IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/INCOME TAX REFERENCE NO. 1 of 2001

[On note for speaking to minutes of order dated 24/07/2020 in R/ITR/1/2001]

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C I T

Versus

MANOJBHAI BHUPATRAI VADODARIA

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Appearance:
MRS MAUNA M BHATT(174) for the Applicant(s) No. 1
MR SN SOPARKAR(869) for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR. JUSTICE J.B.PARDIWALA**
and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

Date : 21/08/2020

ORAL ORDER

(PER : HONOURABLE MR. JUSTICE J.B.PARDIWALA)

1 This note for speaking to minutes is at the instance of the learned senior standing counsel of the Income Tax Department pointing out that inadvertently, in paragraph No.6 of the order passed by this Court in the Income Tax Reference No.1 of 2001, the name of Mrs. Mauna Bhatt appearing as the learned senior standing counsel for the Revenue has not been stated. In the same manner, in paragraphs Nos.6.3, 9.1, 12.3, 12.4 and 12.5 respectively of the order, the name of Mrs. Mauna Bhatt, the learned senior standing counsel has not been stated. It is pointed out that the name of Mr. M.R. Bhatt, the learned senior counsel has been stated in the order.

2 Let the necessary correction be effected and the name of Mrs. Mauna Bhatt, the learned senior standing counsel appearing for the Revenue be substituted with that of Mr. M.R. Bhatt.

3 The Registry shall effect the necessary correction and issue a fresh writ of the order.

(J. B. PARDIWALA, J)

(BHARGAV D. KARIA, J)

DRASHTI K. SHUKLA

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/INCOME TAX REFERENCE NO. 1 of 2001

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE J.B.PARDIWALA

and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

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CORAM: **HONOURABLE MR. JUSTICE J.B.PARDIWALA**
and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

Date : 24/07/2020

CAV JUDGMENT
(PER : HONOURABLE MR. JUSTICE BHARGAV D. KARIA)

1. This reference is made at the instance of Revenue under Section 256 (2) of the Income Tax Act, 1961 (for short the 'Act 1961).

2. This Court passed an order dated 18.09.2000 in Income Tax Application No.264 of 1999, directing the Income Tax Appellate Tribunal, Ahmedabad Bench-'A', Ahmedabad (for short the 'Tribunal') to refer the following three questions arising out of the Tribunal's order dated 19.06.1998 in IT(SS) Appeal No.216/Ahd/1997 for the block Assessment Years 1985-86 to 1994-95 and part period from 01.04.1995 to 21.09.1995 :

> *"1. Whether in the facts of the case, the ITAT was right in law in holding that the assessee was entitled to set off gross unaccounted payments on certain transactions against unaccounted receipts for computing unexplained investment made by him in accordance with section 69B of the I.T Act ?*
>
> *2. Whether in the facts of the case, the ITAT was right in law holding that unexplained and unaccounted cash investment which did not result into tangible benefit was allowable expenditure under section 37 of the Act as business loss under section 28 of the*

Act ?

3. Whether the order of the ITAT is not perverse as being contrary to the evidence on record or as in the case Amrakadamb land deal with Sangvilla land deal based on evidence at all ?"

3. The Tribunal accordingly forwarded the statement of case along with paper book for opinion of this court on the above questions of law on the facts of the case stated therein.

4. The short facts of the case are that the assessee, who is an individual and dealer-cum-broker in lands was assessed under Section 158BD of the Act, 1961 on the basis of the seized documents and various statements recorded under Sections 132 and 131 of the Act, 1961 during the course of search and seizure operation on 21.09.1995 at the premises of two other land brokers one Shri Deepak Mehta and other Shri Suresh Patel.

4.1 The Assessing Officer completed assessment for the block period determining the total income

of Rs.34,63,47,179/- vide order dated 30th September 1997.

4.2 The assessee being aggrieved preferred an appeal before the Tribunal as per the provision of Section 158BC read with Section 256 of the Act, 1961.

4.3 The Tribunal vide order dated 12th June 1998 allowed partial relief to the assessee by deleting some of the additions made by the Assessing Officer.

4.4 The Revenue as well as the Assessee both filed Reference Applications against the order of the Tribunal, which were disposed of by the Tribunal vide order dated 30.11.1998 in Reference Application No.660 and 696/Ahd/1998, rejecting both the Reference Applications.

4.5 The Revenue moved an application under Section 256(2) of the Act, 1961 before this Court, wherein this Court directed the Tribunal to refer the above questions of law for

consideration.

QUESTION NO.1

5. The Question No.1 pertains to set off of unaccounted cash payments against unaccounted cash receipts of the assessee. The assessing officer has referred to the statement of assessee recorded by the Department in Para 4.3.2 of the Assessment Order, wherein it is stated that the assessee admitted with regard to the two transactions of land near Ramdev-pir-no-tekro near Satellite area in Ahmedabad through Shri Dipak Mehta with Shri Saurav Shah with Saumya Construction, which were the same as stated by Shri Dipak Mehta and as per his seized papers showing the area of land as approximately 18538 sq.yds. and the land was sold at the rate of Rs.1988 per sq. yd., which was in the name of Jitendranagar Co-operative Housing Society for total consideration for Rs.3.68 Crore. It was stated by the assessee that initially it was decided to get Rs.70 Lakhs by cheque and remaining by cash but as per final settlement

amount was agreed for Rs.3.5 crores and stated to have received Rs.2.83 crores in cash, out of which Rs.2.53 crores was received through Shri Dipak Mehta in cash and cheque payment must have been made to the society. With regard to the second land deal transaction for final plot No.1196, the assessee sold it at the rate of Rs.1125 per sq. yd. for the total area approximately 11933 sq. yds. The deal was finally settled for total consideration of Rs.1.35 crores and out of which approximately Rs.48 Lakhs was paid by cheque to farmers and land owners and remaining Rs.87 lakh was received in cash. When specifically confronted with two seizes pages and statement of Shri Dipak Mehta in Question No.4 and 5, the assessee stated that contents of these pages and explanation of Shri Dipak Mehta appears to be correct with minor variations.

5.1 The assessing officer did not accept the explanation given in the reply furnished by the

assessee as observed in Para 4.4.4 of the assessment order, which reads as under:

> *"i) Shri Dipak Mehta in his statements categorically stated that full considerations in cash Rs. 90,25,069/- was agreed with the assessee.*
> *ii) The assessee has admittedly accepted that the transaction was held between him and Saumya Construction Co. and as replied in his statement he has received Rs. 87 lacs in cash and Rs. 48 lacs were paid by cheque to the farmers directly by Saumya Construction through society.*
> *iii) The assessee was asked to file the confirmation letters of alleged cash payments to the farmers but he has neither submitted the addresses of the farmers in full and nor confirmation letters in support of cash payment to the farmers for purchase of land at the rate of 851 per sq. yd. including cheque payment has been filed.*
> *iv) The amount of Rs. 32.70 lacs claimed as surplus in the hands of the assessee is not acceptable as Shri Saurabh shah, Shri Dipak Mehta and assessee himself had admitted to have paid and received cash payment respectively. Since no evidence for further cash payment to the land owners is furnished, therefore assessee's contention is not acceptable.*
>
> v) No specific date of payment of amount and other corroborative evidences for subsequent payments to farmers in cash are given hence assessee's plea is unfounded and far from truth and apparently has been advanced to reduce the undisclosed income as done on one pretext or another in respect of other land deals also and hence self serving claim is rejected."

5.2 The Assessing Officer rejected the claim

of set off made by the assessee in para 10 of the assessment order, which reads thus:

> "10. CLAIM OF SET-OFF
>
> *10.1. The assessee in his writ submission filed has not pressed any claim for set off of amount received against land deals, towards undisclosed investment made. The assessee despite specific requisition did not deliberately furnish the total wealth statements as on 31-3-1993, 31-3-1994, 31-3-1995 and 21-9-1995. The assessee has not furnished any other details or particulars about availability of funds from such unaccounted land deals in the course of present assessment proceedings. It is settled position of law that for pressing any claim based on facts, the onus lies on the assessee to furnish the basic and primary facts. Hence in absence the same the claim cannot be at all considered. Further still transaction for which undisclosed income has been added and additions have been made for unexplained investment, it is to be noted that the amount of Rs. 2.53 crores offered to be taxed in his hands concerning land deals at Ramdev-Pir-No-Takro between Nila Housing & Infrastructures Pvt. Ltd. And Samuya Construction Co. Ltd., the amount has been protectively taxed in the hands of assessee and substantial addition has already been made in the hands of the company. Thus those funds are prima facie not available for planning any further investments made by the assessee in his individual hands business and has been accordingly disallowed / restricted for reasons discussed in the Asst. Order passed.*
>
> *10.2. Coming to the other investment as emerging from the appreciation of seized papers most of the investments have been*

made during the F.Y.1994-95. On money receipts pertaining to the second land deal of Ramdev-pir no -Tekro were received during the F.Y. 1993-94 The entire on money payment from RDIL at Rs.12.80 crores has been received only from April 1995 onwards till September, 1995. Similarly the undisclosed income determined for investment and profit in remaining two land deals at 325, 292 have been also determined for part of search year falling in F.Y.95-96 and the brokerage amount, according to assessee's own version was not received and was receivable only. Thus on prima facie merits also assessee is not entitled to any set off of unaccounted income against the unexplained investment made. Further, it is to be clarified that considering the volume of huge land deals entered into by assessee it cannot be automatically presumed that Income received by way of on money receipts was available for investment in the land deals and was not otherwise invested. Hence, the assessee is not entitled to any claim of set off and all the income as well investment determined are liable to be considered without any set off against each other.

11. UNDISCLOSED INCOME OF ASST. YEAR 1995-96

11.2 So also unexplained cash credit has been determined at 11.85 Lacs as the assessee has failed to discharge his onus for establishing the identity of the creditors, genuineness of transactions and credit worthiness of creditors as per requirement of section 68 and hence, same has been accordingly order. Accordingly interest claimed on the same of Rs.1,40,549/- has also been held to be inadmissible.

11.3. The overriding provisions of 158 BD required that income for the asstt. year for which return has not been filed till the date of search and the date has expired,

entire income shall be treated as undisclosed. The due date in the case of assessee is prima facie 31.8.1995 as noted from his return of income for A.Y.1994-95 and prima facie books of accounts of his proprietary concern are not required to be audited. Hence, the entire income for Asstt. Year 1995-96 is required to be treated as undisclosed income for the purpose of Block Assessment Proceeding as determined in the Asstt. Order passed U/s.143(3) for A.Y. 1995-96.

5.3 The Tribunal however, allowed the claim of the assessee for adjustment of subsequent payments against the earlier receipts by observing in para 46 of the order, which reads thus:

"46. In para 10 on pages 101 and 102 of the assessment order heading given is "Claim of Set Off" and it is rejected. The crux of the matter is that the assessee has claimed that he has admitted to the receipt of certain sums in cash and also to the payments of certain other sums in cash. The Assessing Officer has drawn inference in regard to receipts and payments of individual items but in the end has taxed the gross receipts plus gross payments. He has not allowed adjustment of subsequent payments against the earlier receipts of cash which becomes otherwise available with the assessee. It means that assessment order proceeds on the footing that when the assessee makes a payment his cash balance is Nil and, therefore, whatever he has paid he has done so from his income from undisclosed sources on the respective date(s). The

assessee's contention is that he has admitted to the existence of cash receipts and payments and a reasonable view demands that subsequent payment should be presumed to be made out of the cash available from the earlier receipts, if any. In Income-tax quarters it is generally referred to as cash flow statement and it will not be out of place to mention that even in the clubbing of transactions of Hundi loans the Department used to prepare such cash flow statement and then tax the peak amount. We are mentioning it because in those cases ledger accounts existed in different names and consolidation of all the ledger accounts meant that the repayments made to one of the alleged creditors was regarded available to this very assessee for introduction of credit on a subsequent date in another name. The assessee's case obviously stands on a better footing that they are undoubtedly admitted and/or treated as his own moneys received by him and paid by him. So in principle it is difficult to uphold the Department's view. We are not impressed by the plea mentioned in para 10.2 on page 102 that income received by way of on-money receipts cannot be regarded as available for investment in land deals. The Assessing Officer suspects that it was "otherwise invested". In our considered opinion, in is not reasonable or judicious approach. There cannot be any reasonable cause for rejecting the assessee's claim of adjustment of subsequent payments against earlier receipts. Accordingly ground No.15.1 & 15.2 are allowed."

