unexplained money in business assets. Therefore, I am convinced that the investment made in business asset/inventory is to be treated as business income. Hence, the unaccounted stock found of Rs.4,05,41,082/- is to be taxed U/s.28 of the I.T.Act instead of section 69B of the Act. The grounds of appeal in this regard are allowed accordingly."

16.4.6 He relied on the findings of the Hon'ble CIT(A) and also the various judgements he has referred to in para 5.8 of the order extracted above. He submitted that, the ld. CIT(A) has rightly held that, the total amount of Rs. 4,05,41,082/- is assessable as business income U/s.28 of the act and not under the provisions of section 115BBE of the act.

16.4.7 He further relied on the ratio laid down by Hon'ble High Court of Andhra Pradesh in the case of Pr. Commissioner of Income Tax Vs. Deccan Jewellers (P) Ltd (2021) 132 Taxmann.com 73 (AP). In the said case the assessee took a stand that, the excess stock found was a result of suppression of profits from business over years and had not been identifiable separately. This stand has been accepted and concluded by the Assessing Officer that, the income is assessable under the head business. The Pr. Commissioner of Income Tax sought to invoke the provisions of section 263 of the act and the order U/s.263 has been struck down by the High Court of Andhra Pradesh that the order of the Assessing Officer is not erroneous.

16.4.8 He further relied on the decision of ITAT Amritsar Bench in the case of Deepak Setia V. Deputy Commissioner of Income Tax (2023) 155 Taxmann.com 293 (Amritsar-Trib), wherein the Tribunal has held that, when all the incomes earned by the assessee are only from business, there does not arise any question as to application of provisions of section 69A of the act. Accordingly, the Tribunal has held that, an undisclosed income quantified during the course of survey U/s.133A of the act could not have been taxed U/s.115BBE of the act but to be taxed under the regular provisions.

16.4.9 He further relied on the ratio laid down by ITAT Chandigarh Bench in the case of Sham Jewellers V. Dy. CIT (IT Appeal No.375 (Chd) of 2022, dated 22.08.2022, wherein the Tribunal has held as under in the context of the provisions of section 115BBE of the act

> *"10.17 Ground Nos. 8 & 9 challenge the action of the lower authorities in applying the provisions of section 115BBE and thereby charging tax at the rate of 60%. The main thrust of the arguments of the Ld. AR has been that all the additions made or sustained relate only to the business income of the assessee and that nowhere in the assessment order has it been alleged that some other source of income had been detected which gave rise to additional income. It is seen that during the course of assessment proceedings, the various explanations submitted by the assessee have duly mentioned that the surrendered income was derived from the business. A perusal of the assessment order would also show that nowhere in the body of the assessment order, the AO has even contradicted this explanation of the assessee. The AO has not brought on record any iota of evidence to demonstrate that the assessee had any other source of income except income from business and, therefore, it is our considered view that deeming such income under the provisions of sections 68 or 69 would not hold good. In our view, in such a situation, the AO could not have legally and validly resorted to taxing the income of the assessee at the rate of 60% in terms of provisions of section 115BBE of the Act.*
>
> *10.18 The Hon'ble Andhra Pradesh High Court in the case of Principal Commissioner of Income Tax Vs. Deccan Jewellers Ltd. reported in (2021) 438 ITR 131 (AP) held that where the assessee was*

engaged in the business of Gold and Diamond jewellery and Silver articles and during the search and seizure operation u/s 132, excess stock was found to be declared and the assessee had submitted that excess stock was result of suppression of profit from business over the years and the same had not been kept identified separately and the AO had duly considered and accepted the assessee's explanation that investment in excess stock was to be treated as business income, the revisional powers invoked by the Principal Commissioner u/s 263 of the Act were not correct in the eyes of law.

