ITEM NO.35 COURT NO.10 SECTION XV

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

SPECIAL LEAVE PETITION (CIVIL) Diary No(s). 9432/2018

(Arising out of impugned final judgment and order dated 31-07-2017 in DBITA No. 197/2012 passed by the High Court Of Judicature For Rajasthan At Jaipur)

COMMISSIONER OF INCOME TAX -CENTRAL Petitioner(s)

VERSUS

SUNITA DHADDA Respondent(s)

(FOR ADMISSION and I.R. and IA No.40014/2018-CONDONATION OF DELAY IN FILING and IA No.40017/2018-EXEMPTION FROM FILING C/C OF THE IMPUGNED JUDGMENT)

Date : 28-03-2018 This petition was called on for hearing today.

CORAM :
HON'BLE MR. JUSTICE ADARSH KUMAR GOEL
HON'BLE MR. JUSTICE ROHINTON FALI NARIMAN

For Petitioner(s) Ms. Pinky Anand,ASG
Mr. Yashant Adhyaru,Sr.Adv.
Mr. S.A. Haseeb,Adv.
Ms. Vimla Sinha,Adv.
Mr. Nikhil Rohtagi,Adv.
Mrs.Anil Katiyar, AOR

For Respondent(s)

UPON hearing the counsel the Court made the following
O R D E R

Heard learned counsel for the petitioner.

We do not find any ground to interfere with the impugned order. The special leave petition is, accordingly, dismissed.

Pending application(s), if any, shall also stand disposed of.

(MADHU BALA) (PARVEEN KUMARI PASRICHA)
COURT MASTER (SH) BRANCH OFFICER

HIGH COURT OF JUDICATURE FOR RAJASTHAN BENCH AT JAIPUR

(1) D.B. Income Tax Appeal No. 197 / 2012

Commissioner of Income Tax-central, New Central Revenue Building , Statue Circle, Jaipur(Raj)

----Appellant

Versus

Smt. Sunita Dhadda, 1387, Ganesh Bhawan, Partanion, Ka Rasta, Johri Bazar, Jaipur

----Respondent

Connected With

(2) D.B. Income Tax Appeal No. 199 / 2012

Commissioner of Income Tax-central, New Central Revenue Building , Statue Circle, Jaipur(Raj)

----Appellant

Versus

Shri Padam Chand Dhadda, 1387, Ganesh Bhawan, Partanion, Ka Rasta, Johri Bazar, Jaipur

----Respondent

Connected With

(3) D.B. Income Tax Appeal No. 198 / 2012

Commissioner of Income Tax-central, New Central Revenue Building , Statue Circle, Jaipur(Raj)

----Appellant

Versus

Smt. Vijay Laxmi Dhadda, 1387, Ganesh Bhawan, Partanion, Ka Rasta, Johri Bazar, Jaipur

----Respondent

For Appellant(s) : Mr. Anil Mehta with Mr. Sameer Sharma.

For Respondent(s) : Mr. Siddharth Ranka with Mr. Muzaffar Iqbal.

HON'BLE MR. JUSTICE K.S. JHAVERI

HON'BLE MR. JUSTICE INDERJEET SINGH

Judgment

31/07/2017

1. In all these appeals, common questions of law and facts are involved, hence they are decided by this common judgment.

2. By way of these appeals, the appellant has challenged the judgment and order of the Tribunal whereby the tribunal has dismissed the appeal of the department and allowed the appeal of the assessee.

3. While admitting the appeals, this court framed the following substantial questions of law:-

Income Tax Appeal No.197/2012 admitted on 12.08.2015.

> (i) Whether the Tribunal was justified in deleting the addition of Rs.4,07,00,000/- made by the Assessing Officer and confirmed by the CIT(A), being on money' received with respect to subject land of the assessee from Unique Group, which was evidence by the document seized during search u/s 132 of the Act?
>
> (ii) Whether on the premises that Ravindra Singh Thakkar on whose testimony the present assessee was also fasten the tax liability supposed to be afforded opportunity of cross-examination in the facts of the instant case and what would be the effect of the opportunity of cross-examination if not been afforded?"

Income Tax Appeal No.199/2012 admitted on 30.08.2016.

> (i) Whether the Tribunal was justified in deleting the addition of Rs.7,50,00,000/- made by the Assessing Officer and confirmed by CIT (A), on substantive basis, being on money received with respect to land of the assessee from Unique Dream Builders Pvt. Ltd. (UBD), which was evidenced by document seized during search u/s 132 of the Act.

Income Tax Appeal No.198/2012 admitted on 30.08.2016

> "(i) Whether the Tribunal was justified in deleting the addition of Rs.7,50,00,000/- made by the Assessing Officer and confirmed by CIT(A), on substantive basis, being 'on money' received with respect to land of the assessee from Unique Dream Builders Pvt. Ltd. (UDB), which was evidenced by document seized during search u/s 132 of the Act?"

4. Counsel for the appellant taken us to the order of CIT(A) and contended that the order passed by the A.O is required to be restored inasmuch as both the authorities committed serious error in relying on the documents and the material which was found by the A.O. The A.O., after considering the matter has rightly came to the conclusion that on the basis of the document which was recovered from Mr. Thakkar, the income ought to have been added in the account of the assessee. However, CIT(A) and Tribunal after considering the same allowed the appeal of the assessee.

5. Counsel for the respondent has relied upon the following judgments :-

> "**1. CIT VS. Dinesh Kumar Sharma, ITA No.14/2005 decided on 24.04.2017 holding as under:-**
>
> 4. We have heard the learned counsel for the appellant.
>
> 4.1 However, the Tribunal while considering the case, held as under:-
>
> 7. By considering the totality of facts and circumstances of the case, it appears that the lower authorities presumed that the above mentioned properties belong to the assessee. But they have not verified in whose name these properties are recorded in the record of the Municipal Council/JDA or any other agency of the Government. It appears that the lower authorities made the addition by adopting short-cut method in the name of the assessee without verifying the record. No case is made out about the benami transactions by the lower authorities. In these circumstances, we deem it fit to set aside both the

orders of the lower authorities and restore the matter back to the AO to examine the issue from the record of the Municipal council/JDA or any Government agency. If the properties stand in the name of the assessee, only then the addition can be made in the hands of the assessee. However, the AO will be at liberty to examine the case for making the addition in the hands of the persons in whose name the property is recorded in the record of the Municipal Council/JDA etc., if need be. With this direction, the issue is set aside to the AO who will adjudicate in the light of above discussion and by considering the entire evidence as per law but by providing reasonable opportunity to the assessee.

10. After hearing rival submissions and considering the material available on record, we are of the view that the AO made the addition de hores without having any specific material on hand. The said property at Hanuman Nagar D is not identifiable as the Hanuman Nagar D is the name of the colony. The ld. A/R submitted that the assessee is not owning any property in Hanuman Nagar D nor he had sold any property during the assessment year under consideration.

11. From the AO's order, it appears that he has not brought any evidence to establish the ownership of the assessee or to identity the property. It was expected from the AO to verify the ownership of the property or the transaction done by the assessee through the Sub-Registrar's office. When assessee has categorically denied any involvement, then it was expected at least from the first appellant authority to ask for the remand report from the AO. We are satisfied that in the instant case the addition was made merely on the basis of presumption, surmises and conjectures. No addition can by made on the basis of presumption in the block assessment. Therefore, by taking into consideration the ration laid down in the case of Union of India vs. Ajit Jain And Another, 260 ITR 80, we set aside both the orders of the lower authorities and delete the addition of Rs. 1,86,500/-. The assessee will get the relief of this amount.

16. By considering the totality of facts and circumstances of the case, it appears that the statement of Shri Dinesh Kumar Sharma was recorded on 11.1.2001. In his statement, he merely submitted that he has taken the loan on interest from Shri Ashok Kumar Jain (question no. 11). The said loan was partly repaid. Balance of Rs. 45.000/- was continued. The said loan was taken for purchasing the property in the name of wife of the assessee. In these circumstances, we are of the view that when a person is taking the

loan from Shri Ashok Kumar Jain, then he cann't have the business relation with him in normal circumstances. The amount of Rs. 45,000/- was outstanding. If he has the brokerage business with Shri Ashok Kumar Jain, this amount might have been adjusted. In other words, the assessee might have not taken to amount on loan. The assessee has expressly denied that he was having any brokerage business with Shri Ashok Kumar Jain. The assessee is a whole time director in M/s. Shakambri Stone Crushing Pvt. Ltd. The department has made no enquiry whether any brokerage payment was received either from assessee or from any other sources. Even the properties were not identified for which the brokerage was received. If he was a broker, he might have signed as a witness on the transfer deed or diary or at least some document at the time of registration or agreement, but in the instant case no material was brought on record to prove that he was having brokerage business. Moreover, no chance was given for to confront Shri Ashok Kumar Jain. Shri Ashok Kumar Jain never stated of having the brokerage business with the assessee. In these circumstances, we find no justification for making the addition of Rs. 1,13,000/-. Therefore, by setting aside both the orders of the lower authorities, we delete this addition. Thus, the assessee will get the relief of this amount.

19. After hearing rival submissions and considering the material available on record, we are of the view that the AO made the first two additions in summary manner as appears from his order. The CIT(A) has confirmed the order without any discussion. The above two additions are without any material. The AO made no attempt to bring any corroborative evidence or specific circumstances for the presumption. Hence the addition of Rs. 3,24,000/- for the year 1997-98 and addition of Rs. 35,000/- for the years 1998-99 are deleted as the same are de hors without any material.

23. After hearing rival submissions and considering the material available on record, it appears that in the previous ground the AO made the addition for taking the advances from Shri Ashok Kumar Jain on interest. But in this ground, the AO made the addition for giving the advances to Shri Ashok Kumar Jain. Both the facts are contradictory to each other. It appears that the additions were made merely on the basis of presumption and surmises. Neither any statement was recorded of Shri Ashok Kumar Jain nor any admission was obtained from the assessee regarding the said advances. No corroborative evidence was collected by the lower authorities to justify the additions. No

specific circumstances like admission, signature, statement etc. were mentioned before making the presumption pertaining to the said additions. For the similar reasons mentioned above, we find no justification for upholding the orders of the lower authorities.

5. The judgment which has been cited by the counsel for the appellant in the case of P.R. Metrani Vs. Commissioner of Income Tax, Bangalore (2007) 1 SCC 789 is not applicable in the facts of the present case inasmuch as the duplicate books of account were not of assessee but of Ashok Kumar Jain in whose books of account the name of assessee was found."

"2. CIT Jaipur vs. Vijendra Kumar Kankaria , ITA No. 175/2010 decided on 29.05.2017 observing as under:-

"7. He has also taken us to the judgment of Punjab and Haryana High Court in case of Navdeep Dhingra vs. Commissioner of Income Tax reported in [2015] 232 Taxman 0425 (P & H) wherein in para 3 & 4 held as under:-

"3. Aggrieved by this order, the assessee filed an appeal, which was dismissed by the CIT(A). The assessee thereafter filed an appeal before the ITAT which was also dismissed.

4. Counsel for the assessee submits that as admittedly the appellant retracted his admissions, the retracted admissions/statement could not form the basis of additions without any corroborative evidence. Counsel for the assessee draws attention to Office Note (Annexure-A6) dated 26.12.2008, wherein, the Deputy Commissioner of Income Tax has recorded that no other incriminating document except the slip pad has been recovered by the revenue. Counsel for the assessee submits that though an admission is the best evidence of a fact but where an admission is made under coercion and pressure and is retracted, the revenue cannot place reliance upon such an admission and must, therefore, look for other evidence to prove its case. The absence of any other evidence renders the impugned orders which are based upon retracted statements made by the assessee null and void.

8. However, counsel for the respondent contended that the view has been taken by the Supreme Court in recent judgment in case of M/s Andaman Timber Industries vs. Commissioner of Central Excise, Kolkata-II reported in [2015] 281 CTR 241 (SC) wherein it has been held as under:- "As mentioned above, the appellant had contested the truthfulness of

the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17.03.2005 was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions. In view of the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the Show Cause Notice. We, thus, set aside the impugned order as passed by the Tribunal and allow this appeal."

9. He has also relied upon another decision in case of Gopal Saran vs. Satyanarayan reported in AIR 1989 Supreme Court 1141 wherein in para 5 it has been held as under:-

"5. On the basis of the aforesaid, it was contended that it was the definite case of the defendant in Examination-in-chief, that the board belonged to him and that the defendant was carrying on his own business and that there was no dispute as to the same by the plaintiff. It may be mentioned that the plaintiff had not subjected himself to crossexamination in spite of the order of the Court after the remand, therefore, it would not be safe to rely on the examination-in-chief recorded which was not subjected to cross-examination before the remand was made. If that is so, it will appear that there is no evidence of the plaintiff in respect of allegations in the plaint. This position appears established from the facts on record. When the plaintiff appeared for evidence in rebuttal he could have been cross-examined on these points. It was submitted that in rebuttal the plaintiff had stated only with regard to the default in payment of rent but the plaintiff had not chosen to support his plaint case. Before the defendant went to the witness box. There was no question of cross-examining the plaintiff

travelling beyond the evidence of the plaintiff given in examination-in-chief and thereby giving an opportunity to made out a case in cross-examination. It, therefore, appears from the pleadings and the evidence that the respondent did not make out any case of the appellant parting with possession by putting up the hoarding. In examination-in-chief also he did not make out such a case and on the contrary his case was that it was the defendant-appellant who had put up the hoarding. The plaintiff has made the evidence in examination-in-chief non est. It was the case of the defendant that he was carrying on the business of advertisement by putting up the hoardings of different parties. The board was made by him, paintings and writings were also done by him and for putting the hoarding he charged from his customers. Therefore, it appears to us that there are no clear findings that anybody was given lease or anybody was given the right to put up the hoarding and there was parting of possession in favour of anyone else. It was, however, argued that even if the appellant had put the advertisement board hoarding he was earning a huge amount by the same and this was a factor which would indicate that there was parting of possession by him. It was, however, submitted on behalf of the appellant that when the shop had been let out to the defendant-appellant for carrying on business it was the right of the defendant-appellant to carry on the business. It was legally permissible to use the said shop room and also use the roof thereof and earn as much as could be done and as such it is not parting with possession."

10. In view of the above, the view taken by the CIT(A) which was confirmed by the Tribunal is just and proper though the amount which has taken as income from commission is taken on a reasonable side."

He has also relied on the following decisions:-

"3. Common Cause (A Registered Society) and Ors. vs. Union of India (UOI) and Ors.

"22. In case of Sahara, in addition we have the adjudication by the Income Tax Settlement Commission. The order has been placed on record along with I.A. No. 4. The Settlement Commission has observed that the scrutiny of entries on loose papers, computer prints, hard disk, pen drives etc. have revealed that the transactions noted on documents were not genuine and have no evidentiary value and that details in these loose papers, computer print outs, hard disk and pen drive etc. do not comply with the

requirement of the Indian Evidence Act and are not admissible evidence. It further observed that the department has no evidence to prove that entries in these loose papers and electronic data were kept regularly during the course of business of the concerned business house and the fact that these entries were fabricated, non-genuine was proved. It held as well that the PCIT/DR have not been able to show and substantiate the nature and source of receipts as well as nature and reason of payments and have failed to prove evidentiary value of loose papers and electronic documents within the legal parameters. The Commission has also observed that Department has not been able to make out a clear case of taxing such income in the hands of the applicant firm on the basis of these documents.

23. It is apparent that the Commission has recorded a finding that transactions noted in the documents were not genuine and thus has not attached any evidentiary value to the pen drive, hard disk, computer loose papers, computer printouts.

"4. Bhandari Construction Company vs. Narayan Gopal Upadhye

"15. When the terms of the transaction are reduced to writing, it is impossible to lead evidence to contradict its terms in view of Section 91 of the Evidence Act. There is no case that any of the provisos to Section 92 of the Act are attracted in this case. Why the case that was sought to be spoken to by the respondent was not set up by him in the complaint was not explained. The case set up in evidence was completely at variance with the case in the complaint. There was no evidence to show that the consideration was to be Rs. 9,00,000/-, especially, in the light of the recitals in the registered agreement. There was also no document to show the payment of Rs. 4,00,000/- by way of cash. Hence, this was no evidence to show that the balance amount due under the agreement after the admitted payment of Rs. 5,00,000/- was paid. The affidavit produced before the State Forum and the evidence of the colleague of the respondent is clearly inadmissible and insufficient to prove any such payment. Thus, the case set up by the respondent in his evidence was not established. It is in that situation that the District Forum taking note of the payment of Rs. 5,00,000/- and the failure of the respondent to encash the cheque for Rs. 5,00,000/- that was returned by the company, ordered the complainant to pay the balance amount due under the transaction as evidenced by the written instrument and take delivery of the premises in

question and in the alternative gave him the option to take back the sum of Rs. 5,00,000/- with interest. Neither the State Commission, nor the National Commission has given any sustainable reason for differing from the conclusion of the District Forum. A mere suspicion that builders in the country are prone to take a part of the sale amount in cash, is no ground to accept the story of payment of Rs. 4,00,000/- especially when such a payment had not even been set up in the complaint before the District Forum. Not only that, there was no independent evidence to support the payment of such a sum of Rs. 4,00,000/- except the ipse dixit of the respondent. The affidavit of the bank employee filed in the State Commission cannot certainly be accepted as evidence of such a payment. Payment of such a sum had clearly been denied by the company. The respondent had, therefore, to prove such a payment. His case that the purchase price was Rs. 9,00,000/-, itself stands discredited by the recitals in the agreement dated 27.7.1997 in which the purchase price was recited as Rs. 7,75,000/-. Not only that the respondent did not have a receipt for evidencing the payment of Rs. 4,00,000/- and if the amount was paid on 5.7.1997 or 8.7.1997, as claimed by him, he would certainly have ensured that the payment was acknowledged in the agreement for sale executed on 27.7.1997. The agreement for sale actually speaks of his obligation to pay the balance to make up Rs. 7,75,000/- after acknowledging receipt of Rs. 5,00,000/-. The respondent is not a layman. He is a practising advocate. According to him, he specialises in documentation. He cannot, therefore, plead ignorance about the existence of the recital in the agreement. He cannot plead ignorance of its implications."

