

आयकर अपीलीय अधिकरण पुणे न्यायपीठ “ऐ” पुणे में
**IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH “A”, PUNE**

सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री प्रदीप कुमार केडिया, लेखा सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI PRADIP KUMAR KEDIA, AM

आयकर अपील सं. / ITA Nos.1325 to 1329/PN/2013
निर्धारण वर्ष / Assessment Years : 2004-05 to 2008-09

Prabhat Chandra S Jain
206, Anand Bhavan 17,
Babugenu Road,
Princess Street, Marine Lines,
Mumbai – 400002

.... अपीलार्थी/Appellant

PAN: AAKPJ3257E

Vs.

The Asst. Commissioner of Income Tax,
Central Circle -1 (1), Pune

.... प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA Nos.1350 to 1354/PN/2013
निर्धारण वर्ष / Assessment Years : 2004-05 to 2008-09

The Asst. Commissioner of Income Tax,
Central Circle -1 (1), Pune

.... अपीलार्थी/Appellant

Vs.

Prabhat Chandra S Jain
206, Anand Bhavan 17,
Babugenu Road,
Princess Street, Marine Lines,
Mumbai – 400002

.... प्रत्यर्थी / Respondent

PAN: AAKPJ3257E

Assessee by : S/Shri Naresh Jain and
Jatin Kumar Jain

Department by : S/Shri Sashi Bhushan Prasad, CIT
and Rajesh Damor

सुनवाई की तारीख /
Date of Hearing : 02.09.2015

घोषणा की तारीख /
Date of Pronouncement: 16.09.2015

आदेश / ORDER

PER SUSHMA CHOWLA, JM :

All the cross appeals filed by the assessee and the Revenue are against the consolidated order of CIT(A)-II, Pune, dated 28.03.2013 relating to assessment years 2004-05 to 2008-09 against respective orders passed under section 143(3) r.w.s. 153A of the Income Tax Act, 1961 (in short 'the Act').

2. This bunch of cross-appeals filed by the assessee and the Revenue relating to the same assessee relating to assessment years 2004-05 to 2008-09 were heard together and are being disposed of by this consolidated order for the sake of convenience.

3. The issue raised in all the cross appeals is identical. However, reference is being made to the facts in assessment year 2004-05 to adjudicate the issue.

4. The assessee in ITA No.1325/PN/2013 has raised the following grounds of appeal :-

The below mentioned grounds are independent to each other:

1. Addition on account of third party evidence

- 1.1. That Ld. CIT (A) has erred in confirming the additions made by the Assessing Officer on account of unaccounted sales.
- 1.2. That Ld. CIT (A) has further erred in making additions on the basis of third party evidence.
- 1.3. The Ld. CIT (A) did not appreciate basic fact that there was no corroborative evidence found in the records of appellant.
- 1.4. That Ld. CIT (A) also erred in ignoring that Mr. Sohan Raj Mehta, (based on whose statement the addition has been made in case of appellant), had subsequently retracted from his statement.
- 1.5. That Ld. CIT (A) has grossly erred in not accepting fact that Assessing Officer had not provided any opportunity to the appellant to cross examine Mr. Sohan Raj Mehta.

- 1.6. That Ld. CIT (A) has further erred in not considering the various judicial pronouncements cited by the appellant for deletion of the said additions.

2. Without Prejudice to 1 above taking gross profit ratio @ 35% of unaccounted sales

- 2.1. That Ld. CIT (A) erred in taking gross profit @ 35% of alleged Unaccounted Sale.
 - 2.2. The Ld. CIT (A) also erred in taking GP of manufacturing companies and applying same to appellant who is just a trader.
 - 2.3. That Ld. CIT (A) further erred in not accepting the alternative argument of the appellant that without prejudice, in the absence of any manufacturing setup, the appellant can at best be called as trader and in case of trading activity, the profit is very low just 2% of turnover.
 - 2.4 That Ld. CIT(A) failed to appreciate that even section 44AD which talks about presumptive taxation only @ 8% of the gross receipts is considered as G.P.
 - 2.5 That Ld. CIT(A) has grossly erred in talking gross profit rate instead of Net profit rate.
3. The appellant craves leaves to add, to alter or to delete any of the above grounds of appeal if necessary.

5. The Revenue in ITA No. 1350/PN/2013 has raised the following grounds of appeal :-

- 1) On the facts and in the circumstances of the case, the Id. CIT(A) has erred in taking the G.P. @ 35% of unaccounted cash received by assessee.
- 2) The order of the CIT(A) may be vacated and that of the Assessing Officer be restored.
- 3) The appellant craves leave to add, alter, amend and modify any of the above grounds of appeal.

6. Briefly, in the facts of the present case, search and seizure action under section 132 of the Act was conducted on Rasiklal M Dhariwal (RMD) group of cases on 20.01.2010. The assessee was also searched under section 132(1) of the Act. Consequent thereto, notice under section 153A of the Act was issued to the assessee. In response thereto, the assessee furnished return of income declaring total income of Rs.3,43,610/- on 01.03.2011. During the course of assessment proceedings, show cause notice was issued to the assessee. The Assessing Officer noted that during the course of search action at the residential premises of Shri Mittulal at Bangalore on 09.10.2009, large number of incriminating

documents were found and seized. These documents belonged to M/s. Dhariwal Industries Ltd. (DIL) and were maintained by Shri Sohan Raj Mehta, C&F agent of M/s. DIL, on behalf of M/s. DIL. When confronted on the said issue, Shri Sohan Raj Mehta categorically stated in his statement on oath under section 132(4) of the Act, that he was effecting unaccounted sale of Gutkha on behalf of M/s.DIL and the sale proceeds were deployed as per directions of Shri Rasiklal M Dhariwal / Shri Prakash R Dhariwal. Among the recipients of unaccounted sale proceeds, as per the Assessing Officer, the assessee's name figured prominently at several places. As per the seized pages belonging to Bundle No.A/M/08 seized vide Panchanama dated 09.10.2009, copies of which were duly provided to the assessee during the course of assessment proceedings, the Assessing Officer noted that the assessee had received sum of Rs.26,91,03,000/- from M/s. DIL through Shri Sohan Raj Mehta, as per the details tabulated at page 3 of the assessment order. Shri Sohan Raj Mehta in his statement recorded on oath under section 132(4) of the Act stated that M/s. DIL had paid the aforesaid amounts to the assessee through him, as per instructions received from Shri Rasiklal M Dhariwal / Shri Prakash R Dhariwal. The assessee was thus, show caused to explain as to why sum of Rs.26.91 crores should not be added as his undisclosed income. The Assessing Officer in the show cause notice pointed out that from the enquiries and the details submitted by the assessee, it was seen that the assessee was a raw material supplier of M/s. DIL over many years and had transacted with the said concern during the said period of 2003 to 2008 as its raw material supplier. Further, Shri Sohan Raj Mehta had accepted to have carried out unaccounted sale of Gutka during that period as depicted in the documents seized vide Panchanama dated 09.10.2009, seized by Investigation Wing of Bangalore and also because of post-search enquiries and enquiries during the assessment proceeding, it was established beyond doubt that the above mentioned documents seized from Bangalore were actual details of unaccounted sales of Gutka, which M/s. DIL had carried out through Shri Sohan

Raj Mehta and who in turn, had maintained the details of those unaccounted sales, unaccounted sale proceeds generated in cash and the utilization of the said cash generated. He also admitted to have earned commission on this unaccounted sale of Gutka effected by him on behalf of M/s. DIL and has offered the said commission income to tax in the relevant years. The Assessing Officer thus, show caused the assessee that the documents found and seized at Bangalore were not dumb documents and were authentic accounts of cash generation and deployment of cash generated of unaccounted sale proceeds of Rs.345.75 crores. In view thereof, the income arising out of unaccounted sale transaction of Rs.345.75 crores was being taxed in the hands of M/s. DIL for respective years and the payment of Rs.26.91 crores reflected as cash paid by M/s. DIL to the assessee for supply of unaccounted raw materials and the same proposed to be taxed as unaccounted income generated on supply of the said raw materials. The year-wise break-up of the said Rs.26.91 crores was proposed to be added i.e. Rs.1.76 crores in assessment year 2004-05, Rs.7.15 crores in assessment year 2005-06, Rs.7 crores in assessment year 2006-07, Rs.6 crores in assessment year 2007-08 and Rs.5 crores in assessment year 2008-09. The assessee was also show caused to explain as to whether any expenditure was incurred for earning the said undisclosed income. The assessee vide its reply dated 14.12.2011 at the outset reiterated that he had not received any such sum totaling Rs.26.91 crores from Shri Sohan Raj Mehta. He further stated that even in his statement recorded on the day of search, he denied to have received the said sum. The assessee also stated he had already clarified during the course of search that he had not entered into any business transaction with Mr. Sohan Raj Mehta ever in his life and further none of these transactions were reflected in his books of account. Referring to the contents of show cause notice, wherein it was alleged that Shri Sohan Raj Mehta effected unaccounted sale of Gutka on behalf of M/s. DIL and in turn had deployed sale proceeds as per the directions, the assessee asked for the cross-examination of

M/s. Sohan Raj Mehta as to how he could give such statement when nothing was received by him. Further, the assessee also made enquiries as to what was stated by Shri Rasiklal Dhariwal / Shri Prakash Dhariwal. In reference to the statement of Shri Sohan Raj Mehta, in case they had not given any confirmation on statement of Shri Sohan Raj Mehta, then as per the assessee, the said statement was not reliable and in case they had given any confirmation, then the assessee wanted to understand from them about the basis of said confirmation. He stressed that without giving him an opportunity of cross-examination, Shri Sohan Raj Mehta and obtaining the confirmation from Rasiklal Dhariwal and Shri Prakash Dhariwal, no addition should be made, as there were no unaccounted sales nor any receipt of money from Shri Sohan Raj Mehta. Another plea raised by the assessee before the Assessing Officer was that no addition could be made on the basis of accounts/entries in the books of third parties as the same were not sufficient to prove that the assessee had indulged in such transactions. Reliance in this regard was placed on series of decisions with lead decision in **Addl.C.I.T. Vs. Miss Lata Mangeshkar reported in 74 ITR 696 (Bom)**. In the end, without prejudice and without admitting the show cause notice, the assessee stated that in case suppressed sales are detected, the entire sales could not be taken as income and only reasonable net profit should be applied on suppressed sales.

7. The Assessing Officer rejected the submissions made by the assessee at the outset since evidence was seized during the course of search under section 132 of the Act, which as per the Assessing Officer was speaking evidence and proved beyond reasonable doubt, that the entire unaccounted business chain of it regarding unaccounted purchases, unaccounted manufacture, unaccounted packing, unaccounted printing, clandestine removal of goods, unaccounted sales and utilization of sale proceeds. The Assessing Officer also noted that on the basis of said evidence, an addition of Rs.205.70 crores had been made in the case of

M/s. DIL for assessment years 2004-05 to 2008-09. The relevant extract of the assessment order passed under section 143(3) r.w.s. 153A of the Act is reproduced under para 4.5 at pages 11 to 16 of the assessment order of the assessee. The Assessing Officer noted that in the case of M/s. DIL, entire unaccounted turnover was not brought to tax, instead gross profit of M/s. DIL was estimated and was taxed. The Assessing Officer further observed that since M/s. DIL's unaccounted expenses had been allowed as expenses by considering gross profit, it becomes imperative that the corresponding unaccounted income of recipient, in the form of raw material supply, etc. was also brought to tax as per law. The Assessing Officer further met the objections of the assessee that where no documents were seized from his premises and where he had nothing to do with Shri Sohan Raj Mehta or with the seized documents, the said seized documents could not be treated as against him being a third party evidence. The Assessing Officer was of the view that in case the arguments of assessee that third party was no evidence, at all is accepted, the provisions of Evidence Act and section 147, 158BD and 153C of the Act would become redundant. The Assessing Officer admitted that strict rules of evidence were in-applicable to the proceedings under the Income-tax Act, however, that did not mean that the principles of Evidence Act were in-applicable to the proceedings under the Income-tax Act. Reliance in this regard was placed on the ratio laid down by the Hon'ble Supreme Court in Chuharmal Vs. CIT reported in 172 ITR 250 (SC). The Assessing Officer also referred to the retraction by Shri Mallikarjuna of Shimoga and also by Shri S. Balan of Pune and applying the test of human probabilities, held that after reading the seized documents as a whole, sum of Rs.1.76 crores received by the assessee during the instant year was to be treated as undisclosed income of the assessee and the addition to the extent of Rs.1.76 crores was made in the hands of the assessee.