10.19 The ITAT Chandigarh Bench in the case of Famina Knit Fabs Vs. ACIT reported in (2019) 176 ITD 246 (Chd-Trib) has held that, wherein during the course of survey, a surrender was made by the assessee on account of debtors / receivables which was based on a diary found during the course of survey and the Revenue had accepted that the surrender was on account of receivables, it followed that the debtors were generated from the sales made by the assessee during the course of carrying on the business of the assessee which was not recorded in the books of the assessee. The Coordinate Bench of the ITAT went on to further hold that though the said income was not recorded in the books of the assessee but the source of the same stood duly explained by the assessee as being from the business of the assessee and even otherwise no other source of income of the assessee was on record either disclosed by the assessee or unearthed by the Revenue. The Bench further held that the preponderance of probability, therefore, is that the debtors were sourced 18 from the business of the assessee. Therefore, there was no question of treating it as deemed income from undisclosed sources u/s 69, 69A, 69B, or 69C of the Act and the same was held to be in the nature of business income of the assessee.

10.20 Thus, as in the present case, where the source of investment or expenditure is clearly identifiable and the alleged undisclosed asset has no independent existence of its own or there is no separate physical identity of such investment or expenditure, then, first, what is to be taxed is the undisclosed business receipt invested in unidentifiable unaccounted asset and only on failure can it be considered to be taxed u/s 69 of the Act and further where once such investment or expenditure is brought within the purview of tax as undeclared business receipt, then taxing it further as deemed income u/s 69 would be completely out of place.

10.21 Similar view was taken by the Coordinate Bench of ITAT Ahmedabad in the case of Chokshi Hiralal Maganlal Vs. DCIT reported in 131 TTJ 1 (Ahd.)

10.22 It is also seen that the Ld. CIT(A) has relied on the judgement of the Hon'ble Punjab & Haryana High Court in the case of Kim Pharma Ltd. Vs. CIT in ITA No. 106 of 2011 (O&M) and the Ld. CIT

DR has also quoted the same in his arguments before us. However, after going through the aforesaid judgement of the Hon'ble Punjab & Haryana High Court, it is seen that in that particular case, the only issue was with regard to the cash surrendered at the time of survey and no other income. The cash found could not be related to the already disclosed and accepted source of income of the assessee and, therefore, the Hon'ble Punjab & Haryana High Court held that such surrendered cash was to be treated as deemed income u/s 69 of the Act. However, in the present case before us, the assessee has only one source of income i.e. business income and nowhere has it been brought on record that the assessee had any other source of income except business income and, therefore, we respectfully state that judgement of the Hon'ble Punjab and Haryana High Court in the case of Kim Pharma Pvt. Ltd (supra) would not apply on the facts of the present case.

10.23 Accordingly, keeping in view the various judicial precedents as cited above and respectfully following the same, we hold that the AO could not have legally invoked the provisions of section 115BBE of the Act in the present case and further the Ld. CIT(A) was also not legally correct in upholding of the application of provisions of section 115BBE of the Act. Accordingly, ground Nos. 8 and 9 are also allowed."

16.4.10 He further relied on the following recent decisions wherein it has been held that, the income surrendered by assessee during survey/search as excess stock from business operations the same could not be brought to tax under deeming provisions of section 69 of the act r.w.s 115BBE of the act, if excess stock found was relatable to business income and no other undisclosed source is proved by the department, such income is assessable under the regular provisions of the act and not under the provisions of section 115BBE of the act.

(i) Veer Enterprises V. Deputy Commissioner of Income Tax (2024) 158 Taxmann.com 655 (Chandigarh – Trib)

(ii) Montu Shally Knitwears V. Deputy Commissioner of Income Tax (2024) 159 Taxmann.com 677 (Chandigarh – Trib)

(iii) Tejpal Singh V. Assistant/Deputy Commissioner of Income Tax (2024) 158 Taxmann.com 679 (Amirtsar-Trib)

(iv) DDK Spinning Mills V. Deputy Commissioner of Income Tax (2023) 157 Taxmann.com 817 (Chandigarh – Trib)

(v) Pramod Singla V. ACIT (2023) 154 Taxmann.com 347 (Chandigarh-Trib)

(vi) M/s.A P Knit Fab V. Deputy Commissioner of Income Tax, in ITA No.732/Chd/2022, dated 15.02.2024.