"5. Ayaaubkhan Noorkhan Pathan vs. The State of Maharashtra and Ors.

Cross-examination is one part of the principles of natural justice:

"23. A Constitution Bench of this Court in State of M.P. v. Chintaman Sadashiva Vaishampayan AIR 1961 SC 1623, held that the rules of natural justice, require that a party must be given the opportunity to adduce all relevant evidence upon which he relies, and further that, the evidence of the opposite party should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party. Not providing the said opportunity to cross-examine witnesses, would violate the principles of natural justice. (See also: Union of

India v. T.R. Varma, AIR 1957 SC 882; Meenglas Tea Estate v. Workmen, AIR 1963 SC 1719; M/s. Kesoram Cotton Mills Ltd. v. Gangadhar and Ors. ,AIR 1964 SC 708; New India Assurance Co. Ltd. v. Nusli Neville Wadia and Anr. AIR 2008 SC 876; Rachpal Singh and Ors. v. Gurmit Singh and Ors.AIR 2009 SC 2448; Biecco Lawrie and Anr. v. State of West Bengal and Anr. AIR 2010 SC 142; and State of Uttar Pradesh v. Saroj Kumar Sinha AIR 2010 SC 3131).

24. In Lakshman Exports Ltd. v. Collector of Central Excise (2005) 10 SCC 634, this Court, while dealing with a case under the Central Excise Act, 1944, considered a similar issue i.e. permission with respect to the cross-examination of a witness. In the said case, the Assessee had specifically asked to be allowed to cross-examine the representatives of the firms concern, to establish that the goods in question had been accounted for in their books of accounts, and that excise duty had been paid. The Court held that such a request could not be turned down, as the denial of the right to cross-examine, would amount to a denial of the right to be heard i.e. audi alteram partem.

28. The meaning of providing a reasonable opportunity to show cause against an action proposed to be taken by the government, is that the government servant is afforded a reasonable opportunity to defend himself against the charges, on the basis of which an inquiry is held. The government servant should be given an opportunity to deny his guilt and establish his innocence. He can do so only when he is told what the charges against him are. He can therefore, do so by cross-examining the witnesses produced against him. The object of supplying statements is that, the government servant will be able to refer to the previous statements of the witnesses proposed to be examined against him. Unless the said statements are provided to the government servant, he will not be able to conduct an effective and useful cross-examination.

29. In Rajiv Arora v. Union of India and Ors. AIR 2009 SC 1100, this Court held:

Effective cross-examination could have been done as regards the correctness or otherwise of the report, if the contents of them were proved. The principles analogous to the provisions of the Indian Evidence Act as also the principles of natural justice demand that the maker of the report should be examined, save and except in cases where the facts are admitted or the witnesses are not available for cross-examination or similar situation. The High Court in its impugned

judgment proceeded to consider the issue on a technical plea, namely, no prejudice has been caused to the Appellant by such non-examination. If the basic principles of law have not been complied with or there has been a gross violation of the principles of natural justice, the High Court should have exercised its jurisdiction of judicial review.

30. The aforesaid discussion makes it evident that, not only should the opportunity of cross-examination be made available, but it should be one of effective cross-examination, so as to meet the requirement of the principles of natural justice. In the absence of such an opportunity, it cannot be held that the matter has been decided in accordance with law, as cross-examination is an integral part and parcel of the principles of natural justice."

6. Andaman Timber Industries vs. Commissioner of C. Ex., Kolkata-II

"4. We have heard Mr. Kavin Gulati, learned senior counsel appearing for the Assessee, and Mr. K. Radhakrishnan, learned senior counsel who appeared for the Revenue.

5. According to us, not allowing the Assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the Assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the Assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the Assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the Assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the Appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the Appellant wanted to cross-examine those dealers and what extraction the Appellant wanted from them.

6. As mentioned above, the Appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17-3-2005 [2005 (187) E.L.T. A33 (S.C.)] was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.

7. In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the show cause notice."

"7. Principal Commissioner of Income Tax Ahmedabad and Ors. vs. Kanubhai Maganlal Patel

"12. We have heard Shri Varun K Patel, learned counsel appearing on behalf of the Revenue at length. It emerges from the impugned orders and even the order passed by the Assessing Officer that the Assessing Officer made additions under Section 69B of the Act, relying upon the statements of two farmers [i.e., two sellers of the land] in which, according to the Department, they admitted of having received on-money in cash. However, it is required to be noted and it is an admitted position that the statements of those two farmers upon which reliance was placed by the Department were not furnished/given to the assessee to controvert the same. Not only that when a specific request was made before the Assessing Officer to permit them to cross examine the aforesaid two farmers, the same was rejected by the Assessing Officer. Under the circumstances, as rightly observed by the learned Tribunal, the Assessing Officer was not justified in making addition under Section 69B of the Act solely relying upon the statements of those two farmers.

13. We see no reason to interfere with the findings recorded by the learned Tribunal. We are in complete agreement with the view taken by the learned Tribunal while deleting the addition made by the Assessing Officer made under Section 69B of the Act. No substantial question of law arises."

"8. CIT v. Devendra Kumar Singhal

"5. The ITAT thereafter relied upon finding of CIT (A) regarding the nature of diary, which was not found to be an exclusive record of the financial transactions. The ITAT observed:-

"It is also observed by the ld. CIT (A) that the diary did not show an element of exclusive/confidential business record. The ld. CIT (A) treated the diary as general household diary and not related to actual business transactions. We fully agree with this observation of the ld. CIT (A) that there is no sufficient material including LP-4, which could lead to the conclusion that the assessee has received any undisclosed money from employer towards his income i.e. salary. On the other hand, the explanations and submissions of the assessee clearly established that the same were placed before the AO and were not appreciated by him due to lack of concluding enquiry and examination of other relevant persons in this behalf. Considering the entire facts and circumstances of the present case, we do not see any infirmity in the findings of the ld. CIT (A) on this issue. In our view, the ld. CIT (A) has passed a well-reasoned order after appreciating the facts of the present case as well as the settled legal position and therefore, we decline to interfere with his order."

"9. Commissioner of Income Tax-V vs. Indrajit Singh Suri

"The entire issue is based on factual matrix presented before the authorities. We are in complete agreement with the findings of the Tribunal that the Assessing Officer had largely proceeded on the basis of the statement of one Shri Gajjar in whose books of account, the said transaction of Ninad Co-op. Housing Society had emerged. It further appears that no opportunity of cross examination of Shri Gajjar, though requested for, was granted by the Assessing Officer. Cumulatively, thus, when the Tribunal found that there was violation of principles of natural justice by not allowing cross examination despite such request coupled with absence of any evidence, no error much less any substantial error is committed by the Tribunal

in deleting the said amount. This issue, therefore, requires no further consideration."

"10. CIT vs. Supertech Diamond Tools Pvt. Ltd., 74 of 2012

"The reference to the statements made by some of the persons related with the said investing companies is of no effect because such statements could not have been utilized against the assessee Company when the assessee company had not been afforded an opportunity of confronting and cross-examining the persons concerned. There does not appear anything occurring in the statements of the persons relating with the assessee Company so as to provide a basis for the findings recorded by the AO."

"11. Commissioner of Income Tax vs. Ashwani Gupta

"2. The Tribunal has confirmed the order passed by the Commissioner of Income Tax (Appeals) which held the entire addition made by the Assessing Officer to be invalid and had deleted the same. The Commissioner of Income Tax (Appeals) had clearly held that the Assessing Officer had passed the assessment order in violation of the principles of natural justice inasmuch as he had neither provided copies of the seized material to the assessee nor had he allowed the assessee to cross-examine one Mr. Manoj Aggarwal on the basis of whose statement the said addition was made. The Commissioner of Income Tax (Appeals) also held that the entire addition deserved to be deleted, particularly so, because the transactions also stood duly reflected in his regular returns.

3. The Tribunal, after referring to the decision of this Court in the case of CIT v. SMC Share Brokers Ltd. MANU/DE/9286/2006 : [2007] 288 ITR 345, came to the conclusion that there was no infirmity in the order of the Commissioner of Income Tax (Appeals) and, therefore, declined to interfere with the same and dismissed the appeal of the Revenue."

"12. ACIT vs. Govindbhai N. Patel

"Addition under section 69B Undisclosed investment in purchase of agricultural lands--The addition made by the AO on account of undisclosed investment in purchase of agricultural lands. The AO had carried out investment and had collected statements of the sellers of the lands in question to establish that they had received cash payments from the assessee towards

sale consideration. The assessee, however, strongly disputed the contents thereof and requested for cross-examination of the authors of such statements. The AO refused to grant such cross-examination on the premise that the sale deeds were executed. CIT (A) deleted the addition. Tribunal found that the AO proceeded to make addition on the basis of enquiries conducted behind the back of the assessee without giving any opportunity of being heard or without giving any opportunity to cross examine the statements of the sellers. The CIT(A) was, therefore, justified in holding that the addition could not be sustained on that ground itself. Revenue filed appeal against the order of Tribunal. Held: The AO had made additions on two basis firstly, that some of the lands in the village were sold at a higher price, and sellers had given statements to the AO of having received higher sale consideration. Both the grounds were knocked down by the CIT(A) and Tribunal on the premise that the other lands were not shown to be comparable and that the witnesses were not offered for cross-examination. In fact, the assessee contended that the lands sought to be compared by the AO were converted into non-agricultural land, and therefore, naturally fetched much higher price. Therefore, CIT(A) and the Tribunal had correctly concluded that there was no evidence supporting the AO's version that the assessee had invested large amount in purchase of agricultural lands."

"13. CIT Kanpur vs. Shadiram & Others,

"Section 69 of the Income Tax Act, 1961- Unexplained Investments-Assessment Year 1981-82-During course of search carried out at business premises of a partnership firm (one of assessee), a loose parcha was recovered from wallet of one of partner of firm – On basis of entries in that parcha, ITO inferred that investment mentioned in parcha against various names belonged to persons whose name had been mentioned and interest on aforesaid capital investment had been given to them- He, accordingly, added certain amount towards unexplained investments and interest in case of three assessees i.e., partnership firm and two individuals – On appeal, Commissioner (Appeals) confirmed order of Assessing Officer- On second appeal, Tribunal deleted additions holding that there being no corroborative evidence, no adverse inference could be drawn from entries of parcha against assessees- Whether finding recorded by Tribunal was pure finding of fact based on material on record and, therefore, no question of law arose

therefrom-Held, yes."

"14. Commissioner of Income Tax vs. Bhanwarlal Murwatiya and Ors.

"4. The entire case was sought to be hanged by the Revenue on the peg of statement of Shri Suresh Kumar Soni, said to have been recorded from time to time, who had given varying statements, at different times. Learned AO also relied upon certain statements, said to have, been recorded by the Asstt. Director of IT of Amar Chand, Bhanwarlal and Radhey Shyam, but then, no reliance was placed on those statements by the learned Tribunal.

5. Assailing the impugned judgment, it is contended, with all vehemence, that it is more than clearly established on record, that a consideration of Rs. 61 lacs did pass, so much so that Suresh Kumar Soni has been assessed, his balance sheets have been considered, and it is writ large, that during the relevant time, his resources had disproportionately increased, which obviously was on account of the above consideration. Likewise, the aforesaid three witnesses viz; Amar Chand, Bhanwarlal and Radhey Shyam, have also clearly given out, that the land was sold for Rs. 61 lacs and, thus, there was no occasion for deleting the additions.

6. On the other hand, learned Counsel for the assessees submitted that none of the witnesses were examined by the AO, and even Suresh Kumar Soni had given varying statements at different occasions, apart from the fact that he was also not examined by the AO, nor did the assessee have any opportunity to cross examine on the version of Suresh Kumar Soni, so as to test his veracity or reliability, and the statements of the said witnesses, recorded by the other authority, could not be looked into, as they are not even relevant, in view of the provisions of Section 32 of the Evidence Act. It was also contended that even an independent enquiry was got conducted, wherein the learned Dy. CIT had found, that the valuation of the land was not above the one, as shown in the sale deed, and thus, no interference is required to be made.

7. We have considered the submissions, and after going through the impugned orders, are of the view that all said and done, the question as to what was the price of the land at the relevant time, is a pure question of fact. Apart from the fact, that even if, it were to be assumed, that the price of the land was different than the one, recited in the sale deed, unless it is established on record by the Department, that as

a matter of fact, the consideration, as alleged by the Department, did pass to the seller from the purchaser, it cannot be said, that the Department had any right to make any additions. It is a different story as to, to what extent and how, the statement of Suresh Kumar Soni, as given before different authorities, at different times, can be used against the assessee. More so, when none of the witnesses were examined before the AO, and the assessee did not have any opportunity to cross examine them.

8. In any case, the question as to whether the consideration of Rs. 61 lacs, or any other higher consideration than the one, mentioned in the sale deed, did pass from the assessee to the seller or not, does nonetheless remain a question of fact, and it is not shown by the Department, that any relevant material has been ignored, or misread by the learned CIT, or the learned Tribunal."

"15. CIT vs. Dhrampal Premchand Ltd.

"However, AO paid no heed to such request and proceeded with assessment order- Whether since correctness or otherwise of report, on basis of which assessment order was passed against assessee, was itself under challenge, said repost could not be automatically accepted and Assessing Officer committed violation of principles of natural justice in not permitting cross-examination of analyst and relying upon his report to detriment of assessee-Held, yes."

"16. CIT vs. S.M.Aggarwal

"11. In the present case the Assessing Officer has placed reliance on the statement of Smt.Sarla Aggarwal, daughter of the assessed while arriving at the conclusion, that the entries belong to the transactions of the assessed. This statement made by Smt.Sarla Gupta, cannot be said to be relevant or admissible evidence against the assessed, since the assessed was not given any opportunity to cross-examine her and even from the statement, no conclusion can be drawn that the entries made on the relevant page belongs to the assessed and represents his undisclosed income. It is also an admitted fact that the statement of the assessed was not recorded at any stage during the assessment proceedings. The only conclusion which can be drawn about the nature and contents of the document is that it is a dumb document and on the basis of the entry of nothings or figure etc. in this document, it cannot be concluded

that this represents the undisclosed income of the assessed.

10. It is well settled that the only person competent to give evidence on the truthfulness of the contents of the document is the writer thereof. So, unless and until the contents of the document are proved against a person, the possession of the document or hand writing of that person, on such document by itself cannot prove the contents of the document. These are the findings of fact recorded by both the authorities, i.e., Commissioner of Income Tax (Appeals) and the Tribunal.

15. In the present case as already held above, the documents recovered during the course of search from the assessed are dumb documents and there are concurrent findings of Commissioner of Income Tax (Appeals) and the Tribunal to this effect. Since the conclusions are essentially factual, no substantial question of law arises for consideration."

"17. Paramjit Singh vs. ITO, IT Appeal No. 401 of 2009

"We have thoughtfully considered the submissions made by the learned counsel and are of the view that they do not warrant acceptance. There is a well-known principle that no oral evidence is admissible once the document contains all the terms and conditions. Section 91 and 92 of the Indian Evidence Act, 1872 (for brevity 'the 1872Act') incorporate the aforesaid principle. According to section 91 of the Act when terms of a contracts, grants or other dispositions of property has been reduced to the form of a documents then no evidence is permissible to be given in proof of any such terms of such grant or disposition of the property except the document itself or the secondary evidence thereof. According to section 92 of the 1872 Act once the document is tendered in evidence and proved as per the requirements of section 91 then no evidence of any oral agreement or statement would be admissible as between the parties to any such instrument for the purposes of contradicting, varying, adding to or subtracting from its terms. According to illustration 'b' to section 92 if there is absolute agreement in writing between the parties where one has to pay the other a principal sum by specified date then the oral agreement that the money was not to be paid till the specified date cannot be proved. Therefore, it follows that no oral agreement contradicting/varying the terms of a document could be offered. Once the aforesaid principal is clear then ostensible sale consideration disclosed in the sale deed

dated 24-9-2002 (A.7) has to be accepted and it cannot be contradicted by adducing any oral evidence. Thereafter, the order of the Tribunal does not suffer from any legal infirmity in reaching to the conclusion that the amount shown in the registered sale deed was received by the vendors and deserves to be added to the gross income of the assessee-appellant."