SUBMISSIONS OF REVENUE FOR Q.NO.1

6. The learned senior advocate Mr. M.R. Bhatt assisted by Ms. Mauna Bhatt, the learned standing

counsel appearing for the Revenue submitted that no peak credit theory would be applicable and the entire unaccounted gross receipts are to be taxed along with the gross payments/expenses because, though the onus lies on the assessee, he failed in providing any evidence and in absence of any evidence indicating payments made/expenses incurred by assessee, theory of peak credit cannot be applied. It was submitted that there is no nexus between the expenses and receipts and therefore, telescoping could not be proved as the theory of telescoping would be applicable when there is nexus between unaccounted receipts and unaccounted expenses.

6.1 It was submitted that the assessee is not into the business of trading where the activity of sale and purchase is involved where there can be presumption of incurring expense despite no evidence.

6.2 It was submitted that for example, the

evidence available on record indicates that Rs.20 Crore was received by the assessee between specified period which was not recorded in the books of accounts of the assessee and therefore, the same would be unaccounted receipt, whereas the evidence available on record indicates payments made during that period which were unaccounted payments/expenses, therefore, in such case, on account of having nexus between receipt and payment/expenses, theory of telescoping would be applicable. However, the attention of the Court has been invited to the activities of the assessee as recorded by the Assessing Officer to point out that the assessee was dealing with real estate especially land either on his own or as a middleman-broker, or rendering various land related services, which may be desired by the investors like clearances under Land Ceiling Law, N.A. permission etc. It was pointed out the assessee was a sophisticated broker in real estate as per his own statement in his letter dated 11.09.1997 and therefore, in absence of any

evidence showing nexus or co-relation between unaccounted cash receipts and payments, assessee cannot be given benefit of telescoping.

6.3 The learned senior counsel further referred to the non-cooperation of the assessee during the assessment proceedings as recorded by the Assessing Officer by detailed discussion with regard to various land deals of the assessee. The learned counsel therefore, submitted that though the onus lies on the assessee, the assessee failed in providing any evidence with regard to the expenses/payments made and therefore, the unaccounted cash receipts and payments are required to be taxed under Sections 69B and 69C of the Act,1961 as unexplained investment/expenditure .

6.4 The learned advocate submitted that the Tribunal has not considered the provisions of Sections 69B and 69C of the Act, 1961 in proper perspective and in support of his contentions

reliance was placed upon the following decisions:

(i) ***Madathil Zainuddin vs. Commissioner of Income-tax, Kochi*** reported in **[2014] 44 taxmann.com 241 (Kerala)**, wherein the High Court of Kerala has held as under:

> *"'7. The Tribunal proceeded to analyse the facts on record and opined that the stand of the assessee was different from time to time, so also opined assessee was not even able to establish that the source of income was from gold business. If the first stand of the assessee that funds were transferred from Mumbai to Kerala through bank accounts were to be believed, said amount cannot be his amount. But it is also surprising to see that he admitted income of Rs.50 Lakhs in his bulk return as peak credit. This would only go to show; though he tried to establish the transfer of funds from Mumbai to Kerala it was not properly explained. Then coming to stand of the assessee, the assessee failed to bring on record any material to substantiate his stand and the same cannot be believed according to the Tribunal for the following reasons which are extracted below. The claim of the assessee does not appear to be true.*
>
> *(a) If the assessee had really carried on trading in gold biscuits, he could have at least tried to reconcile the quantity details of gold vis-à-vis the deposits found in the bank accounts.*
>
> *(b) Presuming for a moment that the deposits represent sale value of gold, we notice that the deposits are always in lakhs that too in round figures, which would not be so in practical*

situations. There is also wide variation between two deposits, which would not be normally so if the assessee is carrying on trading activity.

(c) From the copy of the three bank accounts placed in the paper book, we notice that the assessee has received an aggregate deposit of Rs. 1.23 crores in the month of December 2001. Even if the initial deposit of Rs. 12 lakhs each (Total Rs. 24.00 lakhs) received in Account Nos.34 and 11804 is considered as the capital of the assessee, it does not commensurate with the amount declared by the assessee in his block return, i.e. up to 31-3-2001. The assessee has declared only a sum of Rs. 8.00 lakhs only as undisclosed income.

(d) In the month of December, 2001, we notice deposits of Rs 25.00 lakhs and Rs. 50.00 lakhs, but there after the deposit amount was in the range of below ten lakhs only up to 20-3-2002. Thereafter, there is a deposit of big amount, i.e., Rs. 24.00 lakhs on 23.3.2002. The last deposit was Rs. 20.00 lakhs made on 6.4.2002. The assessee has not explained the reasons for stopping the alleged gold trade thereafter.

Paragraph 14 is the actual opinion of the Tribunal which deals with the details furnished by the assessee in the cash flow statement. The Tribunal made this exercise in order to understand the claim of the assessee whether the income declared by the assessee in various years including peak credit amount can be taken as source for the cash of Rs. 65 Lakhs seized by the police at Chennai. The cash flow statement with reference to the financial year 2000-01 shows Rs. 3 Lakhs followed by Rs 2 lakhs in the financial year 2002-03 indicating that

Rs. 2 Lakhs was from brother Hussein in the business. There were no details with regard to the nature of business. On the other hand, in the first letter addressed to the Deputy Director of Income Tax this Rs. 65 Lakhs was given to Mr. Azeez to purchase gold biscuits for the purpose of starting business by his brother and others. In other words, it was not the amount pertaining to his gold business but an amount for the purpose of gold for his brother's business. This is a relevant fact that has to be taken note of. Having regard to this stand of the assessee and also unexplained income reflected in the cash flow statement, the Tribunal was justified in not placing much reliance on the cash flow statement furnished by the assessee, as it was a self serving one without supported by any regular bank account and documents.

8. Then coming to the statement of assessee, the income of Rs. 1 Lakh each declared in the years relevant to the assessment years 1997-98 and 1998-99. there is doubt expressed by the Tribunal whether that Two Lakhs was still remaining with the assessee after a gap four or five years according to us it is a genuine doubt. With regard to the declaration of peak credit of Rs. 50 Lakhs, the Tribunal was Justified in saying, by operation of law as legal fiction provided under Section 68 and 69 in the absence of proper explanation of the assessee relating to bank transactions Rs. 50 Lakhs becomes taxable. Then the question is whether the amount of Rs. 65 Lakhs in the hands of the assessee in December, 2012 would represent cash credit amount in the banks when the assessee fails to explain the source of income so far as the bank account in the light of the fact that what exactly the business of the assessee was not proved. In the absence of documents supporting such contention, the Tribunal was justified in

continuing the opinion of the appellate authority that all the amounts shown in the bank accounts are entirely different from the amount of cash Rs. 65 Lakhs found in the hands of the assessee in December, 2012, because if he was really dealing with gold business, it is hard to believe that he was keeping Rs. 65 Lakhs idle with him for a period of more than nine months, that too, to start business for his brother in gold as explained in the letter. First letter immediately addressed after seizure of the gold becomes very relevant. If he was dealing in the gold business he would have declared so in the said letter. But his explanation regarding the bank account was that he acted only as an agent for transferring funds from Mumbai to Kerala through is bank accounts."

(ii) ***Kahan Udyog v. Commissioner of Income-tax*** reported in **[2013] 38 taxmann.com 261(Delhi)**, wherein the Delhi High Court analyzing the provisions of Section 69C of the Act, 1961 upheld the addition made by the Assessing Officer in absence of any details furnished by the assessee in that case with regard to the expenditure incurred, the Delhi High Court has held as under:

"3. In the block assessment order dated 29th November, 1996, the Assessing Officer has referred to various seized papers in respect of unaccounted sales and unaccounted expenditure. These were inventorised. It was found that these transactions were not reflected in the regular books of accounts. Before the Assessing Officer, the appellant

had submitted that the difference between the excess of expenditure over receipts, should be brought to tax and treated as undisclosed income and the two amounts should not be separately taxed. Assessing Officer in the present case did not tax the unaccounted sales and has only taxed unaccounted expenses/expenditure/withdrawals. Before the tribunal, similar plea was raised but was rejected after making reference to the order of the tribunal in the case of Siddhartha Woolen Mills [IT Appeal No. 59 of 2000, dated 25-7-2013]. We have dismissed the appeal of the assessee in the case of Siddhartha Woolen Mills (supra). In the present case, we notice that the tribunal has given relief to the extent of Rs. 1,50,000/- and the Assessing Officer has not made any separate addition on account of profits from unaccounted sales. It is recorded in our order dated 25th July, 2013 in the case of Siddhartha Woolen .Mills (supra) that the expenditure incurred was on account of electricity, petrol, tea pool, etc. and the names of the persons and details why the expenditure was incurred had not disclosed and furnished. The appellant has not, in the present case, furnished details or explained nature and purpose behind the "expenditure". Some expenses have been incurred towards kabadi etc. Names of persons do find mention but the nature of activities undertaken why and for what purpose the payment was made, are not known. It was for the appellant assessee to produce relevant material or produce the said person to justify the payment and show and establish that the expense was not personal in nature but related to or was pertaining to unaccounted business. No one mentioned in the list had appeared before the Assessing Officer to testify and explain the nature and character of the said payments. The

appellant has accepted that these transactions were not recorded in the books. The appellant ran and took the risk when he entered into these transactions and, therefore, should face the consequences prescribed and mandated under Section 69C of the Act."

(iii) ***Commissioner of Income-tax v. Banarsilal Dhawan*** reported in **[1977] 109 ITR 360 (Madras)**, wherein it is held as under:

*"**2**. The assessee is a dealer in crepe soles, raw rubber, etc. For the asst. yr. 1963-64, the relevant accounting year being the preceding financial year, he returned an income of Rs. 10,260 under "business". At the time of hearing before the ITO, it was submitted for the assessee that the proviso to s. 145(1) of the IT Act was applicable and that the assessee had no objection to the estimate of gross profit as in the preceding year. This resulted in an addition to Rs. 15,500 to the disclosed trading results. There were also some hundi transactions during the previous year and the assessee filed a peak credit statement showing a peak credit of Rs. 31,000. By his letter dt. 2nd Sept., 1966, the assessee's representative admitted that a sum of Rs. 31,000 said to be hundi loans was not capable of verification and, therefore, may be treated as having been admitted under section "F" of the return of income. It was also claimed on behalf of the assessee that a sum of Rs. 8,500 out of the total amount of Rs. 31,000 pertained to the previous year and that*

it should be deducted. It was further claimed that the said sum of Rs. 31,000 should be set off against the intangible additions of the earlier years. The ITO declined to comply with this request of the assessee. He held that the assessee had not linked the intangible additions of the past years with the appearance of the credits and unless the assessee proved that the hundi credits were introduced out of profits made in the trading account outside the books, it was not possible to telescope the two additions, with the result, he assessed a sum of Rs. 31,000 as income from other sources.