16.4.11 In the case of respondent, the respondent surrendered during the course of search the excess stock from business activities and honoured in return of income filed also. Hence the income quantified on account of excess stock cannot be brought to tax under deeming provisions of section 69 of the act r.w.s 115BBE of the act.

<u>Unaccounted sale of silver – Rs.6,45,344/-</u>

16.4.12 The ld. A.R. submitted that during the course of search there was shortage of stock of silver to the extent of Rs.6,45,344/-. On a presumption that, such stock has been sold without bills, a declaration U/s.132(4) of the act has been obtained wherein the amount of Rs.6,45,344/- has been admitted as undisclosed income. Primarily the declaration is wrong for the reason that, the whole of unaccounted sale of silver would not become income but only a percentage of such sale being gross profit should have been taxed as income. The respondent however with a view to avoid litigation declared the whole of the amount of Rs.6,45,344/- as income and paid taxes under the regular provisions of the act. The Assessing Officer in the order of assessment has held that, this income is assessable under the provisions of section 115BBE of the act and

taxes are to paid at higher rates. On appeal the ld. CIT(A) has held that, this cannot be an addition U/s.69B of the act as brought out in the order of assessment and therefore the taxes are to be paid under the regular provisions. The relevant findings of the ld. CIT(A) are in para 5.12 of his order is extracted hereunder:-

> *"5.12 As far as the shortage of physical stock of silver in the office of the appellant at Hassan, the AO rightly concluded that the shortage of silver to the extent of 15.008 kgs represented unaccounted sales in the hands of the appellant firm. The value of such unaccounted sales was arrived at Rs.6,43,344/-. This amount was also treated as unaccounted investment and taxed U/s.69B r.w.s 1115BBE. Since, the amount represents absence of business asset in the hands of the appellant, this does not represent any investment or bullion, jewellery etc found for which the source of investment could not be explained, no addition U/s.69B is legally valid. Therefore, the addition made U/s.69B r.w.s. 115BBE on account of unaccounted sale of silver is directed to be deleted. The ground of appeal in this regard is accordingly allowed."*

16.4.13 He relied on the findings of the CIT(A). He further submitted that, the addition is not under the provisions of section 69B of the act and therefore the income is taxable under the regular provisions. He requested us to kindly consider the submissions above and dismiss the ground of appeal of the revenue.

GROUND NO.3 OF THE REVISED GROUNDS OF APPEAL

(c) The ld. CIT(A) has erred in not considering the fact that during the course of search various incriminating documents and material were found and seized. The material found and seized related to various business concerns and investments made by the family members who are partners in the assessee firm. The search and seizure operation unearthed large scale suppression in the income generated and investments. The assessee, when confronted with the evidence found, voluntarily admitted the discrepancies and offered Rs.5,48,60,039/- as undisclosed stock, unaccounted investments and unaccounted sales. The CIT(A), while upholding that the additions of Rs.1,36,73,613/-, being undisclosed investments, are to be taxed U/s.115BBE has erred in holding that the balance of Rs.4,11,86,426/- is to be taxed at normal rates.

16.4.14 The ld. A.R. submitted that, the respondent has not gone back on the declaration made in the statement recorded U/s.132(4) of the act. The quantum remains the same in the return filed with reference to the quantum declared in the statement recorded. However, it is the respondent's submission that, out of the total amount of Rs.5,48,60,039/- declared as undisclosed income, income to the extent of Rs.4,11,86,426/- is to be taxed at normal rates for the reason that, such amounts are not taxable as per the provisions of section 115BBE of the act. He requested us to consider its submission to Ground No.2 above.