8. The CIT(A) after considering factual aspects of the case and legal propositions laid down by the Hon'ble Supreme Court and various other Courts in paras 3.5 to 3.15 held as under:-

"3.16 Section 110 of the Evidence Act is material in this respect which stipulates that when the question is whether any person is owner of anything of which he is shown to be in possession, the onus of proving that he is not the owner, is on the person who affirms that he is not the owner. In other words, it follows from well settled principles of law that normally, unless contrary is established, title always follows possession. Chuharmal Vs. CIT (1998) 172 ITR 250 (SC). Documentary evidence plays an important part in law. The Courts attach great value for documentary evidence. The Punjab & Haryana High Court in the case of Paramjit Singh Vs ITO (2010) 323 ITR 588 (P&H) pointed out that oral evidence is not conclusive as against documentary evidence under sections 91 and 92 of the Indian Evidence Act, 1872."

9. The CIT(A) further referred to the objections of the assessee of not supplying the statement of Shri Sohan Raj Mehta recorded under section 132(4) of the Act, on the basis of which, the addition on account of undisclosed income was made nor grant of an opportunity to cross-examine the same being against the principles of natural justice and also the retraction by Shri Sohan Raj Mehta at a later date and held that where the findings and the statement had already been confronted to the assessee, and also the seized documents which form the basis for addition was also provided and appropriate opportunity was given to the assessee, it could not be said that the Assessing Officer had not given proper opportunity of hearing to the assessee. The CIT(A) thus, held as under:-

"3.17.3 Thus in the given set of facts and circumstances of the case and having considered the factual position including the submission of the appellant, seized documents and various statements relied during the two searches, it is difficult to accept the argument of the appellant that no addition could be made. The seized document do show apparent link between M/s. DIL and the seized document and the entire modus operandi of out of books sales of M/s. DIL has been explained by Shri Sohanraj Mehta, which also gets corroborated by the seized documents. These documents and the accounting records are not dumb document rather are true statement of actual state of affairs among various parties including the appellant. Therefore, it cannot be said that no additions are called for on the loose papers found at the residence of Mithulal Jain at Bangalore. I, therefore, hold that entries indicating to the appellant can lead to addition in the hands of the appellant. These seized documents and statement of Shri Mehta cannot be ignored but are very much relevant and, therefore, the entries related to the appellant can lead to addition in the hands of the appellant."

3.17.4 The Assessing Officer has brought on record and discussed in detail the entire scheme of unaccounted business transactions of M/s. DIL. Considering the

enormity of the transaction which was spread over several assessment years it could not have been expected that the assessee would keep details of each and every transaction connected with the activity. Obviously these could find place in a manner which were discovered by the Investigation Wing during the search action. The efforts of the Assessing Officer in linking up these transactions with the evidences of M/s. DIL with the appellant and others, on this basis needs to be appreciated. Any document has to be necessarily read, as a whole. Applying this principle the genuineness of the seized document and a corollary, the appellant's involvement in the unaccounted business chain gets established beyond any doubt. The seized document do show link between the appellant and M/s. DIL. The seized document and the record of the account are not dumb documents rather are true statement of the actual state of affairs among various parties including the appellant. The fact that has been established is that the appellant is in receipt of unaccounted sale proceeds during the year for the supply of raw material in the form of edible perfume, attar etc. I find it difficult in the given facts and circumstances, to accept the arguments of the appellant that no addition on account of the unaccounted income earned on unaccounted sales of edible perfume could be made. Therefore, I hold that entries related to the appellant would lead to addition of undisclosed income in the hands of the appellant and the grounds of appeal no. 1 and 2 raised by the appellant are, therefore, liable to be dismissed for all the years under consideration."

10. The CIT(A) thereafter, adjudicated the issue raised by the assessee without prejudice that at best net profit could be added in the hands of the assessee. The CIT(A) was of the view that only net rate of profit can be applied in respect of goods sold outside the books of account and the taxing of the entire receipt by the Assessing Officer was not proper and correct. However, the CIT(A) was of the view that estimation of gross profit rate at a higher level is to be taxed in the hands of the assessee. Consequently, GP rate of 35% on unaccounted sales was directed to be applied to work out the income in the hands of the assessee.

11. The assessee is in appeal against the order of CIT(A) and has raised two issues. The first issue is with regard to the addition made on account of third party evidence and second issue raised without prejudice is the application of GP rate @ 35% on unaccounted sales.

12. The Revenue is in appeal against the application of gross profit rate @ 35% on the unaccounted sales.

13. The learned Authorized Representative for the assessee after taking us through the facts of the case, pointed out that no corroborative evidence was found during the course of search on the premises of the assessee. Our attention was drawn to the page 2 of the assessment order and also to the show cause notice issued by the Assessing Officer which is reproduced at page 4 of the assessment order, wherein there is no mention of any incriminating evidence found from the assessee. The learned Authorized Representative for the assessee further pointed out that the documents relied upon by the Assessing Officer to make the addition in the hands of the assessee were the documents found during the course of search on Shri Sohan Raj Mehta. Our attention was drawn to the said documents placed at pages 73 to 83 of the Paper Book and it was pointed out that the entries were in the name of P.C. Jain of Mumbai, however, there is no evidence available from the said documents that P.C. Jain referred to in the seized documents was the assessee i.e. Prabhat Chandra S. Jain. The learned Authorized Representative for the assessee pointed out that even during the course of assessment proceedings, a query was raised before the Assessing Officer as to his conclusion that name P.C. Jain relates to the assessee. However, no proper reply has been given by the assessee in this regard. The learned Authorized Representative for the assessee further submitted that even during the course of search, a query was raised with regard to the documents seized from the possession of Shri Sohan Raj Mehta and the assessee had replied that the documents do not belong to him. Further, no opportunity of cross-examination was provided to the assessee to cross-examine Shri Sohan Raj Mehta. Reference was made to the observations of Assessing Officer at pages 6 and 7 in this regard. The learned Authorized Representative for the assessee further referred to the letter filed at page 72 of the Paper Book, under which Shri Sohan Raj Mehta had retracted his earlier statement and had also stated that he was ready to come to Pune to take part in the proceedings. The learned Authorized Representative for the assessee further pointed out that similar

issue of addition on account of such entries in the seized documents found from the possession of Shri Sohan Raj Mehta, arose before various Benches of Tribunal, wherein consistent view has been taken that no addition is warranted on the basis of such documents. The learned Authorized Representative for the assessee placed reliance on the following decisions:-

1. Shri Vinit Ranawat Vs. ACIT in ITA Nos.1105 and 1106/PN/2013, order dated 12.06.2015
2. Pradeep Amrutlal Runwal Vs. TRO in ITA No.334/PN/2013, order 30.05.2014
3. DCIT Vs. M/s. Bhola Nath RAdha Krishna in ITA No.5149/Del/2012, order dated 05.04.2013.
4. ACIT Vs. M/s. Mohd. Ayub Mohd. Yaqub in ITA No.388/LKW/2013, order dated 10.12.2014

14. The learned Authorized Representative for the assessee further pointed out that in any case in the absence of any other independent evidence to establish that there was escapement of income, no addition could be made in the hands of the assessee. Relying on the entries in the seized documents, our attention was drawn to the Jain Hawala cases decided by the Hon'ble Supreme Court in CBI Vs. V.C. Shukla & Ors. (1998) 3 SCC 410 and Vinod Solanki Vs. UoI & Anr (SC-Civil Appeal No.7407 of 2008). The learned Authorized Representative for the assessee further relied on the ratio laid down by the Hon'ble Bombay High Court in **Addl.C.I.T. Vs. Miss Lata Mangeshkar (supra) and also Straptex (India) (P.) Ltd. Vs. DCIT (2003) 84 ITD 320 (Mumbai)**. Without prejudice to the above said issue, the learned Authorized Representative for the assessee pointed out that it had raised the grounds of appeal against the application of GP rate @ 35%, which was very excessive and high.

15. The learned Departmental Representative for the Revenue on the other hand, pointed out that admittedly, during the course of search on the assessee on 20.01.2010, nothing was found from the possession of the assessee. However, on

09.10.2009, the said documents were found and seized from Shri Sohan Raj Mehta, in which he admitted that he was carrying on the said business of C&F agent of M/s. DIL. The learned Departmental Representative for the Revenue referred to the order of CIT(A), especially paras 3.2 and 3.3 at pages 14 and 15, wherein there is finding of CIT(A) that the assessee was a regular supplier of raw materials and since the assessee was connected to M/s. DIL, there was preponderance of probabilities. The learned Departmental Representative for the Revenue further pointed out that case laws relied upon by the learned Authorized Representative for the assessee were not relevant, as in the above said decision, the assessee was not dealing in individual capacity with M/s. DIL and the business was being carried out by the partnership concern or the company, in which he was a director / partner. Even in one of the cases, the assessee was not searched. The learned Departmental Representative for the Revenue stressed that the seized documents were confronted to the assessee and they were relied upon. Since the documents have been considered by the Assessing Officer as he was also the Assessing Officer of Shri Rasiklal Dhariwal, the addition in the hands of the assessee is justified, especially since Shri Sohan Raj Mehta has accepted the commission on such dealings.

16. The learned Authorized Representative for the assessee in rejoinder pointed out that the assessee has no dealings with M/s. DIL in individual capacity. The company Pragatiram Pvt. Ltd., in which the assessee was a director had transacted with M/s. DIL. With regard to the confirmation of Rasiklal and the Assessing Officer being the same, the learned Authorized Representative for the assessee pointed out that till date no statement of Rasiklal has been given to the assessee and in the absence of the same, it cannot be relied upon to make the aforesaid addition in the hands of the assessee. The learned Authorized Representative for the assessee further stressed that in DCIT Vs. M/s. Bhol Nath Radha Krishna (supra) the

assessee was the supplier of supari and in the documents, there was receipt of Rs.9 crores and even after considering those evidences, the addition was deleted. Further, in Shri Vinit Ranawat Vs. ACIT (supra), Pune Bench of Tribunal had considered the facts at length and had held that where the assessee's uncle and group companies were dealers of M/s. DIL, no addition was warranted in the hands of the assessee.