Against the order of the ITO, the assessee preferred an appeal to the AAC and before that officer the assessee contended that the ruling of this Court in S. Kuppuswamy Mudaliar vs. CIT (1964) 51 ITR 757 (Mad) enabled the assessee to claim a set-off of the gross profit additions of the past years against the unexplained credits in the year in question. The AAC declined to accept this argument and, in his view, the decision of this Court in S. Kuppuswamy Mudaliar vs. CIT (supra) must be taken to have been overruled by the subsequent decision of the Supreme Court in CIT vs. Devi Prasad Vishwanath Prasad (1969) 72 ITR 194 (SC) : TC42R.1025 with the result, he sustained the order of the ITO. The assessee, thereafter, preferred a second appeal to the Tribunal. The Tribunal held that the decision of this Court in S. Kuppuswami Mudaliar vs. CIT (supra) applied to the facts of this case and that the decision cannot be said to have been overruled by the subsequent decision of the Supreme Court in CIT vs. Devi Prasad Vishwanath Prasad

(supra), with the result, the Tribunal accepted the contention of the assessee and allowed the assessee what it called the benefit of set-off of gross profit additions of the past years against the unexplained cash credits in question and directed the deletion of Rs. 31,000 as income from "other sources". It is the correctness of this conclusion of the Tribunal that is challenged before us in the form of the questions extracted already.

xxxx

***7**. In the first place, we are of the opinion that once the assessee has originally shown the credits as having emanated from certain named individuals and when he failed to establish the same, it was not open to him to fall back on a claim that these unexplained credits must be taken to have come out of the additions made in the earlier years. Even if it was open to him to put forward such a case, it was for him to prove positively that though the credits stood in the names of third parties, still it was his money which was brought into account in the names of third parties and the money itself came from the additions made to his assessment in the previous years. Incidentally, this will involve his explaining why he brought his own money into the accounts in the names of third parties. The assessee in the present case has not proved any such thing. It is exactly this position which the ITO in his order pointed out while making the additions. The Tribunal without considering any of*

these facts proceeded as if the decision of this Court in S. Kuppuswami Mudaliar vs. CIT (supra) laid down a universal proposition of law that whenever an assessee failed to explain the credits found in his books of account, it was open to him to claim a set-off of those credits as against the additions made to his income in the previous years' assessments. As we pointed out already, no such proposition has been laid down by this Court in the decision referred to above. As a matter of fact, apart from removing the misconception arising from the inaccurate and misleading use of the expression "intangible additions", this Court did not lay down any such general proposition of law, as if the additions made to the income returned by an assessee, by the Department, constitute his last refuge whenever he finds himself in a tight corner not being able to explain the credits found in his accounts. The truth is that such additions are as real an income, at any rate as far as the Department is concerned, as the income returned by the assessee, and one can as much as the other constitute the source to explain the credits in the accounts in the subsequent years. Therefore, the decision of this Court does not invest such additions with any special significance as a source to explain the credits in the subsequent years. In any case, it will be a question of fact whether there was evidence to find that such additions were the source of the

subsequent credits and in this behalf there is no difference between this source and any other source, apart from the position that with regard to the income assessed in the earlier years, its existence as a possible source of the credits will be a matter of record with the Department while with regard to other sources, their existence may be a matter to be proved."

Referring to above decisions, it was submitted by the learned senior advocate Mr. Bhatt that the tribunal has committed an error in allowing set off of gross unaccounted payments on certain transactions against unaccounted receipts for computing unexplained investment made by him in accordance with section 69B of the I.T Act,1961.

SUBMISSIONS OF ASSESSEE FOR Q. NO.1

7. On the other hand, the learned senior advocate Mr. S. N. Soparkar assisted by the learned advocate Mr. B. S. Soparkar, submitted that the issue of set off of gross unaccounted payments on certain transactions against unaccounted receipts for computing unexplained

investment in accordance with section 69B of the I.T Act is squarely covered as per the following decisions:

(i) Referring to this decision of the Supreme Court In the case of ***Anantram Veerasinghaiah & Co. v. Commissioner of Income-tax*** reported in ***[1980] 123 ITR 457 (SC)***, it was submitted that the Supreme Court has held that the mere availability of fund, in all cases cannot imply that the assessee has not earned further secret profits of undisclosed income during the relevant assessment year, but at the same time, it is a matter of consideration by the taxing authority in each case whether the unexplained cash deficits and the cash credits can be reasonably attributed to a pre-existing fund of concealed profits or they are reasonably explained by reference to concealed income earned in that very year.

(ii) Reliance was placed on the case of ***Commissioner of Income-tax v. President***

Industries reported in [2002] 258 ITR 654 **(Gujarat)** wherein it is held that the sales only represent the price received by the seller of the goods for the acquisition of which it has already incurred the cost. It is the realization of excess over the cost incurred that only forms part of the profit included in the consideration of sales. Therefore, unless there is a finding to the effect that the investment by way of incurring cost in acquiring goods which have been sold has been made by the assessee and that has also not been disclosed, the question whether entire sum of undisclosed sales proceeds can be treated as income of the relevant assessment years, answers by itself in the negative.

(iii) ***COMMISSIONER OF INCOME TAX (CENTRAL) COCHIN. vs. P.D. ABRAHAM @ APPACHAN*** **349 ITR 442 (Ker)**, where in the High Of Kerala held as under:

> 8. After hearing both sides and after going through the orders, what we notice is that the Assessing Officer has considered the claim of the assessee that film directors were paid profit

share of various films directed by them for the assessee. Moreover, details of payments were also available in the seized records. However, the Assessing Officer declined to believe assessee's claim for the reason that there is no written agreement between the assessee and the film directors for profit sharing over and above the agreed consideration paid to them and the cost reimbursed for the production of the film. Further the Assessing Officer has heavily relied on the denial made by the film directors against receipt of payments. We are unable to uphold the Revenue's claim for many reasons. In the first place, admittedly assessee was engaged in unaccounted business and accounts seized pertain to clandestine transactions showing unaccounted receipts and unaccounted expenditure. The assessee himself has voluntarily declared undisclosed income of Rs.43 lakhs over the income returned for the block period. So much so, there is no justification for doubting the entries found in the seized records pertaining to expenditure while accepting the income found recorded therein. When the Department relies on the seized records for estimating undisclosed income, we see no reason why the expenditure stated therein should be disbelieved merely because there is no written agreement and that payments were not made through cheques or demand drafts. Even when unaccounted income is determined from business carried on clandestinely or not, the statute does not authorize assessment of anything other than "undisclosed income" which has to be arrived at after allowing expenditure incurred by the assessee whether it be accounted in the regular books or not.

What is clear from the clandestine records seized from the assessee is that both the film producer and the film directors were engaged in collections and payments outside the regular books of accounts and that is the only reason why there is no written agreement between them in regard to profit sharing and the payments are consciously not made through cheques or demand drafts. The Assessing Officer has also stated that the purpose of payments is not seen recorded in the seized records. We do not think this unrealistic stand is justified in the context of the business carried on by the assessee because between the film producer and the film directors income seen recorded and payments seen made should be taken as relating to business and nothing else. The mere fact that film directors have not confirmed receipt of payment in cash from the assessee also is not a ground for treating the payments as bogus or not genuine. In our view, there is nothing to doubt the genuineness of the payments because assessee himself explained that the film directors are entitled to share profits in respect of successful movies, and the Department has not established that such practice is not there in the film industry. Since, in principle, we uphold the order of the Tribunal that entries relating to payments to film directors found in the seized records should be accepted, we do not think there is any need for us to go to the details of the films produced and various amounts paid periodically by the assessee. Therefore, we do not find any justification to interfere with the findings of the Tribunal with regard to the payments made to the Directors though not recorded by the assessee or

the payees in the regular books of accounts.

9. The remaining part of the addition is only disallowance of payments stated to have been made by the assessee to M/s.Kumudavally Pictures for purchase of a Tamil film. It is seen that while the total payments were Rs.37 lakhs, only Rs.22 lakhs was accounted and balance Rs.15 lakhs was unaccounted payments, which is also seen recorded in the seized records. We do not think there is anything to doubt the genuineness of the transaction because generally what is found by the Department from the seized records is that the business is done partly with black money and partly with white money though accounting of income and expenditure are of insignificant amounts.

10. Learned Senior Standing Counsel for the Revenue has also made reference to the explanation to Section 37(1) of the Act and also to the scope of the proviso inserted to Section 69C of the Act by the Finance (No.2) Act, 1998 with effect from 01/04/1999. Learned counsel for the assessee contended that film production is not an illegal business and therefore payments made though without accounting cannot be said to be illegal payments attracting explanation to Section 37(1) of the Act. We do not think unaccounted expenditure in a proper business can be treated as an expenditure prohibited by law to attract explanation to Section 37(1). So far as the proviso to Section 69C is concerned, in the first place the proviso introduced with effect from 01/04/1999 does not apply to the block assessment for the period covered herein and secondly we do not think excess

expenditure over accounted expenditure in business is covered by Section 69C itself. We therefore do not think there is any application of these two Sections to the case in hand. We, therefore, do not find any ground to interfere with the orders of the Tribunal with regard to the deletion of total addition of Rs.1.09 crores and odd to three film directors and one film producing Company towards unaccounted payments made by the assessee to them. The first question raised in Revenue's appeal is therefore answered against the Revenue and in favour of the assessee.

(iv) Unreported decision in case of ***Commissioner of Income Tax v. Tirupati Construction Company in Tax Appeal No. 1010 of 2014.***

"7. At the outset, it is required to be noted that, while appreciating a document, it is required to be considered in its entirety and it cannot be considered in part. In the case on hand, while appreciating the papers / documents, which according to the Assessing Officer, contained accounted and unaccounted transactions on the part of the Respondent-assessee, she not only failed to examine it properly but also failed in assessing the income as per law. Further, though, the AO, herself, had prepared the account of profit and loss in respect of accounted and unaccounted entries, she did not assign any reason, as to why the profit and loss account of unaccounted transactions

of the Respondent-assessee cannot be believed to be true. Moreover, the AO also did not take into consideration the explanations tendered by the Respondent-assessee vide letters dated 10.12.2008 and 29.12.2008. Even, the working of the peak based on the seized diary given by the Respondent-assessee for the concerned assessment years was also overlooked by the AO and, here again, no reason was assigned for the same. We are, therefore, of the opinion that the CIT(A) rightly held that it would be just and proper, if, the income from the transactions recorded in the seized diary are determined on the basis of highest peak, as increased by the net profit of 5 per cent on the receipts and taxed accordingly, for the relevant assessment years. We do not find that the CIT(A) and ITAT has committed any jurisdictional error in passing the impugned orders."

It was therefore, submitted that the assessee is entitled to set off of payment made in cash against receipts in cash when the assessee has admitted to the existence of cash receipts and payments and in such circumstances, subsequent payment should be presumed to be made out of the cash available from the earlier receipts. Therefore, the Assessing Officer could not have

added the entire gross receipt in the hands of the assessee. It was therefore, submitted that the Tribunal has rightly held that there is no reasonable cause for rejecting the claim of the assessee for adjustment of subsequent cash payments against the earlier cash receipts.

OPINION FOR Q.NO.1

8. Having heard the learned advocates for the respective parties and having gone through the materials on record, it is pertinent to note that the assessee did not furnish any detail or particular about availability of the funds from the unaccounted land deals during the course of assessment proceedings as recorded by the Assessing Officer. The assessee failed to furnish the basic and primary facts. Moreover, it appears that the Tribunal has also not considered the fact that the amount of Rs.2.53 crores pertaining to the land deals at near Ramdev-pir-ni-tekro between Leela Housing and Infrastructure Housing Pvt. Ltd. and the Saumya Construction has

been protectively taxed in the ends of the assessee and substantive addition has already been made in the hands of the Companies. Thus, such funds were prima facie not available for any further investment made by the assessee in his individual land business.

8.1 With regard to other investments, as per the seized papers most of the investments have been made during the F.Y.1994-95. On money receipts pertaining to the second land deal of Ramdev-pirni-Tekro were received during the F.Y. 1993-94 and the entire on money payment from RDIL at Rs.12.80 crores was received only from April 1995 onwards till September, 1995.

8.2 Similarly the undisclosed income determined for investment and profit in remaining two land deals were also determined falling in the F.Y.95-96 and the brokerage amount was also not received. Therefore, the Assessing Officer on the basis of the facts available on record has

held that the assessee is not entitled to any set off of unaccounted income against the unexplained investment made as there is no co-relation between the unexplained cash receipts and unexplained investment.

8.3 In view of above, we are of the opinion that the Assessing Officer has rightly not granted the claim of the assessee for set off on the basis of the facts of the case as there is no even prima facie evidence to show that the income received by way of on money receipts was available for investment in the land deals and was not otherwise invested.