GROUND NO.4 OF THE REVISED GROUNDS OF APPEAL

(d) The CIT(A) erred in holding that the investments of Rs.1,36,73,613/- only are to be taxed U/s.115BBE and the balance of Rs.4,11,86,426/- should be taxed at normal rates, despite the fact that the entire amount of declaration of Rs.5,48,60,039/- has been generated using the same modus operandi and invested in gold.

16.4.15 He requested us to consider its submission to Ground No.2 above.

GROUND NO.5 OF THE REVISED GROUNDS OF APPEAL

(e) The CIT(A) erred in holding that the investments of Rs.1,36,73,613/- only are to be taxed U/s.115BBE and the balance of Rs.4,11,86,426/- should be taxed at normal rates, ignoring the fact that the entire declaration of Rs.5,48,60,039/- has been made voluntarily by the assessee.

16.4.16 He requested us to consider its submission to Ground No.2 above.

GROUND NO.6 OF THE REVISED GROUNDS OF APPEAL

(f) The CIT(A) ought to have appreciated the fact that even though the sources for investment made by the assessee are from income generated from jewellery business, the investments made partakes the character of undisclosed income.

16.4.17 He requested us to consider its submission to Ground No.2 above.

GROUND NO.7 OF THE REVISED GROUNDS OF APPEAL

(g) The CIT(A) erred in giving relief to the assessee without going into the merits of the case.

16.4.18 He requested us to consider its submission to Ground No.2 above.

<u>Respondent Appeal in ITA/1156/Bang/2023</u>

16.5 The ld. A.R. submitted that relevant Ground Wise submissions as under and requested that the same may please be considered: -

(a) The order of the learned Commissioner of Income Tax (Appeals)-2, Panaji, Goa is opposed to the facts of the case and law applicable to it.

16.5.1 He requested to consider its submissions to ground No.2 & 3 hereunder.

(b) The learned Commissioner of Income Tax (Appeals)-2, Panaji, Goa erred in holding that, stock of jewellery valued at Rs.1,36,73,613/- found at the residence of partners has to be considered as undisclosed investment U/s.69B and tax at the rate of 60% U/s.115BBE of the act, ignoring the fact that, these items were excess stock of the business but was kept at the residence and the said stock was offered to tax in the hands of firm and assessed as business income in the assessment and therefore should have been taxed as income under the provisions of section 28 of the act.

16.5.2 He submitted that during the course of search jewellery valued at Rs.1,36,73,613/- found at the residence was determined as undisclosed. It is a practice in the trade that, all the stock would not be kept at the business premises and for safety purposes some portion is kept at the residence also. Hence, while filing the return of income this stock was also declared as undisclosed stock belonging to the business and was declared in the return filed for

the A.Y.2017-18. Accordingly, the taxes were paid at regular rate of 30%, which was accepted by the Assessing Officer while concluding the assessment. However, considered as undisclosed investment of the firm U/s.69B of the act and taxed U/s.115BE of the act at 60%. The ld. Commissioner of Income Tax (Appeals) has held that, the excess jewellery of Rs.1,36,73,613/- found at the residence of the partners is to be taxed U/s.69 of the act and accordingly taxes have to be levied at 60% as contemplated under the provisions of section 115BBE of the act.

16.5.3 The ld. A.R. submitted that, the major source of income to the group is from the jewellery business activity and the excess stock represents income generated from such activity. The appellant has offered the excess stock found in the (1) Business premises is Rs.1,52,07,375/- & at residence is Rs.1,36,73,614/-, (2) stock with Gold Smith, at shop Rs.1,59,69,750/- & at their residence is Rs.93,63,957/-, shown in the Profit & Loss account of the firm. The Assessing Officer has accepted the returned income and taxed the whole of excess stock of jewellery found U/s.69B of the act. He referred to para 6.1 and 6.3 of the assessment order. The Assessing Officer held jewellery stock found at residence as undisclosed investment and added U/s.69B of the act and levied tax U/s.115BBE of the act. Under the circumstances, it cannot be held that, stock of jewellery found at residence is assessable U/s.69B of the act and taxes leviable under the provisions of section 115BBE of the act. However, the Commissioner of Income Tax (Appeals) while passing appeal order has accepted partly explanation of the appellant held that Rs.4,05,41,082/- is taxed U/s.28 of the act, whereas the jewellery found in residence of partner of Rs.1,36,73,614/- is taxable U/s.69B of the act liable at 60% to tax U/s.115BBE of the act. For having accepted the business income declared in the return filed the said stock found at