17. We have heard the rival contentions and perused the record. Search and seizure action under section 132 of the Act was carried out in the RMD group cases on 20.01.2010 and the assessee's premises was also searched on 20.01.2010. Pursuant to the search, the Assessing Officer issued notice under section 153A of the Act and in response thereto, the assessee filed return of income. The case of the Revenue against the assessee was that another search action had taken place at the residential premises of one Shri Mittulal at Bangalore on 09.10.2009. During the course of search, various incriminating documents were found and seized, which related to the activities of M/s. DIL and were maintained by one Shri Sohan Raj Mehta, who was the C&F agent of M/s. DIL. When confronted, Shri Sohan Raj Mehta in his statement recorded under section 132(4) of the Act admitted that he was effecting unaccounted sales of Gutka on behalf of M/s. DIL and sale proceeds were deployed as per the directions of Rasiklal Dhariwal and / or Prakash Dhariwal. As per the seized documents, name of PC Jain of Mumbai was there on various pages and the Assessing Officer tabulated the details from Bundle A/M/08. The monthly and year-wise details of the amounts against PC Jain are tabulated at page 3 of the assessment order and total to Rs.26,91,03,000/-.

18. The issue arising before us is that in the absence of any finding that the notings on the said documents in the name of PC Jain having not been established to be of Mr. Prabhat Chandra S Jain i.e. the assessee, no addition could be made

in the hands of the assessee. The case of the Revenue on the other hand, was that since the assessee was supplying raw material to M/s. DIL, his association having been established whether M/s. DIL and where M/s. DIL was engaged in sale of Gutka outside books, the entries on the said seized documents were relating to the assessee and since the same were not recorded in the books of account, addition to that extent merited in the hands of the assessee.

19. We find objection of the assessee was that in the absence of any documents having been found from the possession of assessee during the course of search at his residence and in the absence of any corroborative evidence found during the course of search on Shri Mittulal, from whose possession documents maintained by Shri Sohan Raj Mehta were found, no addition could be made in the hands of the assessee on account of any notings on such documents, without establishing that the person referred to in the said documents was the assessee and also in the absence of any cross-examination being allowed of Shri Sohan Raj Mehta. The assessee further pleaded that Shri Sohan Raj Mehta on a later date had retracted his earlier statement and in view thereof, no reliance could be placed on the earlier statement recorded of Shri Sohan Raj Mehta. We find identical issue arose before the Tribunal and identical submissions were made by the learned Authorized Representative for the assessee and identical objections were raised by the learned Departmental Representative for the Revenue in Shri Vinit Ranawat Vs. ACIT (supra). The Tribunal after considering rival contentions and the seized documents and various legal propositions, held as under:-

"37. We have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer and the CIT(A) and the Paper Book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find in the instant case a search u/s.132 of the I.T. Act was conducted at the premises of Mr. Mittulal at Bangalore on 09-10-2009 wherein certain incriminating documents were found belonging to the Dhariwal group. Those documents were maintained by one Shri Sohan Raj Mehta, C&F agent of M/s. Dhariwal Industries Ltd. In his statement recorded u/s.132(4) Mr. Mehta had stated that he was effecting unaccounted sales of Gutkha of Dhariwal Industries Ltd. and the sale proceeds were deployed as per the instructions of Shri Rasiklal M.

Dhariwal and his son Shri Prakash M. Dhariwal. In some of the seized papers name of certain persons are appearing which contain the name either "Vinit" or "Vinit Ranawat". On the basis of those names and entries against said names, the Assessing Officer deciphered the amount as Rs. 1 crore for A.Y. 2006-07 and Rs.20 crores for A.Y. 2007-08 as received by the assessee Shri Vinit Ranawat. Although Mr. Mehta in his statement recorded u/s.132(4) has stated that this amount was paid by Dhariwal Industries to Shri Vinit Ranawat through him, however, the statement appears to have been retracted as per the findings given by the Ahmedabad Bench of the Tribunal in the case of Mustafamiya H. Sheikh.

38. It is the case of the Assessing Officer that the assessee was associated with Dhariwal group for a long time and the assessee's name appearing in the seized document tally with the regular business association with M/s. Dhariwal Industries Ltd. and if test of human probability is applied to the facts of the case it becomes evident that assessee was part of the entire scheme of unaccounted business chain of M/s. Dhariwal Industries Ltd. The role of the assessee was that of a co-conspirator. During the course of search and post search proceedings Mr. Sohan Raj Mehta had stated that the seized books of account, loose sheets and other documents, i.e. A/M/01 and A/M/29 were actually belonging to the C&F business of M/s. Dhariwal Industries Ltd. He had categorically stated that page 34 of A/M/08 and other related documents were written by him and most of the pages were in Marwadi language. The statement of Mr. Mehta clearly explains the entire unaccounted business chain and unaccounted business transactions of M/s. Dhariwal Industries Ltd. Mr. Sohan Raj Mehta, the author of the seized document in his statement u/s.132(4) has explained true impact of the contents of the seized documents and has also acknowledged and substantiated the fact that the seized documents belong to M/s. Dhariwal Industries Ltd. and therefore his statement has immense evidentiary value. Based on the above and on the basis of various other observations in the assessment order the Assessing Officer made addition of Rs. 1 crore for A.Y. 2006-07 and Rs.20 crores for A.Y. 2007-08 as undisclosed income of the assessee which has been upheld by the CIT(A).

39. It is the submission of the Ld. Counsel for the assessee that from the very beginning the assessee was denying to have received any such amount from Mr. Sohan Raj Mehta. According to him, no addition can be made in the hands of the assessee on the basis of papers found in the premises of third party. Further, the assessee being a small taxpayer, some evidence should have been found from the residence of the assessee to show that in fact he has received such huge amount. It is also the case of the Ld. Counsel for the assessee that the Department itself is treating this as "short term advance" during the course of search action. Similarly, the statement of Mr. Rasiklal M. Dhariwal is contrary to the finding of the Department. It is also the submission of the Ld. Counsel for the assessee that different Benches of the Tribunal under identical facts and circumstances have deleted the addition made by the Assessing Officer on the basis of notings found from the premises of Mr. Sohan Raj Mehta.

40. We find some force in the submission of the Ld. Counsel for the assessee. The assessee in the instant case is an individual and proprietor of M/s. S. Chains which is engaged in the business of job work in gold ornaments. M/s. S.D.D. Agencies is the C&F Agent of M/s. Dhariwal Industries Ltd. in the State of Maharashtra for their Gutkha and Pan Masala business. A search and seizure action on the premises of Mr. Mittulal at Bangalore was carried on 09-10-2009 wherein documents maintained by Mr. Sohan Raj Mehta, C&F Agent of M/s. Dhariwal Industries Ltd were found. The assessee's premises was also searched on 20-01-2010, i.e. after a period of about 3 months and 10 days. During the course of search at the premises of the assessee he was questioned about the documents found from the premises of Mr. Mittulal which contain documents maintained by Mr. Sohan Raj Mehta. The assessee at the time of search had completely denied to have received any such amount from Mr. Sohan Raj Mehta.

Relevant Question and answer of the assessee recorded during the course of search u/s.132(4) are as under (paper book page 41 and 42) :

“Q.33 A search action u/s.132 was carried out on 0-10-2009 in the case of Shri Mittulal by Investigation Wing of Bangalore. In course of the search action certain incriminating documents related to Shri Sohanraj Mehta were found in connection with C&F agency of RMD Group of Pan Masala and Gutkha products. Shri Sohanraj Mehta was also covered by the Investigation Wing of Bangalore and on being confronted with these incriminating documents, Shri Sohanraj stated that the said pages interalia contain the notings regarding handing over of Rs.21.22 crores to Shri Vinit Ranawat of Mumbai which is C&F agent of RMD group. Shri Sohanraj also stated that the said payments in cash were made as per the direction of Shri R.M. Dhariwal and Shri Prakash Dhariwal. Please state whether the said cash of Rs.21.22 cr received from Shri Sohanraj Mehta on account of RMD group are reflected in your books of accounts.

A.33 I have gone through the documents shown to me and say that I have never received this amount from Shri Sohanraj Mehta. Hence, the said payments are not reflected in my books of account.

Q.34 A search action u/s.132 was carried out on 26-1-2010 in the case of Dhariwal group. In the course of statement recorded u/s.132(4) Shri Prakash Dhariwal has explicitly stated that the above referred payments have been made by Shri Sohanraj Mehta at the instruction of my father Shri Rasiklal Dhariwal as short term advance. I am showing you the relevant portion of the said statement. Please go through the same and state whether the payments in cash received from Sohanraj Mehta at the discretion of Shri R.M. Dhariwal are recorded in your books of account.

A.34 I have gone through the statement shown to me of Shri Prakash Dhariwal recorded on 20-01-2010, however, I have never recorded the amount mentioned from Shri Sohanraj Mehta hence the said payment are not recorded in my books.

Q.35 The statement of Shri Sohanraj Mehta recorded u/s.132(4) on 09-10-2009 has been confirmed by Shri Prakash Dhariwal in the statement recorded u/s.132(4) on 20-01-2010. Thus, both Shri Sohanraj Mehta and Shri Prakash R. Dhariwal have stated on oath that payments in cash of Rs.21.22 cr has been made to you at the direction of Shri Rasiklal Dhariwal by Shri Sohanraj Mehta. As the statements have been given by them on oath, you are therefore once again requested to go through the above referred documents/statement and state whether the said cash receipts are reflected and recorded in your regular books of accounts.

A.35 As already stated earlier, I have never received any cash from Sohanraj Mehta at the instant of Shri Rasiklal Dhariwal or Prakash Dhariwal. Hence, no such cash is recorded in my regular books of accounts.”

41. It is also pertinent to note here that the search party during the course of search at the premises of the assessee has not found any evidence whatsoever to substantiate that the assessee has in fact received any amount either from Mr. Sohan Raj Mehta or from Mr/ Rasiklal Manikchand Dhariwal/Mr. Prakash M. Dhariwal or M/s. Dhariwal Industries Ltd. No unaccounted asset, investment or loose paper evidencing such huge receipt has been found. Further, we find from the query raised during the course of search that the authorised officer has treated the same as “short term advance” given to the assessee. Therefore, we find some force in the submission of the Ld. Counsel for the assessee that if the amount is a short term advance the question of the same constituting income in the hands of the assessee does not arise. We find from the statement of Mr. Sohan Raj Mehta recorded during the course of search proceedings u/s.132 on 09-10-2009 where Mr. Sohan Raj Mehta in his answer to Question No.31 has replied as under :

“Q.31 Please state how these transactions are unaccounted?”

Ans: M/s Dhariwal Industries Ltd has a manufacturing unit in Singsandra, Bangalore. Our firm M/s Mehta Associates is a sole C & F agent of the Company for their product RMD Gutka since 1994-95. I have very long business and personal association with Mr. Raskilal Manikchand Dhariwal. He considers me as close

confident. As per the requirement of the Distributors, I place order for dispatch of Stock either with Mr. Prashant Bafna or Mr. Jeevan Sancheti, who are incharge of the Factory at Bangalore. To send a dispatch with bill or without bill is decided as per their choice and the Stock of Gutka is sent by Matador Van to this office. The stock that comes without bill is immediately dispatched to our customers. We keep only the stock that comes with bill in our office. The stock that comes without bill is dispatched immediately to our customers. I have been involved in these transactions for longtime and I am responsible for all the despatches and also for the collections from our customers; Normally, we extend credit of 7-10 days to our customers. They remit consideration for the Guntka stock received by them. Periodically, I send these Collections to Mr. Rasiklal or his son Mr. Prashant as per their instructions."

42. Similarly, in his answer to Question Nos. 33 and 34 he has replied as under :

"Q.33 I am showing you exhibit marked as A/M/29, seized from the residence of Mr. Mitulal, No. 219, 68th, Cross, 5th Block, Rajaji Nagar, Bangalore. Please go through these loose sheets serially numbered 1-61 and state the contents written over these loose sheets?