8.4 The Tribunal however, emphasized on a presumption that a reasonable view demands that subsequent payment should be presumed to be made out of the cash available from the earlier receipts, if any. The Tribunal without adverting to the facts has allowed the claim of the petition only on the ground of such presumption

by referring to the principles of peak credit without applying the same to the facts of the case.

8.5 Moreover, the Tribunal has also erred in discarding the fact of absence of any material to show that the assessee proving nexus or co-relation between unaccounted cash receipts and payments. Therefore, in such circumstances, it appears that the Assessing Officer has rightly held that the assessee is not entitled to any claim of set off and all income as well as investment determined are liable to be considered without any set off against each other.

8.6 In view of the facts available on record, we are of the opinion that the Tribunal, which is a final fact finding authority has reversed the findings of the Assessing Officer only on the basis of the principles of law without referring to the facts available on record. Therefore, the decisions cited on behalf

of the assessee which are based on facts of each case are not applicable and hence the same are not discussed in detail.

8.7. In such circumstances, we answer the question No.1 in negative i.e. in favour of the Revenue and against the assessee.

QUESTION NO.2

9. As regards the Question No.2 for allowing the loss under Section 37 of the Act in respect of unexplained and unaccounted cash investment which did not result into tangible benefit, the factual aspects of the case relating to Baronet land and Jagatpur land are that the assessee claimed the loss of Rs.2.93 crores on account of payment made to one Shri G.C. Patel for procuring land as the land deal could not be materialized. The Assessing Officer has referred to the statement of Shri G.C. Patel who has deposed that he has not received the said amount. The Assessing Officer has narrated the facts in detail in para

5 with regard to Baronet land and land at Jagatpur.

SUBMISSIONS OF REVENUE FOR Q. NO.2

9.1. The learned Senior advocate for the Revenue submitted that there is no evidence on record to show that the assessee made payment to Shri G.C. Patel, whereas on the contrary Shri G.C. Patel in his statement stated that he did not receive the amount of 2.93 Crore from the assessee. It was submitted that the onus is on the assessee to establish that he has suffered the loss and if the contention of the assessee is accepted then such amount which is not supported by any evidence except bare words of the assessee would go out of tax. It was therefore, submitted that the findings given by the Tribunal for allowing loss is beyond the records are perverse.

9.2. The attention of the Court was invited at the findings given by the Assessing Officer in para 5.2.10, which reads thus:

"5.2.10 DETERMINATION:

(i) The contention of the assessee filed vide letter dated 11-9-97 and further clarification vide letter dated 18-9-97 are considered very carefully, it is admitted even till date by the assessee that Rs.2.93 crores was paid in cash. Further it is to be noted that the assessee even at this stage also has not uttered a single word abut the source of such huge unexplained cash payment and as per submission filed also the same admittedly remain totally unexplained. Rights in the land to the extent of cash payment were existing as stated by Shri Manoj Vadodaria in his statement recorded on 13-11-95, 14-11-95, 16-11-95 and finally on 7-2-96. Therefore, the contention now taken vide para 7.4 as above is not acceptable that the assessee was not having any right against the cash component paid by him towards the land deal. In fact, the submission for the assessee are contrary to the available facts on records and goes against basic business prudence as no person would allow a transaction in which he has made huge investment of nearly Rs. 3 crore to be settled without any benefit to him. The obvious suggestion which emerges from such contention is that assessee is now contending that he allowed the Adani Group concern to make profit at his Cost, which he would never do unless such cash component came from Adani's, which he empathically denied in his statement recorded. In his statement dt. 13-11-1995 in reply to Q.11 it was clearly and categorically mentioned by the assessee that against cash payment of Rs. 2.93 crores paid by him, his development right with society were still outstanding and were yet to be settled. Further still in reply to Q.12 on 16-11-1995 it was again re-iterated by assessee that he was having development right with society against cash payment and due to dispute between society and present developers he was not having

written agreement with any of them. In reply to Q.16 of the statement on 16-11-1995 he clearly admitted existing investment of Rs. 2.93 crores in Baronet land for development rights. Still further when queried about his role in Baronet land deal in Q.11 of his statement recorded on 7-2-1996, the assessee maintained that this is true that on papers this land deal was finally done between Govind C. Patel and Adani, but all its negotiations were done by him and all cash payment were arranged by him. But since he did not have availability for payments to be made through cheques, he had arranged for cheque payments through Adani's. It was also negotiated by him. Therefore, he was negotiating with the society against the cash payment made. The assessee maintained that since he had negotiated with Shri Govind Patel through Shri Suresh Patel, he was aware about all the facts.

(ii) The above depositions spread over two months, that too after 2 months from the end of the block period clearly brings out that when in Feb,96 the assessee was fairly certain about the rights against cash payment made and was accordingly making negotiations. Further, it is simply unbelievable that when he had himself negotiated the subsequent land deal (as now stated to be between Labh Construction Ltd. And Adani's) that he would have totally sacrificed his interest represented by investment of Rs. 2.93 crores made in cash. The further contention raised that department may now confirm with Labh Construction Ltd., that no cash payment was made is on face of it devoid of any merit or substance and fairly speaking such a contention cannot be seriously even raised. This is an admitted position that any person would not admit any unaccounted investment in land deal, thereby inviting tax

liabilities and penal consequences and additional Stamp Duty, unless department is in possession of incriminating evidences and hence there is absolutely no question of Labh Construction Ltd. admitting any such payment. Hence the contention now taken about loss are on the facts of it, devoid of any merit and substance and in any case assessee has brought to evidence or details on records to establish huge loss and further fact that such loss was actually incurred before the end of block period. It is worthwhile to note that assessee has raised serious objections that transactions discovered in other searches, even though pertaining to the block period cannot be considered in block proceedings. Here on the fact of it until after the close of more than 4 months from the end of block period i.e. 21-9-95, the assessee in his statement recorded on 7-2-96 admitted the existence of right and thus loss was not incurred before the end of block period.

(iii) Further it is settled position of law that income/loss is to be determined with reference to the definite period covered under assessment and loss/profit incurred/earned beyond that period cannot enter into the computation of earlier period. The assessee in view of above discussion has totally failed to establish that loss was incurred prior to the end of block period and value of investment made in cash at the end of block period was NIL and hence the claim of loss is not maintainable on facts as well as in law and is hereby rejected.

(iv) In view of the aforesaid discussion, addition of Rs. 2.93 crores is made in the total income of block period in the hands of the assessee as unexplained investment. Since a sum of Rs. 50 lakhs is paid cash in the F.Y. 93-94 and Rs. 2.43 Crores is paid in cash in the F.Y. 94-95, hence,

accordingly addition as unaccounted investment for Rs. 50 lakhs is made in the Asst. Yr. 1994-95 and Rs. 2.43 crores in the Asst. Yr. 1995-96 respectively.

(A.Y. 1994-95 Rs. 0.50 crores, A.Y. 1995-96 Rs. 2.43 crores.)"

9.3. Similarly with regard to the land at Jagatpur, the assessing officer in para 5.5.5 of the assessment order has observed as under :

"5.5.5 DETERMINATION :

i) It is an admitted fact that the land was purchased at the payment of Rs. 10 lacs from the farmers and sold to Shri Govind C. Patel at Rs. 2.16 crores and repurchased by the assessee at Rs. 3.36 crores. Against initial sale, a sum of Rs. 1.90 crores is received by the assessee from Shri Govind C. Patel from 19-10-1993 to 10-8-1994. Rs. 26 lacs were outstanding at the time of repurchase by the assessee. The account was squared up by way of Hawala of Kanubhai Patel to Rs. 1.75 crores and Rs. 1.35 crores payable by the assessee to Shri Govind C. Patel and by cross entry (adjustment) of Rs. 26 lacs.

ii) It is further clear from the page.105 that amount outstanding at the time writing of page.105 on the instruction of the assessee was Rs. 1.05 crores against Rs. 1.35 crores as on page.21. It means that Rs. 30 lacs is admittedly paid by the assessee to Shri Govind C. Patel, Further the assessee has himself admitted investment of Rs. 87 lacs in his statement recorded u/s. 131 by the ADIT and accordingly disclosed the amount as his unaccounted investment vide reply to Q.16 of Statement dtd. 16-11-1995.

iii) The assessee has claimed loss of Rs. 130

lacs vide Para 10.5 which is not acceptable as no proof regarding cancellation of the deal with the farmers and no other evidence to this effect were furnished during the course of assessment proceedings by the assessee. Apparently, the poor farmers simply could not have afforded to cancel the deal after receipt of substantial sum which would have been required to be returned by them in the event of such cancellation, would have entailed, more so considering assesses self professed role as sophisticated broker in para 1.2 of his written submission dtd. 11.9.97 as extracted above. The undisputed admitted position about this land transaction which emerges is here under :

1. Assessee has paid Rs. 10 lacs to farmers

2. Assessee has further paid Rs. 77 lacs to Shri Vijay Shah in connection with reacquisition of this land as admitted by assessee.

3. Assessee has also paid Rs. 30 lacs in connection with this very deal, apart from Rs. 175 lacs paid to Kanubhai as agreed in para 10.4(f) of written submission dtd. 11-9-95. Thus, against total payment Rs. 205 lacs, assessee was in receipt of money to the tune of Rs. 190 lacs. Thus a further amount of Rs. 15 lacs was paid.

4. Thus overall payment / investment made by assessee in connection with this land deal stand at Rs. 102 lacs (Rs. 10 Lacs + Rs. 77 lacs + Rs. 15 lacs) against the land whose initial sale consideration was agreed at Rs.2.16 crores and later the assessee reacquired at Rs. 3.36 crores.

iv) In the face of this clear position of facts, assessee's contention of loss without any shred of evidence is required to be

simply ignored as assessee is holding this land worth more than Rs. 3 crores obtain investment of Rs. 1.02 crores only. Further the assessee being self professed expert in land clearance etc., it is difficult to accept assesses contents as now taken that he could not get necessary clearance or permission which remains totally unsubstantiated in absence of any evidence. Further the amount payable at Rs. 43 lacs as contended in para 10.7 and treating the same as written back liability shows that such amount was not payable by the assessee to Govind C. Patel, which in turn confirmed all the happening about the land deal till date of recording of statement dt. 7-2-1996.

vi) In view of the above discussion the total investment in the land at Rs. 102 lacs is added to the income of the assessee u/s. 69 of the Act which includes Rs. 87 lacs admitted by the assessee as his net investment. An undisclosed income of the assessee in the Asst. Year 1994-95 for initial payment to farmers at Rs. 10 lakh and balance for A.Y. 1996-97.

(Asst. Year - 1994-95 - Rs. 10 lakhs
Asst. year - 1996-97 - Rs.92 lakhs)"

9.4 Referring to the above findings of the Assessing Officer, it was submitted that there is no evidence for any payment made by the assessee to Shri G.C. Patel and therefore, the assessee is not entitled to claim of any loss under Section 37 of the Act, 1961.

9.5 Referring to the findings given by the Tribunal in para Nos.23, 24 and 38 of the impugned order, it was pointed out that the Tribunal has not considered the fact that there is no evidence available on record, which indicates the payment made to Shri G.C. Patel and Shri G.C. Patel has denied the receipt of such payment. It was submitted that the decisions cited by the assessee before the Tribunal are also of no consequence as in such cases material available on record was indicative of payment made upon which the presumption was drawn for incurring of loss. It was therefore submitted that in the facts of the case, the Tribunal without arriving at any finding of fact has allowed the loss and as such the impugned order of the Tribunal is perverse.

9.6 In such circumstances, it was submitted that the Tribunal has erred in holding that the assessee is entitled to the loss with regard to the unexplained and unaccounted investment, which

did not result into tangible benefit under Section 37 of the Act as business loss under Section 28 of the Act, 1961.