residence could not have been brought to tax under the provisions of section 115BBE of the act instead of section 28 of the act. He relied on the ratio laid down by the High Court of Madras in the case of CIT V. P. Balasubramanian (2013) 354 ITR 116 (Madras). He also relied on the following decisions on the same issue.

(i) Fashion World V. Asst. CIT (ITA No.1634/Ahd/2006) dated 12.02.2010.
(ii) Arora Alloys Ltd V. Dy. CIT (ITA No. 1481/Chand/2017), dated 06.11.2019.
(iii) Jasvinder Singh V. Deputy Commissioner of Income Tax (2024) 109 ITR (Trib) 377 (Chandigarh)

16.5.4 He further relied on the ratios laid down in the following decisions wherein it is held that, the excess stock once surrendered as business income the taxes are to be paid at regular provisions and not under the provisions of section 115BBE of the act.

(i) Bunty Kumar V. ACIT/Deputy Commissioner of Income Tax (2023) 157 Taxmann.com 245 (Amrtisar-Trib)
(ii) DDK Spinning Mills V. Deputy Commissioner of Income Tax (2023) 157 Taxmann.com 817 (Chandigarh-Trib)
(iii) Parmod Singla V. ACIT (2023) 154 Taxmann.com 347 (Chandigarh-Trib)
(iv) Deepak Setia V. Deputy Commissioner of Income Tax (2023) 155 Taxmann.com 293 (Amritsar – Trib)
(v) Harish Sharma V. ITO (IT Appeal No.327 (Chd) of 2020, dt.11.05.2021
(vi) Daulatram Rawatmull V. CIT (1967) 64 ITR 593 (Calcutta)
(vii) Mansfield & Sons V. CIT (1963) 48 ITR 254 (Calcutta)

(viii) Sham Jewellers V. Dy.CIT (IT Appeal No.375 (Chad) of 2022, dt.22.08.2022

(c)The learned Commissioner of Income Tax (Appeals)-2, Panaji, Goa, has erred in ignoring the position of law that, as far as the provisions of section 115BBE of the act is concerned the rate of taxation was at 30% upto 05.12.2016 and therefore the taxes payable on unexplained investment assessable U/s.69A of the act was at 30% upto that date and under the circumstances in respect of unaccounted investments quantified as on 24.06.2016 the taxes payable were at 30% and not at 60% as determined by the Assessing Officer.

16.5.5 The ld. A.R. submitted that, the unaccounted jewellery of Rs. 1,36,73,613/- was quantified as undisclosed income in the search conducted on 24.06.2016. If the income was assessable under the provisions of section 69 of the act and taxes were payable under the provisions of section 115BBE of the act. The said provisions as it stood on 24.06.2016 reads as under: -

> *"115BBE (1) Where the total income of an assessee includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D, the income tax payable shall be the aggregate of: -*
>
> *(a) The amount of income tax calculated on income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D, at the rate of thirty percent, and*
> *(b) The amount of income tax with which the assessee would have been chargeable had his total income been reduced by the amount of income referred to in clause (a)."*

16.5.6 He submitted that, since the income is quantified on 24.06.2016, the law prevailing on that day should be applied and the taxes will have to be levied at 30%. However, the above provisions were amended by Finance Act 2016 w.e.f 01.04.2017.