Ans : I have gone through the exhibit marked A/M/29. I have placed my signature on page no. 24 of this exhibit in confirmation of having seen it. This exhibit contains loose slips serially number 1-61. Slips marked as sl.no. 4 to 8, 49 to 50, 58 and 59 contain the notings of Mr. Raskilal Manikchand Dhariwal and his son Mr. Prakash. The notings on these slips contain their directions to me to handover the amount mentioned in the slip to the person who brings the slip. Sometimes, they do not write any name on the slip, I have to handover the money mentioned in the slip to the bearer of the slips. Most of the times, I may not know the person but still I make payment to them as I have standing instructions from Mr. Raskilal Manikchand Dhariwal and his son Mr. Prakash to handover the money to the bearer of the slip. The money is paid out of the collections received from the distributors towards unaccounted sales.

Q.34 Do you obtain any receipt from the parties to whom you hand over Cash as per the instructions of Mr. Raskilal Manikchand Dhariwal and his son Mr. Prakash

Ans : No. It is not required. After receipt of Cash, they leave the slip with me. That is considered as evidence."

43. From the above it is seen that Mr. Sohan Raj Mehta has never identified the assessee. It is also an admitted fact that the request of the assessee to cross examine Mr. Sohan Raj Mehta was not granted on the ground that the same will not serve any purpose.

44. We further find Mr. Rasiklal Manikchand Dhariwal in his statement recorded u/s.132(4) on 21-01-2010 in reply to Question No. 9, 11 and 12 has answered as under (page 124 of paper book filed by Ld. DR) :

"Q9. Similarly, I am showing you page No.34 of Bundle No.A/M/29 seized on 9/10/2009. Kindly go through the contents and please explain.

Ans. This is a signed chit in my handwriting dt.20/2/2007 wherein I have instructed Shri Vinit Ranawat to hand over an amount of Rs.500000-00 (Five Lakhs).

Q11. Similarly, I am showing you page no.24 of Bundle No.A/M/29 seized on 9/10/2009. Kindly go through the contents and please explain.

Ans. This is a signed chit in my handwriting dt.10/11/2006 wherein I have instructed Shri Vinit Ranawat to hand over an amount of Rs.500000-00 (Five Lakhs).

Q.12 Similarly, I am showing you page no.22 of Bundle No.A/M/29 seized on 9/10/2009. Kindly go through the contents and please explain.

Ans. This is a signed chit in my handwriting wherein I have instructed Shri Vinit Ranawat to hand over an amount of Rs.50000-00 (Fifty Thousand).”

45. From the above, it is seen that at one place the Department is treating the amount as short term advance by Mr. Rasiklal Manikchand Dhariwal to the assessee (Question No.34 to assessee u/s.132(4) on 20-01-2010). Similarly, Mr. Rasiklal Manikchand Dhariwal in his reply to Question Nos. 9, 11 and 12 recorded u/s.132(4) of the I.T. Act has stated that he has instructed Mr. Vinit Ranawat to hand over the various amounts. Therefore, it is not clear as to whether the Assessing Officer is correct or the Investigation Wing at the time of examining the assessee are correct or the answer of Mr. Rasiklal Manikchand Dhariwal is correct.

46. The Hon'ble Bombay High Court in the case of Aziende Colori Nazionali Affini, Italy (Supra) has held that the agreement had to be considered as a whole and that the different clauses in the agreement could not be considered separately. Therefore, when the Department itself is treating the same at one place as short term advance, therefore, the question of treating the same as income of the assessee does not arise. It is also an admitted fact that the papers were found with Mr. Sohan Raj Mehta at Bangalore. Therefore u/s.132(4A) they can be presumed to be true, genuine and correct only in the case of the searched person, i.e. Mr. Sohan Raj Mehta who has admitted that the papers belong to him. Therefore, we find force in the submission of the Ld. Counsel for the assessee that on the basis of the papers found with some third party addition cannot be made in the hands of the assessee particularly when there is no business connection between the assessee and that party.

47. The Hon'ble Bombay High Court in the case of Addl.CIT Vs. Lata Mangeshkar reported in 97 ITR 696 has held that mere entries in the accounts regarding payment to the assessee was not sufficient as there was no guarantee that the entries were genuine in absence of any corroborative evidence. In that case, the income-tax authorities sought to assess certain income as income from undisclosed sources received by the assessee on the basis of statement by 2 persons that they had paid money in black to the assessee and entries in books belonging to them regarding alleged payment to the assessee. The Tribunal examined the statement made by the 2 persons and found that the evidence tendered by them suffered from serious infirmities. It held that mere entries in the accounts regarding payments to the assessee was not sufficient as there was no guarantee that the entries were genuine. The Tribunal therefore held that there was no proof that the amount in question represented income from undisclosed sources belonging to the assessee. On further appeal by the Revenue, the Hon'ble High Court held that the conclusion of the Tribunal had been reached by it on a proper appreciation of the evidence. This was finding of fact by the Tribunal and no question of law arose and no reference would lie from the decision of the Tribunal. Accordingly, the appeal filed by the Revenue was dismissed.

48. The Hon'ble Supreme Court in the case of CBI Vs. Shri V. C. Shukla reported in 3 SCC 410 has observed as under :

“The rationale behind admissibility of parties' books of account as evidence is that the regularity of habit, the difficulty of falsification and the fair certainty of ultimate detection give them in a sufficient degree a probability of trustworthiness (wigmore on evidence \$ 1546). Since, however, an element of self interest and partisanship of the entrant to make a person - behind whose back and without whose knowledge the entry is made - liable cannot be ruled out the additional safeguard of insistence upon other independent evidence to fasten him with such liability, has been provided for in Section 34 by incorporating the words such statements shall not alone be sufficient to charge any person with liability.

The probative value of the liability created by an entry in books of account came up for consideration in Chandradhar vs. Gauhati Bank [1967 (1) S.C.R. 898]. That case

arose out of a suit filed by Gauhati Bank against Chandradhar (the appellant therein) for recovery of a loan of Rs. 40,000/- . IN defence he contended, inter alia, that no loan was taken. To substantiate their claim the Bank solely relied upon certified copy of the accounts maintained by them under Section 4 of the Bankers' Book Evidence Act, 1891 and contended that certified copies became prima facie evidence of the existence of the original entries in the accounts and were admissible to prove the payment of loan given. The suit was decreed by the trial Court and the appeal preferred against it was dismissed by the High Court. In setting aside the decree this Court observed that in the face of the positive case made out by Chandradhar that he did not ever borrow any sum from the Bank, the Bank had to prove that fact of such payment and could not rely on mere entries in the books of account even if they were regularly kept in the course of business in view of the clear language of Section 34 of the Act. This Court further observed that where the entries were not admitted it was the duty of the Bank, if it relied on such entries to charge any person with liability, to produce evidence in support of the entries to show that the money was advanced as indicated therein and thereafter the entries would be of use as corroborative evidence.

The same question came up for consideration before different High Court on a number of occasions but to eschew prolixity we would confine our attention to some of the judgements on which Mr. Sibal relied. In Yesuvadiyan Vs. Subba Naicker [A. I. R. 1919 Madras 132] one of the learned judges constituting the Bench had this to say:

S.34, Evidence Act, lays down that the entries in books of account, regularly kept in the course of business are relevant, but such a statement will not alone be sufficient to charge any person with liability. That merely means that the plaintiff cannot obtain a decree by merely proving the existence of certain entries in his books of account even though those books are shown to be kept in the regular course of business. he will have to show further by some independent evidence that the entries represent real and honest transactions and that the moneys were paid in accordance with those entries. The legislature however does not require any particular form or kind of evidence in addition to entries in books of account, and I take it that any relevant facts which can be treated as evidence within the meaning of the Evidence Act would be sufficient corroboration of the evidence furnished by entries in books of account if true."

While concurring with the above observations the other learned Judge stated as under:

" If no other evidence besides the accounts were given, however strongly those accounts may be supported by the probabilities, and however strong may be the evidence as to the honesty of those who kept them, such consideration could not alone with reference to s.34, Evidence Act, be the basis of a decree."(emphasis supplied)

In Beni Vs. Bisan Dayal [A. I. R 1925 Nagpur 445] it was observed 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 Vs. Ram Rakha [A. I. R. 1953 Pepsu 113] the High Court, while negating 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, 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 the were in accordance with facts.

The evidentiary value of entries relevant under Section 34 was also considered in Hiralal Mahabir Pershad (supra) I.D. Dua, J. (as he then was) speaking for the Court observed that such entries though relevant were only corroborative evidence and it is to be shown further by some independent evidence that the entries represent honest and real transactions and that monies were paid in accordance with those entries.

A conspectus of the above decisions makes it evident that even correct and authentic entries in books of account cannot without independent evidence of their trustworthiness, fix a liability upon a person. Keeping in view the above principles, even if we proceed on the assumption that the entries made in MR 71/91 are correct and the entries in the other books and loose sheets which we have already found to be not admissible in evidence under Section 34) are admissible under Section 9 of the Act to support an inference about the formers' correctness still those entries would not be sufficient to charge Shri Advani and Shri Shukla with the accusations levelled against them for there is not an iota of independent evidence in support thereof. In that view of the matter we need not discuss, delve into or decide upon the contention raised by Mr. Altaf Ahmed in this regard. Suffice it to say that the statements of the four witnesses, who have admitted receipts of the payments as shown against them in MR 71/91, can at best be proof of reliability of the entries so far they are concerned and not others. In other words, the statements of the above witnesses cannot be independent evidence under Section 34 as against the above two respondents. So far as Shri Advani is concerned Section 34 would not come in aid of the prosecution for another reason also. According to the prosecution case itself his name finds place only in one of the loose sheets (sheet No. 8) and not in MR 71/91. Resultantly, in view of our earlier discussion, section 34 cannot at all be pressed into service against him.

(underline provided by us)

49. We further find identical issue had come up before various Benches of the Tribunal on the basis of the notings of Mr.Sohan Raj Mehta found during the course of search. We find the Ahmedabad Bench of the Tribunal in the case of Shri Mustafamiya H. Sheikh (Supra) has observed as under:

"7. On a perusal of the seized materials received from the Investigation wing, Pune, the AO had noticed that Page 34 was a summary of the cash payment made by Shri Sohanraj Mehta for the period from April 2003 - August 2006 as per the direction of RMD Group. As per this version, an amount of Rs.57.50 lakhs pertained to Shri Sheikh Mustafmiya Hussainmiya of Ahmedabad and page 47 was the monthly summary for the month of January - March 2004 of the unaccounted transaction carried out by Shri Sohanraj Mehta C & F of Karnataka Region of RMD Group. After analyzing the issue exhaustively as detailed in the assessment order as well as in the appellate order under dispute, a sum of Rs.57.5 lakhs in cash as evidenced by the seized documents was treated as unaccounted receipt in the hands of the assessee and, accordingly, added to the income of the assessee for the period under consideration by the AO which has been subsequently sustained by the learned CIT (A) for the detailed reasons recorded in his appellate order which is under scrutiny.