SUBMISSIONS OF THE ASSESSEE FOR Q.NO.2

10. On the other hand, the learned senior advocate for the assessee relied upon the findings given by the Tribunal in para 23 to 25 of the impugned order, which reads thus:

> *"23. The next deal considered in the assessment order is of Baronet land in paras marked 5.2.1 to 5.2.10 on pages 37 to 44. The Assessing Officer has made an addition of Rs. 2.93 crores for cash paid by the assessee to Shri G. C. Patel for acquiring the rights in the aforesaid land. In this particular deal there is no dispute between the assessee and the Department in regard to the quantum. It is admittedly paid by appellant and therefore has to be considered in the assessment of the appellant. We, therefore, need not elaborate herein that aspect. The real dispute is of the allowability of this sum of Rs. 2.93 crores as loss. Assessee's stand is that cash has been paid and the assessee has admitted it and on that basis he is being taxed, but there is no evidence which would be admissible in any civil litigation for supporting the assessee's case that he made that payment and acquired any rights in that land. Assessee claims that Shri G. C. Patel has not admitted to the receipt of this money. Therefore, according to the assessee the cash payment made by him is totally lost*

to him from the date of search itself due to a sort of precipitate action taken on that date and the sense that negotiations and transactions which were not intended to be recorded and shown came to that and hence the parties involved would take their respective stands on the basis of existing record. Since there is no record existing for booking Shri G. C. Patel and he has not admitted to the receipt of the money paid by the assessee it is a loss to him.

24. On the other hand, Department's contention is that assessee was still having some development rights outstanding which were to be settled and further that it was not conclusively proved by the assessee that the money paid by him was totally lost to him and that too within the block period relevant to this assessment.

25. On careful consideration we find that the information and evidence brought on record in this regard is inadequate for enabling us to take any view in the matter. Respective stands have been reiterated before us but they are basically by way of arguments only and to us they do not appear to be based on some solid evidence - documentary or oral. Actually no evidence has been pointed out to us even in regard to existence of any dispute in regard to this land unlike the position in the Silver Arc Land. Further, assessee has claimed at the development rights in this land have been assessed on successively to a number of parties and ultimately to Labh Construction Ltd. but the Department has tried to verify the correct position in regard there. One can imagine and envisage a number of leads for litigation in this respect but with a view not to restrict the Department's discretion in this regard, we consider it just and proper not to mention them herein. The facts and in the circumstances of the case, it would just and reasonable to set

aside this particular act with a direction that the Assessing Officer would adjudicate upon it and he would be free to collect and consider fresh material also as he may deem fits to decide whether it is a loss to the assessee. Similarly, assessee would be free to produce any material in support of his contentions for claim of loss. Of course, the Assessing Officer before taking a view would give a reasonable opportunity of being heard to the assessee."

10.1. The learned counsel submitted that the Tribunal has remanded the matter back to the Assessing Officer with a direction to adjudicate the issue afresh.

10.2. With regard to the other land at Jagatpur after recording the facts of the case, the Tribunal ultimately held in para 38 and 39 of the impugned order, which reads thus :

"38. The Assessing Officer has given his main reason for rejection of claim for loss in clauses marked (iv) onwards on page 61 of the assessment order. He has pleaded that the assessee has acquired rights in the land. He has also pleaded that the poor farmers could not have agreed to the cancellation of deal. On careful consideration, we find that it is an admitted position that the assessee had paid only Rs. 10 lacs to about twenty farmers by way of advance and no formal documents of any type were executed in regard to this

land and no cheque payment was also made. Assessee entered into agreement with Shri G.C. Patel to sell the land obviously in the hope that he would be able to pass on the rights of the farmers to Shri G.C. Patel. In the second part of the deal Shri G.C. Patel could not have passed on anything more than what he had acquired in the part of the deal because a transferor cannot pass anything more than what he has. So the first part of the deal for sale from the assessee to Shri G. C. Patel and the second part of the deal for reversal of the first part or even by way of sale by G.C. Patel to the assessee was in respect of the rights which were to be acquired from the farmers. In the absence of any agreement those rights were not acquired at all. Of course, there is evidence as pointed out to us available on record that there were disputes in regard to this land. e.g. Shri Suresh Patel's statement dated 30th October, 1995 at page 139 of the Paper Book. So on the facts and in the circumstances of the case and looking to the nature of transactions particularly in regard to the cash transactions which were not intended to be shown to any Government Department it is unreasonable to infer that even after the search the assessee continued to hold some rights in that land. A really reasonable inference would be that assessee made some payments to the farmers being hardly 5% of the value (10,00,000 : 2,16,00,000 or even less i.e. 10,00,000 : 3,36,00,000) in the hope that he would be able to acquire the rights in the lands and deal with them but ultimately on account of the land being vest with disputes and litigation and ultimately on account of the intervention of the search and seizure proceedings absolutely nothing formal like cheque payment or any written agreement etc. in regard to this deal. The fact of the matter is that this deal up to the stage of

the transactions recorded in the seized papers was not intended to be shown to any Department and the assessee has come to own up those transactions under the circumstances referred to in para 7 & 9 above but in the ultimate analysis he has not acquired any rights in those lands.

39. The other aspect is that of investment by the assessee. As already indicated assessee has admitted an investment of Rs. 10 lacs to the original land owners and the Department has also accepted this figure. Second figure is of Rs. 77 lacs given out by the assessee and accepted by the Department for the loss really borne by the assessee on this transaction because out of a total loss of Rs. 1.20 crores (3.36 - 2.26) assessee has said and the Department has accepted that a sum of Rs. 43 lacs is retained by the assessee as unilaterally taken remission in the sense that this sum was payable by the assessee to Shri G.C. Patel but it was payable by the assessee to Shri G. C. Patel but it has been neither paid nor regarded as payable after the date of search viz. 21.9.95. This leaves a difference of Rs. 15 lacs (102-87) We have carefully considered that aspect also and we find that there is a flaw in the approach of the Assessing Officer in regard to this sum of Rs. 15 lacs. He has mixed up the inferences to be drawn from the jottings on sheet No. 21 in which Rs. 1.35 lacs is shown as payable by Manoj Vadodariya from there he has jumped to the jottings on sheet No. 105 in which against Jagatpur land only sum of Rs. 105 lacs has shown as payable and he has concluded that a sum of Rs. 30 lacs is paid during the intervening period adding this to 175 lacs paid / payable to Kanubhai he has come to the conclusion that Rs. 205 are paid against the receipt of money of Rs. 190 lacs and hence a sum of Rs. 15 lacs is extra paid. Now the real flaw lies in the fact

that he has proceeded with the figure of Rs. 77 lacs for difference between loss of Rs. 120 lacs and unilateral remission of Rs. 43 lacs as admitted by the assessee and then he has adopted the figure of Rs. 105 lacs as on page 105. He appears to have fallen into the error that on the basis of page 105 the figure of payment would come to Rs. 62 lacs (i.e. 105-43) so this amount of Rs. 62 lacs with Rs. 15 lacs computed by Assessing Officer would give a figure of Rs. 77 lacs which is admitted by the assessee. In the computation of the Assessing officer this Rs. 15 lacs has, in effect, been considered twice over. Otherwise also it is obvious that the assessee had met from his undisclosed sources the effective loss of Rs.77 lacs (120-43) and also paid Rs. 10 lacs to the original owners. Hence total investment comes to Rs. 87 lacs only and not Rs. 102 lacs."

10.3 Reliance was also placed upon the findings of the Tribunal, wherein the Tribunal has discussed the legal aspects of the case in para 44 and 45 of the impugned order, which reads thus:

"44. As already stated, all these unexplained or unaccounted investments were made for business. Any expenditure pertaining to business has to be allowed for computing the business income. If technically unexplained investment is added u/s. 69 the deduction is allowable to compute the business income. If technically unexplained investment or unaccounted investment is added u/s. 69C the entire expenditure towards it has to be allowed as business loss. This view is

supported by the decision of Patna Bench of the Tribunal in the case of Nishant Housing Development Pvt. Ltd. vs. ACIT 52 ITD 103. At this stage, we may point out that to negative this view the Legislature is proposing to amend Sec. 69C in following manner :-

> *"29. Amendment of Section 69C - In section 69C of the Income-tax Act, the following proviso shall be inserted at the end with effect from the 1st day of April, 1999, namely:-*
>
> > *"Provided that, notwithstanding anything contained in any other provision of this act, such unexplained expenditure which is deemed to be the income of the assessee shall not be allowed as a deduction under any head of income."*

45. If such disallowance was automatic then there was no need of amending Sec. 69C. It would be pertinent to note that effect of the amendment if it is approved will come into effect from 1.4.1999 which is far after the relevant years under consideration. The view of the Patna Bench of the Tribunal is definitely a correct view because by technical approach anybody can be taxed on hypothetical income. There are provisions of including deemed income and there are also provisions for restricting the exact expenditure but there is no case of hypothetical income or hypothetical expenditure in the parameter of Income-tax Act. Income-tax Act has been enacted for obtaining tax from the income and no tax can be levied on hypothetical proposition where the assessee will not be able to pay tax as per assessed income. The Supreme Court in the case of Godhra Electricity Co. Ltd. vs. CIT 225 ITR 746 opined that hypothetical income cannot be brought to tax. In that case, it would be seen that if technically

is taken the assessee could be taxed in the assessment year when the High Court judgment was in its favour for realising high electrical charges from the customers but subsequently when the concern was taken over by the government no such higher collection was made by the company but on technical view the department had included the income on accrual basis based on High Court Judgment whereas the Supreme Court was of the view that the income accrued to the assessee was only hypothetical and cannot be taxed because it did not realise the same. Mere adopting this decision to show that the actual income or the real income can only be taxed and further that only the deemed income as provide in the Act specifically such as Sec.69 can only be taxed. Accordingly aforesaid payments which ultimately did not result into tangible benefit shall be allowable also as expenditure u/s.37."

10.4. It was submitted that the Tribunal after taking into consideration the facts of the case and after considering the case laws cited before it, has allowed the loss claimed by the assessee and the Tribunal also relied upon the amendment made in Section 69C of the Act w.e.f. 1st April 1999, whereby a proviso was added for disallowance for deduction under any other head of income with regard unexplained expenditure, which is deemed to be the income of the assessee under Section 69C. It was pointed out that the

Tribunal also relied upon decision of the Supreme Court in case of ***Godhra Electricity Co. Ltd. vs. CIT 225 ITR 746,*** to hold to apply the real income theory to allow the claim under Section 37 of the Act.

10.5 The learned senior counsel for the assessee relied upon the following decisions:

(i) Referring to the decision in case of ***Principal Commissioner of Income-tax v. RJD Impex (P.) Ltd.*** reported in [2016] 69 taxmann.com 306 (Gujarat), it was submitted that this Court while considering the allowance of the claim of the bad debts has held as under :

> *"4. The facts as emerging from the record reveal that the respondent assessee had claimed that certain debts had become bad in respect of seven parties. The Assessing Officer declined the claim in respect of six parties and allowed the bad debt deduction in respect of A. P. Sayona Trade Association. In respect of two of the parties, namely, Sakar Overseas Pvt. Ltd. and Shree Ram Trading Co., the Assessing Officer noted that these advances were not debts which have been taken into account in the computation of income and that as the assessee had filed cases against these*

entities and as judgment on these court cases are yet to be delivered, bad debts were not allowed at that stage. It was also noted that the goods were not received and that the payments were made in advance and that therefore, these amounts could not be treated as bad debts. As regards the dues from Quality Foods and S.Y.P. Exporter, the Assessing Officer was of the view that the trade advances for purchases could not be treated as bad debts. As regards S.N. Das Freight Forwarders Pvt. Ltd., the Assessing Officer noted that the same represented excess payment made for forwarding expenses. According to the Assessing Officer, there was nothing to show that the amounts have actually turned bad and he, accordingly, disallowed Rs.5,15,52,492/-.

5. In appeal, the assessee took the stand that without prejudice to its original claim of bad debts, the amount should be allowed as a business loss. The Commissioner (Appeals) called for a remand report from the Assessing Officer and concluded that to the extent the transactions in question were not disputed and the assessee had demonstrated that loss had actually been incurred, the same is to be allowed as deduction as business loss. It was also noted that the assessee had exported substantial quantities of agricultural processed goods, including dehydrated garlic flakes and white onion powder, and it was in this connection that the assessee bona fide and in the course of normal business, gave advances to S.Y.P. Exporter, Sakar Overseas Pvt. Ltd. and Shri Ram Trading Co. It was also noted that criminal cases were also instituted against the persons who were given these advances, who turned out to be fraudulent in their conduct. These advances were accordingly held to be business loss.