"18. CIT-13 Vs. M/s. Ashish International (ITA No. 4299 of 2009; dated, 22.02.2011)

"The Tribunal has recorded a finding of fact that the assessee had disputed the correctness of the above statement and admittedly the assessee was not given any opportunity to cross examine the concerned Director of M/s. Thakkar Agro Industrial Chem Supplies P. Ltd. who had made the above statement. The appellate authority had sought remand report and even at that stage the genuineness of the statement has not been established by allowing cross examination of the person whose statement was relied upon by the revenue. In these circumstances, the decision of the Tribunal being based on the fact, no substantial question of law can be said to arise from the order of the Tribunal. The appeal is dismissed with no order as to costs."

"19. Commissioner of Income Tax vs. Anil Khandelwal (21.04.2015 - DELHC)

"6. This Court further notices that the ITAT independently examined the evidence which the CIT (A) had scrutinized. It also took note of the paper book which had been furnished to the lower authorities and was satisfied that the amounts attributed to the assessee in fact had not been established and that in the given circumstances, the reference to Section 132(4A) and Section 292C was not justified. Having regard to the factual nature of the dispute - and having examined the findings of the lower authorities on this account which we do not consider unreasonable, this Court holds that no substantial question of law arises for consideration.

"20. Commissioner vs. Motabhai Iron and Steel Industries (03.09.2014 - GUJHC)

"10. From the findings recorded by the Tribunal, it is apparent that the sole basis of the demand was the statement of Shri Arjandas who did not appear pursuant to the summons issued to him. The assessee was, therefore, deprived of an opportunity to cross-examine the witness in respect of the statements

made against him. In these circumstances, no reliance can be placed on the statement of such witness who has not subjected himself to cross-examination by the affected party. Under the circumstances, the statement made by Shri Arjandas lost its efficacy and therefore, could not have been used against the assessee. Besides, the Tribunal has also found that M/s. Star Associates was regularly supplying goods to the assessee in the past and on no occasion, it was found that they had issued invoice without actually supplying the goods. It is in the light of the aforesaid facts that the Tribunal has deleted the disallowances of credit of Rs. 14,42,177/-. Under the circumstances, it cannot be said that there is any infirmity in the view taken by the Tribunal while deleting the disallowance of credit of Rs. 14,42,177/-."

21. CIT vs. S.C. Sethi, D.B.I.T Appeal No. 78 of 2005, 10.03.2006

"10. The facts stated above clearly indicate that no question of law arises in this appeal. The findings recorded by the Tribunal are findings of fact affirming the earlier finding of fact recorded by the Commissioner of Income-Tax (Appeals). Apparently when the loose papers by itself did not indicate receipt of the alleged undisclosed income by the assessee and peripheral reliance on the document was not earlier countenanced in absence of opportunity of cross-examination of the person from whose possession the loose papers were recovered. The fact that the Assessing Officer has not made any efforts to serve the said Sh. A.K. Chhajer and secure his presence by invoking powers under the Income-tax Act for securing presence of any witness also goes to show that the Assessing Officer has not really made efforts to give effect to the directions of the Commissioner of Income-tax (Appeals) for making available opportunity of cross-examining Sh. A.K. Chhajer by the assessee."

6. We have heard learned counsel for the parties.

7. Taking into consideration the observation made by the Tribunal regarding not allowing cross-examination of Mr. Thakkar from whose documents the amount is alleged to have been taken in the interest of the assessee.

8. In that view of the matter the finding recorded by the Tribunal is just and proper and issues is answered in favour of the of the assessee against the department.

9. The appeals stand dismissed. A copy of this judgment be placed in each file.

(JINDERJEET SINGH),J. (K.S. JHAVERI),J.

Mohit Grover
Sr. No.61-62.

IN THE INCOME TAX APPELLATE TRIBUNAL
JAIPUR BENCH 'A' JAIPUR

(BEFORE SHRI R.K.GUPTA AND SHRI N.L.KALRA)

ITA No.751/ JP/2011
Assessment year 2008-09
PAN: ABLPD 4605 Q

Smt. Sunita Dhadda 1387, Ganesh Bhawan Partanion Ka Rasta, Johri Bazar, Jaipur (Appellant)	Vs.	The DCIT Central Circle- 2 Jaipur (Respondent)

ITA No.852/ JP/2011
Assessment year 2008-09
PAN: ABLPD 4605 Q

The DCIT Central Circle- 2 Jaipur (Appellant)	Vs.	Smt. Sunita Dhadda 1387, Ganesh Bhawan Partanion Ka Rasta, Johri Bazar, Jaipur (Respondent)

Department by : Shri Subhash Chandra
Assessee by : Shri J.K. Ranka & Shri Siddharth Ranka

Date of hearing: 02-11-2011
Date of Pronouncement: 30-12-2011

ORDER

PER N.L. KALRA, AM:-

The assessee as well as Revenue have filed appeals against the order of the ld. CIT(A)-Central, Jaipur dated 01-07-2010 for the assessment year 2008-09.

2.0 First of all, we will take up the appeal of the assessee and the grounds of appeal raised by the assessee are as under:-

1. That on the facts and in circumstances of the case, the ld. lower authorities grossly erred in acting illegally on facts as well as in law, in assuming, presuming, on conjectures and surmises, in holding and making an addition of impugned amount of ₹ 4.07 crores (Rupees Four crores and seven lakhs only) as income on account of receipts by way of undisclosed income.

1.1. That the impugned addition is wholly unjustified and inferences so drawn are baseless, without evidence, without material and contrary to the material on record and are whimsical.

1.2. That the learned Assessing Officer grossly erred in relying upon the vague, unrelated statement of one Shri Ravindra Singh Thakkar which is unsupported by any other material or corroborative evidence, which was at the back of the appellant, the learned Commissioner of Income-tax (Appeals) also grossly erred in following the same without any application of mind and without providing a right to cross-examine the person who so stated adversely at the back of the appellant.

1.3. That it is categorically stated before the learned Assessing Officer as well as the learned Commissioner of Income-tax (Appeals) that user of material behind the back of the assessee is unjustified, is illegal, is bad in law, is in violation of principles of natural justice and such statement deserves to be excluded for non-consideration but both the learned authorities grossly erred in placing mechanical reliance on the statement, its user is in utter violation of principles of natural justice.

1.4. That specific challenge was before the learned Commissioner of Income-tax (Appeals) in the Written-Submissions and arguments and reliance was placed on several authorities of Hon'ble Supreme Court, Hon'ble Rajasthan High Court and various Courts, the learned Commissioner of Income-tax (Appeals) grossly erred in not even referring the same, in ignoring the same and in scuttling out the valid objection.

1.5. That user of said Annexure-'D' i.e. the "Position of Funds as on 22.12.2008 and Requirement" is vague, unsigned, unsupported by material evidence, unrelated with the assessee, is a sheer waste of paper was to be ignored, should have been ignored but both the learned Assessing Officer and the learned Commissioner of Income-tax (Appeals) grossly erred in using it, in part to suit their own convenience which is against the settled principles of law.

1.6. That it was specifically requested that appellant should be permitted to cross-examine the person who has provided the so called Annexure-'D' but both the learned authorities are totally mum and silent on the very valid objection though it is supported by innumerable authorities of the Courts, user of such material is in violation of principles of natural justice and such material ought to have been ignored and deserves to be ignored.

1.7. That merely on the basis of the alleged statement, if any, of Shri Ravindra Singh Thakkar dated 29.01.2009 and Annexure-'D' i.e. "Position of Funds as on 22.12.2008 and Requirement", huge addition of ₹4.07 crores has been made which is unjustified, illegal, bad in law and deserves to be deleted.

1.8. That the impugned addition is contrary to the statement on oath of the appellant recorded on 25.02.2009 and 02.03.2009 under section 132(4)/131 of the Act where the appellant had categorically, repeatedly and in un-equivocal words emphatically asserted on oath that the sale was made as recorded in the registered sale deed and not at ₹2.50 crores per bigha.

1.9. That it was also stated that even the sale price duly stated in the registered sale deed is substantially higher (more than 3 times) than what was prevailing price (DLC price) by the Sub-Registrar, Sanganer Jaipur (City), District Jaipur. Even then, the learned lower authorities grossly erred in ignoring the same and in putting their own value which is based on no material and contrary to the material on record.

1.10. That the learned lower authorities grossly erred in illegally observing that in such type of dealings the transaction invariably has cash/on money component, which is based on assumptions, presumptions, conjectures and surmises and contrary to the findings of the registering statutory authority and the material on record.

1.11. That the learned lower authorities grossly erred in placing reliance on the so called alleged surrender, if any, by Shri Ravindra Singh Thakkar or/and group companies without providing any contrary material and without providing the basis as to on what basis surrender was made and tax if any was paid by Shri Ravindra Singh Thakkar and group companies. Even otherwise, using the said material behind the back of the assessee, in not providing the material, in mechanically following the same, is in utter violation of principles of natural justice.

1.12. That the appellant having not earned the said amount of ₹4.07 crores and same having not been received by the appellant, the addition is unauthorized, illegal, invalid, bad in law and misuse of provisions of law and deserves deletion.

2. That on the facts and in the circumstances of the case, the learned lower authorities grossly erred in levying interest under section 234B & 234D when there is no liability of such interest.''

2.2 The brief facts of the case are that during the course of search on the members of Unique Builders Group of Jaipur on 28.01.2009, certain incriminating documents reflecting the payment(s) of 'on-money' in cash by the members of Unique Group were

found and seized. The document seized as Page 78 of Exhibit 24 of Annexure A from C-116, Jan Path, Lal Kothi, Jaipur [referred] to as "A-24/78"] reflected such payment by the members of Unique Group. The Assessee has sold a piece of land to a company M/s Milestone Dwellers Pvt. Ltd. ["MDPL'] in which the certain members of Unique Group have substantial stake. On the land so sold, MDPL is developing a housing project. In the return of income filed by one of the members of the Unique Group, the amount was surrendered as payment of 'on-money' and tax paid thereon. However, on examination of the return of income of the assessee by the A.O., no such receipt was reflected. After issuing show-cause letter dated 03.12.2010 and 16.12.2010 and considering the reply, the A.O. made the addition of RS. 4.07 crore as 'on-money received on sale of land from Unique group. The A.O. has considered the argument of assessee and observed/held as under :-

> (i) At the outset it is stated that the whole reply of the Assessee is a bundle of stories and allegations against all and sundry including the buyer, M/s. Milestone Dwellers Pvt. Ltd. Sh. Ravindra Singh Thakkar, the director of the buyer-company etc. The opportunity through the said show-cause was given to the Assessee to defend her case in right manner and to furnish evidences which she could rely on while presenting her case/arguments. But, the learned Counsel has furnished 14 page reply which full of conjectures and surmises and the moot issue has not even been touched upon. The reply rotates around the District Level Committee (DLC) rate of the area, the provisions of section 50C, various supposed events which would have/have not transpired between the Assessee and Sh. Ravindra Thakkar of Unique Group and M/s. MDPL.

(ii) The Assessee in her reply has contended that the said land was already sold at three times the DLC rate prevalent during the time and alleged receipt of Rs. 4.07 crore would further raise the final sale consideration of land. This contention of the Assessee has no bearing on the fact of the case because the undersigned is in possession of seized document which clearly states otherwise that on-money was received in connection with the said land. Needless to mention that in this type of business, the transaction invariably has cash/on-money component which is out of books and the vehement reliance on the DLC rate by the Assessee does not actually serve her purpose.

(iii) The Assessee's reliance on the provisions of section 50C whereby it has been alleged that the Assessing Officer cannot adopt a value higher than the prevalent DLC rate for purpose of section 48 of the Act is misplaced because section 50C only deals with those payments which have been shown in the books of account only. However, in the instant case the whole issue is about the payments being made, and being received in cash as on-money which have not been reflected in the books. Thus, section 50C is irrelevant in the facts and circumstances of the case.

(iv) The issue basically as discussed elaborately is in respect of Rs. 4.07 crore which was given in cash by Sh. Ravindra Thakkar of Unique Group in lieu of purchase of Mahapura Land of the Assessee on which the project Unique Symphony was about to be developed. The Department is in possession of a seized document [Page 78 of Exhibit 24 of Annexure A seized from C-116, Janpath, Lal Kothi, Jaipur - "A-24/78" & "the Annexure"] which is more than clear that Rs. 4.07 crore was given in cash to the seller of the said property because the said annexure mentions the found flow statement of the said project.

(v) That there has been a surrender of Rs. 4.07 crore by Sh. Ravindra Singh of Unique Group accepting categorically in his statement dated 28.01.2009 that the impugned amount has been paid in cash as on-money in lieu of buying the said land of the Assessee at Mahapura and has also accepted that the same is not reflected in his books of account and the source of which has been stated to be out of book sales consideration from various projects. Further, this surrender very much honoured by the Unique Group while filiing their returns of income. Had there been on substance in the statement of Sh. Ravindra Singh Thakkar, he would have not offered such a hefty amount as undisclosed and would have chosen to pay taxes on the same. It means, the statement of Sh. Ravindra Singh Thakkar should not be subjected to any question mark. Further, the sanctity of the said Annexure is established beyond doubts where in cash of Rs. 4.07 crore in lieu of purchase of Mahapura land is reflected and because it stands corroborated with the statement of Sh. Ravindra Singh Thakkar. And, hence, the authenticity of the said Annexure as well as its content is beyond question now.

(vi) The Assessee has questioned the reliance placed by the IT Authorities on the statement of Sh. Ravindra Singh. In this connection it is stated that, firstly, the statement in which he has stated to have made cash/on-money payments of Rs. 4.07 crore has been administered under oath. Secondly, the Unique Group has surrendered the amount so mentioned in the statement in their return of income. Thirdly, tax and interest has been duly paid and deposited in the government coffers. Fourthly, a document has been seized which contains mention of cash payment of Rs. 4.07 crore and this document corroborates the statement of Sh. Ravindra Singh Thakkar of Unique Group. Thus, all the facts pointed above leave no room for the suspicion of the statement of Sh. Ravindra

Singh Thakkar of Unique Group taken on oath and there is no reason for the A.O. to have disbelieved the said statement anyway.

(vii) The Assessee in her reply para 3.3. has vehemently argued that the statement as well as the paper is baseless because it does not spell anywhere that the alleged payment of Rs. 4.07 crores was made to her. The argument of the assessee is ridiculous and devoid of any logic because very obviously, the assessee was the sole seller of the said land and when Rs. 7.6 crore is accepted to have been received by her through cheque, there is no reason as to why the payment of Rs. 4.07 crore in cash would not have been received by her and same has to be accepted because both the figures form part of the same annexure.

(viii) That various courts have held, from time to time, that the test of human probabilities and circumstantial evidence should be applied before arriving at any conclusion in any matter. Reliance is placed on the ratio of the decision in the case of Sumati Dayal 214 ITR 801 (SC) wherein it was held that "after considering the surrounding circumstances and applying the test of human probabilities had rightly concluded that the appellant's claim about the amount being her winnings from races was not genuine.

2.3 In view of the above elaborate discussion, A. O. held that it is established that the contention of the Assessee holds no water and therefore deserves to be rejected and an addition of Rs. 4.07 crores is made to the income of the Assessee on account of receipts of undisclosed income.

2.4 The submissions made by the ld. AR of the assessee before the ld. CIT(A) are summarized as under:-

1. The assessee agree to sell the land measuring 4.67 bigha out of agricultural land in village in Mahapura on Jaipur-Ajmer Highway in terms of agreement to sale dated 19-11-2007 to M/s. Milestone Dwellers (P) Ltd. through its director Shri Ajit Singh S/o Shri Sardar Ram Singh for a sale consideration of Rs. 7.60 crores. The part of the sale consideration was received vide cheque dated 19th Nov. 2007 and such part of sale consideration received was of Rs. 5.00 crores. The balance sale consideration of Rs. 2.60 crores was received by pay order dated 15-03-2008 at the time of registration of sale deed on 15-0302008.

2. The sale deed was registered by the Sub-Registrar after verification and satisfaction. The Sub-Registrar evaluated the value of land at Rs. 2,53,74,000/- based on the prevalent market rate / DLC rate

3. The assessee filed the return of income on 29th Sept. 2008 and disclosed the Long term capital gain on sale of agricultural land. The detailed reply dated 29-09-2010 by assessee was filed on 4-10-2010 and in this reply the assessee denied the receipt of an amount of Rs. 4.07 crores in cash from Shri Ravinder Singh Thakkar/ M/s. Milestone Dwellers (P) Ltd. Attention was drawn towards Section 50C of the Income Tax Act and it was stated that sale consideration was Rs. 7.60 crores as against the value evaluated by the stamp authority at Rs. 2.53 crores .

4. The loose pages which were confronted to the assessee were explained as fund flow statement and position of funds as on 21-12-2008. Reference has been made to pages 50 to 52 of the of Annexure 'A' of page no. 78 of Annexure A on the basis of loose sheet. Shri Ravinder Singh Thakkar was required to explain the source of 5.65 crores . In his reply, he admitted the difference of Rs. 6.65 crores on account of investment and expenditure. In respect of source of expenditure, it was stated that sale consideration is out of books received by cash in respect of different projects. It was submitted before the ld. CIT(A) that DDIT did not call for

further material or details to verify about credence and correctness of the statement.