7.1. Admittedly, the whole proceedings were initiated on the strength of a statement of a third party (Shri Sohanraj Mehta). The purported seizure of slips, loose sheets etc. at the premises of a third party contained only the names, but, not

other details such as their identity, addresses, contact numbers etc. On a perusal of the statement, it is clear that the payments made were to the persons whose names were appearing on the right side of the papers (sheets) which were paid to those persons on the instructions of PRD & RD. Moreover, against the names of Mustufa & Taufik, it was specifically written as (PRD) expenditure in respect of PRD was given by Shri Sohanraj Mehta as per the telephonic and written instruction of Prakash Rasikal Dhasriwal and Rasiklal Manikchand Dhariwal as per the Statement of Sri Sohanraj Mehta dated 21.10.2009 [Refer: Page 99 of PB AR]. To a question No.14 Exhibit A/M/8/dated 9.10.2009 which contained a bunch of loose sheets serially numbered from 01 to 58 to explain the contents, Shri Sohanraj Mehta answered thus -

"Page 34 records receipt of Gutkha consignment from Dhariwal Industries Ltd., during April 2003 to Jan. 2006 totalling to Rs.218,00,91,198/- (which is recorded on the left hand side of the page). On the right hand side of the page, parties to whom cash payments were made have been recorded, on instructions from Dhariwal Industries Ltd., The instructions were in the form of slips of paper and they contain the signatures of Mr. Rashiklal Manikchand Dhariwal and his son Mr. Prakash Dhariwal. Such payments totaling to Rs.206,76,54,463/- were made in 2003-2006. The balance of Rs.11,24,36,739/- was settled by me subsequently over a period of time."

7.2. Considering the statement of the said person, there is strong force in the contention of the assessee that even assuming that the receipt of such amount was merely a collection for on behalf of the company and such amount cannot par take the character of income in the hands of those persons.

7.3. Moreover, according to the assessee, the searched person being a third party had retracted all the statements recorded during the search proceedings in the following words:

"1. I referred my aforesaid statement recorded by Deputy Commissioner of Income-tax, Central Circle 2(2), Bangalore on 10.8.2011.

2. In this statement dated 10.8.2011 sense conveys that my detailed letter dt.23.12.2009 filed with the Asst. Director of Income-tax (Investigation) Unit 2(1), Bangalore is negated which is incorrect and untrue.

3. Today on 3.12.2011, Saturday I depose in the name of Almighty God that under wrong promises, mistaken beliefs, inadequate guidance and improper advise, I signed the letter dt. 10.8.2011 in the Income-tax Department, Bangalore which is absolutely wrong and not the correct version of what I wanted to convey to the Income-tax Department at that point of time.

4. With my this letter specifically addressed to you, I once again state that all my statements recorded during the search proceedings on 10.9.2009 and my statement dated 10.8.2011 recorded at Bangalore before Deputy Commissioner of Income-tax, Central Circle 2(2), Bangalore is retracted un- conditionally by me, it being improper." [Refer: Pages 225 - 27 of the assessee's submission dt.12.12.2012].

7.4. Thus, there is force in the assessee's contention that he should have been afforded an opportunity to cross-examine the third party [Shri Shohanraj Mehta] since his statements on oath were coupled with inconsistency, he retracted his earlier statements and, thus, not above the board.

7.5. Moreover, the assessee's plea for permission to cross examine Shri Sohanraj Mehta at the assessment stage was not conceded by the AO on the ground that -

"[On page 9 CIT (A)] 2.8..... Comments of the AO:

(ii) Opportunity of cross examination of Shri Sohanraj Mehta: 'The assessee was provided with the copy of the statement of Shri Sohanraj Mehta recorded by the ADIT (Inv), Pune, along with documents on which his statement was recorded. Due to paucity of time the cross examination could not be granted."

7.6. The CIT (A) had also turned down the assessee's request for cross-examination on the ground that -

"(On page 53) 2.25.....It has also been indicated, as borne out on records, that the appellant had asked for cross examination of the party for the first time only on 14.12.2011. The appellant was also fully aware that the limitation to pass reassessment order in the case expires on 31.12.2011. Thus, between 29.3.2011 till 14.12.2011, the appellant did not make any request to the AO that an opportunity of cross examination is required by him. Fully knowing that it would not be possible for the AO to call a party from distant Bangalore and afford the facility of cross examination during a short period of just 12 working days, the appellant makes request for cross examination. There is no denying the fact that cross examination is an inalienable right of an agreed party but it is also true that there has to be a justifiable time frame in which such right can be exercised. It is as settled principle of law that rights and duties under a statute go hand in hand and cannot be exercised in isolation. The appellant truly had the right to cross examination but at the same time had the duty to ask for it within a reasonable time frame. A right exercised with ulterior motives does not possess the sanction of law. Facts of the case clearly indicate that the appellant had purposefully demanded cross examination at a time when it was considered impractical and unfeasible....."

7.7. In essence, the principles of natural justice on the legitimate request of the assessee, to cross examine the third party on the basis of whose statement the impugned addition sought to be added to his income, has been denied on flimsy grounds.

7.8. At this point of time, we shall analyze the judicial pronouncements on a similar issue, as under (PB -184):

(i) the Hon'ble jurisdictional High Court in the case of DCIT v. Mahendra Ambalal Patel reported in (2010) 40 DTR (Guj) 243 had held as under:

"From the findings recorded by the Tribunal it is apparent that though it is the case of Revenue that the land has been sold by the assessee to GC through MV, there is no material on record to indicate that the said land in fact belongs to the assessee. Though the AO has placed reliance upon the statements of MV and GC for the purpose of taxing the amount in the hands of the assessee, despite specific request being made by the assessee for cross- examining both the said persons, the AO has not permitted the assessee to cross-examine them. In the circumstances, no reliance could be placed upon the statements of the said persons as the assessee had no opportunity to cross-examine them. The statements made by the aforesaid persons would have no evidentiary value and as such, would not be admissible in evidence. Further, though the said MV has stated that he has paid Rs.60 lakhs to the assessee on behalf of one GC, the said amount has not been taxed in the hands of GC. Moreover, no evidence has been adduced to indicate that any transaction in relation to the land in question has actually taken place. The Tribunal has rightly found that the basis for making the addition in the case of the assessee is merely a bald statement of MV, which is not corroborated with any documentary evidence found at the time of search, either in the case of S or MV or the assessee. No plea to the effect that the impugned order of the Tribunal suffers from any perversity has been raised. The Tribunal having based its conclusion on findings of

fact recorded by it after appreciation of the evidence on record, it cannot be stated that the impugned order of the Tribunal suffers from any legal infirmity....."

(ii) During the course of hearing of a reference application of the Revenue in the case of DCIT (Asst) v. Prarthana Construction Pvt. Ltd [Tax Appeal No.79 of 2000 dated 25.3.2001] before the Hon'ble jurisdictional High Court, the learned Counsel for the assessee submitted that the documents in question have been found from the premises of a third party. The loose papers cannot be stated to be books of account in the light of the decision of the Supreme Court in the case of CBI v. V.C. Shukla and others (1998) 3 SCC 410 as observed by the Tribunal and submitted that the Tribunal has based its conclusions on the findings of fact recorded by it upon appreciation of the evidence on record; that the Tribunal had examined the facts and circumstances of the case and had come to the conclusion that the Revenue had not been able to establish its case against the assessee and as such, the order of the Tribunal being based upon findings of fact recorded by it, does not give rise to any question of law. It was, further, submitted on behalf of the assessee that the entire case of the revenue was based upon documents recovered during the course of search from the premises of third parties and the statements of the third parties and that the assessee was not granted an opportunity to cross examine the third parties and as such their statements have no evidentiary value.

After due consideration of rival submissions and also taking into account the reliance placed by the assessee's counsel in the cases of (i) Kishinchand Chellaram v. CIT (1980) 125 ITR 713 (SC) &

(ii) CIT v. S.C. Sethi (2007) 295 ITR 351 (Raj), the Hon'ble Court had held thus:

"[PB - 174] 16. Thus, it is apparent that the conclusions arrived by the Tribunal are based upon the aforesaid findings of fact recorded by it upon appreciation of the evidence on record. On behalf of the revenue nothing is pointed out to show that the findings recorded by the Tribunal are in any manner perverse, nor is it the case of the revenue that the Tribunal has taken into consideration any irrelevant material or that any relevant material has been ignored. The conclusion arrived at by the Tribunal on the basis of the findings of fact recorded by it cannot in any manner be said to be unreasonable. In the aforesaid premises, the impugned order of the Tribunal being based upon findings of fact recorded by it upon appreciation of the evidence on record, which findings have not been dislodged by the revenue by pointing out any evidence to the contrary, therefore, does not warrant any interference."

7.9. Taking into account the submissions of the assessee, the stand of the AO, reasoning of the CIT (A) in sustaining the action of the AO and also in conformity with the rulings of the Hon'ble jurisdictional High Court (supra), we are of the considered view that that learned CIT (A) was not justified in sustaining the addition of Rs.57.5 lakhs made by the AO in the hands of the assessee for the following reasons:

(i) that the learned AO had solely depended upon the information received from the Investigation Wing of Pune;

(ii) that the AO had failed to substantiate the same with any credible documentary evidence to the effect that the assessee had indeed received the alleged cash payment of Rs.57.5 lakhs from Shri Sohanraj Mehta as the assessee had categorically pleaded before the AO that he was making purchases through Ambika Distributors who were the C & F Agents for Gujarat Region;

(iii) that the total unaccounted sales effected by Shri Sohanraj Mehta C & F of RMD Gutkha on behalf of Dhariwal Industries Limited for the period of April 2003 to Feb 2008 was Rs.345.72 crores (approx). The unaccounted income for the AY 2004-05

was arrived at Rs.40,88,32,514/-, the same was added substantively in the case of M/s. Dharival Industries Limited and concluded the assessment for the AY 2004-05 u/s 153A r.w.s. 143 (3) of the Act, dated 29.12.2011 by the ACIT, C.C. 1(1), Pune [Courtesy: P 231 - 238 of PB AR];

(iv) that once the alleged sum of Rs.57.5 lakhs was subjected to tax in the hands of Dhariwal Industries Limited, the same cannot be subjected to suffer further tax. This view has been fairly conceded by the CIT (A) "(On page 54) 2.27.....The appellant is right to the extent that no income can be taxed twice....."

(v) that the AO had candidly admitted that during the course of assessment proceeding itself the assessee had sought permission to cross examine Shri Sohanraj Mehta which was summarily rejected by taking refuge ".....Due to paucity of time, the cross examination could not be granted"

[Refer: Para 2.8 (Page 10) of the CIT (A)'s order].

This stand of the AO, to view it mildly, is against the spirit of judicial pronouncements;

(vi) that the AO had merely come to a conclusion based on a statement of a third party, without bringing any credible documentary evidence to the contrary on record to nail the assessee; &

(vii) No reliance can be placed on the statements of a third person whose premises were subjected to a search since he had retracted his own statement made earlier on oath and precisely the assessee has been denied to cross-examine him to bring out the truth.

7.9.1 For the above said reasons, we hereby hold that the addition made for Rs.57,50,000/- by the learned AO on account of undisclosed income, which was further sustained by the learned CIT(A) requires to be deleted and accordingly, we hereby direct the revenue to delete the same. Thus, ground No.1 raised by the assessee with respect to reopening of the assessment u/s 148 of the Act is dismissed and ground No.2 with respect to addition on account of undisclosed income is allowed in favour of the assessee."

50. We find the Bangalore Bench of the Tribunal in the case of DCIT Vs. H.S. Chandramouli (Supra) had also an occasion to decide an identical issue and deleted the addition by observing as under :

"13. We have considered the submissions of the learned DR. It is seen that the document in question was seized from the possession of one Mr. Sohanraj Mehta. The seized document makes a reference to the name of the assessee and a figure of Rs.22.75 lakhs appears against his name. As to whether this document evidences payment of Rs.22.75 lakhs to the assessee is a moot question. There is no basis set out in the order of the AO for coming to the conclusion that the seized document evidences receipt of money by the assessee from Sohanraj Mehta. The presumption u/s. 292C of the Act is only with reference to the person searched and it cannot be extended to the assessee. There is no corroborative evidence or statement of Sohanraj Mehta relied upon by the AO, to the effect that a sum of Rs.22.75 lakhs was paid to the assessee. The assessee has categorically denied having received any payment from Sohanraj Mehta. Even in the proceedings before the AO, when the assessee was examined, he had taken the same stand. The details called for in the scrutiny assessment did not call for any specific details on the seized document or receipt of cash based on the seized document.