6. The Tribunal, after considering the material on record, found that it was an

undisputed position that the assessee did in fact trade in processed agricultural produce, in connection with which the advances in question were made, and it was in the course of this trading that, the business loss of making unrecoverable advances was incurred. The Tribunal found, as a matter of fact, that the losses were wholly incidental to the business carried on by the assessee. It further noted that there may not be any trading transactions of these products in the current year, but the business of the assessee has not come to a halt. No doubt, the criminal complaints filed by the assessee had not reached finality and the persons who allegedly and fraudulently obtained these advances were on bail granted by the High Court, however, the remote possibilities of recovery did not take away assessee's right to claim reasonably foreseeable business loss. The Tribunal noted that the Commissioner (Appeals) had given categorical and detailed findings about these advances having become actually bad and these findings remain uncontroverted and accordingly, confirmed the relief granted by the Commissioner (Appeals).

7. Thus, the Tribunal has recorded concurrent findings of fact to the effect that advances given by the assessee had become actually bad and such findings had remained uncontroverted. It is not the case of the appellant that the Tribunal has placed reliance upon any irrelevant material or that any relevant material has been ignored, nor is the learned counsel for the appellant in a position to point out any material to the contrary to dislodge the concurrent findings of fact recorded by the Tribunal. In the aforesaid premises, the conclusion arrived at by the Tribunal being based upon the findings of fact recorded by it upon appreciation of the evidence on

record, does not give rise to any question of law, much less, a substantial question of law, warranting interference."

It was submitted that the Tribunal has arrived at a finding of fact but the Tribunal did not place reliance upon the irrelevant material or any relevant material has been ignored, more particularly when the learned counsel for the Revenue has failed to point out that the finding of fact recorded by the Tribunal or the conclusion arrived at by the Tribunal are based on irrelevant material or are base on ignoring any relevant material, the impugned order of the Tribunal cannot be said to be perverse and therefore, no interference should be made by this Court in the impugned order of the Tribunal.

(ii) Referring to the decision of the Rajasthan High Court in the case of ***Commissioner of Income-tax v. Anjani Kumar Co.Ltd.*** reported in [2002] 124 TAXMAN 429 (RAJ), it was submitted that the Court after considering the fact that advance was paid for acquiring agricultural land

to set up a factory, but when the agricultural land was not required, and no capital asset came into existence; and therefore there was no question of granting any depreciation on such asset but as the land was not acquired, therefore, the payment made by the assessee was to be allowed at business loss.

(***iii)*** Relying upon the decision of the Delhi High Court in the case of ***Commissioner of Income-tax v. Rose Services Apartment India(P.) Ltd.*** reported in [2010] 326 ITR 100 (Delhi), it was submitted that the High Court has come to the conclusion in that case that the loss incurred by the assessee on account of refund of advance was in nature of business loss.

(iv) Reference was made to the decision of this court in case of ***COMMISSIONER OF INCOME TAX vs. MAHENDRA N. SHAH*** reported in ***280 ITR 462 (Guj),*** wherein it was found that the Tribunal has recorded as a matter of fact, that there is

evidence in the form of telegrams, correspondence as well as assessee's attempt through Consulate General of India to recover the money, but in vain and that two post dated cheques received from intermediary had not been honoured and the assessee had not received anything against the amount which was collected by Dubai party by retiring letter of credit. In that case, the Tribunal has further recorded the following findings of facts : (i) the assessee had in fact suffered a loss to the tune of Rs. 3,45,000; (ii) the loss related to the business, came to the knowledge in the year under consideration; (iii) contention that the transaction was not genuine was not even the case of the AO because the AO himself had observed in the assessment order that a fraud had been committed by Dubai party by presenting false shipping documents; (iv) in face of the correspondence and telegrams on record the assessee had prima facie established incurring of loss, but the Revenue had failed to discharge the onus which was clearly on Revenue to show that

the transaction was not genuine; (v) the AO had placed undue emphasis on the lapse committed by the bank official but the said fact cannot wipe out the loss incurred by the assessee. In light of the aforesaid findings recorded by the Tribunal while concurring with the view expressed by Dy. CIT(A), it is apparent that the impugned order of the Tribunal does not suffer from any infirmity. In fact, the entire issue is based on facts and appreciation of evidence without involving any question of law. The Tribunal was thus right in holding that the assessee was entitled to deduction of sum of Rs. 3,45,000 as business loss document was on record, which indicate the same.

10.6 It was therefore submitted that the Tribunal having arrived at finding of facts, no error can be said to have committed in the impugned order holding that unexplained and unaccounted cash investment which did not result into tangible benefit was allowable expenditure

under section 37 as business loss under section 28 of the Act,1961, so as to interfere the same.

OPINION FOR Q.NO.2

11. Having considered the submissions made by both the sides and having gone through the materials on record, it appears that the Assessing Officer has categorically observed that there is no evidence to show that the assessee made payment of Rs. 2.93 crores to Shri G.C. Patel for acquiring rights in the land, the Tribunal has found that it is an admitted position that the assessee had paid only Rs. 10 lacs to about twenty farmers by way of advance and no formal documents of any type were executed with regard to the land. Thereafter, the Tribunal recorded that the assessee entered into an agreement with Shri G.C. Patel to sell the land obviously in the hope that he would be able to pass on the rights of the farmers to Shri G.C. Patel. It appears that thereafter, the Tribunal relied upon the statement of Shri Suresh Patel

dated 30th October 1995 that there were disputes with regard to the land in question and presumed that as the cash transactions were not intended to be shown to any Government Department, it is unreasonable to infer that even after the search, the assessee continued to hold some rights in that land. Thereafter, the Tribunal made an inference that assessee made some payments to the farmers being hardly 5% of the value in the hope that he would be able to acquire the rights in the lands and deal with them but ultimately on account of the land being vest with disputes, litigation and ultimately on account of the intervention of the search and seizure proceedings absolutely nothing came out of it and the assessee lost his money. However, the Tribunal presumed that the assessee made payment of Rs. 2.93 crores to Shri G.C. Patel in arriving at such finding which is not borne out from the record. It appears that the Tribunal has misdirected itself by observing that it cannot be reasonably inferred that by paying cash amount of

less than 5% of the total value, the assessee would still be able to claim some rights in the land when there is absolutely nothing formal like cheque payment or any written agreement etc. in regard to this deal. The Tribunal, therefore in total disregard to the findings of fact recorded by the Assessing Officer supported by the material documentary evidence on record has only on the basis of the assumption and presumption, remanded the matter back to the assessing officer to decide the issue of allowing loss amounting to Rs.2.93 Crore for payment made to Shri G.C. Patel.

11.1 We are of the opinion that the very basis and foundation of claiming the business loss of Rs. 2.93 Crore by the assessee which requires finding of fact that the assessee has made a payment of Rs. 2.93 Crore. However, when there is no evidence on record with regard to the payment made by the assessee to Shri G.C. Patel even by any remote corroborative evidence in form

of any noting on the seized papers found during the course of search except bare words of the assessee and when Shri G.C. Patel in his statement has denied this fact of receipt of cash amounting to Rs. 2.93 Crore from the assessee, there was no need to remand this issue back to the assessing officer, because for unaccounted transactions there cannot be any evidence for either payment or receipts of cash except what is found during the course of search and seizure by the Department or in form of other corroborative evidence, which may be collected after search and seizure and further the statement recorded of the concerned persons under the provisions of the Act, 1961. When the assessee claims that he has not received any benefit out of payment of unaccounted cash then onus would lie upon him to claim such payment as business loss. In the facts of the case, it appears that the Tribunal contrary to the evidence on record has made inferences on the basis of the assumption and presumption so as to remand the issue of the

claim of the assessee of Rs. 2.93 Crore towards business loss.

11.2 With regard to loss claimed by the assessee in respect of Jagatpur land deal, the Tribunal has arrived at the findings contrary to the material documentary evidence on record as the Tribunal misinterpreted the seized material so as to find error in the finding of the assessing officer which is based on the entries made in the seized papers at sr. No.21 and 105. It appears that the Tribunal has considered irrelevant factors for holding that the assessing officer has considered twice the amount of Rs.15 Lakhs by taking into consideration the entries in the seized papers observing that the assessing officer jumped from one seized paper to another, whereas on careful consideration of the assessment order, we are of the opinion that the Tribunal has arrived at a perverse finding contrary to the material on record.

11.3 In such circumstances, the Question No.2 is also answer in negative i.e. in favour of the Revenue and against the assessee and therefore, the assessee would not be entitled to claim Rs. 2.93 crores as business loss either as allowable expenditure under Section 37 or business loss under Section 28 of the Act,1961 with regard to the unexplained or unaccounted cash investment which did not result into tangible benefit to the assessee. As the Tribunal has remanded.

QUESTION NO.3

12. With regard to the Question No.3, the Tribunal has deleted the addition made with regard to the two land deals, namely, Amrakadam and Sangvilla. The facts of the case with regard to this issue are that the assessee failed in discharging his primary onus for identity of creditor, genuineness of the transaction, and creditworthiness of the creditor. The assessee claimed that the payment made to the farmers by him was an allowable expenditure. The Tribunal

has recorded the factual position in the following paragraphs with regard to the issue of the said two land deals, which reads thus :

> *"2. The date of commencement of search was 21.9.1995 and the date of receipts and documents u/s/ 158BD of the Act was 11.7.1996 and the assessment was completed on 30.9.1997. On the basis of search and seizure operations carried out at the premises of land brokers Shri Deepak Mehta and Suresh Patel on the 21st September, 1995. In the course of those proceedings u/s. 132, inter alia, some loose papers were found with rough jottings and in the statements recorded u/s. 132/131 the said Shri Deepak Mehta and Shri Suresh Patel stated that the seized paper identified as Nos. 6; 21; 22 & 105 of Annexure-1 depicted the cash transaction in which assessee was involved as buyer/seller and/or broker. Thereupon statements of the 16.11.95 and finally on 7.2.96. It is significant to note that action u/s. 132 was not taken in assessee's case. Further, it had also transpired that one Shri G. C. Patel of the Ganesh Housing group was also involved in many transactions with the assessee but again significantly action u/s. 132 was not take at his place also. Perhaps some statements of Shri G. C. Patel were recorded but in the block assessment of this assessee there is no identification or even mention regarding versions of claims of the said Shri G. C. Patel let alone Department's finding there-on. Assessee specifically asked for the copies of inter alia the statements of Shri G.C. Patel but in vain. Department's stand is and was that those statements are not being used against the assessee.*
>
> *3. The assessee in his statements, broadly speaking, admitted existence of almost all*

the transactions of those seized papers marked as No.6; 21; 22 and 105 but gave his own version and explanations in regard to their contents.

4. Then on 14.3.96 there were search and seizure operations u/s. 132 carried out at the premises of Radhe developers (India) Ltd. (RDIL for Short) and its officers, in the course of which loose papers with rough jottings were found and paper marked 106 of Annexure-A3 related, inter alia, to the land of Shantinagar Shaila Co.O\op. Housing Society. At one time Shri Ashish Patel, Managing Director RDIL stated to the effect that the jottings were for payment of Rs. 12.80 crores to the assessee and Vasant Adani etc. In regard to these papers and transactions assessee, right from the beginning, has denied his involvement.

5. Then, in the course of yet another search on 3.8.96 in the premises of L. T. Shroff some seized paper allegedly depicted deposit of Rs. 10 lacs in cash by the assessee and the existence of this deposit is also denied all along by the assessee.