5. The assessee filed the details of different sale deeds of land situated in village Mahapura and none of the land was sold below Rs. 1.00 crore per bigha. The assessee has sold 1.18 hectare of land for Rs. 7.60 crores

6. The AO without providing the supporting material, inspection record and cross examination made the addition of Rs.4.07 crores and such action of the AO was in haste and was in violation of principle of natural justice.

7. There is no evidence of receipt of on money. The Sub-Registrar is the competent authority to value the property for the purpose of assessment of stamp duty and the value as shown by the assessee was accepted.

8. The value as shown in the registered sale deed should be accepted as sale consideration and for this proposition, the ld. AR relied upon Section 50C of the Act and also relied upon the decision of the Hon'ble Bombay High Court in the case of CIT Vs. Dr V.K. Bhaskaran Nair and another (1979) 116 ITR 873

2.5 Before the ld. CIT(A) the assessee relied on the following decisions:-

1) Parimisetti Seetharamamma vs. CIT (1965) 57 ITR 532 (SC)

2) Umacharan Shaw and Bros. vs CIT (1959) 37 ITR 271(SC)

3) Mangilal Agarwal vs ACIT (2008) 3000 ITR 372 (Raj High Court)

4) CIT vs. Anupam Kappor (2008) 299 ITR 179 (Punjab & Haryana High Court)

5) Dhakeshwari Cotton Mills vs CIT (1954) 26 ITR 775(SC)

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

2.6 The AO has tried to support the addition on the basis of statement at page 78. The onus was on the revenue to establish that such amount was received and was in the nature of income.

2.7 The revenue has failed to provide the mode of receipt by the assessee, the manner of receipt by the assessee , the date of receipt by the assessee and the evidence for its receipt by the assessee. Attention was drawn to Section 69A of the Act. This Section provides that the assessee is required to explain the source in case the assessee is found to be owner of money, bullion, jewellery etc. not recorded in the books of account. The legislature in its wisdom has put the burden on the revenue to first establish that the assessee is the owner of any money, bullion or jewellery.

2.8 The opportunity of cross examination was not provided to the assessee. The story of the 'on money' payment has been concocted by Ravinder Singh Thakkar in order to blackmail and pressurize the assessee. The relations became constrained immediately after execution of the sale deed and handing over the possession. Ravinder Singh Thakkar wanted that balance of the land be also sold and on the old terms though the assessee was not agreeable. The assessee was threatened of dire consequence and also was informed of close contacts of Thakkar family with the ruling party. The so called 'on money' payment is afterthought and manipulation on the part of Ravinder Singh Thakkar with malice and malafides.

2.9 The assessee has shown the capital gain on the entire sale consideration though she could have easily evaded the payment of tax by showing the sale of land at DLC rate i.e. the rate at which land could have been valued for stamp duty purposes. The revenue has not been able to point any other comparable case of sale.

2.10 It was further submitted that M/s. Milestone Dwellers (P) Ltd. has not taken the benefit of any such payment in computing the cost in books of accounts. The so called 'fund flow statements' of the said project is after the material date and therefore, cannot be believed..

2.11 Shri Ravinder Singh Thakkar in his statement has nowhere categorically stated that the amount has been paid in cash to the assessee as 'on money' in lieu of buying the said land of the assessee at Mahapura

2.12 Shri Ravinder Singh Thakkar received the cash payment from the sales made in different projects in order to siphon such amount. Shri Ravinder Singh Thakkar concocted the storey of its payment and expenditure on conversion and consruction

2.13 From this statement, it appears that the amount has been surrendered as undisclosed income of Shri Ravinder Singh Thakkar in individual capacity. It is not known who has disclosed the impugned amount as his income whether Shri Ravinder Singh Thakkar in his individual capacity or the purchaser money. If the source was out of the sale consideration outside the books from various projects then it would be assessable in the hands of the relevant projects and its owners. Mere surrender made by M/s. Unique Group while filing their return of income is of no consequence. . There may be 101 hidden reasons for the so called surrender and its honouring by the M/s. Unique Group.

2.14 Shri Ravinder Singh Thakkar has stated that source is 'on money' and profit earned in cash. Thus he has taken the advantage of set off / telescoping and in turn no real tax has indeed been paid by Shri Ravinder Singh Thakkar.

2.15 In this case, the AO has relied on the statement of Shri Ravinder Singh Thakkar while statement of Shri Ravinder Singh Thakkar was not accepted by the AO in thecase of Smt. Vijay Laxmi Dhadda and Shri Padam Chand Dhadda.

2.16 The assessee in her statement recorded on oath on 25-02-2009 and 02-03-2009 has stated that land has been sold at Rs. 1.50 crores per bigha to the company through Shri Vishal Jain, Broker. She clearly stated on oath that she has not received payment of Rs. 2.50 crores.

2.17 The ld. CIT(A) after considering the submissions of the assessee held as under:-

> ''7. I have considered the submission of ld. A.R. and have perused the material on record. It is undisputed that the appellant has sold a piece of land admeasuring 4.67 bigha to the company M/s. Milestone Dwellers Pvt. Ltd. (referred as MDPL), in which members of Unique group of the builder have substantial stake. The apparent sale consideration this land as per the sale deed, was Rs. 7.60 crore. Meanwhile search nd seizure operation was carried out in the Unique group of cases and various incriminating documents were seized, which inter-alia included page 78 of exhibit 24 of Ann. A (hereafter referred as A-24/78). The scanned image of this page is available on page 6 of the assessment order. For ready reference the relevant portion is reproduced below:-

Position of Funds as on 22.12.2008 & REquirement

	Total Amount	Bank	Cash
Cost of Land	1167.00	760.00	407.00
Registration Exp.	33.20	33.20	
Brokerage	7.50	7.50	
Common Boundary	1.65	1.65	
Total Cost of Land	1209.35	802.35	407.00
Conversion Exp. (Liason)	108.00		108.00

Expenses incurred till date			
Construction Expenses	200.19	150.1`9	50.00
Sales & Mktg. Exp.	18.81	18.81	
Salary to Staff	13.85	13.85	
Indirect Expenses	16.08	16.08	
Fixed Assets	22.34	22.34	
Less: Outstanding Liabilities	- 1.35	- 1.35	
	269.92	219.92	
Deposits & aDvance	22.82	22.82	
Total Expenses Incurred So Far	1610.09	1045.09	565.00

From perusal of the aforesaid document, it is seen that it shows details of expenditure about some project and more particularly the expenditure/investment made in the project till 22.12.08. The cost of land under the bank column is mentioned as '760.00' and considering that such details are prepared by writing the amount in the units of 'lakh', obviously the cost of land is Rs. 760 lakhs under the bank column. The fact that figures have been written in units of 'lakh' is evident from amount of registration expenses incurred which is Rs. 32,94,660/- + Rs. 25,000/- (which can be rounded off to Rs. 33.20 lakhs) and is written as "33.20". Simultaneously, it is seen that the appellant has sold land to M/s MDPL for apparent consideration of Rs. 7.60 crore. According, it is quite evident from this document itself that it is reflecting the expenditure incurred by the Unique group on the project coming up on the land sold by the appellant to M/s. MDPL of Unique group. Immediately below the cost of land, the registration expenses, brokerage expenses and common boundary expenses are also mentioned and under the bank column respective figures of the expenses under these heads are shown. Against the head 'cost of land', apart from the figure of '760.00' under the 'bank' column, figure of '407.00' under the 'cash' column is also mentioned as well as total cost of land is mentioned as '1167.00'. These details amply prove that apart from making payment of Rs. 760 lakhs through

cheque for purchase of impugned land, the directors/controlling person of M/s. MDPL have paid Rs. 407 lakhs in cash obviously as on-money. Hence this document is well self speaking and not a dumb document, as argued by the A.R. of the appellant. The argument of A.R. of name of Sunita Dhadda not mentioned on the page, is also irrelevant in view of above discussion.

7.1 This conclusion is further supported by the statement of Sh. Ravindra Singh Thakkar S/o Sh. Ajit Singh Thakkar (son and father, both being directors of the company) recorded on 29.1.09 during the course of search carried out in their group, wherein at question no. 23,he was confronted with page 75 to 78 of Annexure A-24 having position of fund as well as page 50 to 52 of A-24 having details of assets and liabilities of M/s MDPL as on 31.12.08. After going through these papers Sh. Ravinder Thakkar admitted that the group has incurred on-money expenditure of Rs. 4,07,00,000/- for purchase of land which is paid in cash. He has also stated about the other expenditure incurred in cash on construction and other item totaling to Rs. 5,65,00,000/- (including above referred Rs. 4.07 crore). He has also admitted that this amount is not recorded in the books of accounts of M/s MDPL or other entity of the group.

7.2 The statement of Sh. Ravindra Thakkar further clinches the issue that Rs.4.07 crore have been paid by the directors of M/s MDPL in cash over and above Rs. 7.60 crore paid through cheque for purchase of impugned land from the appellant. Appellant has undisputedly admitted to have received Rs. 7.60 crore through cheque which has also been shown in the sale deed and expectedly denied to have received Rs. 4.07 crore in cash.

7.3 Coming to the arguments of the natural justice and the opportunity taken by the appellant, as per the appellant, the copy of full statement of Sh. Ravindra Singh Thakkar was not given. Copy of fund flow statement on page 52 to 54 of Ann. A-24 not provided. It is seen by the undersigned and A.R. was also fair enough to accept that the copy of the relevant portion of the statement of Sh.Ravindra Singh Thakkar dated 29.1.09 particularly the question no. 23 and his answer to the question, which has been used as supporting evidence in the case of appellant, was supplied to this appellant during the assessment proceeding. Similarly, copy of page 78 of exhibit A-24, which has been used against the appellant for making aforesaid addition was also supplied. Thus it is quite evident that reasonable opportunity has been given to the appellant wherein the copies of the evidence used against her were given. It may be mentioned that the complete statement of Sh. Ravindra Singh Thakkar will obviously have numerous details about business affairs of their group which being personal for the group can not be disclosed to other parties. Moreover all the complete details of business of Unique group are otherwise also not relevant and has also not been used against the appellant and therefore not required to be supplied to the appellant. Similarly page 52 to 54 having details of assets and liability of M/s MDPL had also not been used against the appellant and would obviously contain the details of business affairs of M/s MDPL, which is also not required to be given to the appellant. Making such request will be extending the concept of natural justice too far which is not envisaged by the Hon'ble Courts.

7.4 Now coming to the example of DLC rates given by the appellant, firstly it is to mention that copy of registered sale deed of Smt. Mangli Devi being so furnished for comparison by the appellant, is considered by the undersigned. On perusal of this sale deed of Smt. Mangli Devi, it is seen that the said land is about 200 meter (i.e. about 656 feet away) from Jaipur Ajmer Road Highway, whereas the land of the appellant is just adjoining (rather touching) Jaipur-Ajmer Highway, and in fact the north side of the land so sold is surrounded by Jaipur-Ajmer Road as is clearly mentioned in the first schedule attached with the registered sale deed of the impugned land dated 15.3.08. Secondly, the other copy of the sale deed by Smt. Premlata Bansal to M/s. Salasar Overseas Pvt. Ltd. is regarding the agricultural land which is not at all on the Jaipur-Ajmer Highway but is on small road going from village Mahapura to village Newta and thus is not at all comparable.

Without prejudice to above, it is seen that when there is document proving payment of on-money in cash by the purchaser against sale of the land for the project to be developed by the purchaser, and thereby consequent receipt of money by the appellant unaccountedly which is further supported by the statement of Sh. Ravindra Kumar Thakkar of M/s MDPL (The purchaser) averring incurring of expenses by way of on-money paid in cash for purchase of impugned land, such direct evidences will obviously override these sales instances of the claimed nearby lands (though they are not nearby land as mentioned above).

7.5 The another argument taken by the appellant regarding provision of section 50C being not applicable as the DLC rate was found lower than the apparent consideration shown in the registered sale deed is of no relevance because the A.O. has not made addition by invoking the provision of section 50C but has made addition of unaccounted on-money consideration received on sale of impugned land. The other argument of the appellant that A.O. has squarely failed to give details of subsequent investment by the appellant of the claimed receipt of on-money, is also rejected as A.O. has made addition of uncounted receipt on sale of impugned land on the basis of written as well as oral evidences and A.O. is not required to substantiated his finding by unearthing subsequent investment, if any, so made by the appellant.

7.6 The other argument is that purchaser of the land is M/s MDPL not Shri Ravindra Singh or Unique group. The A.O. has not spelt out as to what is Unique group. On being asked by the undersigned, the A.O. has informed that Sh. Ajit Pal Singh and Ravindra Singh are the directors in M/s Milestone Dwellers Pvt. Ltd. Moreover it is a known fact in the common parlance, the various concerns of Sh. Ravindra Singh and Sh. Ajit Pal Singh including M/s MDPL and other concerns are collectively known as 'Unique group'.

7.7 The other argument of the appellant that in the statement Sh. Ravindra Singh Thakkar has not stated as to on which date, to whom and before whom the alleged amount of Rs. 4.07 crore was paid in cash to the appellant has been considered by me. The argument is having no force, as obviously the cash

amount would be given before the execution of the sale deed and it has to be given to the seller of the land, namely the appellant. It need not be given in the presence of someone else.

7.8 The other argument was that surrender made by the member of the Unique group while filing their return of income is of no consequence and there may be 101 hidden reasons for the same, has been considered by me. Firstly, as far as surrender of unaccounted income is concerned, no purchaser is going to make the surrender, if he has not entered into unaccounted transaction by payment of on-money. Secondly, Sh. Ravindra Singh Thakkar in the statement has very categorically stated that for purchase of impugned land payment of Rs. 4.07 crore was made in cash (apart from 7.60 crore made through cheque), then assumption of the A.R. that there may be 101 reasons for the so-called surrender is far fetched and frivolous. Further as regards date of cash flow statement being 22.12.08, being after 15.3.08 i.e. date of registration is concerned, from careful perusal of the details mentioned on impugned document i.e. A-24/78, it is seen that though the heading indicate 'the position of fund as on 22.12.08' but the details mentioned below clearly show the broad expenditure incurred in purchase of land and thereafter in the construction till 22.12.08. Obviously, as against the heading 'cost of land' under the column 'bank' and 'cash', figures of '760.00' and '407.00' are written apart from figure under the column total amount as '1167.00', it evidently provides that apart from Rs. 760 lakhs, the purchaser group has paid Rs. 407 lakhs in cash to the seller of the land at the time of purchase of land. Therefore the argument of the A.R. of the date being different is rejected.

7.9 Now coming to the decision cited by the A.R. of the appellant, in the case of Parimisetti Seetharamamma vs. CIT (1965) 57 ITR 532 the Hon'ble Supreme Court has held that in cases where receipt is sought to be taxed as income, the burden lies on the department to prove that it is within taxing provision. Facts of this case were different. Even otherwise, it is clear from the aforesaid discussion, that the A.O. has discharged its burden of proving that the aforesaid unaccounted payment so received are taxable.

7.10 Another case referred was of Umacharan Shaw and Bros. vs CIT (1959) 37 ITR 271 wherein Hon'ble Supreme Court has held that suspicion however strong cannot take the place of the material or evidence. I also rely on the same judgment referred by ld. A.R. In the instant case of the appellant, it is seen that addition has not been made by the A.O. merely on the suspicion. The additions have been made on the basis of written as well as oral evidences.

7.11 The facts in the case of CIT vs. Anupam Kappor (2008) 299 ITR 179 (P&H) are different wherein there was no material before that A.O. to prove that the cash equivalent to the cheque amount was given. However in the instant case of the appellant, there is clear evidence. The facts of reported case of Mangilal Agarwal vs. ACIT (2008) 3000 ITR 372 decided by Hon'ble Rajasthan High Court are quite different then that of appellant. The decision in the case of Lal Chand Bhagat Ambica Ram vs. CIT (1959) 37 ITR 288 (SC) is also not applicable as facts of this reported case are quite different. Similarly other cases

referred by the ld. A.R. of the appellant are distinguishable on facts.

7.12 In view of facts and circumstances and the documentary as well as the oral evidence, it is held that the appellant has received Rs. 4.07 crore as on-money in cash for sale of impugned land apart from apparent consideration of Rs. 7.60 crore received through cheque and A.O. was justified in making addition of Rs. 4.07 crore to the income of the appellant.

7.13 However, I agree with the alternative submission of the A.R. of the appellant that the said income of Rs. 4.07 crore so upheld to have been received as on-money on sale of impugned land, then as the amount has been upheld to be received on account of sale of land on which capital gain is chargeable. Accordingly, instead of taxing the on-money received separately under the head income from other sources it will be reasonable and fair to consider it as unaccounted addition sale proceeds received and to work out the capital gain accordingly.''

2.18 Before us, the ld. AR has filed the written submission alongwith the paper book containing 147 pages. We are reproducing the written submission though most of the submissions are the same which have been raised before the ld. CIT(A) and have been considered by him.