14. In the light of these circumstances, the CIT(Appeals) was justified in coming to the conclusion that no evidence has been brought on record to prove that the

assessee received the sum of Rs.22.75 lakhs from Sohanraj Mehta. The addition made by the AO was therefore rightly deleted by the CIT(A). We do not find any ground to interfere with the order of the CIT(Appeals)."

51. We find the Lucknow Bench of the Tribunal in the case of M/s. Mohd. Ayub Mohd. Yakub Perfumers Pvt. Ltd., (Supra) while deleting the addition under identical facts and circumstances as held as under :

"2. The facts in brief borne out from the record are that during the course of search conducted upon Shri. Sohanraj Mehta, C&F of RMD Gutkha group in Bangalore, statement of account was seized in which there was an entry of Rs.50 lakhs in the name of Malik Kannauj. This entry was interpreted by the Revenue as this amount was given to Shri. Abdul Malik, MD of the assessee-company. On the basis of seized documents, the Assessing Officer has formed a belief in the assessee's case that the income chargeable to tax has escaped assessment, as this amount was not shown by the assessee in its books of account. Accordingly a notice under section 148 of the Income-tax Act, 1961 (hereinafter called in short "the Act") was issued and assessment was completed under section 147 of the Act read with section 144 of the Act in the hands of the assessee, resulting into an addition of Rs.10.48 lakhs as profit on this unaccounted sale of Rs.50 lakhs.

3. An appeal was preferred before the Id. CIT(A) with the submission that no document indicating payment of Rs.50 lakhs to the assessee- company was found during the course of search. Only dumb documents were found in which there was a debit entry of Rs.50 lakhks in the name of Malik Kannauj. Even in the statement of Shri. Sohanraj Gupta, there was no mention of the Director of the assessee-company, Shri. Abdul Malik. Therefore, the Id. CIT(A) came to the conclusion that in the absence of any evidence involving the assessee to the alleged receipt of Rs.50 lakhs, reopening in the hands of the assessee under section 147 of the Act is not proper and he accordingly annulled the assessment.

4. Aggrieved the Revenue has preferred an appeal before the Tribunal and reiterated its contentions. During the course of hearing, a specific query was raised from the Id. D.R. as to what evidence they have collected during the course of search or thereafter, on the basis of which the Assessing Officer has formed a belief that the income chargeable to tax has escaped assessment in the hands of the assessee. No satisfactory answer was furnished by the Id. D.R. We have also carefully perused the seized documents and we find that there is a debit entry of Rs.50 lakhs in the name of Mlik Kannauj, but this entry does not indicate that the amount of Rs.50 lakhs was given to the Managing Director of the assessee. There may be hundred of Malik in Kannauj but on the basis of this dumb document, the reopening of assessment in the hands of the assessee is not permissible. Moreover, the searched party has also examined Shri. Sohanraj Gupta and the statement is also placed on record and at nowhere Shri. Sohanraj Gupta has deposed about payment of Rs.50 lakhs to the assessee. In the absence of any relevant material, the reopening of assessment in the hands of the assessee is not proper. The Id. CIT(A) has given valid reasons while holding that the reopening is bad. The relevant observations of the Id. CIT(A) are extracted hereunder:-

"5.1.6 From all the aforesaid correspondence, it is obvious that there is no clue as to how the identity of "MALIK Kannauj" as appearing in the seized document (supra) was interpreted as Shri Abdul Malik, MD of the appellant company. In the statement given by Shri Sohanraj Gupta, there is no mention of any Malik. Further, in his statement under oath before the ADIT(Inv), Kanpur, Shri Abdul Malik, the M.D. of the appellant company had denied such transaction. In these circumstances, I fail to understand as to how, the A.O. formed the belief that the entry in the name of "Malik Kannauj" (as appearing in the seized document) referred to Shri 'Malik, M.D. of the appellant company. Further, even for argument sake if "Malik Kannauj" indeed referred to Shri Abdul Malik, the M.D. of the

appellant company, there was no evidence/material on record which could link that payment to the assessee company. Just because the ADIT (Inv), Kanpur had informed the A.O. that the entry of payment of Rs. 50 Lakhs (as mentioned in the seized document) to one "Malik Kannauj" related to the Appellant company (without any supporting in this regard), to same could not have been the basis for the A.O. to initiate the reassessment proceedings in the case of the appellant company. It is a trite law that the "reasons to believe" for reopening the case should be that of the A.O. alone and could not be formed at the dictates of others or on suspicion, conjectures or surmises.

5.1.7 In the instant case, in my considered view, the A.O. had no material before him which could link the said payment to the appellant company. The "reasons to believe" in the case have been recorded on irrelevant material. On the basis of such material, no prudent man could have formed the belief that income had escaped asstt. in the hands of the appellant company. Accordingly, I hold that the very assumption of jurisdiction by the A.O. under section 147 of the Act was illegal and, therefore, any asstt. framed pursuant to such illegality cannot be sustained. Thus, the whole asstt. framed u/s 147 is hereby annulled. While taking this view, I am fortified by the decisions of the Hon'ble Apex Court in the case of CIT vs Daulat Ram Rawat Mull (87 ITR 349) wherein, it was held:

"there should, in our opinion, be some direct nexus between the conclusion of fact arrived at by the authority concerned and the primary facts upon which the conclusion is based. The use of extraneous and irrelevant material in arriving at that conclusion would vitiate the conclusion of facts....."

In the result, the appeal is allowed."

5. Since we do not find any infirmity in the order of the Id. CIT(A), we confirm his order."

52. Similarly the Lucknow Bench of the Tribunal in the case of DCIT Vs. Pawan Kumar Agarwal (Supra) has held as under :

"5. We have considered the rival submissions. We find that the issue in dispute was decided by learned CIT(A) as per para 7 & 7.1 of his order, which is reproduced below for the sake of ready reference:-

"7. That vide grounds No. 3 to 7, assessee has challenged the additions of Rs.1,13,40,000/- made on account of alleged undisclosed income. I have carefully considered the rival submissions and perused the material on record. I have also gone through the order of the A.O. It was contended by the learned AR before me that mere jottings and notings should not be the basis for making any addition in the returned income, more particularly when A.O. has not allowed the opportunity of Cross Examination of Mr. Shobhan Raj Mehta. The material provided/gathered by the department has also been produced before me. In this paper, it is seen that name of assessee is appearing. It was vehemently argued before me that how the department comes into conclusion that name Pawan Agarwal as appearing in the seized material is appellant. The name of appellant is very common and it is possible to be some other Pawan Agarwal instead of appellant. The submissions of the appellant are considered. On examination of the assessment record it is seen that the appellant categorically denied having any financial or business transaction with Sh.Shobhan Raj Mehta. A request was also made to provide complete statements on the basis of which addition was being contemplated by the assessing officer. However, the assessing officer did not provide the copies of those statements. During the course of assessment proceedings, the assessing officer did not throw any light on any inquiry/ investigation carried out by him that could justify the additions made by him. That assessee has vehemently stated that the department has not proved that the identity of Shri Pawan Agarwal with the assessee and no slip, letter, document etc. showing any relationship of assessee with Shri Shobhan Raj Mehta were not found from the possession of Shri Shobhan Raj Mehta. The A.O. has required assessee's copy of accounts in the books of M/s. Dhariwal Industries, Pune and this was found verified from the assessee's books of

A/c. It is clear that the assessee has business relationship with M/s. Dhariwal Industries, Pune and not with the Shobhan Raj Mehta. Therefore, it is clear that the addition made by the Assessing Officer purely based on guess work without any evidence, therefore this addition deserves to be deleted.

7.1 From the facts enumerated above, it is clear that the assessing officer failed to establish any case against the appellant. Further inquiry/ investigation was required to be carried out on the information passed by the ADIT(Inv.)- III, Kanpur but evidences are not collected or placed. Copies of the statements, on the basis of which additions has been made, were not provided nor was the opportunity of cross- examination given to the appellant. The assessing officer merely summarized the salient features of the report of the ADIT (Inv.)-III, Kanpur and thereafter summarily rejected the reply of the appellant as not satisfactory. Learned counsel for the assessee, on the other hand, contends that neither the said Shri Shobhan Raj Mehta was allowed to be cross-examined nor a copy of his statement was given despite several requests. The AO's contention to the effect that the contents of the statement were made known to the assessee, is not a compliance of mandatory requirement to provide the assessee incriminating material to defend its own case and therefore it can categorically be held that:

- (i) Statement of Shri Shobhan Raj Mehta was not given to the assessee.
- (ii) Beyond the belief of presumption on the information supplied by the ADIT(Inv.)-III, Kanpur, further evidences are not found to corroborate the additions.
- (iii) Cross-examination of Shri Shobhan Raj Mehta was not allowed.
- (iv) The assessee firm had strongly denied having any financial and business transactions with Mr. Shobhan Raj Mehta.

In view of these factual exigencies, it is held that the addition made by the AO, without any corroborative evidence, was unjustified and accordingly deleted. Accordingly, ground No. 3 to 7 raised by appellant are allowed."

5.1 From the above Para from the order of CIT(A), we find that a categorical finding has been given by him that statement of Shri Shobhan Raj Mehta was not given to the assessee and beyond the belief of presumption on the information supplied by the ADIT(Inv.)-III, Kanpur, further evidences are not found to corroborate the additions. He has also given a finding that Cross-examination of Shri Shobhan Raj Mehta was not allowed and the assessee firm had strongly denied having any financial and business transactions with Mr. Shobhan Raj Mehta. These findings of CIT(A) could not be controverted by Learned D.R. of the Revenue and moreover, the name of the assessee i.e. Pawan Kumar Agarwal is very common name and merely because this name is mentioned in a seized paper found during the course of search at Bangalore at the premises of Shri Shobhan Raj Mehta, with whom the assessee was not having any direct transaction, it cannot be said that the said Pawan Kumar Agarwal, of whom the name was mentioned in the seized paper is the assessee. Without establishing this aspect that the name mentioned in the seized paper is that of the assessee, no addition can be made in the hands of the present assessee on the basis of such seized paper. Considering these facts, we do not find any reason to interfere in the order of CIT(A)."