The amendment got the president's assent on 05.12.2016. Consequent to this, the provisions read as under: -

> *"115BBE. Where the total income of an assessee –*
>
> *(a) Includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D and reflected in the return of income furnished under section 139; or*
> *(b) Determined by the Assessing Officer includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D, if such income is not covered under clause (a),*
>
> *The income tax payable shall be the aggregate of –*
> *(i) The income of income tax calculated on the income referred to in clause (a) and clause (b) at the rate of sixty per cent; and*
> *(ii) The amount of income tax with which the assessee would have been chargeable had his total income been reduced by the amount of income referred to in clause (i)."*

16.5.7 He submitted that the Assessing Officer has levied taxes at 60% considering an amendment which became a law from 05.12.2016 on an income quantified on 24.06.2016. he submitted that, the tax laws prevailing as on 24.06.2016 should be applied and not a law which came into statute from 05.12.2016. He also submitted that, substantive amendments cannot be brought into the statute retrospectively. He relied on the ratios laid down in the following decisions.

i) CIT V. Vatika Township (P) Ltd (2014) 367 ITR 466 (SC)

The Hon'ble Supreme Court has held as under:-

> *"…………………Furthermore, an amendment made to a taxing statute can be said to be intended to remove 'hardships' only of the assessee, not of the Department. On the contrary, imposing a retrospective levy on the assessee would have caused undue hardship…………..."*

ii) Avani Exports v. CIT (2012) 348 ITR 391 (Guj)

The Hon'ble High Court in the context of retrospective amendments has given the following finding in para 20 of its order.

> *"…………………… If after inducing a citizen to arrange his business in a manner with a clear stipulation that if the existing statutory conditions are satisfied, in that event, he would get the benefit of taxation and thereafter the revenue withdraws such benefit and imposes a new condition which the citizen at that stage is incapable of complying whereas if such promise was not there, the citizen could arrange his affairs in a different way to get similar or at least some benefit, such amendment must be held to be arbitrary and if not, an ingenious artifice opposed to law…."*

The above decision is confirmed by Hon'ble Supreme Court in Commissioner of Income Tax V. Avani Exports (2015) 58 Taxmann.com 100 (SC).

iii) <u>Utsav Cold Storage (P) Ltd Vs. Income Tax Officer, Ward – 3(2), Jaipur (2019) 107 Taxmann.com 184 (Jaipur-Trib).</u>
The Hon'ble Tribunal has held as under in the last paragraph of its decision.

> *"Thus it is a cardinal principle of tax law as propounded by the Courts that law to be applied which is in force in the relevant assessment year unless and otherwise provided expressly or by necessary implication a clarificatory amendment by insertion of an explanation can be read into the main provision but if a change is brought in the existing law by insertion of a new provision then the same cannot be applied in the case when no such law was in force at the relevant point of time and, therefore, a new tax liability cannot be created by a subsequent amendment in respect of a transaction as well as the return of income filed when such law was not in the Statute book….."*

16.5.8 The ld. A.R. requested us to consider the submissions above and hold that, for the facts and circumstances of the appellant taxes will have to be levied at 30% on the unaccounted jewellery of Rs. 1,36,73,613/- quantified during the course of search on 24.06.2016.

17. The ld. D.R. submitted that it cannot be possible to hold the value of unaccounted stock of jewellery found in the business

premises of the assessee as business income of the assessee instead it should be brought to tax u/s 69 r.w.s. 115 BBE of the Act. Further she submitted that jewellery found at the residence of the assessee cannot be treated as undisclosed stock of the assessee's business. Hence, the addition to be sustained.

18. We have heard the rival submissions and perused the materials available on record. During the course of search action on 24.6.2016, there was undisclosed stock found as follows:

(a) A total quantity of gold weighing 3507.100 gms. at the residence of the assessee valuing at Rs.93,63,957/- @ Rs. 2670/- per gm. which has been accepted by the assessee as undisclosed stock relating to the business of the assessee and the same has been kept at the residence of assessee for safety purpose.

(b) Details of gold given to goldsmith has been found, which shows 5.970 kgs. At the market rate of Rs.2675/- p.gm. valuing at Rs.1,59,69,750/-. Further, while taking the physical stock during the course of search action at the office premises of the assessee,

(c) There was a stock as per books of accounts of 61162 gms. as against the physical stock of 66847.600 gms. Thus, there was a difference of 5.685 kgs. Valuing at Rs.2675/- p.gm. totaling of Rs.1,52,07,375/-.

(d) There was a jewellery found at the residence of Mr. Ravish totaling of 4990.37 gms. Valuing at Rs.1,36,73,613/-.

18.1 The ld. AO treated entire total value of this jewellery of Rs.5,48,60,039/- as income from other sources and taxed at 60% by applying provisions of section 115BBE of the Act. However, ld. CIT(A) has considered an amount of Rs.4,11,86,426/- as stock found at the business premises (including Rs.93,63,957/- business stock at the residence) as income from business and treated the balance amount of gold jewellery found at residence and seized at Rs.1,36,73,614/- as income u/s 69B r.w.s. 115BBE of the Act. Now the contention of the ld. A.R. is that the entire stock belongs to

the business of the assessee and this stock of 4990.37 gms of jewellery relating to assessee's business found at Mr. Ravish's residence kept for safety purpose and it cannot be treated as unexplained investment u/s 69B r.w.s. 115BBE of the Act and entire excess jewellery both found at the business premises of the assessee as well as residence of Mr. Ravish to be considered as business income of the assessee and it cannot be treated as income from other sources u/s 69B r.w.s. 115BBE of the Act.

18.2 We note that assessee is in jewellery business. The assessee had admitted excess stock found in the business premises of the assessee as well as residence of the assessee as business income and offered the same for taxation by bringing the same to P&L account of the assessee. The ld. AO accepted the returned income and taxed the whole excess stock of jewellery. The assessee has been explaining before the lower authorities that excess stock found during the course of search action had emanated from the stock of earlier years and it is nothing but the flow back of the business income earned by assessee from year to year. Unless the department is having any material to show that the assessee has earned the same from any other unknown sources of income, it is to be treated as business income only. In our opinion, when the assessee has explained that the source was from the business and except stock difference no other investment with any other asset was found and particularly, this unexplained excess stock is surrendered as business income has to be assessed as business income and not under the head unexplained investment under the head investment u/s 69B of the Act. For this purpose, we rely on the decision of coordinate bench of Chennai in the case of Overseas Leathers Vs. DCIT in ITA No.962/Chny/2022 dated 5.4.2023, wherein held as under:

> *12. "During the course of survey, excess stock of leather and allied products has been found and such excess stock was noticed when physical inventory of stock in trade of the assessee was taken up.*

Further, said stock is mixed with regular stock in trade of the assessee. The assessee has explained before the Assessing Officer that it could not immediately reconcile difference in stock and thus, to buy peace from Department, additional income has been offered under the head income from business, equivalent to the amount of excess stock found during the course of survey. The explanation offered by the assessee either during the course of survey or during the assessment proceedings is not negated with any other evidences to disprove the claim of the assessee that source for acquisition of stock in trade is other than business income of the assessee. Moreover, the assessee derives only one source of income from manufacturing and trading in leather and allied products, which is evident from income declared for the impugned assessment year and earlier assessment years. Further, when the assessee has explained source for excess stock found during the course of survey, is out of income earned from current year business, the AO did not go further to disprove the claim of the assessee that said source is not from income from business. Moreover, it is a general practice in trade that income generated is either ploughed back into the business in the form of stock in trade or receivables or spent for other purpose like acquisition of asset outside the business. In this case, during the course of survey except stock difference, no other investment with any other asset was found. Therefore, from the above it is very clear that explanation offered by the assessee that source for excess stock is out of income generated from business activity of the current year appears to be plausible explanation. Therefore, we are of the considered view that when the assessee has explained the source for acquisition of stock out of business income, the AO ought to have accepted the explanation of the assessee and assessed the income under the head profits and gains of business or profession, but not under the head unexplained investment u/s. 69B of the Act. This is because, excess stock found during the course of survey does not have any independent identity as the asset is a mixed part of overall stock found in the business premises of the assessee, which in our considered view represents business income."

18.3 Being so, under the facts and circumstances of the case, we note that the assessee has declared additional income towards excess stock found during the course of search action both at the business premises of the assessee as well as partner of the assessee (Mr. Ravish) and there was no material to suggest that the assessee has not earned this income other than from the jewellery business carried on by the assessee from assessment year to assessment year and it has to be treated as income earned from the assessee only in the assessment year under consideration or earlier years from business and the same has

been surrendered as income of the assessee to be treated as accordingly, especially, the ld. AO has not done anything to dispute the claim of assessee that the source was not from the business. The lower authority cannot apply the provisions of section 69B r.w.s. 115BBE of the Act and the income declared by the assessee to be considered as income from normal business of the assessee.

18.4 Further, the revenue authorities were not able to submit any evidence to show that such income is not connected with the business income of the assessee or accumulated from non-recognising sources. Hence, all the incomes earned by the assessee are only from the business income of the assessee, there do not arise any question as to application of provisions of section 69 or 69A or 69B or 69C of the Act. Hence, taxing such income at special rate u/s 115BBE of the Act is improper. It is settled principle of law that when there is no separate source of income identified during the course of search action or survey or during the course of assessment proceedings or appellate proceedings, any income arising to the assessee shall be treated to be out of the normal business of the assessee only. For this purpose, we place reliance on the judgement of Deepak Setia Vs. DCIT reported in 106 ITR (Trib) 125 (Amritsar).

18.5 Further, same view was taken by this coordinate bench of Tribunal in the case of Banti Kumar Vs. ACIT 157 Taxmann.com 245 (Amritsar).

18.6 Further, in the case of DDK Spinning Mills Vs. DCIT 157 Taxmann.com 817 (Chd.) wherein held that when during the course of survey, assessee surrendered certain amount on account of addition made to factory building, since source of investment in said building was stated to be out of business income, which was duly honoured by assessee while filing the

return of income, wherein amount was offered to tax under head "business income" and tax was paid on the same at normal rate, provisions of section 69B r.w.s. 115BBE of the Act could not be invoked so as to make addition on account of certain amounts treating it as unexplained investment. Same view was taken by coordinate bench of Chandigarh Bench in the case of Pramod Singhala Vs. CIT (154 Taxmann.com 347).

18.6 Hence, the addition sustained by ld. CIT(A) at Rs.1,36,73,613/- u/s 69B r.w.s. 115BBE of the Act has to be treated as income from business. Similarly, in the case of jewellery found at the business premises of the assessee at Rs.4,11,86,426/- to be treated as business income of the assessee and to be assessed accordingly. Thus, the grounds of appeal of the revenue are dismissed and grounds of appeal of the assessee are allowed.

19. In the result, appeal of the assessee in ITA No.1156/Bang/2023 is allowed and the appeal of the revenue in ITA No.1166/Bang/2023 is dismissed.

20. In the result, appeals of the revenue in ITA Nos.1163 to 1166/Bang/2023 are dismissed and appeal of the assessee in ITA No.1156/Bang/2023 is allowed.

Order pronounced in the open court on 10th June, 2024

Sd/-
(Keshav Dubey)
Judicial Member

Sd/-
(Chandra Poojari)
Accountant Member

Bangalore,
Dated 10th June, 2024.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The DR, ITAT, Bangalore.
5 Guard file

By order
Asst. Registrar,
ITAT, Bangalore.