''2.1 The ld. Assessing Officer in his assessment order at Pg 2 claims to have sent a letter dated 03.12.2010 but it was not received by the appellant. However, the appellant received a letter dated 16.12.2010 for 20.12.2010. With this letter too copy of the alleged statement of Shri

Ravinder Singh Thakkar was not provided. A reply dated 20.12.2010 was submitted. PB 49-51. There upon copy of part of the alleged statement of Shri Ravinder Singh Thakkar dated 29.01.2009 was provided, giving only questions No. 23 & 24 and its reply. (PB 52-54)

3. The appellant submitted two detailed letters of explanations and objections dated 23.12.2010. These objections have been considered by the AO in his assessment order and mentioned by us in brief in this order and hence are not reproduced.

4. The ld. Assessing Officer without providing the supporting material, inspection of records and cross-examination, in haste and in violation of principles of natural justice arbitrarily, capriciously, mechanically made an addition of Rs. 4.07 Crores, after discussion in Para 4.

5. The replies filed before the ld. lower authorities is based on true and correct facts and not on conjectures and surmises. The moot issue as to the alleged payment has been thoroughly dealt and discussed with convincing reasoning. DLC rate (being the fair market value) has been given statutory recognition and is based on real facts and the day-to-day dealings. It is suitably revised from time to time based on cogent material. Value evaluated by the District Level Committee formed by the Government is considered as real, actual and proper index of the prevalent rates.

5.1 The story of the “on money” payment has been concocted by Shri Ravinder Singh Thakkar in order to blackmail and pressurize the appellant. Relations became constrained immediately after execution of the Sale Deed and handing over of possession. He wanted the balance of the land be also sold and on the old terms, to which the appellant was not agreeable and refused. He threatened of dire consequences and also stated of his close contacts with the ruling party. It is an after-thought and

manipulation on the part of Shri Ravinder Singh Thakkar with malice and malafides.

5.2 There is no material, worth credence found in the search, stating that "on money" was received by the appellant in connection with the impugned land. No copy of such seized document which clearly states that on-money was received in connection with the said land was provided to the assessee.

5.3 The ld. Assessing Officer has indulged in surmises and conjectures in stating **that in this type of business, the transaction invariably has cash/on-money component which is out of books.** If the inference is correct, where was the necessity to record sale consideration at Rs.7.60 Crores when the prevalent value evaluated by the competent authority was Rs. 2.53 Crores only? By further reducing the sale consideration from real amount of Rs.7.60 Crores, the appellant would have been a beneficiary and avoided the tax on capital gain but she never wanted to indulge in under statement and truly recorded the sale consideration. The assessee has already paid huge capital gains tax. The purchaser too would have paid lesser stamp duty and registration. Further the ld. Assessing Officer has utterly failed to find subsequent investment of the alleged on-money. Where the alleged on-money evaporated remains unexplained, though it is more than three years.

5.4 The understanding of the ld. lower authorities that section 50C only deals with those payments which have been shown in the books of account only is erroneous and highly misunderstood. Section 50C on the contrary substitutes the recorded value in the sale deed and does not talk of the books of account. The alleged 'on-money' was not received by the appellant and hence has not been reflected in her books regularly maintained and has also not been found to have been invested or spent.

Books have been accepted by the learned Assessing Officer. Section 50C is relevant and has been rightly relied upon.

5.5 The ld. lower authorities have utterly failed in finding any other transaction of similarly situated land at the alleged rate of Rs.2.50 Crores per bigha. When such rate was not fair market rate and was not prevalent on the material date, question of additional payment of Rs.4.07 Crores by cash does not arise. If the land would have been sold below the fair market rate, any inference could have been drawn. In-spite of the continual challenge given to the ld. Assessing Officer, he has utterly failed to find any transaction above Rs.1 Crore per hectare. He could not find even any transaction at Rs.1 Crore per bigha around that time or even later.

5.6 The ld. lower authorities have summarily and mechanically believed the statements of Shri Ravinder Singh Thakkar, which is in violation of principles of natural justice. As commented herein above page 78 of Exhibit-24 of annexure A, remains un-proved and the questions posed remain unattended, unsolved and unanswered. Copies of page 52-54 reflecting funds flow statement was not provided to the assessee. The ld. Assessing Officer utterly failed in providing the supporting material, as also not permitting inspection of the relevant record and cross-examination. It has been established beyond doubt that no credence was given by the purchaser company; M/s. Milestone Dwellers Pvt. Ltd. while computing cost in its books of account, which too have been audited and submitted before the ld. Assessing Officer. The so called 'fund flow statement' of the said project is after the material date has not been recognized and believed by the purchaser company and not recorded in its books. Further it has not been explained as to how and in what manner conversion related expenditure of Rs.1.08 Crores and construction expenses of Rs.50 lacs were incurred. No supporting material has been

produced or found. It is all manipulation and misstatement on the part of Mr. Ravindra Singh Thakkar, in his personal interest and for personal gain.

5.7 The appellant has not been provided with copy of the statement dated 28.01.2009. The appellant was provided only question Nos. 23 and 24 and its answers given on 29.01.2009.

5.8 In fact the observations of the ld. Assessing Officer is contrary to the statement of Shri Ravindra Singh Thakkar. In the said statement too Shri Ravindra Singh Thakkar has nowhere categorically stated that the impugned amount has been paid in cash to the appellant as "on-money" in lieu of buying the impugned land of the appellant at Mahapura.

5.9 It appears that 'out of book sales consideration' from various projects was received and siphoned by Mr. Ravindra Singh Thakkar and to pocket that amount he concocted the story of its payment and expenditure on conversion and construction. Further the cash flow statement as on 22.12.2008 is after 15.03.2008, the date of registration of the sale deed. The "position of funds as on 22.12.2008 and requirement" is even otherwise internal working unconnected with the appellant.

5.10 Mr. Ravindra Singh Thakkar has nowhere stated: as to on which date, to whom and before whom the alleged amount of Rs.4.07 Crores was paid by cash to the appellant. He has not produced any receipt or contemporary evidence. From the statement it appears that such amount was surrendered as undisclosed income of Shri Ravindra Singh Thakkar in individual capacity. It is not known as to who has disclosed the impugned amount as his income whether Shri Ravindra Singh Thakkar in his individual capacity or the purchaser company. If the source was out of

book sales consideration from various projects, then it would be assessable in the hands of the relevant projects and its owners.

5.11 We submit mere surrender having been made by the "Unique Group" while filing their return of income is of no consequence. There may be 101 hidden reasons for the so called surrender and its honouring by the Unique Group**.** It is also not known and not clearly stated by the ld. Assessing Officer as to what is the status of the so called 'Unique Group'. The queries raised in the objections completely remain unsolved and unanswered in the impugned order. We submit the ld. Assessing Officer has avoided solving the real objections raised before him and has tried to by-pass the same by repeating his own version, unworthy of credence by a reasonable and un-interested person well versed in law.

5.12 On posing of question No. 24 Shri Ravindra Singh Thakkar has stated that the source is on-money and profit earned in cash. It is thus crystal clear that he has taken the advantage of set-off/telescoping and in turn no real tax has indeed been paid by Shri Ravindra Singh Thakkar. Tax; if any, has been paid by Mr. Ravindra Singh Thakkar and not by M/s. Milestone Dwellers Pvt. Ltd. as alleged by the ld. Assessing Officer.

5.13 The ld. Assessing Officer has mentioned that statement of Shri Ravindra Singh Thakkar should not be subjected to question mark. We are surprised at the faith reposed by the ld. Assessing Officer who himself has rejected the statements given by the very same person in the case of Smt. Vijay Laxmi Dhadda / Padam Chand Dhadda.

5.13.1 Mere recording of statement after administering on oath cannot be mechanically, summarily and blindly believed to be true and

correct. The said statement is false and has been emphatically denied as true by the assessee appellant. Mr. Ravindra Singh Thakkar has definitely committed offence of perjury**.** Non-putting of questions, which are very relevant and appropriate by the ld. Deputy Director clearly creates suspicion and certain assurances and protection extended to Shri Ravindra Singh Thakkar. It is apparent that when Shri Ravindra Singh Thakkar was found indulging in out of book sales consideration and pocketing such amount, he concocted the story with malafides against the appellant. **As** explained earlier, mere surrender and payment of tax by 'Unique Group' does not imbibe confidence of such motivated and malafide surrender. In fact; the purchaser is M/s. Milestone Dwellers Pvt. Ltd. and not Shri Ravindra Singh Thakkar or "Unique Group" – what is Unique Group has not been spelt out by the ld. Assessing Officer. The so called facts made as a base for foundation of the addition are surmises, conjectures, assumptions, presumptions, suspicions on the part of the learned Assessing Officer and the action is arbitrary, capricious unreasonable, unfair and illegal; offending Article 14, 19 and 265 of the Constitution of India.

5.14 Statement of the assessee appellant were also recorded u/s.132(4)/131 of the Act on oath on 25.02.2009 and 02.03.2009 wherein she clearly and categorically stated that the impugned land has been sold at Rs.1.50 Crore per bigha to the company through Vishal Jain broker. She stated that entire sale consideration was received by cheques and no cash amount was received. She clearly stated on oath that she has not received payment at Rs.2.50 Crore per bigha and has not received any amount other than recorded in the registry.

5.15 The inference drawn by the ld. lower authorities on the basis of "position of funds as on 22.12.2008 and requirement" is erroneous, unbelievable and insufficient to make such a huge addition in

the hands of the appellant. It is rather no evidence. As submitted herein before the appellant was not provided relevant record as well as its inspection to verify and make further comment. The ld. Assessing Officer utterly failed in providing true and full copy of the alleged statement, the relevant record and to permit the cross examination so called for.

5.16 Furthermore the alleged Position of Funds has also been partly relied by the ld. lower authorities. Copy extracted by the ld. Assessing Officer and by the ld. CIT (A) in their orders is as follows:

Position of Funds as on 22-12-2008 & Requirement

	Total Amount	Bank	Cash
Cost of Land	1167.00	760.00	407.00
Registration Exp.	33.20	33.20	
Brokerage	7.50	7.50	
Common Boundary	1.65	1.65	
Total Cost of Land	1209.35	802.35	407.00
Conversion Exp. (Liason)	108.00		108.00
Expenses incurred till date			
Construction Expenses	200.19	150.19	50.00
Sales & Mktg. Exp.	18.81	18.81	
Salary to Staff	13.85	13.85	
Indirect Expenses	16.08	16.08	
Fixed Assets	22.34	22.34	
Less: Outstanding Liabilities	-1.35	-1.35	
	269.92	219.92	
Deposits & Advance	22.82	22.82	
Total Expenses Incurred So Far	1610.09	1045.09	565.00

Whereas the actual sheet is as follows **PB 54**:

Position of Funds as on 22-12-2008 & Requirement

	Total Amount	Bank	Cash
Cost of Land	1167.00	760.00	407.00
Registration Exp.	33.20	33.20	
Brokerage	7.50	7.50	
Common Boundary	1.65	1.65	
Total Cost of Land	**1209.35**	**802.35**	**407.00**
Conversion Exp. (Liason)	108.00		108.00
Expenses incurred till date			
Construction Expenses	200.19	150.19	50.00
Sales & Mktg. Exp.	18.81	18.81	
Salary to Staff	13.85	13.85	
Indirect Expenses	16.08	16.08	
Fixed Assets	22.34	22.34	
Less: Outstanding Liabilities	-1.35	-1.35	
	269.92	219.92	
Deposits & Advance	22.82	22.82	
Total Expenses Incurred So Far	**1610.09**	**1045.09**	**565.00**

	Total (100%)	Milestone (60%)	Ajit Group (40%)
Total Requirement	1610.09	966.05	644.04
Amount Received			
Share Capital	100.00	60.00	40.00
Debentures etc.	755.95	755.95	0.00
Debenture Interest (Payable)	5.64	5.64	0.00
Other Amount	242.39	205.00	37.39
Cash	565.00	0.00	565.00
Total Received	1668.98	1026.59	642.39
Surplus Fund Available	58.89	60.54	-1.65
Details of Available Funds			
Axis Bank	51.03		
HDFC Bank	5.10		
Cash in Hand	2.76	58.89	
Further Requirement			
As per List of Sandeep Gupta (Approx.)	280.00 (up to 18 Feb 2009)		
Misc. Exp.	10.00		
For Salary etc. (Dec & Jan)	6.00		
For Outstanding Liabilities	1.35	297.35	238.46

	Total	Milestone Share	Ajit Group Share
Requirement of Funds	297.35	178.41	118.94
Surplus Fund Available	-58.89	-60.54	1.65
Net Requirement of Funds	238.46	117.87	120.59

i) It is abundantly clear that Share of Milestone Group is shown @ 60% and Ajit Group is shown @ 40%.

ii) Ajit Group in order to extract more money from Milestone Group and justify its share of investment has inflated the alleged amount spent by it and shown it entirely under 'Cash'. Out of 642.39 shown under the head of Ajit Group it claims to have spent 565.00 in cash which is approx 88% and is highly doubtful. The figures appended in the above-mentioned sheet needs to be confirmed by M/s. Milestone Group which has not been done so – by the ld. lower authorities. It fortifies the argument of the assessee appellant that Rs. 407.00 lacs represent the justification of share of investment by Mr. Ravindra Singh Thakkar/ Unique Group in M/s. Milestone Dwellers Pvt. Ltd. without actual investment made by it and extract more money from Milestone Group.

iii) Further what is most surprising is the fact that entire Conversion Expenses (Liaison) to the extent of Rs. 108.00 lacs have been shown to have been incurred in Cash and not a single penny have been incurred in official charges. Such huge amount is highly unlikely for conversion. The figures appended in the above-mentioned sheet needs to be confirmed by M/s. Milestone Group which has not been done so – by the ld. lower authorities. It fortifies the argument of the assessee appellant that Rs. 108.00 lacs represent the justification of share of investment by Mr. Ravindra Singh Thakkar/ Unique Group in M/s. Milestone Dwellers Pvt. Ltd. without actual investment made by it.

iv) Further what is most surprising is the fact that Construction Expenses to the extent of Rs. 50.00 lacs have been shown to have been incurred in Cash and another Rs. 150.00 lacs by Bank. No detail of payment of such huge amount in cash is provided by the department. Incurring such huge expenses without obtaining 90B permission & approval of maps from JDA is highly doubtful, as one cannot start construction before obtaining 90B & approval of maps. Construction activity is barred over agricultural land without transfer of land use and approval of maps. The figures appended in the above-mentioned sheet needs to be confirmed by M/s. Milestone Group which has not been done so – by the ld. lower authorities. It fortifies the argument of the assessee appellant that Rs. 50.00 lacs represent the justification of share of investment by Mr. Ravindra Singh Thakkar/ Unique Group in M/s. Milestone Dwellers Pvt. Ltd. without actual investment made by it.

v) It is nothing but a dumb document as far as assessee appellant is concerned. There are many pitfalls and unanswered questions as mentioned earlier. It is no evidence.

6. It is submitted that the Sale Deed has been duly executed and registered and the contents of the said document have become final and unchallengeable. We submit there is no evidence that alleged "*on money*" of Rs. 4.07 Crores was paid by "Cash" to the assessee appellant. No receipt of Rs. 4.07 Crores allegedly received by the assessee was provided. There is no acceptable evidence that any amount over and above the recorded value was paid in actuality.

6.1 Section 54 of the Transfer of Property Act 1882 defines "sale" as a transfer of ownership in exchange for a price paid or promised or part paid and part promised. Such a transfer in the case of tangible immovable property of the value of 100 rupees and upwards, can be made only by a registered instrument. The word 'price' is used in its ordinary sense as meaning money only. It is used in the same sense as in sec. 77 of the Contract Act. The Supreme Court in *CIT vs. Motor & General Stores (P) Ltd.* reported in 66 ITR (1967) page 692 held that though 'price is not defined in the act, it is used in the same sense as in the Sale of Goods Act,1930 and means the money consideration for the sale of goods.

6.2 Sec.17 of the Indian Registration Act, 1908 lists the documents which are compulsorily registerable. Sale deed is compulsorily registerable u/s. 17(1)(b) of the Act. The Sale Deed was registered on 15.03.2008. Sec.34 of the said Act is in respect of enquiry before registration by Registration Officer. Detailed enquiry was conducted u/s. 34. Document has been registered after scrutiny, verification and satisfaction. Certificate of registration has been affixed u/s. 60 of the Act. In the present case independent valuation was arrived at by the Competent Authority and stated on the Deed.

6.3 The Indian Stamp Act, 1899 requires payment of stamp duty. In respect of sale, it is advolarem based on the sale consideration. The competent authority has to satisfy in respect of the value and to adjudicate as to proper stamp duty. In case of deficient stamp duty, the deed can be impounded. No action for any additional stamp duty on the alleged amount of Rs. 4.07 Crore has been initiated by the Competent Authority.

6.4 It is well settled proposition of law that the Sub-Registrar of assurances is a competent authority to value a property for the purpose of assessment of stamp duty as also for the purpose of charging the registration fees under the Indian Stamp Act and Indian Registration Act respectively. It is an independent authority having complete data of prevalent market rates.

6.5 The legislature in its wisdom has inserted sec. 50C of the Act with effect from 1st April, 2003. As per the said section, the full value of the consideration for the purposes of sec. 48 of the Income-tax Act shall be deemed as is assessed by the "Stamp valuation authority" for the purpose of payment of stamp duty. The legislature have reposed confidence in and have held for substitution of that value considering it as more realistic. We submit in the present case the value as computed by the stamp authority should prevail**.** We rely upon the decision of the Hon'ble Bombay High Court in *CIT v. Dr. V.K. Bhaskaran Nair and another* (1979) 116 ITR 873.

7. Sec.91 & 92 of the Indian Evidence Act, 1872 are extracted hereunder:

> 91. *Evidence of terms of contracts, grants and other dispositions of property reduced to form of document**.** – When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions herein-before contained.*

> 92. *Exclusion of evidence of oral agreement - When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying adding to or subtracting from, its terms.*

7.1 In view of the said sections, it is well settled proposition of law that sale consideration as recorded in the registered sale deed is conclusive and no other evidence can be adduced against such documentary evidence. The ld. Assessing Officer totally/utterly failed to adduce any evidence as to additional payment to the seller. In spite of the consistent claim of the appellant as to non-payment of any additional amount, the learned Assessing Officer failed to provide reliable supporting material and meet with the objections made and dealt hereinbefore.

7.2 *The Lahore High Court in Divansingh vs. Gurbachan Singh and others AIR 1932 Lahore 276 held* that *in case of a sale, other evidence of the transaction, than the deed itself is barred by the provisions of sec. 91, Evidence Act*.

7.3 *The Mysore High Court in Doddamallappa v. Gangappa AIR 1962 Mysore 44 held "When a sale deed has been executed and registered in respect of certain immovable properties, in a suit for possession by the vendee it is not open to the vendor to let in oral evidence to show that the terms of the contract between the parties were different or were at variance with the terms contained in the registered document*."

7.4 *The Kerala High Court in Leelamma Ambikakumari and another Vs. Narayanan Ramakrishnan AIR 1992 Kerala 115 at 119 held:*

> "*Section 91 and 92 of the evidence act is a complete bar for any party to set up a case that the consideration for sale is morel than what is mentioned in the conveyance or in the contract. In the present case the plaintiff has no case that the consideration mentioned in the document was not paid, or that there was any failure of consideration or that the consideration agreed to between the parties was of a different kind than what was mentioned in the document. The definite case of the plaintiff is that the real consideration for the sale was Rs.16,000/- where as the conveyance shows the consideration to be Rs.10,000/-. In view of the provisions contained in sec.91 and 92 of the Evidence Act, the plaintiff is not entitled to plead such a case, nor he is entitled to adduce evidence in support of the same*."

7.5 *The Hon'ble Supreme Court in M/s. Febril Gasosa vs. Labour Commissioner and others AIR 1997 (S.C.) 954 at 958 has held – A written settlement arrived at between the parties could not, therefore, be varied or modified except by a written settlement or by a written memorandum duly signed by the parties incorporating the terms of the so-called understanding. Sec.92 of the Indian Evidence Act, 1872 also lays down that when the terms of any contract, grant or settlement, as are required by law to be reduced to the form of a document, have been proved as per the provisions of sec.91 of the Evidence Act, no evidence of any oral agreement or settlement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting varying adding to or subtracting from its terms.*"

7.6 The Punjab & Haryana High Court in *Paramjit Singh v. Income Tax Officer* (2010) 323-ITR-588 at 591 observed: "*There is well*

known principle that no oral evidence is admissible once the document contains all the terms and conditions. Sections 91 and 92 of the Indian Evidence Act, 1872 (for brevity "the 1872 Act") incorporate the aforesaid principle. According to section 91 of the Act when terms of contracts, grants or other dispositions of property have been reduced to the form of documents then no evidence is permissible to be given in proof of any such terms of such grant or disposition of the property except the document itself or the secondary evidence thereof. According to section 92 of the 1872 Act once the document is tendered in evidence and proved as per the requirements of section 91 then no evidence of any oral agreement or statement would be admissible as between the parties to any such instrument for the purposes of contradicting varying, adding to or subtracting from its terms. According to illustration 'b' to section 92 if there is absolute agreement in writing between the parties where one has to pay the other a principal sum by a specified date then the oral agreement that the money was not to be paid till the specified date cannot be proved. Therefore, it follows that no oral agreement contradicting / varying the terms of a document could be offered. Once the aforesaid principle is clear then the ostensible sale consideration disclosed in the sale deed dated September 24, 2002 (A-7) has to be accepted and it cannot be contradicted by adducing any oral evidence."

In the above-said case payment of sale consideration of Rs. 24,65,000/- was recorded. It was pleaded that sale consideration was not paid and affidavit of the vendor was filed, but was rejected being a self-serving document. It was observed that the consideration reflected in the Sale Deed, accepted by the Registering Authority, is relevant and must prevail. It also observed that the argument of the assessee is absurdly wrong argument for which no credence should be given and the Assessing Officer has no right to vary the terms of the contract between the parties

and in the same way, the assessee has no right to change the contents of the sale deed, which are already executed and reached finally. (Page 591)

7.7 Hyderabad Bench of ITAT in *Smt. K.Narasamma vs. ITO* (1990) 32 ITD 494 held: "*any evidence stood precluded by virtue of provisions of sections 91 and 92 of the Indian Evidence Act, 1872, according to which, when the terms of any disposition of property, etc., have been reduced to the form of a document, no evidence shall be given in proof of the terms of such disposition of property except the document itself. This being the position, on facts and in law, no weight could be given to the statement of B to prove that an amount of Rs. 3.5 lakhs and not Rs. 3 lakhs passed on from B to the assessee as sale consideration*.

7.8 We may further mention that the learned lower authorities have "*not proved*" his claim and has also not been able to "*disprove*" the claim of the appellant. Section 3 of the Indian Evidence Act, 1872 is interpretation clause. We are extracting here under the sense in which the expression "proved", "disproved" and "not proved" have to be understood:

"PROVED**"**: A fact is said to be proved when after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

"DISPROVED": A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

"NOT PROVED": A fact is said not to be proved when it is neither proved nor disproved.

On the question of the standard of proof, there is but one rule of evidence which in India applies to both civil and criminal trials and what is contained in the definition of "proved" and "disproved" in Sec.3 of the Evidence Act. The test in each case is, would a prudent man after considering the matters before him deemed the fact in issue "proved" or "disproved".

8.1 It is well settled proposition of law that the court should safeguard itself against the danger of basing its conclusions on suspicions, howsoever strong they may be. It is equally well settled that the courts decision must rest not upon suspicion but upon legal grounds established by legal testimony. Mere suspicion, however strong, cannot take the place of proof. We rely upon *State vs. Gulzari Lal Tandon* AIR 1979 S.C. 1382 and *J.A. Naidu vs. State of Maharashtra* AIR 1979 S.C. 1537. We may further mention that the lower authorities failed to find even a single instance of sale during FY 2007-08 at Rs. 2.50 Crore per bigha as alleged by it.

8.2 The above stated principles of the Indian Evidence Act are equally applicable and have been applied with full force in Income-tax proceedings. The Hon'ble Supreme Court in *Chuharmal v/s. C.I.T.* (1988) 172-ITR-250 stated: "*what was meant by saying that the Evidence Act did not apply to proceedings under the Income-tax Act, 1961, was that the rigour of the rules of evidence contained in the evidence Act was not applicable; but that did not mean that when the taxing authorities were desirous of invoking the principles of the Evidence Act in proceedings before them, they were prevented from doing so*."

8.9 The ld. Assessing Officer on page 3 and onwards of the impugned order has tried to support the addition on above discussed statement and page 78 which is faulty and without jurisdiction. It is well settled proposition of law that when any addition is made by the Revenue by way of income, the burden to prove that such amount was received and was in the nature of income is on the Revenue. In the instant case, the ld. Assessing Officer has utterly failed to discharge his burden which heavily lied upon him. As far as the burden of appellant is concerned it was discharged by statements recorded under oath and otherwise.

9.1 In the case of the appellant, the Revenue has utterly failed to prove that the impugned amount of Rs. 4.07 Crore was received by the appellant during the assessment year in question from Shri Ravinder Singh Thakkar or anyone else**.**

9.1.1. The Hon'ble Supreme Court in *Parimisetti Seetharamamma v. CIT* (1965) 57-ITR-532 at 536-537 observed: '*By sections 3 and 4, the Indian Income-tax Act, 1922, imposes a general liability to tax upon all income. But the Act does not provide that whatever is received by a person must be regarded as income liable to tax. In all cases, in which a receipt is sought to be taxed as income, the burden lies upon the department to prove that it is within the taxing provision. Where however a receipt is of the nature of income, the burden of proving that it is not taxable, because it falls within an exemption provided by the Act, lies upon the assessee*'.

9.1.2 Similar view as to the burden of proof that the assessee has received extra payments rests on the Revenue has been reiterated in *Dr K. George Thomas v/c. CIT* (1985) 156 ITR 412 (S.C.) at 420.

9.1.3 Similar view has also been expressed in CBI vs. VC Shukla & Ors AIR 1998 SC 1406 wherein it was held: *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 sufficient degree of trustworthiness*. 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 44 by incorporating the words 'such statements shall not alone be sufficient to charge any person with liability'." (Para 34)

9.2 We submit that the Revenue has failed to provide its mode of receipt by the assessee, the manner of receipt by the assessee, the date of receipt by the assessee and the evidence for its receipt by the assessee. No receipt or acknowledgement of the appellant individual has been found or produced, though the ld. Assessing Officer states on Pg 2 but no such alleged receipt has been found, shown, produced or annexed.

9.3 The documents furnished by the ld. Assessing Officer cannot be admitted in evidence and therefore no addition in this regard can be sustained. It is settled law that suspicion, howsoever, strong cannot take the place of legal proof, as has been held by the Hon'ble Supreme Court in the case of Umacharan Shaw and Bros. v. CIT (1959) 37-ITR-271. Further reliance is placed upon:

- Krishnand vs. State of Madhya Pradesh: AIR 1977 SC 796
- Jayadayal Poddar vs. Mst. Bibi Hazra: AIR 1974 SC 171
- CIT vs. K Mahim Udma: 242 ITR 133 (Ker)
- Dhakeshwari Cotton Mills: 26 ITR 775 (SC)

- Omar Saha: 37 ITR 151 (SC)
- Jindal Saw: 118 TTJ 228 (Delhi)

9.4 The circumstances narrated by the learned Assessing Officer do not justify the ultimate inference drawn by him. The finding of the learned Assessing Officer based on the circumstances is perverse and is only a surmise or conjecture, which does not entitle a judicious quasi-judicial authority to make such a fanciful addition and create fictitious-imaginary tax demand.

9.5 The proposition that burden to prove while making any addition in the hands of an assessee is on the Revenue is well settled. The Legislatures in its wisdom, to make the said proposition explicitly, inserted section 69A by the Finance Act, 1964 with effect from 1.4.1964, putting the burden on the Revenue to prove that the assessee is owner of any money, bullion, jewellery, etc. not recorded in the books of account, if found to be the owner of such money, bullion, jewellery, etc. Once the assessee is found as the owner, the burden to explain its source is on the assessee else it shall be assessable as undisclosed income. The question of furnishing explanation would arise only when the Revenue proves beyond doubt that the money was paid to the appellant. In the present case nothing is there except the alleged statement which too does not mention the name of the appellant or payment for purchase of land of the appellant.

9.6 The Hon'ble Rajasthan High Court in the case of *Mangilal Agarwal v. Asstt. CIT* (2008) 300 ITR 372 after analyzing the provision contained u/s. 69A observed: '*Apparently the condition precedent for invoking section 69A is the finding that the assessee is found to be the owner of any bullion, jewellery or other valuable articles. No presumption of ownership has been raised statutorily in favour of the Revenue and against the assessee, nor is there any warrant to invoke section 69A merely on the basis of the*

assessee's possession. On his disclaimer that such articles found in his possession do not belong to him, the burden lies on the Revenue to establish the ownership of the assessee before raising any presumption against him'. The Hon'ble Court referred to the decision of the Supreme Court in CIT v/s. Daulat Ram Rawatmaull (1973) 87 ITR 349 thus: "*It was a case in which a sum of Rs. 5 lakhs standing in the name of B was sought to be assessed in the hands of the assessee-firm as belonging to it. The Assessing Officer has found that the said Rs. 5 lakhs stood deposited in the name of B, did not belong to B and found that it is belonging to the assessee-firm and assessed as income from undisclosed sources of the assessee. However, the Commissioner of Income-tax (Appeals) had set aside the said additions and up to the Tribunal, the finding was affirmed. On a reference being submitted to the High Court in terms of directions issued under section 66(2) of the Indian Income Tax Act,1992, the High Court set aside the additions made on account of undisclosed income in relation to the said amount. On appeal, affirmed the judgment of the High Court, the Supreme Court said (head-note). "That the question was not whether the amount of Rs. 5 lakhs belonged to B, but whether it belonged to the respondent-firm. The fact that B had not been able to give a satisfactory explanation regarding the source of Rs. 5 lakhs would not be decisive even of the matter as to whether B was or was not the owner of that amount. A person could still be held to be the owner of a sum of money even though the explanation furnished by him regarding the source of that money was found to be not correct. From the simple fact that the explanation regarding the source of money furnished by X, in whose name the money was lying in deposit, had been found to be false, it would be a remote and farfetched conclusion to hold that the money belonged to Y. There would be in such a case no direct nexus between the facts found and the conclusions drawn therefrom.*"

9.7 In the present case the real question before the ld. Assessing Officer was whether the sum of Rs. 4.07 Crores was paid by Shri Ravinder

Singh Thakkar by "cash" to the appellant in person and on which date and what is the evidence for the payment. We submit noting as provided on page 78 and statement is not sufficient and adequate evidence. It is a dumb document. Even the name of the assessee does not appear. There are many pit-falls and unanswered questions noted earlier. It is no evidence.

9.7.1 On perusal of the alleged statements of Shri Ravindra Singh Thakkar (though it does not have any evidentiary value) even it does not spell the name of the appellant at all, further it does not mention even payment of money to the extent of Rs. 4.07 Crores of land of the assessee by him/them. Even Shri Ravindra Singh Thakkar does not say as to how and in what manner huge amount of Rs. 4.07 Crores was paid. A person making such huge payment of Rs. 4.07 Crores will certainly obtain a receipt but no receipt has been produced/placed/found in the possession of Shri Ravindra Singh Thakkar/ Unique Group/Milestone Group in the search proceedings – if found – has not been produced/placed for perusal of anyone.

9.7.2 Even the alleged page 78 does not mention at all the name of appellant or even the payment for purchase of land from the appellant. How any adverse inference can be drawn when neither the alleged "statements" of Shri Ravindra Singh Thakkar prove anything or the noting "on page 78". Can reliance on the alleged statement be placed when name of the appellant does not figure anywhere? So far Right to cross-examination has not been allowed or denied – can a huge addition of Rs. 4.07 Crores be made on such a dumb document which even otherwise doesn't mentioned the name of the appellant or even payment of "on money" on the land purchased from the appellant. Who says that the payment of Rs. 4.07 Crores has been made to the appellant? In whose presence? When, Where & How? One who makes huge payment of Rs. 4.07 Crores will certainly remember as to whom paid, when paid & how paid. In the instant case nothing is forthcoming from anyone – neither Shri

Ravindra Singh Thakkar / Milestone Dwellers Pvt. Ltd. / Unique Group / Shri Ajit Singh nor even by the ld. lower authorities.

9.7.3 As stated earlier – to extract/get more money from the promoters of "Milestone Group/Milestone Dwellers Pvt. Ltd." which is based in Mumbai some inflated figures were created in internal papers of Shri Ravindra Singh Thakkar/Unique Group so that Unique Group need not have invested amount to the extent of Rs. 4.07 Crores or Rs. 5.65 Crores. Shri Ravindra Singh Thakkar has even allegedly stated the money was from "various projects" but does not spell investment in the land purchased from the appellant.

9.8 The Punjab & Haryana High Court in *CIT v/s. Anupam Kapoor* (2008) 299 ITR 179 did not believe on the allegation: "*A cheque had been taken by the beneficiary i.e. by paying cash equivalent to the cheque amount and the premium thereon*". The Hon'ble Court at page 182 observed: *There was no material before the Assessing Officer, which could have led to a conclusion that the transaction was, simpliciter a device to camouflage activities, to defraud the Revenue. No such presumption could be drawn by the Assessing Officer, merely on surmises and conjectures"*. The Income Tax Appellate Tribunal rightly relied on *C. Vasantlal and Co. v. CIT* (1962) 45-ITR-206 (SC); *M.O. Thomakutty v. CIT* (1958) 34-ITR-501 (Ker.) and *Mukand Singh and Sons v. Presiding Officer*, Sales Tax Tribunal (1997) 107-STC-300 (P&H). It also took support from the binding precedents observing: *The Income Tax Appellate Tribunal also took into consideration that it was only on the basis of a presumption that the Assessing Officer concluded that the assessee had paid "cash" and purchased the cheque*.

9.9 The Hon'ble Supreme Court in *Dhakeshwari Cotton Mills v. C.I.T.* (1954) 26-ITR-775 at 782 observed: "*As regards the second contention, we are in entire agreement with the learned Solicitor-General*

when he says that the Income Tax Officer is not fettered by technical rules of evidence and pleadings, and that he is entitled to act on material which may not be accepted as evidence in a court of law, but there the agreement ends; because it is equally clear that in making the assessment under sub-section (3) of Section 23 of the Act, the Income Tax Officer is not entitled to make a pure guess and make an assessment without reference to any evidence or any material at all. There must be something more than bare suspicion to support the assessment under Section 23(3). The rule of law on this subject has, in our opinion, been fairly and rightly stated by the Lahore High Court in the case of Seth Gurmukh Singh v. Commissioner of Income-tax, Punjab." (It is by bench of 5 judges and is being repeated in all the subsequent binding precedents).

9.10 The Hon'ble Supreme Court in *Lalchand Bhagat Ambica Ram v. C.I.T.* (1959) 37-ITR-288 did not approve of the addition when the circumstances relied on by the Income-tax Officer were matters of pure conjecture, suspicion and surmises: the notoriety for smuggling foodgrains was merely a background of suspicion and the appellant could not be held to have indulged in smuggling without any evidence; the cancellation of the foodgrain license and the prosecution of the appellant were of no consequence inasmuch as the license was restored and the appellant was acquitted of the offence with which it was charged; the mere possibility of the appellant earning considerable amounts in the account year was a matter of pure conjecture; and the fact that the appellant indulged in speculation did not legitimately lead to the inference that the profits in speculative transactions could exceed the value of the notes." It held that the Tribunal in arriving at its conclusion indulged in suspicions, conjectures and surmises and acted without any evidence or upon a view of the facts which could not reasonably be entertained : the facts found were such that no person acting judicially and properly instructed as to the relevant law could have found. After applying number of judgments of the Apex Court it held as follows: "*When a court of*

fact arrives at its decision by considering material which is irrelevant to the enquiry, or acts on material, partly relevant and partly irrelevant, and it is impossible to say to what extent the mind of the court was affected by the irrelevant material used by it in arriving at its decision, a question of law arises : whether the finding of the court of fact is not vitiated by reason of its having relied upon conjectures, surmises and suspicions not supported by any evidence on record or partly upon evidence and partly upon inadmissible material.

An assessment made without disclosing to the assessee the information supplied by the departmental representative and without giving any opportunity to the assessee to rebut the information so supplied and declining to take into consideration all materials which the assessee wants to produce in support of the case constitutes a violation of the fundamental rules of justice and calls for interference by the court.

It also held: "*Conclusions based on facts proved or admitted may be conclusions of fact but whether a particular inference can legitimately be drawn from such conclusions may be a question of law. Whether, however, the facts finding authority has acted without any evidence or upon a view of the facts which could not reasonably be entertained or the facts found are such that no person acting judicially and properly instructed as to the relevant law could have found; the court is entitled to interfere.*"

10. Opportunity of cross-examination not provided:

10.1 Principles of natural justice have an ancient ancestry. Law presumes that Man has an innate sense of goodness, of fairness, and of morality. Since certain principles are considered to be omnipresent in Nature, Man's conscience has been able to discover them. These principles are not part of the codified law, but they permeate the codified laws like ether. Two main principles

of natural justice are firstly "*nemo judix in causa sua*" or "*nemo debet esse judex in propria causa sua*" that is "*no man shall be a judge in his own cause*". The second rule is "*audi alteram partem*", that is, "*hear the other side*". A corollary has been deduced from the above two rules and particularly the audi alteram partem rule, namely "*qui aliquid statuerit, parte inaudita altera acquum licet dixerit, haud acquum fecerit*" that is, "*he who shall decide anything without the other side having been heard, although he may have said what is right, will not have done what is right*" or in other words, as it is now expressed, "*justice should not only be done but should manifestly be seen to be done*".

Till the beginning of 20th Century, the applicability of these principles was restricted to the judicial and quasi-judicial authorities. However, with the obscuring of the demarcation between the quasi-judicial and administrative functions, these principles were equally applied to the administrative functions. Thus, in the case of State of Orissa v Dr. (Mrs) Binapani Dei (AIR 1967 SC 1269), the Apex Court observed that "even an administrative order which involves civil consequences…must be made consistently with the rules of natural justice". In the case of Mohinder Singh Gill v Chief Election Commissioner, New Delhi [(1978) 1 SCC 405], while defining the term ''civil consequence'', the Hon'ble Supreme Court said, " 'Civil consequence' undoubtedly cover infraction of not merely property or personal rights but of civil liberties, material deprivations and nonpecuniary damages. In its comprehensive connotation, everything that affects a citizen in his civil life inflicts a civil consequence". The Apex Court has reiterated this view as in the case of S. L. Kapoor v Jagmohan & Ors [(1980) 4 SCC 379] and in Canara Bank & Ors. V Debasis Das & Ors [(2003) 4 SCC 557]

10.2 In the case of Sahara India (Firm), Lucknow v Commissioner of Income Tax, Central- I & Ano. [(2008) 14 SCC 151] the Apex Court underlined the aim of these principles when it held as: *The underlying principle of natural justice, evolved under the common law, is to check arbitrary exercise of power by*

the State or its functionaries. Therefore, the principle implies a duty to act fairly i.e. fair play in action. The aim of rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. They do not supplant the law but supplement it.

10.3 The Full Bench of Supreme Court in the case of State of Kerala vs. K.T. Shaduli Yusuff (1977) 39 STC 478 held as under "*One of the rules which constitutes a part of the principles of natural justice is the rule of audi alteram partum which requires that no man should be condemned unheard. It is indeed a requirement of the duty to act fairly, which lies on all judicial authorities, and this duty has been extended also the authorities holding administrative enquiries involving civil consequences or affecting rights of parties*".

10.4 The Hon'ble Supreme Court in Kishan Chand Chela Ram vs. CIT reported in (1980) 125 ITR 71**3** held that "*The department ought to have called upon the manager to produce the documents and papers on the basis of which he made the statements and confronted the assessee with those documents and papers. It was true that proceedings under the income-tax law were not governed by the strict rules of evidence, and, therefore, it might be said that even without calling the manager of the bank in evidence to prove the letter dated February 18, 1955, it could be taken into account as evidence. But before the income tax authorities could rely upon it, they were bound to produce it before the assessee so that the assessee could controvert the statements contained in it by asking for an opportunity to cross examine the manager of the bank with reference to the statements made by him*".

10.5 The Hon'ble Supreme Court in Kalra Glue Factory vs. Sales Tax Tribunal (1987) 167 ITR 498 set aside the order of the Tribunal as well as order in revision of High Court on the ground that *the statements of a partner of another*

firm upon which the Sales Tax Tribunal relied, had not been tested by cross examinations.

10.6 The Hon'ble Rajasthan High Court in CTO Vs. Haryana Dal Mill (1993) 90 STC 519 dismissed the departmental revision petitions on the ground that the *respondent not having been given opportunity to discredit the entries or cross examine the agent and the entries not having been proved nor the agent examined, the order of the Board of Revenue was justified*.

10.7 The Hon'ble Kerala High Court in P.S. Abdul Majeed Vs. Agricultural Income tax & Sales Tax Officer (1994) 209 ITR 821 in a writ petition by the Petitioner-Assessee held that *there were two inspections of the Petitioner's holdings on November 3, 1981, and on September 19, 1985, before and after the assessment year in question, when the inspecting authorities estimated the yield of cardamom from the petitioner's holdings at 180 Kgs. The order of reassessment was made without any reference to either of these inspection records but merely on the strength of the entries in the auctioneers' records. Reliance on the auctioneers' records and treating them as if they were conclusive did violence to the principles of natural justice. The petitioner had denied the sales in toto. He had also prayed for an opportunity to cross-examine the auctioneers. When such a request was made it was incumbent on the officer to afford opportunity to the assessee to cross-examine the authors of those books. The petitioner had been denied the reasonable opportunity which was due in law, in relation to the assessment, and that was sufficient to vitiate the order. The order of reassessment was not valid and was liable to be quashed*.

10.8 The Hon'ble Calcutta High Court in CIT Vs. Eastern Commercial Enterprises (1994) 210 ITR 103 held that "*Cross examination is the sine qua non of due process of taking evidence and no adverse inference can be drawn against a party unless the party is put on notice of the case made out against him. He must be supplied the contents of all such evidence, both oral and documentary, so*

that he can prepare to meet the case against him. This necessarily also postulates that he should cross examine the witness".

10.9 The Income-tax Appellate Tribunal, Hyderabad Bench in Mahaveer Transport Co. vs. ITO reported at (1987) Vol. 23 ITD 206 held "*further while finalizing the assessment even an opportunity to cross examine those lorry owners from whom the statements and sworn depositions were recorded was prayed for by the assessee. However, that request was not considered. It was against principles of natural justice and the statements of the lorry owners could not be used for any purpose whatsoever in as much as no fair opportunity was given to the assessee to cross-examine these witnesses*".

10.10 The Hon'ble ITAT, Delhi Bench in Sunil Agarwal vs. ACIT (2002) 82 ITD 1 held that *additions to income could not have been made by the AO without confronting the assessee with the statements of witness which were adverse to assessee.*

10.11 In Mahesh Gulab Raj Joshi vs. CIT (A) (2205) 95 ITR 300 (Mum) on the basis of statement recorded of one V during Survey conducted of his proprietary concern. The AO treated sale of diamonds by assessee to 'D' as fictitious and made addition u/s. 68 in hands of assessee. No opportunity of cross examining V having been allowed to the assessee, statement of V could not be relied upon or made basis of addition.

We submit and it is well settled that: on no account whatever should the learned Assessing Officer base its findings on suspicions, conjectures or surmises, nor should it act on no evidence at all or on improper rejection of material and relevant evidence or partly on evidence and partly on suspicions, conjectures and surmises. We request to ignore the findings solely based on the unproved documents.

11. The reliance placed by the ld. Assessing Officer on the decision of the Supreme Court in the case of *Sumati Dayal* reported in 214 ITR 801 is misplaced. In the said case Settlement Commission found the following facts:-

> (1) The lady moved an application before the Settlement Commission wherein she stated that she was agreeable to reasonable addition on a reasonable basis with regard to inadequate drawings for purchase of jackpot gifts, other expenses in connection with races and losses etc. The finding of the Settlement Commission in order to come to the conclusion that the apparent is not the real and that the appellant's claim about her winning in races is contrived and not genuine was based on the following reasons:
>
> *(i) The appellant's knowledge of racing is very meager;*
>
> *(ii) A Jackpot is a stake of five events in a single day and one can believe a regular and experienced punter clearing a Jackpot occasionally but the claim of the appellant to have won a number of Jackpots in three or four seasons not merely at one place but at three different centres, namely, Madras, Bangalore and Hyderabad appears, prime facie, to be wild and contrary to the statistical theories and experience of the frequencies and probabilities;*
>
> *(iii) The appellant's books do not show any drawings on race days or on the immediately preceding days for the purchase of Jackpot combination tickets, which entailed sizable amounts varying generally between Rs. 2,000/- and Rs. 3,000/-. The*

drawings recorded in the books cannot be co-related to the various racing events at which the appellant made the alleged winnings;

(iv) While the appellant's capital account was credited with the gross amounts of race winnings, there were no debits either for expenses and purchases of tickets or for losses; and

(v) In view of the exceptional luck claimed to have been enjoyed by the appellant, her loss of interest in races from 1972 assumes significance. Winnings in racing became liable to income tax from April 1, 1972 but one would not give up an activity yielding or likely to yield a large income merely because the income would suffer tax. The position would be different; however, if the claim of winnings in races was false and what were passed off as such winnings really represented the appellant's taxable income from some undisclosed sources.

(II) The Hon'ble Court commented on the approach of the Chairman of the Settlement Commission and approved of the majority opinion after considering surrounding circumstances and applying the test of human probabilities and rightly concluded that the appellant's claim about the amount being her winning from races is not genuine. It cannot be said that the explanation offered by the appellant in respect of the said amounts has been rejected unreasonably and that the finding that the said amounts are income of the appellant from other sources is not based on evidence.

We submit the ratio of the said decision does not support the Revenue but supports the appellant. The surrounding circumstances which were created in the course of the search with Shri Ravindra Singh Thakkar and applying the test of human probabilities the rightful

conclusion which should have been drawn would be that the explanation of payment and the other expenditure stated by Mr. Thakkar is not genuine. We submit the finding of the ld. Assessing Officer that the impugned amount of Rs.4.07 Crores is income of the appellant is not based on evidence but is contrary to the material on record and human probabilities.

12. The Hon'ble Supreme Court in Kishan Chand Chelaram vs. CIT (1980) 125 ITR 713 at 723 observed: "*The burden was on the revenue to show that the amount of Rs. 1,07,350/- said to have been remitted from Madras to Bombay belonged to the assessee and it was not enough for the revenue to show that the amount was remitted by Tilokchand, an employee of the assessee, to Nathirmal, another employee of the assessee*." It further observed that *the assessee cannot be expected to call for the specified persons in evidence for the purpose of helping the Revenue to discharge the burden which lay upon it*.

12.1 We submit that it was the burden of the ld. Assessing Officer to prove that the amount of Rs.4.07 Crores was paid by Shri Ravinder Singh Thakkar and was received by the appellant by way of sale consideration of the impugned land. We submit the material is totally absent for making addition in the hands of the appellant. The Revenue has utterly failed to discharge the burden heavily casted upon it**.**

13. In the light of the facts, submissions, contentions and the law analyzed herein above, it is most humbly and respectfully submitted that there is no material evidence on the basis of which the ld. Assessing Officer could legally come to the conclusion that the amount of Rs.4.07 Crores was paid by Shri Ravinder Singh Thakkar and was received by the appellant. The addition deserves to be deleted and be directed to be deleted.''

2.19 Before us, the ld. DR submitted that evidence filed during the course of search and the statement recorded on oath of Shri Ravinder Singh Thakkar clearly suggest that 'on money' has been passed in respect of purchase of land. The sale consideration as mentioned in the sale deed is shown in the position of fund as on 22-12-2008. The cost of land has been taken at Rs. 11.67 crores which included the consideration paid through bank and consideration of Rs. 4.07 crores paid in cash. It is not the case of the assessee that the expenses mentioned in such documents are incorrect. In respect of construction expenses, the ld. DR submitted that the group which purchased the land made construction. The expenditure must have been incurred even before getting the approval because for incurring the expenditure, the decision of the group in making investment is important. The group may incur the expenditure even not permitted by the Rules and Regulations. What we were considering is as per document of incurring expenses and the party who has incurred the expenses admitted it. At the time of search in the case of M/s. Unique Group, the statement of Shri Ravinder Singh Thakkar and his father were recorded on 29-01-2009 and were confronted with pages 75 to 78 of Annexure A-24 as well as pages 50 to 54 of Annexure A-24 having details of assets and liabilities of M/s. Milestone Dwellers Pvt. Ltd. as on 31-12-2008. Shri Ravinder Singh Thakkar admitted that group has incurred 'on money' expenditure. In the case of 'on money' payment, one has to rely on the circumstantial evidence. Since project was being managed by M/s. Milestone Dwellers Pvt. Ltd. of Shri Ajit Singh in the ratio of 60:40 and therefore, the payment, if any, made outside the books of accounts was kept recorded in the loose papers. The ld. DR drew our attention that the company M/s. Milestone Dwellers Pvt. Ltd. is a concern belonging to M/s. Unique Group. The ld. DR stated that evidence

should be evaluated on the basis of the human probability. For this purpose, the ld. DR relied on the decisions of Hon'ble Apex Court in the case of CIT Vs. Durga Prasad More , 82 ITR 540 and Sumit Dayal vs CIT, 214 ITR 801.

2.20 We have heard both the parties. The search in the case of M/s. Unique Group was conducted in the month of Jan. 2009. The loose papers found at the time of search were confronted to the persons in whose premises searches were made. The AO for the first time issued a letter dated 21-09-2010 vide which he sought information u/s 133(6) in the case of M/s. Milestone Dwellers Pvt. Ltd.. The assessee filed the rely vide letter dated 29th Sept. 2010 and copy of this letter is available at pages 35 to 37 of the paper book. Vide this letter, the assessee stated that she has never received the amount of Rs. 4.07 crores in cash. It was further submitted in the letter that she is not aware as to how Shri Ravinder Singh Thakkar, Director of M/s. Milestone Dwellers Pvt. Ltd. has stated to have paid a sum of Rs. 4.07 crores. She requested the AO to kindly provide the copy of the statement of Shri Ravinder Singh Thakkar and also requested to provide the cross examination of Shri Ravinder Singh Thakkar. Alongwith this letter, he submitted the copies of the bank account as desired. The AO during the course of assessment proceedings in the case of the assessee for the first time issued a letter dated 3-12-2010. The AO in his order has mentioned that in the letter dated 3rd Dec. 2010, the assessee was required to explain as to why a sum of Rs. 4.07 crores in respect of receipt of 'on money' be not added to her income for the assessment year 2008-09. In the written submission, the ld. AR submitted that the assessee received a letter dated 16-12-2010 and filed reply vide letter dated 20-12-2010. Vide this letter, the assessee informed the AO that she has not received letter dated 3-12-2010 and requested that copy of this letter alongwith

Annexures be provided to her. The assessee filed reply vide letter dated 23-12-2010 and copy of that letter alongwith Annexure is available at pages 55 to 79 of the paper book. This reply was filed after getting copy of letter dated 3-12-2010 alongwith Annexures. Vide this letter, AO was informed about the copies of the sale deed of lands situated in village Mahapura which showed that the land was not being sold about Rs. 1.00 crore per hectare. Vide this letter, it was stated that Shri Ravinder Singh Thakkar has made a huge windfall in getting the land without investing his share in M/s. Milestone Dwellers Pvt. Ltd.. He fabricated the document to show that he has put the cash from his side towards land purchase and towards liaison with the Govt. officials for giving land conversion and permission. The assessee required the AO to ascertain from the officials M/s. Milestone Dwellers Pvt. Ltd. as to whether any cash was paid. Vide this letter, the assessee made request that the copy of the entire statements should be given and an opportunity of cross examination of Shri Ravinder Singh Thakkar be given. M/s. Milestone Dwellers Pvt. Ltd. is a joint venture of Milestone Real Estate Fund and M/s. Unique Dream Builders Contribution in M/s. Milestone Real Estate Fund has been contributed by promimant people of India/ Mumbai for real estate investments. According to the assessee, Shri Ravinder Singh Thakkar in order to justify his share of investment from his side cooke a story of spending the cash so that he can get the maximum benefit without bringing his share of funds. Thus the assessee requested to cross examine Shri Ravinder Singh Thakkar, Shri Ajit Singh and employees of Milestone Real Estate Fund. The AO has passed the assessment order on 29-12-2010. The assessee vide letter dated 23-12-2010 requested the AO to allow her to examine Shri Ajit Singh, Ravinder Singh Thakkar and employees of M/s. Milestone Real Estate Fund before any adverse inference is taken. As

per principle of natural justice, it was obligatory on the part of the AO to have provided all the materials which were being used against her. In case the AO was relying on the statement of a person then the assessee will have to be given an opportunity to cross examine. Moreover, in case the AO wants to make reliance for making addition on the basis of the documents found during the course of search at 3rd party then presumption u/s 292C will not be available against the assessee. Such presumption, even in the case of the assessee in whose case the document has been found during the course search, is rebuttable. Reliance is placed on the decision of Hon'ble Jurisdictional High Court in the case of CIT Vs. S.M.S. Investment Corporation Ltd., 207 ITR 364. While recording the statement of Shri Ravinder Singh Thakkar at the time of raid, he was confronted with pages 75 to 78 of the paper and pages 50 to 52 of Annexure A-24. However, the AO in his order has mentioned only to the fund flow statements and copy of such fund flow statements was given to the assessee. In the statement, Shri Ravinder Singh Thakkar was asked to explain as to why the entry of Rs. 5.65 croes is not reflected in the assets and liabilities of M/s. Milestone Dwellers (P) Ltd. According to Shri Ravinder Singh Thakkar, there is difference between two balance sheets and the difference is to the extent of Rs. 5.65 crores i.e. the amount invested in cash. We are not having the benefit of going through all the papers mentioned in the statement relating to such issue as these have not been provided to the assessee except fund flow statement. Thus we feel that the assessment order has been passed in violation of principle of natural justice. We had considered the similar issues in the case of Smt. Vijay Laxmi Dhadda. In that case also, the principle of natural justice was violated and the reliance was placed on documents

found at the search of third party. It will be useful to reproduce the following paras from that order.

> ‘’2.17 The revenue authorities recorded the statement of Shri Ravinder Singh Thakkar, a person belonging to M/s. Unique Group on different dates from 28-01-2009. The revenue authorities provided only page 4 of his statement recorded on 28-01-2009. The relevant portion of statement of Shri Ravinder Singh Thakkar is available at pages 40 to 42 o the paper book. In respect of the document found in the locker, Shri Ravinder Singh Thakkar explained the transactions with the assessee and her husband. Shri Ravinder Singh Thakkar has clearly mentioned that he negotiated the deal with the assessee and her husband but the deal could not mature and therefore, he received back the cheques which were issued. Thus Shri Ravinder Singh Thakkar has not admitted of making the payment in cash. The contention of the revenue that Shri Ajit Singh Thakkar has admitted these unaccounted payments and included in the calculation while working out the additional unaccounted income offered for taxation in the return of income so filed. It is the contention of the assessee that he has not been provided the copy of the documents on which revenue is placing reliance including the admission of Shri Ajit Singh Thakkar in the return of income. The Hon'ble Apex Court in the case of Kanwar Natwar Singh v. Directorate of Enforcement, 330 ITR 374 held that right to fair hearing is a guaranteed right. However, the person has a right to know the evidence to be used against him. The supply of material relied upon by the authorities on the basis of which the law has been set into motion are to be given as per requirement of natural justice. In that case, the Hon'ble Apex Court directed the authorities to provide all the documents on which reliance has been placed. In the instant case, Shri Ravinder Singh Thakkar has not given any adverse statement. In case the revenue wanted to rely on the unacounted income offered by Shri Ajit Singh Thakkar then the assessee should have been provided an

opportunity of not only seeing the document but also cross examination. The Third Member decision in the case of Kawin Internactive (P) Ltd. , 133 ITD 29 upheld the findings of the ld. CIT(A) in deleting the addition because the AO relied upon uncomparbale cases and has not provided the opportunity to the assessee of being heard. The Third Member had an occasion to consider the issue of making an addition merely on the basis of evidence procured from Third party in the case of ITO Vs. Mayur Agarwal , 128 ITD 55. It was held that no addition can be made merely on the basis of evidence procured from Third party when the assessee denied transactions unless such party to be put up for cross examination.

2.19 We had noticed that search operations were carried out in the case of M/s. Unique Group on 28-01-2009. The statement of the husband of the assessee was recorded on 4-03-2009 and the statement of the assessee was recorded on 16-03-2009. We are not aware as to when Shri Ajit Singh Thakkar, father of the assessee Shri Ravinder Singh Thakkar admitted such unaccounted payment and included in the calculation while working out the additional unaccounted income offered for taxation in the return of income so filed. The assessee was given show cause notice alongwith Annexure on 16-12-2010. The assessment has been completed vide order dated 29-12-2010. Hence all the proceedings have been concluded within a fortnight of issuance of show cause notice. The search was conducted in Jan. 2009 and the statement of the assessee was recorded in March 2009. After receipt of the show cause notice, the assessee required the AO to provide him statement of computation of income filed by Shri Ajit Singh Thakkar. After getting the copies, the assessee should have asked for cross examination of Shri Ajit Singh Thakkar . The Hon'ble Gujarat High Court in the case of Heirs and Legal Representatives of Late Laxmanbhai S. Patel vs. CIT, 327 ITR 290 had occasion to consider the addition in the hands of a person who has signed the promissory note which was found during the course of search at the premises of the firm in which third party was partner and the firm

disclosed such unaccounted income. The Hon'ble High Court held that the amount covered of promissory note could not be assessed as income of the assessee from undisclosed sources as the assessee was not given an opportunity of cross examination the third party in whose search promissory note was found. It will be useful to reproduce the held portion from this decision.

‘’(ii) That except the statements of K and R there was no other evidence available with the Department. A copy of the statement of R was not given nor was an opportunity of cross-examining R given to the assessee. K had subsequently retracted his statement. Even after retraction, he along with two other partners had filed disclosure petition disclosing this very amount in the disclosure petition. The assessee's statement was recorded by the Assessing Officer and some discrepancies were pointed out but merely on the basis of such discrepancies, adverse presumptions could not be drawn against him. The Department had failed to establish any nexus between the promissory note and the amount said to have been given by the assessee to K. The Tribunal was not right in law in upholding the addition of Rs. 8,78,358 in the hands of the assessee.’’

2.20 The Hon'ble Apex Court in the case of Rajesh Kumar v. DCIT , 287 ITR 91 held that principle of natural justice should be followed in the case where a person suffers civil consequences though the principle of natural justice is not impliedly mentioned. By passing of assessment order and creating a demand, there are civil consequences and the AO should have provided an opportunity. The Hon'ble Apex Court in the case of Kishinchand Chellaram v. CIT, 125 ITR 713 held that if an evidence to be used against the assessee is not shown to him then such evidence is not admissible. In this case, Hon'ble Apex Court held that the Department ought to have called upon the bank manger to produce the documents and papers on the basis of which he has made the statement and confronted the assessee with those documents and papers. The

Hon'ble Apex Court in the case of CIT Vs. Bokaro Steel Ltd. , 236 ITR 135 had an occasion the issue of accrual of income and principle of real income. In this case, the original agreement seized to be operative abinito and reversal of entries were there in the account books. The assessee did not receive any real income. In the instant case, the assessee in his statement in the month of March, 2009 clearly stated that the amounts were not received and cheques were returned back. Such facts is supported from the statement of Shri Ravinder Singh Thakkar made u/s 132 (4) of the Act at the time of search. The concept of real income was again reiterated by the Hon'ble Apex Court in the case of Godhra Electricity Co. Ltd. Vs. CIT, 225 ITR 746. The Hon'ble Apex Court in the case of CIT Vs. Daulatram Rawatmull, 87 ITR 349 observed that there should be necessity of nexus between the conclusion and primary facts. The assessee has not been able to show that he received cheques and the same were returned because the deal could not materialize. The revenue is relying on the disclosure of income by Shri Ajit Singh Thakkar father of Shri Ravinder Singh Thakkar. Thus the primary facts are not confronted to hold that the assessee can be charged with undisclosed income. The Hon'ble Apex Court in the case of Parimisetti Seetharamamma Vs. CIT 57 ITR 532 held that the case in which the receipt is sought to be taxed as income then burden is upon the Department to prove that it is within the taxing provisions. The AO in his order has not mentioned any section under which he has taxed the receipt. The Hon'ble Jurisdictional High Court in the case of CIT Vs. S.C. Sethi, 295 ITR 351 had an occasion to consider the case in which the addition was made on the basis of entries of loose papers found during the course of search. No opportunity was given to the assessee of cross examination of the person from whose possession loose papers were recovered. The Hon'ble Jurisdictional High Court therefore, upheld the findings of the Tribunal in deleting the addition. The Hon'ble Jurisdictional High Court also noticed that revenue in this case did not file any appeal against the order of the Tribunal for the subsequent

assessment year on the same facts. In this case, we do not feel that second inning be given of the Department. The revenue was having sufficient time to confront with the assessee with the evidence which it wanted to rely. Even upto first appellate stage, the assessee was not confronted with all the evidences on which the revenue is placing reliance and drawing inference against the assessee. ITAT Ahemdabad Bench in the case of Sheth Akshay Pushpavadan Vs. DCIT, 130 TTJ 42 held that presumption u/s 132(4A) cannot be invoked against the assessee in a case when the seized paper was not recovered during the course of search from the possession of the assessee. In this case, the documents which are being relied upon by the revenue were found during the course of search of third party. The Hon'ble Delhi High Court in the case of CIT Vs. Ashwani Gupta, 191 Taxman 51 confirmed the order of the ld. CIT(A) in which the ld. CIT(A) cancelled the order because there was violation of principle of natural justice. In this case, the assessee was neither provided copies of seized materials nor he was allowed to cross examine the person on the basis of whose statement, the addition was made. The ITAT Jaipur Bench in the case of ITO Vs. Shri Prem Chand Narang (ITA No. 1183/ JP/2010 dated 11-02-2011) had an occasion to consider the presumption as contained in Section 292C of the Act. It will be useful to reproduce following para from that order.

''2.7 Section 292C refers to the presumption in respect of books of account and documents found in the possession and control of any person in the course of survey u/s 133A of the Act. The presumption which may be made for any proceedings under the Act are as under:-

> ''(*i*) that such books of account, other documents, money, bullion, jewelleryor other valuable article or thing belong or belongs to such person;
>
> (*ii*) that the contents of such books of account and other documents aretrue; and
>
> (*iii*) that the signature and every other part of such books of account and other documents which purport to be in the

> handwriting of any particular person or which may reasonably be assumed to have been signed by, or to be in the handwriting of, any particular person, are in that person's handwriting, and in the case of a document stamped, executed or attested, that it was duly stamped and executed or attested by the person by whom it purports to have been so executed or attested.]''

2.8 Section uses the word 'may'. The word 'may' leave it to the Court to make or not to make presumption according to the circumstances of the case. Such presumption is optional and the Court is not bound to make it. Section has not contained the word 'shall presume'. Similar wording of 'may presume' is contained in Section 132(4A) of the Act. The Jurisdictional High Court in the case of CIT Vs. SMS Investment Corporation (P) Ltd, 207 ITR 364 has held that presumption is rebuttable. In that case, seized paper showed the calculation of compounding interest while agreement was in respect of receiving the simple interest. The Hon'ble High Court held that presumption in Section 132(4A) is rebuttable. In view of the factual position, the reopening of the assessment was invalid on the ground that the assessee has received compound interest. The presumption mentioned in Section 132(4A) is similar to presumption u/s 292C of the Act. The ITAT Ahemdabad Bench in the case of Unique Organiors and Developers (P) Ltd Vs. DCIT , 70 TTJ 131 held that presumption cannot be applicable to a third party from whose possession such documents have not been found by the Revenue. The Hon'ble Apex Court in the case of State of West Bengal Vs. EITA India Ltd (2003) 5 SCC 239 had an occasion to consider the distinction between the word 'may' and '' shall presume'. In the case of 'may presume' the fact is to be considered as proved unless and until it is disproved or may call for prove of it. The ITAT Ahemdabd Bench in the case of Sheth Akshay Pushpavadan Vs. DCIT, 130 TTJ 42 (UO) held that payment of on-money on the basis of diary seized from the third party cannot be considered for the purpose of making addition u/s 69 of the Act. We therefore, hold that the ld. CIT(A) was justified in deleting the addition.

> The ld. CIT(A) has also considered the alternate submissions in respect of availability of funds with all the family members of the assessee and the addition could not have been made even if the entry in the document is to be presumed as correct.''

2.21 Following our findings that there is violation of principle of natural justice and evidences not established against the assessee and hence the ld. CIT(A) was not justified in confirming the addition. We accordingly delete the addition.

3.0 The Hon'ble Punjab & Haryana High Court in the case of Paramjit Singh Vs. ITO , 236 CTR 466 had an occasion to consider the issue of admissibility of oral evidence as against documentary evidence. It will be useful to reproduce the held portion from the above judgement..

> ''Held. There is well-known principle that no oral evidence is admissible once the document contains all the terms and conditions. Section. 91 and 92 of the Indian Evidence Act, 1872 (for brevity 'the 1872 Act') incorporate the aforesaid principle. According to Section 91 when terms of a contract, grants or other disposition of property have been reduced to the form a of a document then no evidence is permissible to be given in proof of any such terms or such terms or such grant or disposition of property except the document itself or the secondary evidence thereof. According to Section 92 of the 1872 Act, once the document is tendered in evidence and approved as per the requirements of Section 91 then no evidence of any oral agreement or statement would be admissible as between the parties to any such instrument for the purpose of contradicting, varying, adding to or subtracting from its terms. According to illustration 'b' to Section 92 if there is an absolute agreement in writing between the parties where one has to pay the other a principle sum by specified

> date then the oral agreement that the money was not be paid till the specified date cannot be proved. Therefore, it follows that no oral agreement contacting / varying the terms of a document could be offered. Once the aforesaid principle is clear then ostensible sale consideration disclosed in the sale deed dated 24th Sept. 2002 has to be accepted and it cannot be contradicted by adducing any oral evidence. Therefore, the order of the Tribunal does not suffer any legal infirmity in reaching to the conclusion that the amount shown in the registered sale deed was received by the vendors and deserves to the gross income of the assessee.''

.

3.1 In the instant case, secondary evidences cannot be relied on as neither the witnesses produced or the person who prepared the documents were produced.. Thus the sale consideration as shown in the documents is to be accepted.

4.0 Now we take up the appeal of the revenue .

4.1 The ld. CIT(A) has given alternate finding that a sum of Rs. 4.07 crores is to be taxed under the head capital gain.

4.2 The issue before the ld. CIT(A) was against addition of Rs. 4.07 crores. The ld. CIT(A) has not touched any new source of income. The power of the ld. CIT(A) are coterminous with the power of the AO. The ld. CIT(A) was therefore, justified in recording the finding that the amount should be taxed under the head capital gain. Since we have held while deciding the appeal in the case of the assessee that the amount is not to be added, therefore, the appeal of the revenue is academic.

4. In the result, the appeal of the assessee is allowed and that of the revenue is dismissed.

The order is pronounced in the open Court on 30-12-2011.

Sd/-	Sd/-
(R.K. GUPTA)	(N.L. KALRA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Jaipur
Dated; 30/12/2011

*Mishra

Copy forwarded to :-

1. Smt. Sunita Dhadda, Jaipur
2. The DCIT, Central Circle- 2, Jaipur
3. The ld. CIT
4. The ld. CIT(A)
5. The ld.DR
6. The Guard file (ITA No.751 & 852/JP /11)

By Order

A.R, ITAT, JAIPUR