53. We find the Delhi Bench of the Tribunal in the case of M/s. Bhola Nath Radha Krishan (Supra) while deleting an identical issue has observed as under :

"7. After considering the arguments of both the sides and the facts of the case, we do not find any infirmity in the above order of learned 7 ITA-5149/Del/2012 CIT(A). The addition has been made on the basis of certain chits found from Shri Sohan Raj Mehta and his statement. Admittedly, the assessee has no dealing with Shri Sohan Raj Mehta. The assessee is supplying goods (Supari) to RMD Group who are manufacturing Gutkha. Shri Sohan Raj Mehta is C&F agent for Karnataka region of RMD Group. The search had taken place at the assessee's business premises as well as at the business premises of RMD Group. No evidence of any unrecorded sale by the assessee or unrecorded purchase by RMD Group was found. Thus, when, despite search at the premises of seller and buyer, no evidence of any unrecorded sale or purchase is found, in our opinion, merely because in the

chits found at the premises of some third party with whom the assessee has no business dealing, it cannot be presumed that the assessee is making sales outside books. Moreover, as per chits found from Shri Sohan Raj Mehta, the payment made to the assessee is only `9 lakhs and not `9 crores. The department has also relied upon the statement of Shri Sohan Raj Mehta. It was pointed out by the learned counsel that Shri Sohan Raj Mehta retracted his statement. However, as per Revenue, Shri Sohan Raj Mehta has retracted his retraction affirming the original statement. On these facts, the learned CIT(A) has come to the conclusion that the statement of Shri Sohan Raj Mehta cannot be relied upon because he is frequently retracting his statement. Moreover, a statement of a third party cannot be used against the assessee unless the assessee is allowed an opportunity to cross-examine him. Now, we find that during the assessment proceedings, the assessee specifically requested for allowing opportunity to cross-examine Shri Sohan Raj Mehta also and requested the Assessing Officer to supply the copy of retraction of his statement. The Assessing Officer has reproduced the assessee's letter, paragraph No.11 of which, reads as under:-

"11. The assessee had requested your good self to provide the following documents:

- (a) Copy of the Sworn Statement of Sh. Sohanraj Mehta.
- (b) Copy of written statements or Affidavits obtained from Sh. Mehta wherein he has mentioned that Rs.9 crore was payable to the assessee.
- (c) Copy of subsequent retraction of the statements made at the time of search operation, if any.
- (d) Copy of receipts obtained from the assessee by Sh. Sohanraj Mehta on payment to the assessee, if any.

The assessee has been provided statement of Sh. Sohan Raj Mehta. However, it is further submitted that the assessee should be given the opportunity to cross examine the genuineness of the statements of Sh. Sohan Raj Mehta and should be given reasonable opportunity to verify the claims made by him. In the case of Kishan Chand Chelaram (125 ITR) it has been held by the Hon'ble Supreme Court of India that before taking a decision the assessee has to be allowed a chance or an opportunity of rebuttal with respect to the documents which are to be used against the assessee. The assessee has gone through the entire statements of Sh. Sohan Raj Mehta recorded under section 132(4) of the Income Tax Act. Nowhere there is any mention of Bhola Nath Radha Kishan or any of its partner in the said statement. The assessee cannot be held liable for any act of the omission or commission done by him. Mr. Sohan Raj Mehta's statement regarding decoding of figures is also not applicable on the assessee since this has no bearing or nexus of connection with the assessee firm or its business transaction.

No addition or adverse decisions can be taken on the basis of surmises and/or conjectures. There has to be specific mention of M/s Bhola Nath Radha Kishan, 6377, Naya Bans, Kahri Baoli, New Delhi in order to link any payment to it from Mr. Sohan Raj Mehta or anybody else....."

(emphasis by underlining supplied by us)

8. The Assessing Officer has dealt with this letter but he has not given any reason for not allowing the assessee an opportunity to cross-examine Shri Sohan Raj Mehta. Similarly, he has neither supplied the copy of retraction of his statement nor dealt with the retraction in the 9 ITA-5149/Del/2012 assessment order. It is only in the remand report he has mentioned that Shri Sohan Raj Mehta has retracted his retraction also. Considering the totality of above facts, we entirely agree with the learned CIT(A) that the statement of Shri Sohan Raj Mehta cannot be used against the assessee and, similarly, the chits found from the third party, with which the assessee has no dealing, cannot be used against the assessee in the absence of any corroborative evidence. That merely because some excess stock was found in the survey for which separate addition has already been made, it cannot be further presumed that the assessee made sales outside the books, specially when the

survey was followed by the search and neither during the course of survey nor during the course of search, any evidence of sale outside the books was found. In view of the totality of above facts, we do not find any justification to interfere with the order of learned CIT(A). The same is sustained.”

54. We find the Pune Bench of the Tribunal in the case of Pradeep Amrutlal Runwal reported in 149 ITR 548 while deleting addition under identical facts and circumstances has observed as under :

“5. After going through the rival submissions and material on record, we find that the issue before us is regarding the addition of Rs. 5,10,00,000/-. As stated earlier, during the search proceedings in the case of Dhariwal Group, some loose papers were seized wherein certain amounts were written against the name of 'Pradeep Runwal'. Hence, the case of the assessee was reopened u/s 148 of the Income Tax Act. It was explained to the learned Assessing Officer that the assessee had not earned any such income of Rs. 5.10 crs. and therefore, no addition should be made. However, the Assessing Officer has not accepted the contention of the assessee.

5.1 The Assessing Officer has stated that the papers were seized from Dhariwal Group. The said papers were seized from the residence of Shri Sohanraj Mehta. According to the Assessing Officer, the assessee could not disown the existence of such documents. The Assessing Officer observed that the money has been passed on by Dhariwal Group through their staff. Hence, the assessee must have received the amount noted on the seized papers. The Assessing Officer has proceeded to make the addition of Rs.5.10 crs. by stating that as per section 114 of the Indian Evidence Act, it is an accepted rule of evidence that if a person possessing an evidence does not produce it, the inference is that such evidence if produced is detrimental to him. Accordingly, the Assessing Officer held that the said receipts were the income of the assessee.

5.2 The Assessing Officer has further held that according to the provisions of section 80 of the Indian Evidence Act, there is a presumption as to the documents produced as record of evidence are genuine. Hence, he has held that the documents seized from Dhariwal Group could be relied upon for making addition in the hands of the assessee. The Assessing Officer has placed reliance on the decisions of Sumati Dayal vs. CIT [(1995) 214 ITR 801(SC)], CIT vs. Durga Prasad More [(1969)72 ITR 807(SC)], Himmatram Laxminarain vs. CIT [(1986)161 ITR 7(P&H)], CIT vs. Ganapathi Mudaliar [(1964)53 ITR 623(SC)] and CIT vs. Lacchman Dass Oswal [(1980)126 ITR 446(P&H)].

5.3 According to us, the additions made by the Assessing Officer were not justified in the facts and circumstances vis-à-vis of the assessee. As discussed earlier, during the course of search in the case of Dhariwal Group, the only documents found on the basis of which the addition u/s 69A has been made in the case of the assessee are in the form of two loose papers wherein amounts of Rs. 4.80 Crores and Rs. 30 lacs were noted against the name "Mr. Pradeep Runwal". Apart from this, no evidence has been found to suggest that the assessee had actually received the said amount or that the assessee had entered into any transaction with Dhariwal Group. There is no evidence on record to suggest that the assessee has previous business relations with the Dhariwal Group. In the absence of any documentary evidence to suggest the same, it could not be presumed that the amounts reflected in the loose papers were the income of the assessee received from Dhariwal Group. It has been the consistent stand of the assessee that there may be many persons of the name Pradeep Runwal in Pune and there was no specific evidence to suggest that the said notings pertained to the assessee. Hence, it was not justified as to how, in the absence of any other corroborative details, the Assessing Officer has assumed that the amounts reflected the income of the assessee himself, while the assessee has no business dealings

of his with Dhariwal Group. The Assessing Officer has not brought on record any evidence to suggest that Dhariwal Group has admitted that the amounts were paid to the assessee. Hence, simply because the name of the assessee is noted on the seized papers does not mean that the addition could be made in the hands of the assessee. Since no evidence was found relating to the existence of any transaction between the assessee and Dhariwal Group and in the absence of any corroborative evidence to suggest that the assessee had actually received the said amount, no addition could be made merely on the basis of noting in loose papers found during the search proceedings in the case of Dhariwal Group against the name of the assessee.

5.4 The presumption u/s 132(4A) is available only in respect of the person from whom the paper is seized. It could not be applied against a third party and hence, no addition could be made on the basis of the evidence found with third party. The presumption u/s. 132(4A) could be used only against the person from whose premises the documents are found and not against the person whose name appears in the seized papers.

5.5 In this case, the addition has been made on the basis of the documents found with Dhariwal Group and thus, the presumption u/s. 132(4A) could not be used against the assessee since no incriminating documents were found with it. In the case of ACIT Vs. Lata Mangeshkar (Miss) (1974) 97 ITR 696 (Bom), the addition was made in the hands of the assessee on the basis of the entries in the books of third persons. Hon'ble Bombay High Court held that such addition could not be made only on the basis of the notings in the books of third persons. The facts of the present case are covered by the decision of Lata Mangeshkar (supra). It is a settled legal position that the decision of jurisdictional High Court is binding on all authorities below it. Thus, the reliance placed by the Assessing Officer on the loose papers is not justified at all. Therefore, the question of making any addition is not justified in the absence of other corroborative evidence to that effect.

5.6 Without prejudice to the above, the learned Authorized Representative submitted that the Assessing Officer was not justified in making the additions by relying on the provisions of section 114 of the Indian Evidence Act. The concerned Assessing Officer has referred the aforesaid section which states that the court may presume that the evidence which could be and is not produced would, if produced be unfavourable to the person who withholds it. It is pertinent to mention this rule applies to the cases wherein it is evident or an established fact that a particular evidence or document was in possession of the assessee. For example, an owner of a land may well be expected to be in possession of a 7/12 extract of the said land in order to check whether the said land was used for agricultural purposes. In the present case, the provisions relied by the Assessing Officer are not applicable, the assessee is not withholding any documents. The case of department is that the amount mentioned on the seized paper found with the Dhariwal Group indicates that the assessee has received the amount, therefore, the burden was on the Assessing Officer to establish the same. The reliance placed on the provisions of section 114 of Indian Evidence Act is misplaced.

5.7 As stated above, it has been consistent stand of the assessee that the assessee has had no business relations whatsoever with the Dhariwal Group. Further, apart from the noting on paper with the name 'Pradeep Runwal, there is no corroborative evidence in this regard against the assessee. In such circumstances, where the assessee has not entered into any transaction with the Dhariwal Group, one certainly could not expect the assessee to be in possession of any evidence to suggest that it has not entered into any such transaction except for his books of account which have already been verified by the concerned Assessing Officer. Hence, the Assessing Officer was not justified in placing reliance on the provision of section 114 of the Indian Evidence Act.

5.8 It was further submitted on behalf of assessee that the Assessing Officer was not justified in making the addition by relying on the provisions of section 80 of the Indian Evidence Act which states that there is a presumption that the documents produced before the court as record of evidence are genuine. In this regard, the stand of the assessee is that in the case of assessee, document produced was merely in the form of a rough noting wherein certain amounts were written against the name 'Pradeep Runwal'. As discussed earlier, there may be many people of that name in Pune and in the absence of any other corroborative evidence to that effect. In such a situation, it cannot be inferred that it belongs to the assessee.

5.9 While making the addition of Rs. 5.10 crores as stated above, the CIT(A) relied on the following decisions of Sumati Dayal vs. CIT [(1995) 214 ITR 801(SC)], CIT vs. Durga Prasad More [(1969) 72 ITR 807(SC)], Himmatram Laxminarain vs. CIT [(1986) 161 ITR 7(P&H)], CIT vs. Ganapathi Mudaliar [(1964) 53 ITR 623(SC)] and CIT vs. Lacchman Dass Oswal [(1980) 126 ITR 446(P&H)]. In this regard, the stand of the assessee has been that the case laws relied by the Assessing Officer are differentiable on facts and hence, the same are not applicable to the case of the assessee. In all the cases relied by the Assessing Officer, the fact that the assessee had actually earned income or received amounts by way of cash credits, unexplained investment etc. was not under dispute. The issue related to whether the receipts were received from genuine lenders or whether the investments or receipts were a part of the disclosed sources of income of the assessee. We find that in the present case, the issue in question itself is whether rough noting on loose paper found in the course of search at the premises of third person could be assumed the income from the assessee as in the cases relied by the Assessing Officer. This fact has not been established in the case of assessee, therefore, the case laws relied by the Assessing Officer are clearly distinguishable on facts and hence, not applicable to the case of the assessee.