6. The assessment order itself runs into 112 typed sheets and carries almost an equal number of sheets as Annexures being Xerox copies of some of the seized papers and the copies / synopsis of some of the recorded statements. Assessee's grounds of appeal and SOF run into 48 types sheets and are accompanied with three Annexures. Very detailed hearings took place before us in the course of which the learned Advocates for the assessee pressed and elaborated very succinctly the points taken in the grounds of appeal and SOF. The learned Sr. DR also very proficiently and empathically defended the assessment order. He furnished written submissions (in ten closely typed sheets) also primarily in the form of synopsis and a sort of summation of Department's stand. Very detailed submissions were made before

us from both sides on each of the disputes and transactions involved but some common aspects of the respective stands run through almost all the disputed items. For facility of exposition it would be better to note first some of those common aspects"

12.1 The Tribunal, thereafter recorded its finding in respect of Amrakadam land in para Nos.12 to 16 of the impugned order, which reads thus :

"12. Bond land deal considered in the assessment order is the said Amrakadam land or Vejalpur Survey No.1196. This land was sold by the assessee to Saumya Construction and assessee has readily admitted a profit of Rs. 32.70 lacs apart from a sum of Rs. 5 lacs paid by him, earlier in point of time, to the original owners (being farmers) of that land. But vide para marked 4.4 (with sub-paras 4.4.1 to 4.4.4) on pages 22 to 25, for that addition made is of Rs. 87.22 lacs inclusive of Rs. 2.41 lacs for a smaller piece of land of 242 sq. yds. Assessee's stand in the matter is firstly that there was no separate payment of Rs. 2.41 lacs in regard to a smaller plot and secondly that all the cash and cheque payments were made by the ultimate purchaser M/s. Saumya Construction P. Ltd. of the original land owners who were farmers and in the process assessee earned only a profit of Rs. 32.70 lacs by way of rate difference. In the statement of facts accompany in the grounds of appeal paras marked 3.1 and 3.2 on pages 238 of the paper book give, inter alia, detailed tracts from the assessment order passed by the Assessing Officer (viz. DCIT, S.R.1, Ahmedabad) in the case of Nila on

29.8.97. It is argued on behalf of the assessee that in that assessment order a detailed analysis of all the facts and figures has been done and therein is he that on the basis of jottings on the seized paper as well as appropriate analysis of the relevant part of the statements recorded it has to be held that assessee received in cash Rs. 84.81 lacs only after deal was finalised at Rs. 1,34,25,000. On this basis it pleaded that there was absolutely no justification or adding separately a sum of Rs. 2.41 lacs as referable some other small plot. Even in regard to the cash receipt Rs. 84.81 lacs it is submitted that the assessee passed on major part of it to the original land owners viz. farmers who admittedly received the cash payments also directly from the housing society and he made a profit of Rs. 32.7 lacs only.

13. In the written submissions, the Sr. DR has again emphasised the aspect that the assessee has not furnished confirmatory letters or even the complete addresses of the farmers to whom he claims to have passed on substantial cash out of Rs. 84.81 lacs received by him. It is further contended by the learned Sr. DR that such cash payment by the assessee to the farmers is nowhere recorded in the seized documents.

14. It is submitted by the learned Advocate of the assessee that the learned Sr. DR is not justified in emphasising that the complete address of the original owners were not furnished. It is pleaded that the cheque payments are made to the original owners and those persons are identifiable and at any rate the assessee had given the names and Vejalpur was not such a big place that the person could not have been identified; only if Department tried to locate/identify them. The point made out is that the complete information is furnished by the assessee and Department has not tried to verify it at

all. In regard to the confirmatory letters it is submitted that the original owners after receiving the full money were no more under the control of the assessee and hence Department should have attempted to verify the correctness of assessee's claim. Ultimately it is submitted that the profit shown in a sum of Rs. 32.70 lacs on a deal of a total sum of about Rs. 1.34 crores and that too within a short period of a couple of months is more than reasonable and deserves to be accepted.

15. We have considered the rival submissions and material on record. The seized papers relevant for this deal is No.6 of Annexure-A1 seized from the premises of the land broker Shri Deepak Mehta on 21.9.95. Copy is available as Annexure to the assessment order. It contains some calculations primarily by way of multiplications of two figures which claimed to be rates and measurements of the land in question and they are obviously the probable values for the land at some stage of negotiations. In the assessment order of Nila dated 29.8.97 the DCIT, S.R.1, has analysed the contents and the statements in a much more thorough fashion than done by the Assessing Officer of this assessee in the assessment order dated 30.9.97. We agree with and uphold the findings given in that assessment order dated 29.8.97 that the cash component actually involved in this deal was Rs. 84.81 lacs and not Rs. 87.22 lacs. Further, there is lot of force in the plea taken on behalf of the assessee that the original owners were identifiable only if the Department had tried to do so and the assessee had done his best by providing the names particularly when admittedly the cheque payments were made to them directly. In the light of the trust of the arguments of he learned Advocates recorded in para-7 above and our observations thereon as contained in para-9

above we have no hesitation in holding that on the facts and circumstances of this case it is unreasonable to infer that the whole sum of cash payment of Rs. 84.81 lacs was pocketed by the assessee, the point is that the original of cash component passing on the land deals. Proceeding on this premise one has only to imagine and estimate what should be regarded as reasonable profit to the assessee. Moreover, the statement of the appellant is main basis for making this addition and accordingly Assessing Officer cannot be allowed to approbate and reprobate at a later stage - while he has relied upon those part of the statement which favour the revenue but conveniently ignored those portions which favour the assessee.

16. On the facts and in the circumstances of the case we hold that the profit admitted by the assessee is reasonable and hence the addition required in respect of this land deal has to be restricted to Rs. 32.70 lacs."

12.2. With regard to Sangvilla land deal, the Tribunal has observed in para 40 to 42 as under :

"40. Para marked 5.6 of the assessment order covers "other land dealings" under the heading 'A' on page 62 he considers Sung villa Land bearing F. P. No. 259. The Assessing Officer has added Rs. 70 lacs for unexplained investment by the assessee by way of payment to Shri G. C. Patel and has also added Rs. 7.5 lacs for half share of the brokerage on this land. Assessee's contention is that he was merely one of the brokers for this land deal and hence there is no question of his giving Rs. 70 lacs from his own resources. His claim is that the said sum of Rs. 70 lacs was first received form the prospective buyers of the

land and then passed on to Shri G. C. Patel. Hence according to him it is no includible in his total income. In regard to brokerage his point is that he hoped to get the brokerage but really he had not got it and thereafter the whole deal gets lapsed consequent upon the search and seizure operation on 21.9.1995. His alternative argument is that brokerage eve if due to him was not actually received and as he follows cash basis it was not taxable in his hands.

41. Before us in the oral and written submissions respective stands are taken by the parties and our attention has also been drawn to that particular entry in the seized papers.

42. We have very carefully perused the contents of the relevant seized paper and also considered the rival submissions. On top of seized paper No. 105 of Annexure - A/1 found from the premises of Shri Suresh Patel on 21.9.1995 there is a sort of disjointed entry of Rs. 70 lacs declared to be pertaining to this land. We call it disjointed because before this entry there are three other entries whose total is taken but this particular entry of Rs. 70 lacs has been left out of that total though recorded along with those three entries and in the same fashion. We have already had an occasion of analysing the remaining entries of that sheet in connection with Silver Arc Land. We have dealt with the entries of that sheet as not indicative of any conclusive deals or receipts and payments but appear to be mere recordings for the understanding of position at a particular point of time. Coupled with the fact that these sheets are not found from the assessee's premises nor are they in his handwriting - they do not prove anything either. All the same the assessee has admitted in his statement that he paid Rs. 70 lacs but along with that he has also stated that he was only a broker in

the land and passed on that money of Rs. 70 lacs after receiving it from the prospective buyers. The Department disbelieved this part of the statement of receipt from the prospective buyers and main reason given in the assessment order regarding this is in para (v) on page 64 to the effect that "the assessee could have named the person to whom the land was sold and other details of rate etc." This assessee's argument on this aspect is that such questions were never put to the assessee and the only question asked was as reproduced on pages 63 and 64 of the assessment order. Therefrom it is clear that this question was not asked and hence the assessee cannot be faulted for not furnishing it. On the face of it the assessee earned a brokerage and it is common knowledge that brokers are not expected to investment their money. They bring the parties together and the prospective buyers pay to the prospective sellers may be through the broker. We have no hesitation in inferring that either from the seized paper or from the statement which constitute the only basis for Departments inference it cannot be sustained. The whole addition of Rs. 77.5 lacs is deleted."

SUBMISSIONS OF THE REVENUE FOR QUESTION NO.3

12.3 Referring to the aforesaid findings of the Tribunal, the learned senior counsel for the Revenue submitted that Tribunal erred in deleting additions, though the assessee failed in discharging his primary onus. Attention was invited to the observation made by the Tribunal

with regard to Amrakadam land in para No. 14 by rejecting the contention made on behalf of the Revenue that the complete address of the original owners were not furnished by observing that the cheque payments made to the original owners, who are identifiable and the assessee had given the names and Vejalpur was not such a big area that the person could not have been identified; only if the Department tried to locate/identify them. It was submitted that the Tribunal treated the names given by the assessee of farmers in Vejalpur land as the complete information.

12.4 The learned senior counsel for the Revenue relying upon such observation made by the Tribunal submitted that the impugned order is a perverse order as there is an erroneous appreciation of facts on record by excepting the contention of the assessee that only the names of the farmers in the Vejalpur area would amount to furnishing complete information by the assessee by drawing adverse inference against the Revenue

that it has not tried to verify such information at all.

12.5 The learned senior counsel further pointed out that the Tribunal has erred in shifting the onus to prove on the Revenue when admittedly the assessee failed in discharging primary burden to give full details of the farmers apart from their names and the area.

12.6 It was therefore, submitted that the order of the Tribunal is absolutely perverse with regard to the finding in respect of the two land deals of Amrakadam and Sangvilla.

SUBMISSIONS OF THE ASSESSEE FOR QUESTION NO.3

13. On the other hand, the learned senior counsel appearing for the assessee submitted that the Tribunal after appreciation of evidence on record has given a finding of fact and the Revenue has failed to point out as to what material facts are omitted to be considered or any irrelevant

material is considered to arrive at finding of fact by the Tribunal so as to come to the conclusion that the finding of fact arrived at by the Tribunal with regard to the two land deals at Amrakadam and Sangvilla are perverse.

13.1 The learned senior counsel has relied upon the following decision :

(i) Referring to the decision in the case of ***Commissioner of Income-tax v. Varinder Rawlley*** reported in ***[2014] 51 taxmann.com 524*** (Punjab & Haryana), the learned senior counsel for the assessee submitted that the Punjab and Haryana High Court has held that when the assessee has entered into transaction by cheque and the details of information is given by the assessee then it was the duty of the Assessing Officer to directly make an inquiry and when no inquiry is made by the Assessing Authority to ascertain the factum of clearance of cheque from the bank, the Court held that the assessee has sufficiently discharged the burden which lie upon it to

explain the nature and the source of credit entry appearing in his accounts and the burden clearly shifted in that case on to the Department to prove to the contrary.

(ii) Similarly, the Allahabad High Court in the case of ***Commissioner of Income-tax Meerut v. Smt. Sadhana Jain*** reported in ***[2014] 45 taxmann.com 432 (Allahabad)*** has held that Once the assessee furnishes the evidence in nature of cheques, their dates, amounts, particulars of banks and addresses of persons who were stated to have sold shares had been furnished by assessee, burden of assessee stood discharged.

13.2 It was therefore, submitted that in the facts of the case, the Tribunal has found that the complete information was provided by the assessee with regard to the payments made to farmers and the Tribunal has rightly held that the burden cast upon the assessee has been discharged as the Assessing Officer has failed to carry out any further enquiry to identify the

person or has failed to take any further steps for identifying the person, it cannot be said that the impugned order of the Tribunal is perverse. It was therefore, submitted that as the Tribunal has come to the finding of fact on the basis of the materials on record, such finding cannot be said to be perverse or has been contrary to the evidence on record with regard to the two land deals Amrakadam and Sangvilla.

OPINION FOR Q.NO.3

14. Having heard the learned counsel for the respective parties and having gone through the materials on record, with regard to the controversy raised vis-à-vis, the Question No.3 to find out whether the findings given by the Tribunal are perverse or not, in view of the materials available on record, it would be necessary to refer to the findings arrived at by the Assessing Officer in respect of two land deals i.e. Amrakadam and Sangvilla.

14.1 The Assessing Officer with regard to the land deals at Amrakadam situated at Vejalpur, Survey No.1196 has observed in para 4.4 of the assessment order to make addition of Rs. 87.22 lacs for the A.Y. 1994-95 reads as under :

"4.4 Second land deal of Vejalpur land Survey No. 1196

4.4.1 In the show cause notice dt. 14-8-1997 vide para 6 query was raised from the assessee as under :

"Other land transaction for land at FP No. 1196 Nr. Ramdev-pir-ni-tekro belonging to Amarkadam Co-operative housing society was entered between you and Shri Saurabh Shah of Saumya Construction Co. the deal was finalised at the rate of Rs. 1125 per sq. yd. for area of 12116 sq. yd. along with one more land pieces of 242 sq. yd. at total consideration of Rs. 138.71 lacs. You have stated to have received Rs. 90.250 lacs in cash and remaining amount of Rs. 48.46 lacs is stated to be receivable by cheque. Shri Shaurabh Shah in his statement 8-12-95 and 9-1-1996 has confirmed the delay and payment in cash. IN your statement dt. 7-2-1996 reply to Q.No.3 you also reconfirmed the deal in the circumstances. Your are required to show cause as to why cash received of Rs. 90.25 lacs should not be added to your income as undisclosed income. Further please produce evidence and entries regarding cheque payment received from this land transaction".

4.4.2 The assessee replied the show cause

notice vid para 4.2 to para 4.5 vide his letter 11-9-95, the relevant portion is extracted as under :

> *"4.2(d) That, in the same statement, upon being so asked, I have there and then stated that the rights in the land in question had been acquired by me only about a month before the deal of sale to Saumya Construction Pvt. Ltd. was struck and that except for the initial payment of Rs. 5 lacs which I had to the land owners in cash, all the remaining payments that had to be made to them in cash had been made out of the cash payments received by me from Saumya Construction Pvt. Ltd. Since the time lag between the acquisition and sale was very short, the payment by cheques to the land owners came to be made directly by the ultimate purchaser Saumya Construction Pvt. Ltd. through the medium of the Society.*
>
> *4.2.(e) That, as explained there and then in my aforesaid statement, I had really got only the surplus of Rs. 32.70 lacs which this transaction had generated - because the buyer for the land which had been agreed to be acquired from its owner at Rs. 851 per sq. yd., could found only within a matter of one month @ Rs. 1125 per sq. yd. so that the entire payment - both by cheques and cash, that was payable to the landowners was arranged directly form the buyer to the landowners.*
>
> *4.4 A perusal of the above would also satisfy your good selves the reason for there being minor differences in the figures which have been mentioned in your letter presumably on the basis of a cursory look at the concerned material."*

4.4.3. In course of discussion on 15-09-97 the Authorised Representative of assessee was requested to furnish complete names and

address, date(s) and payment to farmers along with their confirmation. In reply there to the assessee has simply furnished a list of names according to which recorded payment was made. During hearing on 19-09-97 it was stated by Authorised Representative present that, nothing further was to be added / submitted.

4.4..5 In view of above facts and as admitted by assessee himself addition of Rs. 84.81 is liable to be made to the total income of the assessee. Here it is worthwhile to mention that Shri Saurabh Shah in his statements recorded by the ADIT admitted Rs. 84.81 lacs as payments in cash to Shri Manoj Vadodariya on account of land S.No.1196. As stated earlier one more piece of land 242 sq. yd. was agreed to be sold in cash at lumpsum amount of Rs. 2,41,000/-. Assessee has not furnished any comment on this land transaction hence considering assessee's own admission of Rs. 87 lacs in his statement and other facts of the case as apparent from the seized papers total addition of Rs. 87.22 lacs (84.81 + 2.42) is made to the income (which includes Rs. 84.81 received from Shri Saurabh Shah + 2.41 lakhs received on land transaction pertaining to plot of 242 sq. yd. Addition of Rs. 87.22 lacs is therefore made in the assessment year 1994-95 in the hands of the assessee on substantive basis.

(ADDITION A.Y. 1994-95 - RS. 87.22 LACS)"

14.2. Similarly with regard to the land deals of Sangvilla land bearing Final Plot No.259, the Assessing Officer has observed as under :-

"A) <u>SANGVILLA LAND BEARING F.P. NO. 259.</u>

i) The first entry on the front side of

page, 105 refers to payment made of Rs. 70 lacs in cash by Shri Manoj B. Vadodariya to Shri Govind C. Patel for purchase of land known as Sangvilla land bearing F. P. No. 259. The narration on the page is as under: "70 - 259 - Pete Chukvya Manoj". This narration as explained by Shri Suresh Patel in Answer to Q. 28 of statement dated, 22-9-95 is as under :

> i) "The first entry of 70 on front side of page. 105 refers to payment of Rs. 70 lacs in cash made by Shri Ahmedabad (Director of Neela Housing Infrastructure Pvt. Ltd.) to Shri Goving C. Patel of Ganesh Housing Corporation for purchase of land for Sungilla Society, F. P. No. 259. The land is situated Nr. Bodakdev, No. Judge's Bunglow."
>
> (Emphasis added)

ii) In the statement dt. 30-10-1995 in reply to Q.4 Shri Suresh Patel was specifically asked to state the status of land of F.P. No. 259 as on that date. In reply to Q,4 Shri Suresh Patel stated as under :

> "There is a litigation in this land hence it is still open plot of land. Shri Manoj Vadodariya has approx., paid Rs. 70 lacs for this land. No cheque payment is made."
>
> (Emphasis added)

ii) In view of this clear position the assessee was asked to explain the soruces of the investment vide para 8 of the show cause notice dated, 14-8-1997 under :

> "Para 8 : - Page 105 : seized from the residence f Suresh Patel contains a summary of land transaction between you and Govind C. Patel. An amount of Rs. 70 lacs stated as paid by you in cash to Govind Patel for Sangvilla land was found entered. Please explain the source of payment by you."

iii) The assessee replied vide para No.11 of 11-9-1997 as under :

> "Para.11.2 : In so far as first transaction of Rs. 70 lacs is appearing on seized paper 105 on which I have to draw your attention to the relevant portion of may statement recorded on 14-11-1995 attended vid A.22. What is that shows is the true nature of transaction."

iv) The assessee's reply is not clear and he has simply referred to reply to Q.11 (2) as contained in Annex. 22 of his letter, and hence vide order sheet entry dt. 15-9-1997, the assessee was again asked to explain the sources of payments of Rs. 70 lacs as clearly coming out from the seized page 105 and its narration and as explained by Shri Suresh Patel and stated by the assessee in reply to Question No.7 & 8 of statement dtd. 14-11-95 and 07-2-96 respectively. the assessee has not made any further submission and submitted on 19-9-1999 that they have nothing further to add is addition to whatsoever have been said in the written submissions. This Clearly shows the attitude of assessee during the assessment proceedings and evasive replies about clear transactions. The relevant portion of statements dt. 14-11-1995 is reproduced here under : 1m10

> "Qn. Please state as per your money, how many transactions of land you have entered through Shri Suresh Pate."
>
> Ans. I entered into following transactions through shri Suresh Patel who is broker of Shri Govind Patel of Ganesh Housing Society.
>
> i) Aram Society ------
>
> ii) Bodakdev F. P. No. 259
>
> "I and Suresh Patel acted as brokers in the Bodakdev F.P. No. 259 land. I further sold this land through another broker. the sale consideration was

received by me and out of that I paid Rs. 70 lacs to Shri Govind C. Patel through Shri Suresh Patel. We were to receive brokerage of Rs. 15 lacs which is pending till date. My share of brokerage was Rs. 7.5 lacs and share of Sureshbhai in the brokerage was Rs. 7.5 lacs.

v) The above admission makes it further clear that payment of Rs. 70 lacs was made to Shri Govind C. Patel for the land in question. The assessee could definitely name the person to whom it was sold, to any case he not give the address of the purported buyer and at what rate and when the land was sold. No confirmation was furnished from the alleged purchaser also. Further no attempt at all has been made to furnish clarification, details or evidence to substantiate and clarify this matter even during assessment proceedings. shri Suresh Pate in his statement has clearly and categorically stated that the assessee paid Rs. 70 lakhs in cash for purchase of land to Shri G. C. Patel. As further sale of land and receipt of money is totally unsubstantiated and this claim is rejected. It is accordingly held that payment of Rs. 70 lacs is made by Shri Manoj Vadodariya out of his undisclosed income. An addition of Rs. 70 lacs is made as unaccounted investment in the Asst. Year 96-97. Further Shri Manoj Vadodariya has himself stated that he was to receive brokerage of Rs. 7.5 lacs on the deal, hence on accrual basis an addition of Rs. 7.5 lacs is made as unaccounted income on the transaction of F. P. No. 259 as referred above.

(Unaccounted investment of Rs. 70,00,000/- A.Y. 96-97:

Unaccounted income of Rs. 7.5 lacs A.Y. 96-97)"

14.3 On comparison of the aforesaid finding

given by the Assessing Officer with that of the Tribunal in respect of two land deals, it appears that the Tribunal has discarded the same on the ground that furnishing the name in the area of farmers by the assessee would be enough to identify the person as Vejalpur is not such a big place that the person could not have been identified. Such finding arrived at by the Tribunal in para 14 of the impugned order is nothing but a perverse finding because it is not possible to find out to locate or identify person only because he belongs to a particular area in absence of any specific address. The Tribunal has committed grave error by shifting the burden on the department on the basis of such vague information provided by the assessee. Thus the very basis and foundation of the Tribunal to delete the addition made by the Assessing Officer is erroneous and perverse as the Tribunal has considered the irrelevant factor to arrive at such conclusion.

14.4 Similarly with regard to the Sangvilla land deal, the Tribunal in para 42 has branded the entry in the ceased papers as disjointed on the ground that the entries of that sheet at Annexure-A/1 found from the premises of Shri Suresh Patel on 29.09.1995 is of Rs. 70 lacs is not indicative of any conclusive deal or receipt in payments but appears to be *mere* recordings for the understanding of position at a particular point of time. It is not possible to understand on what basis the Tribunal has drawn such inference in absence of any corroborative evidence in support of such findings when the assessee has admitted in his statement that he paid Rs. 70 Lakhs after receiving the same from the prospective buyer, but such statement was not believed by the Assessing Officer as the assessee failed to provide the name of the person to whom the land was sold as well as the rate at which such land was sold. The Tribunal further has erroneously and perversely held that as question was not asked to the assessee, the assessee

cannot be faulted for not furnishing the details and the person to whom the land was sold and only because the assessee was a broker and he was not expected to make investment of his money. It appears that such findings are arrived at by the Tribunal only on the basis of the presumption and assumption and the findings given in para 42 are perverse as the same are not based on the materials on record but are arrived at after taking into consideration the irrelevant factors that the broker only bring the parties together and the prospective buyers pay to the prospective sellers may be through the broker. The Tribunal has therefore; committed error in drawing inference that either from the seized papers or from the statement which constitute the only basis, the addition cannot be sustained.

14.5 We are therefore of the opinion that the Tribunal has arrived at perverse findings contrary to the evidence on record in case of two land deals of Amrakadam and Sangvilla without

there being any evidence on record to arrive at such findings to delete the addition made by the Assessing Officer, which is supported by the cogent evidence on record.

14.6 In that view of the matter, the Question No.3 is also answered in negative i.e. in favour of the Revenue and against the assessee, holding that the order of Tribunal is perverse and contrary to the evidence on record in case of Amrakadam and Sangvilla land deals based on no evidence at all.

15. In view of the above, the Reference stands disposed of accordingly as allowed as all the three questions referred are answered in favour of the Revenue and against the assessee.

(J. B. PARDIWALA, J)

(BHARGAV D. KARIA, J)

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