5.10 According to CIT(A), the name of the assessee appears on the seized papers and seized documents give a detailed and minute noting of the transactions of Dhariwal Group. He has stated that Shri Sohanraj Mehta has admitted that the documents were written by him and most of the papers were written in marwadi language. The CIT(A) referred to the fact that Shri Mehta had admitted that the papers belonged to Dhariwal Group. In para 4.3, the CIT(A) states that when the author of the paper has accepted the notings made by him, in that event, the document is having great evidentiary value and could not be rejected. As regards, the objection of the assessee that no evidence was found to indicate that the assessee had received the amount, the CIT(A) referred to the fact of acceptance of the paper by Shri Mehta and considering the fact that the modus operandi was clarified by Shri Mehta, the addition was rightly made by the Assessing Officer, has been held by CIT(A). He has referred to various decisions in support of the addition made. Firstly, he has relied upon the decision of ITAT Third Member in the case of Khopade Kisanrao Manikrao [74 ITD 25]. In this regard, the stand of assessee is that the decision in the case before Third Member was not applicable to the facts of the present case. In the said case, the assessee was searched and documents were found indicating on money received on sale of plots. On the basis of the documents found, the Assessing Officer estimated the income from on money which was held to be valid. In that case, the issue that no addition could be made on the basis of documents found with third party was neither raised nor applicable. Thus, according to us, the said decision has no application to the facts of the assessee's case.

5.11 The CIT(A) in para 2.5 has placed reliance upon ITAT, Pune decision in the case of Dhanvarsha Builders and Developers Pvt. Ltd. [102 ITD 375]. In the said case, the assessee was searched and documents were found indicating on money received by the assessee. It was held that the document was found with the assessee and therefore, the A.O. was justified in making the addition. Even in this case, the issue of no addition can be made on the basis of

documents found with third party was not raised. The CIT(A) has further referred to the decision of ITAT, Mumbai in the case of P. R. Patel Vs. DCIT [(2001) 78 ITD 51 (Mum)] for the proposition that seized papers cannot be called dumb paper because they indicate date, amount and calculation. There is no dispute with the above proposition. The papers are found pertaining to Dhariwal Group as admitted by Shri Mehta and therefore, these documents may be relevant for deciding the issue in the case of Dhariwal Group. However, in the absence of any corroborative evidence, the addition could not be made in the hands of the assessee on the basis of the said papers.

5.12 The CIT(A) has further relied upon ITAT Third Member decision in the case of Dhunjibhoy Stud and Agricultural Farm Vs. DCIT [(2002) 82 ITD 18 (PUNE)(TM)], In this case, the assessee was a builder and had sold flat to one Mr. Tanna. There was search on Mr. Tanna wherein a document was found indicating flat purchased from the assessee firm and the amount of cheque and cash paid. The amount of cheque paid was tallying with the books and therefore, it was held that cash was paid as noted on the paper. Mr. Tanna had also accepted the fact that cash was paid to the assessee. In these facts, ITAT held that since there was transaction between assessee and Shri Tanna and also the fact that the amounts paid by cheque tallied, the addition was rightly made. The assessee rightly submitted that the said decision is not applicable to the facts of the present case. Firstly, there is no transaction between the assessee and Dhariwal Group. Secondly, there is no corroborative evidence found which could suggest that the assessee had received any amount. The Assessing Officer and CIT(A) have also not brought on record any evidence to suggest that the payment was made to the assessee. Accordingly, considering the factual position, the decision in the case of Dhunjibhoy Stud and Agricultural Farm is not applicable in the case of assessee.

5.13 The CIT(A) has relied on the decision in the case of Vasantibai N. Shah Vs. CIT [(1995) 213 ITR 805 (Bom)]. In this case, the issue was regarding validity of reassessment proceedings. The assessee had made a false disclosure. Subsequently, the case was reopened. Hon'ble High Court held that the reopening was valid since the assessee herself had made a false disclosure. Thus, the facts are totally different from the present case and hence, the ratio of Vasantibai N. Shah (supra) is not applicable to the assessee's case. The CIT(A) further relied on the decision in the case of Green Valley Builder v. CIT [(2008) 296 ITR 225 (Ker)]. In the said case, the assessee was engaged in real estate business and it had sold certain plots. The assessee stated that the plots were sold at Rs.1750/- per cent while the Assessing Officer on the basis of evidences held that actually the lands were sold at Rs.4,000/- per cent. Hon'ble High Court held that the additions made were correct. The said decision is not applicable to the facts of the present case. The CIT(A) has further relied upon the decision in the case of Chuhamal Vs. CIT [(1988) 172 ITR 250 (SC)] for the proposition that documentary evidence plays an important part. There is no dispute to the said proposition but in the absence of any corroborative evidence no addition could be made in the hands of the third party.

5.14 We find that in Thakkar Developers Ltd. [IT A No. 581/PN/08], ITAT in paras 3 and 4 held as under:-

"The above said Shri Kolhe was examined, cross examined and re-examined and no evidence was gathered from him to establish that the contents of the seized documents were correct and true. Thus, in the absence of any corroborative evidence in the present case, the said seized document has to be treated as a dumb document as rightly observed by the CIT(A). The A.O. dismissed the retraction of the statement dated 29.03.2003 by filing an affidavit as an after thought and self serving. The A.O. concluded that the facts mentioned in the seized documents clearly indicated that the statement given on 29.03.2003 was true and correct. The A.O. has not brought on record any material or corroborative evidences to come to these

conclusions. The reasons given by the A.O. in this regard are without any basis and support. The affidavit filed by Shri Kolhe remained uncontroverted and which is against the settled legal position on the issue that the contents of the affidavit be rejected by confronting the same to the deponent which is missing in this case. Nothing was shown by the A.O. that there was any other material co related to the seized documents. The A.O. was not justified in rejecting the contents of the affidavit as mentioned above. The A.O. further relied on the presumptions u/s 132(4A) of the Act on the ground that this section was very clear that the contents of book of account and other documents may be presumed to be true and presumption can be drawn even on the third person who was not searched u/s 132 of the Act. The A.O. further rejected the submissions given by the assessee in his paper book dated 28.12.2007 reiterating the same stand. The A.O. has drawn inferences and presupposes relying on surmises and conjectures. The ITAT Mumbai Bench in their decision in the case of Straptex (India) Pvt. Ltd. [84 ITD 320 (Mum)], clearly held that the presumption u/s 132(4A) is applicable only against the person from whom possession the books of accounts or other documentary were found and not against any other person. It is held that as per Section 132(4A) where any books of account or document is found in the possession and control of any person in the course of the search, it is to be presumed that they belong to "such person". Thus, clearly the presumption is in respect of the person from whom they were found. The use of the word "to such person" in the said Section means the person from whom the books of account or documents were found. Clause (ii) of Section 132 (4A) provides that the contents of such books of account or documents are true. This presumption can be applied only against the person from whose possession the books of account or the document were found. Therefore, the A.O. was not justified in applying the provisions of Section 132(4A) to the assessee in the present case who was not searched u/s 132 of the Act nor the document was found and seized from, their possession. Even, otherwise, such presumption u/s 132(4A) of the Act is not conclusive and rebuttable one".

6. Similar view has been taken by ITAT, Pune in Amit D Irshid [ITA No.988/PN/11] that presumption u/s. 134(4A) is available only against the person from whose possession the document is found and not against the third person. In the absence of clinching evidence against the third person as stated above, no action could be taken against him. In such a situation, the Assessing Officer was not justified to make addition in question in assessee's case. In view of above, we are of the view that the addition made by the Assessing Officer is not justified and the same is directed to be deleted. It is pertinent to mention here that this case is being decided in its facts and circumstances; it cannot be applied to other cases as such.

7. In the result, appeal filed by the assessee is allowed."

55. Since in the instant case the assessee from the very beginning has denied to have received any such payment from M/s. Dhariwal group through Mr. Sohan Raj Mehta and since no incriminating material was found from the residence of the assessee during the course of search and since the assessee is not dealing with M/s. Dhariwal group in his individual capacity, therefore, respectfully following the decisions cited above and in view of our reasonings given earlier, we are of the considered opinion no addition in the hands of the assessee can be made. Since it is held that the assessee has not received any amount, therefore, the question of taxing the same u/s.56(2)(vi) as held by CIT(A) does not arise. In this view of the matter, we set aside the order of the CIT(A) and direct the Assessing Officer to delete the addition of Rs.1 crore for A.Y. 2006-07 and Rs. 20 crores for A.Y. 2007-08. Grounds raised by the assessee on this issue are accordingly allowed.

56. Since the assessee succeeds on merit, therefore, the ground relating to validity of assessment u/s.143(3) r.w.s. 153A become academic in nature and therefore the same is not being adjudicated.

57. In the result, both the appeals filed by the assessee are allowed."

20. As pointed out by us in the paras hereinabove, the facts of the present case are identical to the facts before Pune Bench of Tribunal in Shri Vinit Ranawat Vs. ACIT (supra) and where the assessee has denied to have received any payment from M/s. DIL through Shri Sohan Raj Mehta and in the absence of any incriminating documents having been found from the residence of the assessee during the course of search on 20.01.2010 and where the assessee is not dealing with M/s. DIL in his individual capacity, the ratio laid down by the earlier decision of Tribunal as referred to in Shri Vinit Ranawat Vs. ACIT (supra), is squarely applicable to the facts of the present case. The company Pragatiram Pvt. Ltd., in which the assessee is a director was supplying raw material to M/s. DIL and the assessee is not supplier of any items of raw material to M/s. DIL. In the above said facts and circumstances, where it is not established that name PC Jain of Mumbai written in the said document was in fact the assessee before us and in the absence of any evidence having been found to establish that the assessee before us has received the said amounts from Shri Sohan Raj Mehta on account of M/s. DIL group, we find no merit in the aforesaid addition made in the hands of the assessee. In view thereof, we set-aside the order of CIT(A) and direct the Assessing Officer to delete the addition of Rs.1.76 crores in assessment year 2004-05. In view of our deleting the said addition in the hands of the assessee, there is no merit in estimating any gross profit on such undisclosed receipts. Accordingly, the main objections raised by the assessee are allowed and the ground of appeal raised on alternate base is dismissed. The grounds of appeal raised by the Revenue are also dismissed.

21. The facts and issues in ITA Nos.1326/PN/2013 to ITA Nos.1329/PN/2013 and ITA Nos.1351/PN/2013 to ITA Nos. 1354/PN/2013 are identical to the facts and issues in ITA No. 1325/PN/2013 and ITA No.1350/PN/2013 and our decision in ITA No.1325/PN/2013 and ITA No.1350/PN/2013 shall apply *mutatis mutandis* to ITA Nos.1326/PN/2013 to ITA Nos.1329/PN/2013 and ITA Nos.1351/PN/2013 to ITA Nos.1354/PN/2013.

22. In the result, appeals of the assessee are partly allowed and the appeals of the Revenue are dismissed.

Order pronounced on this 16th day of September, 2015.

Sd/- (PRADIP KUMAR KEDIA) लेखा सदस्य / ACCOUNTANT MEMBER	Sd/- (SUSHMA CHOWLA) न्यायिक सदस्य / JUDICIAL MEMBER
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पुणे / Pune; दिनांक Dated : 16th September, 2015.

GCVSR

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to :

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT(A)-II, Pune;
4. आयकर आयुक्त / The CIT, Central, Pune;
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "ए"
/ DR 'A', ITAT, Pune ;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune