

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

**BEFORE SHRI D. KARUNAKARA RAO, AM AND
SHRI S. S. VISWANETHRA RAVI, JM**

Sl. No.	ITA Nos.	Name of Appellant	Name of Respondent	Asst. Year
1-3	1177/PUN/2015 1178/PUN/2015 1179/PUN/2015	Laxmi Civil Engineering Services Pvt. Ltd., 1148, E-Ward, Sykes Extension, Takala, Kolhapur-416001. PAN: AAACL5602N	ACIT, Central Circle, Kolhapur	2009-10 2010-11 2011-12
4-6	1245/PUN/2015 1246/PUN/2015 1247/PUN/2015	ACIT, Central Circle, Kolhapur	Laxmi Civil Engineering Services Pvt. Ltd., 1148, E-Ward, Sykes Extension, Takala, Kolhapur-416001. PAN: AAACL5602N	2009-10 2010-11 2011-12
7	608/PUN/2016	ACIT, Central Circle, Kolhapur	Vijaykumar Rajaram Shah, “Viraj Bungalow”, 1148, E-Ward, Sykes Extension, Takala, Kolhapur-416001. PAN: ADNPS2394F	2011-12

Assessee by : Shri Dr. P. Daniel, Adv.
Shri R. C. Modi, CA
Revenue by : Shri B. Kishore

सुनवाई की तारीख / Date of Hearing : 23.06.2020
घोषणा की तारीख / Date of Pronouncement : 26.06.2020

आदेश / ORDER

PER D. KARUNAKARA RAO, AM:

There are **7 appeals** under consideration. Out of them, 3 (three) appeals i.e. ITA Nos.1177 to 1179/PUN/2015 are filed by assessee, Laxmi Civil Engineering Services Pvt. Ltd. (LCESPL). Appeals in ITA Nos.1245 to 1247/PUN/2015 are filed by Revenue. Thus, these are the **cross appeals** and are directed against the common orders of the CIT(A)-1 & 2, Kolhapur dated 01.06.2015 for the (three) assessment years 2009-10 to 2011-12. Further, the appeal in ITA No.608/PUN/2016 relates to Sri Vijaykumar Rajaram Shah and is filed by the Revenue against the order of the CIT(A)-11,

Pune dated 05.01.2016 u/s 143(3) of the Act for the assessment year 2011-12. Sri Vijaykumar Rajaram Shah is the Managing Director of the company-LCESPL. Since the facts and issues involved in all the above 7 captioned appeals of the Revenue as well as of the assessee are interlaced, therefore, all the above 7 captioned appeals were heard together and are being disposed of by this composite order.

2. Brief Facts common to the cross appeals for three assessment years : Briefly stated the relevant facts include that the assessee is engaged in the business of executing the Civil, Electrical and Mechanical contracts. The details of dates of filing of return of income, returned income and assessed income for the respective assessment years under consideration are tabulated as under :-

<i>A.Y.</i>	<i>Dates of filing of Return of Income</i>	<i>Returned Income</i>	<i>Assessed Income</i>
<i>2009-10</i>	<i>31.10.2009</i>	<i>7,67,71,340/-</i>	<i>14,42,51,631/-</i>
<i>2010-11</i>	<i>18.07.2011</i>	<i>15,30,190/-</i>	<i>39,80,58,455/-</i>
<i>2011-12</i>	<i>30.09.2011</i>	<i>2,53,998/-</i>	<i>19,76,44,154/-</i>

3. There was a search and seizure action u/s 132 of the Act at the residential as well as business premises of the assessee and the Sri Vijaykumar Rajaram Shah on 15.06.2010 (A.Y. 2009-10). The search action resulted in seizure of certain incriminating materials (the relevant details given in para 7.1 at pages 3 and 4 of the assessment order). Further, there was a discovery of unaccounted cash in the various premises of the group concerns of the assessee amounting to Rs.2.74 crores. Out of the same, the Department seized Rs.2.60 crores (rounded up). Further also, there was a jewellery seizure amounting to Rs.7,97,181/- out of discovery of Rs.46,82,110/-. The search action resulted in recording of statement of Shri

Vijaykumar Rajaram Shah and Shri Hemant Vijay Shah u/s 132(4) of the Act. Unaccounted income amounting to Rs.29,15,76,000/- disclosed Laxmi Civil Engineering Services Pvt. Ltd., Kolhapur and the same was offered in various assessment years as “business income” of the assessee. The details of assessment year-wise, incriminating material-wise, particulars of income-wise are tabulated in para 7.1 of the assessment order. For the sake of completeness, the relevant table (given in para 7.1 of the assessment order) is extracted as under :-

<i>Particulars</i>	<i>Ref. Page of seized material</i>	<i>F.Y. 2008-09</i>	<i>F.Y. 2009-10</i>	<i>F.Y. 2010-11</i>	<i>Total</i>
	<i>Party No./Bundle No./Page No.</i>				
A] Unexplained expenses	L-1/B2/5	-	3486000	-	3486000
	L-1/B2/6	-	743000	-	743000
	L-1/B2/7	-	1013000	-	1013000
	L-1/B2/10	70000000	92028000	12100000	174128000
	L-1/B2/11	-	20000000	5000000	25000000
	L-1/B2/12	-	6950000	-	6950000
	L-1/B2/14	-	10785000	-	10785000
	L-1/B2/15	-	20971000	-	20971000
	L-1/B2/16	-	2500000	-	2500000
B] Amount receivable	L-1/B2/17	-	19000000	-	19000000
C] Amount of cash found		-	-	-	-
In Premises of V.R. Shah		-	-	25100000	25100000
In locker of K.M. Doshi		-	100000	-	100000
In the locker of Sou. Anita Hemant Shah		-	-	300000	300000
Total Applications		70000000	177576000	42500000	290076000
D] Contingencies		-	1500000	-	1500000
Total Undisclosed Income		70000000	179076000	42500000	291576000

4. The above extracted table indicates the offer of unaccounted income of Rs.7 crores for the assessment year 2009-10, Rs.17.90 crores (rounded up)

for the assessment year 2010-11 and Rs.4.25 crores for the assessment year 2011-12 respectively, totalling to Rs.29.15 crores (rounded up).

5. In compliance of the above statement, the assessee filed the returns of income including the above stated disclosure of undisclosed income for all the assessment years under consideration. Specific to the assessment year 2009-10, which is relied for facts, the assessee offered the said Rs.7 crores as undisclosed income in the return income for that year. Otherwise, the regular income of the assessee works out to Rs.7,22,78,057/-. The total income offered by the assessee for the year under consideration is Rs.14,22,78,057/- (i.e. 7,22,78,057 + 7,00,00,000).

6. In the return of income, the assessee claimed deduction u/s 80-IA(4) of the Act in respect of the entire total income of Rs.14,22,78,057/-. Similar claims are made by the assessee in the rest of the two assessment years i.e. A.Y. 2010-11 and 2011-12.

7. **Before the A.O. :** During the assessment proceedings u/s 153A of the Act, a question is raised by virtue of the correctness of said claim of deduction u/s 80-IA(4) of the Act in respect of the entire total claim of Rs.14,22,78,057/-. The Assessing Officer raised the issue relating to the “Developers” versus “Contractors” *qua* the claim of deduction u/s 80IB(4) of the Act, and Assessing Officer held that the assessee is merely a Contractor. In this regard, the assessee filed the written submissions which found part of the Assessing Officer’s order vide para 8. The Assessing Officer discussed the language of sub-section (4) of section 80-IA(4) of the Act and deliberated on various case laws relied upon by the assessee. The Assessing Officer also attempted to disregard the decision of Pune Bench of the Tribunal in assessee’s **own case** vide ITA No.254/PUN/2008, ITA No.431/PUN/2007, ITA

No.435/PUN/2007 and ITA No.766/PUN/2009 pertaining to assessment years 2006-07, 2005-06, 2003-04 and 2004-05 dated 08.06.2011 as well as the Jurisdictional High Court's judgement in the case of ABG Heavy Industries Ltd. & Others, 322 ITR 323 (Bom-HC). Assessing Officer held that every decisions must be considered as applicable to the facts of that case. Assessing Officer disregarded even the decision in its own case too. Otherwise, the judgements in assessee's own case (supra) as well as the judgement of the Jurisdictional High Court in the case of ABG Heavy Industries Ltd. & Others (supra) are in favour of treating the "contractor" as a "developer" for the purpose of granting of deduction u/s 80-IA(4) of the Act. Thus, the Assessing Officer is of the opinion that the assessee being a contractor is not eligible for the claim of deduction u/s 80-IB(4) of the Act.

8. Further, referring to the issue of claim of deduction u/s 80-IA(4) of the Act in respect of the **undisclosed income offered** in the return of income after the search action, the Assessing Officer took the objections to the said claim. Otherwise, the assessee justified the claim relying on Mumbai Bench of the Tribunal in the case of Eversmile Construction Co. Pvt. Ltd. in ITA No.4238/Mum/2010 dated 30-8-2011 which also relates to the assessment made u/s 153A of the Act. In this case, the Tribunal held that *"there is no exercise of the jurisdiction of the Assessing Officer on the inclusion of new income and no restriction on the assessee to claim any deduction which was claimed originally in the original assessment"*. Referring to the source of said undisclosed income of Rs.29.15 crores, ld. Counsel for the assessee submitted that the source of the said undisclosed income is assessee's business itself. The undisclosed income is the business income of the company only. The search and seizure action resulted in discovery of the

mode of inflation of various expenses to save the tax and thus, the the source of the said Rs.29.15 crores is the assessee's business itself only. So long as the business discovered during the search and seizure action is from the actual business of the assessee, subject to the fulfilment of the conditions relating to filing of certain audit reports in Form No.10CCB, the assessee should be entitled to claim of deduction u/s 80IA(4) of the Act. In this regard, the assessee relied on the series of the decisions such as : (i) Control Touch Electronic Pvt. Ltd., 77 ITD 522; (ii) CIT vs. Suman Papers & Boards Ltd., 314 ITR 119; (iii) JK Export SB of Settlement Commission, SA No.21 dt. 29.01.1996; and, (iv) CIT vs. V. Subramaniyan (Late), 305 ITR 289.

9. The summary of the assessee's explanation in this regard is extracted as under :-

"The Business facilitation expenses are sourced by inflating various expenses debited to Profit & Loss A/c. When source of income is generated from the profit & loss a/c it is nothing but income from business. Therefore, it is eligible for deduction U/s. 80IA(4).

Without prejudice to above the income sourced by inflating various expenses debited to profit & loss a/c. has been used for incurring business facilitation expenses, which are basically business expenses and therefore the same shall be allowed as deduction to the assessee."

10. However, the Assessing Officer, as per discussion given in para 16.2 and 16.3 of the assessment order, rejected the above proposition of the assessee. Further, the Assessing Officer discussed the philosophy of the provisions of section 132 of the Act and relied on various decisions and held that the provisions of section 132 of the Act, is not for the benefit of the assessee.

11. Further, invoking the provisions of section 37(1) of the Act, the Assessing Officer discussed the application of the said explanation which

refers to the non-allowability of certain expenditure, when used for the purpose of offences prohibited by law. Further, invoking the provisions of section 69C of the Act, the Assessing Officer is of the opinion that such expenditure which is deemed to be the income of the assessee shall not be allowed as deduction and another head of income when even if the eligible income is found out during the search action. Eventually, in para 17.4 and 17.5 of the assessment order, the Assessing Officer summed up the reasons for denial of deduction u/s 80IA(4) of the Act in respect of the undisclosed income found during the search action. Referring to the assessee's failure to enclose the audit report in Form No.10CCB, the Assessing Officer found that there is requirement of enclosing such Form No.10CCB with the returns of income filed u/s 153A of the Act. When such condition is not fulfilled even if the same is found before the Assessing Officer, the condition specified in specification stands violated. In that case, the Assessing Officer held that the assessee is not eligible for deduction relying on the judgement of the Hon'ble Kerala High Court in the case of P.D. Abraham, 252 CTR 407 (Kerala-HC). But in any case, this is not a case of search assessment u/s 153A of the Act. The Assessing Officer discussed the same in para 14 of his order and distinguished the series of judgements relied on by the assessee. In fact, the Assessing Officer distinguished the Jurisdictional High Court's judgement in the case of CIT vs. Sheth Developers Pvt. Ltd., 254 CTR 127. The Assessing Officer opined that this is case where the assessment was made u/s 153BC of the Act and not section 153A of the Act as in the assessee's own case. In this case, the assessee made a claim of deduction u/s 80IB(10) of the Act in respect of the undisclosed income of the block period. Eventually, the Assessing Officer added the undisclosed income of Rs.7 crores as income from other sources as per discussion given in para 18.3 of his assessment order. Similar additions were made in the other two assessment years too.

The Assessing Officer also made adjustments to the claim of deduction *qua* the income by way of Miscellaneous Receipts.

12. **Miscellaneous Receipts :** On the denial of deduction u/s 80IA(4) of the Act in respect of the miscellaneous receipts, the Assessing Officer noticed that the assessee earned miscellaneous receipts and credited to the Profit and Loss Account. These receipts were considered as a business receipts. On finding, these receipts are not prima-facie business receipts arising out of the business activity of the assessee, the Assessing Officer raised them as non-business income and also proposed to deny the claim u/s 80IA(4) of the Act on these Miscellaneous Receipts.

13. In response to the query raised by the Assessing Officer, the written submissions were made by the assessee which was discussed in para 19.2 of the assessment order. In the said para 19.2 of the assessment order, a table is furnished wherein 20 types of miscellaneous recipes are reflected. The Assessing Officer discussed each of these miscellaneous receipts and held that, for the assessment year 2009-10, Rs.16,86,241/- is only found eligible for such a claim. Balance of the income of Rs.3,85,74,806/- is taxed as “income from other sources” as per discussion given in para 19.3 of the assessment order. Similar adjustments was done in all the assessment years under consideration.

14. Further, the Assessing Officer invoked the provisions of section 14A of the Act. Eventually, the Assessing Officer, as per discussion given in para 20 to 20.3 of the assessment order, disallowed a sum of Rs.2,87,333/- and added back the same to the total income of the assessee.

15. **Before the CIT(A) :** The summary of these additions and the manner of making the assessment u/s 153A of the Act for assessment years 2009-10, 2010-11 and 2011-12 are summarized by the CIT(A) in his order. Before the CIT(A), the assessee raised the issues relating to the (i) denial of deduction in respect of regular profits of business of the assessee and (ii) undisclosed income offered by the assessee during the search action u/s 134 of the Act. The assessee raised another issue relating to the addition made u/s 14A of the Act. The CIT(A) dealt with all these issues in a consolidated manner for covering the assessment years 2008-09 to 2011-12. The relevant issues/grounds are extracted in para 17 of the order of the CIT(A). In support of the grounds raised by the assessee, the assessee filed the written submissions which are extracted in para 21 of the order of the CIT(A). Otherwise, the assessee submitted that similar issues came up for adjudication before the Tribunal in assessee's own case for the assessment years 2003-04 to 2006-07 (*supra*) and the issues were decided in favour of the assessee holding that the assessee is eligible for claim of deduction u/s 80IA(4) of the Act.

16. While deciding the issues in favour of the assessee, the Tribunal relied heavily on the Jurisdictional High Court's judgement in the case of **ABG Heavy Industries Ltd. (*supra*)**. The fact that ABG Heavy Industries Ltd. is a contractor for the JNP Trust and the same is found eligible for claim of deduction u/s 80IB(4) of the Act which was considered by the Tribunal and the said decision was applicable to the facts of the present case. In the written submission, the assessee relied heavily on the order of the Tribunal in **assessee's own case** vide ITA No.254/PUN/2008, ITA No.431/PUN/2007, ITA No.435/PUN/2007 and ITA No.766/PUN/2009 pertaining to assessment years 2006-07, 2005-06, 2003-04 and 2004-05 dated 08.06.2011.

Highlighted the requirement of following the precedent in assessee's own case (supra) and also relied on the decision of Pune Bench of the Tribunal in the case of ITO vs. **M/s. Gajraj Constructions** vide ITA No.2057/PUN/2013 for the assessment year 2010-11 dated 11.02.2015, ld. Counsel for the assessee submitted that a contractor constitutes a developer for the purpose of claiming of deduction u/s 80IA(4) of the Act. The ld. Counsel for the assessee further submitted that the facts are identical with that of the present case i.e. undisclosed income offered by the assessee is also for the reason of inflation of expenses. The facts that the Hon'ble High Court remanded the matter in that case to the ITAT which eventually decided the issues in favour of the assessee were also discussed in para 25 of the order of the first appellate authority. After considering the written submissions and arguments of the assessee, the CIT(A) discussed the issue of allowability of deduction u/s 80IA(4) of the Act, analysed the applicability of the Pune Bench's decision in the case of M/s BT Patil & Sons Belgaum Construction Pvt. Ltd., 126 TTJ 557 dated 26.10.2009 and also discussed the meaning of developers/contractors. The CIT(A) also analyzed the explanation given by the Board vide Circular No.3/2008 dated 12.03.2008 relating to the clarification regarding the developer with reference to the infrastructure facility, industrial park, etc for the purpose of section 80IA of the Act. Relying on the Bombay High Court's judgement in the case of ABG Heavy Industries Ltd. (supra) and Pune Bench decision in the case of Pratibha Constructions and Engineers Ltd. vs. ACIT vide ITA No.118/PUN/2008 and others, the CIT(A) opined to term the "contractor" is not essentially contradictory to the term "developer". The assessee was held to be eligible for deduction u/s 80IA(4) of the Act. There was a discussion with reference to the applicability of the Mumbai Bench of the Tribunal in the case of ACIT vs. Bharat Udyog Ltd. 118 ITD 336. Referring to another decision of the Tribunal in the case of Metal Infra

Projects Ltd. vs. CIT, 26 DTR 359 (JP) (Trib.) where the effect of explanation introduced by the Finance Act, 2007 was discussed and held in favour of the assessee rejecting the arguments of the Revenue. The relevant extracts were given in para 41 of the order of the CIT(A). Accordingly, the assessee was considered eligible for claim of deduction u/s 80IA(4) of the Act in respect of the profits of the business of the assessee who was considered as a developer for the purpose of the said section. Referring to the Hon'ble Bombay High Court's judgement in the case of Sheth Developers Pvt. Ltd. (supra), the CIT(A) discussed the core issue raised in the said appeal i.e. allowability of the claim of deduction u/s 80IB(10) of the Act in respect of the income computed as undisclosed income u/s 69A of the Act. Mentioning that in both the cases i.e. assessee and the Sheth Developers Pvt. Ltd. (supra), the CIT(A) mentioned that in both the cases there was undisclosed income and only difference with reference to the claim of deduction in different sections i.e. the assessee of the present appeal made a claim u/s 80IA(4) of the Act and in Sheth Developers Pvt. Ltd. made a claim of deduction u/s 80IB(10) of the Act. The Hon'ble Bombay High Court considered the Hon'ble Madras High Court's judgement in the case of ANBU Textiles vs. ACIT, 262 ITR 684 where the deduction u/s 80IB of the Act was allowed while computing the undisclosed income for the block period in that case. Thus, the assessee is found eligible for claim of deduction on the income offered by the assessee during the search and seizure action u/s 132 of the Act. Thus, the CIT(A) found the assessee, being a contractor, constitutes a developer for the purpose of section 80IA(4) of the Act and the deduction is found eligible **in respect of both the regular/business income** of the assessee as well as the **undisclosed business income** offered by the assessee during the search and seizure action.

17. Regarding the addition made by the Assessing Officer u/s 14A of the Act for the assessment years 2008-09 to 2011-12, the assessee submitted that no exempt income was earned during the year under consideration. Out of the investments made by the assessee in such case there was no application of the provisions of section 14A of the Act. Further, there was a discussion about non-adjustment of seized cash towards the existing liabilities and resultant levy of interest u/s 234B of the Act for the assessment year 2010-11.

18. Aggrieved with the above order of the CIT(A) for the assessment year 2009-10, the assessee as well as the Revenue are in cross appeals before the Tribunal with the above extracted grounds.

19. The assessment year-wise/cross appeal-wise, appeal is taken up in the following paragraphs. The issue for adjudication in the appeals of assessee relates to the correctness of the disallowance u/s 14A of the Act when the total income does not include any exempt income. In assessment year 2010-11, there is an issue relating to levy of penalty u/s 234B of the Act *qua* the failure to adjust the seized cash. Further, the issue of allowability of deduction u/s 80IA(4) of the Act in respect of miscellaneous receipts and also in respect of additional income admitted during the search action u/s 132 of the Act.

Cross Appeals For A.Y. 2009-10

20. First, we shall take up the cross appeals vide ITA No.1177/PUN/2015 filed by the assessee and ITA No.1245/PUN/2015 filed by the Revenue for the assessment year 2009-10 are the lead case for deciding the issues in the following paragraphs.

ITA No.1177/PUN/2015 – A.Y. 2009-10 – By Assessee

21. The grounds raised by the assessee are asunder :-

“1) On the facts and circumstances of the case and in law the Ld. CIT(A) Kolhapur was not justified in sustaining the disallowance made by the A.O. of Rs.2,87,333/- invoking the provisions of S.14A of the Act r.w.r. 8D. The Ld. CIT(A) failed to appreciate the quantum of interest free funds available with the appellant company. The judgement of the Hon’ble Jurisdictional Bombay High Court in CIT v. HDFC Bank Ltd. (2014) 366 ITR 505 (Bom) was squarely applicable to the facts of the case. The disallowance be deleted.

2) On the facts and circumstances of the case and in law and on careful perusal of the order passed by the A.O., it reveals that the prerequisites of such disallowance in S. 14A have been ignored which mandate that the A.O. to record satisfaction that the interest-bearing funds have been used to earn tax-free income. The satisfaction to be recorded must be based upon credible and relevant evidence and onus to prove that interest bearing funds have been used, lie squarely on the shoulders of Revenue. The A.O. failed to discharge the onus that lay upon her. The disallowance made by the A.O. and sustained by Ld. CIT(A) be quashed and set aside.

3) The appellant craves to leave, add/amend or alter any of the above grounds of appeal.”

22. The only issue raised in the assessee’s appeal relates to the disallowance made by the Assessing Officer and confirmed by the CIT(A) on account of provisions of section 14A r.w. Rule 8D(2) of the Rules. For the assessment year 2008-09 too, the Assessing Officer disallowed a sum of Rs.2,87,333/-. The CIT(A) confirmed the same as per the discussion given in para 60 of the order of the CIT(A). In the process, both the Assessing Officer and the CIT(A) ignored the assessee’s submissions that no exempt income earned by the assessee out of the investments made in the shares of the sister concern.

23. Before us, the argument of the ld. Counsel for the assessee is that the said investments of Rs.90 lakhs was made out of the interest free funds. Further, the ld. Counsel for the assessee filed the written submission in this regard and the said written submission is extracted hereunder :-

“3. In the above appeal, the assessee has raised two grounds of appeal, both of which are against disallowance made by the Assessing Officer of Rs.2,87,333/- u/s. 14A of the Act. The said disallowance has been upheld by the CIT (A) and, hence, the assessee is in further appeal before Your Honours. The above issue has been discussed by the Assessing Officer on Pg. No. 66 onwards of his order. The Assessing Officer has observed that the assessee has made investment of Rs.90 lacs in the shares of its subsidiary, viz., Dimension Construction P. Ltd. **It was contended before the Assessing Officer that the assessee-company has not received any tax-free income.** It was also contended by the assessee that it has sufficient own fund in the form of share capital as well as reserves and surplus. And, hence, no disallowance of interest should be made u/s. 14A of the Act. The assessee also relied upon certain case laws in support of its contention.

4. The Assessing Officer, however, has held that it is not possible to verify that the investment has been made from own fund or from borrowed fund as no separate account is maintained. According to the Assessing Officer, it is not correct to say that no disallowance should be made because the assessee has not earned any exempt income. The Assessing Officer has relied upon the decision of the Special Bench of the Hon'ble Tribunal in the case of Cheminvest Ltd. v. ITO [124 TTJ 577 (Del)]. The Assessing Officer calculated the disallowance as per Rule 8D of the Income-tax Rules at Rs.2,87,333/- consisting of disallowance of interest of Rs.2,42,333/- and of disallowance of expenses of Rs.45,000/-.

This decision is reversed by Hon. Delhi High Court in case of Cheminvest Limited vs. CIT (2015) 378 ITR 33 (Delhi) HC and also SLP filed by the Department against the said decision is dismissed by Hon. Supreme Court.

(Refer Page No. 347, Para 23 for the decision and refer Page No. 335 – 349 for the case laws in the Paperbook for the Case Laws)

5. The above disallowance was challenged before the CIT (A) who has discussed this issue on page No. 65 of his order. The CIT (A) has held that the fact that the investment has been made in subsidiary company or assessee has not received any exempt income during the year would not lead to conclusion that the disallowance cannot be made. Following the decision of Special Bench in the case of Cheminvest Ltd. v. ITO [124 TTJ 577 (Del)] he confirmed the disallowance made by the Assessing Officer.

6. It is respectfully submitted before Your Honours that the assessee has not received any exempt income during the year. This is evident from the Profit & Loss A/c and the computation of income filed in the paper book before Your Honours. In fact, the submissions to that effect was made before both the lower authorities and remains undisputed. However, the lower authorities have relied upon the decision of Special Bench in the case of Cheminvest Ltd. v. ITO [124 TTJ 577 (Del)]. It is submitted that the above decision of the Special Bench has been reversed by the Hon'ble **Delhi High Court in the case of Cheminvest Ltd. v. CIT (378 ITR 33)**. Subsequently, Hon'ble jurisdictional High Court in the case of Ballarpur Industries in ITA No. (51 of 2016 dated 13.10.2016) considered the above decision of the Hon'ble Delhi High Court and held that no disallowance could be made were the assessee has not received any exempt income during the year under consideration. Subsequently, the Hon'ble jurisdictional High Court in the case of DCIT v. Rivian International P. Ltd. has observed as under.

“3. We have given careful consideration to the submissions. On facts, it appears from the impugned judgment that the assessee had made investment in shares of closely held companies which did not declare any dividend. On facts, there is no dispute that the assessee has not earned any exempt income during the year under consideration. After consideration of Section 14A, the Delhi High Court followed the decisions of certain other High Courts. Section 14A of the said Act provides that for the purpose of computing the total income, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income

*which does not form part of the total income under the said Act. In other words, Section 14A provides that if there is an income which does not form a part of the total income under the said Act, the expenditure which is incurred for earning the income is not an allowable deduction. **Therefore, during the relevant year, if the assessee has not earned any tax-free income, the corresponding expenditure incurred cannot be taken into consideration for disallowance.*** (Emphasis supplied).

7. On the basis of the above decisions, it is submitted that the disallowance made by the Assessing Officer may kindly be deleted. It would not be out of context to point out that the various coordinate Benches of the Tribunal have also taken the similar view consistently. We also like to submit that, in any case, the disallowance u/s 14A cannot be made in the facts of the present case as assessee has sufficient own fund."

24. From the above, it is an undisputed fact that the assessee has not earned any exempt income during the year under consideration. In such circumstances, the law does not permit making any disallowances u/s 14A of the Act r.w. Rule 8D(2) of the Rules. The stated judgement in the case of Cheminvest Limited (supra) is relevant.

25. Therefore, after hearing both the sides and considering the above written submission of the assessee on this issue, we are of the opinion that the grounds are required to be allowed in favour of the assessee. Accordingly, the grounds raised by the assessee are allowed.

26. In the result, the appeal of the assessee in ITA No.1177/PUN/2015 for the assessment year 2009-10 is allowed.

ITA No.1245/PUN/2015 – A.Y. 2009-10 – By Revenue

27. The grounds raised by the Revenue are as under :-

"1) On the facts and the circumstances of the case and in law, the Ld. CIT(A) has erred while allowing the assessee's appeal or eligibility of **Miscellaneous Receipts** of Rs. 3,85,74,806/- without controverting the facts enumerated by the AO in his order and further erring in treating the said receipts as Profits and gains derived from eligible business as required by Section 80IA(4) of the Act.

2) On the facts and the circumstances of the case and in law, the Ld. CIT(A) has erred in holding that the assessee is eligible for **additional deduction** u/s 80IA(4) of the Act of Rs. 7,00,00,000/- addition made on account of undisclosed income declared during the course of Search Action.

3) *The order of the Ld. CIT(A) may be vacated and that of the Assessing Officer be restored.*

4) *The appellant craves leave to add, alter, amend and modify any of the above grounds of appeal."*

28. Ground no.1 relates to the allowability of claim of deduction u/s 80IA(4) of the Act in respect of **"miscellaneous receipts"** (supra), the Id. CIT(A) dealt with this issue by grouping the issues for the all three assessment years 2005-06, 2006-07 and 2007-08. Before the CIT(A), the assessee argued that such non-search issues cannot be decided by the Assessing Officer when the assessments are of non-abated assessments. The CIT(A) considered the same in favour of the assessee for these years relying on the various decisions of the Tribunal. It is finding of the Tribunal that the additions cannot be made on such non-search issue i.e. miscellaneous receipts *qua* the claim of deduction u/s 80IA(4) of the Act in the assessment made u/s 153A of the Act. On the allowability of claim of deduction u/s 80IA(4) of the Act for the assessment years 2005-06 to 2011-12 on the said miscellaneous receipts, the CIT(A) discussed each of such receipts and gave a finding, whether each of such receipts constitutes a business income or otherwise and also if the assessee is eligible for claiming of deduction u/s 80IA(4) of the Act or otherwise. CIT(A) granted relief to the assessee in all the three assessment years.

29. Aggrieved with the above finding of the CIT(A) on the issue of allowability of deduction u/s 80IA(4) of the Act of such miscellaneous receipts and the relief granted by the CIT(A) to the assessee, the Revenue is in appeal before us.

30. In connection with the issue of the allowability of deduction u/s 80IA(4) of the Act of such miscellaneous receipts, ld. Counsel for the assessee filed **written submission** and the same is extracted hereunder :-

“8. The assessee is in the business of infrastructure development. It carries on various projects like water supply, irrigation, roads etc. under agreements with Central Government, State Government etc. It has claimed deduction u/s. 80IA(4) of the Act of Rs.14,22,78,057/-. The above amount includes, inter alia, an amount of Rs.3,85,74,806/- on account of various miscellaneous receipts. According to the AO, these receipts are not eligible for deduction u/s. 80IA(4) of the Act being not derived from eligible business. Accordingly, he has disallowed claim of assessee u/s. 80IA(4) of the Act in respect of such miscellaneous receipts.

9. At this juncture, we would like to mention that the Assessing Officer has initially held that various projects of the assessee are not eligible for deduction u/s. 80IA(4) of the Act on various grounds. However, this finding of the Assessing Officer has been reversed by the CIT (A) following several decisions of Tribunal and High Court including the decisions of Tribunal in the assessee's own case for earlier years. The question, as far as ground No. 1 of the Department's appeal is concerned, is regarding eligibility of miscellaneous receipts u/s. 80IA(4) of the Act.

10 The above issue has been discussed by the Assessing Officer on page No. 62 of his order. The receipts under consideration which is subject-matter of Ground No. 1 of Department's appeal are as under.

Particulars of Miscellaneous Receipts	Amount	
Bank Interest & Other Interest	73,28,660.44	
Other Income	8,43,409.77	
VAT Reimbursement	1,70,77,488.00	
Work Insurance	1,08,85,831.00	New Item
FBT (Excess Provision)	1,246.00	New Item
Other Deductions from Sub- Contractor	20,21,798.00	
Material Deductions Sub-Contractor	2,82,140.00	
	3,84,40,573.21	

11. It would be worthwhile to note that similar disallowance was made by the Assessing Officer in A.Y. 2008-09 in respect of following receipts which are common to the receipts during the year under consideration.

Particulars of Miscellaneous Receipts	Amount for AY 08-09	Amount for AY 09-10
Bank Interest & Other Interest	78,85,014.50	73,28,660.44
Other Income	4,35,000.00	8,43,409.77
VAT Reimbursement	53,03,571.00	1,70,77,488.00
Other Deductions from Sub- Contractor	1,20,04,233.00	20,21,798.00
Material Deductions Sub- Contractor	10,15,398.00	2,82,140.00
	2,66,43,216.50	2,75,53,496.21

12. The said action of the Assessing Officer in A.Y. 2008-09 was subject-matter of dispute before the Hon'ble Tribunal. The Hon'ble ITAT has passed the order on 31.07.2019 allowing the deduction u/s 80IA in respect of the above

receipts. Therefore, it is requested the finding of the Hon'ble Tribunal in A.Y. 2008-09 so far as the above receipts are concerned be followed and deduction u/s 80IA may be please be allowed.

13. We would like to now discuss those receipts which are coming up for the first time in the year under consideration. An amount of Rs.1,246/- is on account of reversal of excess provision of FBT. It may be noted that the assessee has reduced the above amount from its income in the computation of income. Since the provision for FBT, when it was created, has been added back to the total income of the relevant assessment year, there is no question of offering this income for taxation in the year in which the excess provision has been written back, i.e., the year under consideration. Consequently, there is no question of claiming any deduction u/s. 80IA(4) of the Act. An amount of Rs.1,08,85,831/- represents work insurance. In this respect, it is submitted that the amount of work insurance represents insurance claim received by the assessee during the year under consideration from the insurance company. This claim has been made and received in respect of work done by the assessee in connection with construction of road at Pallari. It is important to note that the construction work at Pallari is an eligible activity for the purpose of deduction u/s. 80IA(4) of the Act. When the work was carried out the expenditure has been debited to the Profit and Loss. Since the road project is eligible for deduction u/s. 80IA(4) of the Act receipt of insurance amount is also to be credited to Profit and Loss and not liable to tax. In this regard, the reliance is placed upon the decision of Delhi High Court in the case of CIT v. Sportking India Ltd. (324 ITR 283).

(Refer Para 2 on Page no. 359 and Para 12 on Page 365 and No. 358 to 365 for the case law in Paperbook of Case Laws).

14. The Assessing Officer has not accepted the above receipts to be part of business income from eligible undertaking. According to the Assessing Officer, these receipts have got nothing to do with the business and they are not entitled for any deduction.

15. Elaborate submissions have been made before the CIT (A) which is recorded by him on page No. 8 to 11 of his order. The ld. CIT (A) has given a detailed finding on page No. 14 to 16 of his order.

16. The assessee relies upon the detailed submissions made before the CIT (A) and his findings as well as submissions made hereinabove. It is submitted that the assessee has undertaken various infrastructure development projects, all of which are eligible for deduction u/s. 80IA(4) of the Act and about which there is no dispute. Therefore, it is requested the finding of the Hon'ble Tribunal in A.Y. 2008-09 so far as the common items for A.Y. 2008-09 and for A.Y. 2009-10 are concerned be followed. As regards the other amounts, it is submitted these receipts are integral part of the business of the assessee as explained hereinabove.

17. Since the only activity of the assessee is of infrastructure development project and the entire business eligible for deduction, there is no other source of income and, hence, the above amounts may kindly be held to be eligible for deduction u/s. 80IA(4) of the Act."

31. We have heard both the sides and perused the oral/written submissions of both the parties. On careful examination, we find the miscellaneous receipts can be sub-grouped into three lots i.e. (i) the receipts covered by the earlier Tribunal's order; (ii) the receipts, assessee never claimed deduction; and, (iii) the business connected receipts or otherwise. So far as sub-group one is concerned, we find the receipts is covered by the order of the Tribunal in the assessee's own case for the assessment year 2008-09 (supra). The Assessing Officer is directed to follow the said order of

the Tribunal (supra) scrupulously. When it comes to the balance of receipts, we find in respect of few receipts, the assessee never claimed the deduction. The Assessing Officer is directed to consider the same. Finally, regarding the rest of the receipts, if any, Assessing Officer shall examine each of them carefully *qua* the business nature, nexus to the business activity of the assessee etc and allow the deduction if they are of business nature. The Assessing Officer, after giving reasonable opportunity to the assessee, shall decide the issue in accordance with the law. Accordingly, the ground no.1 is **partly allowed for statistical purposes.**

32. Ground no.2 relates to the allowability of deduction u/s 80IA(4) of the Act in respect of the **additional income** declared during the search. In this regard, ld. Counsel for the assessee filed the **following written submission :-**

“18. As stated hereinabove, the assessee is carrying on various infrastructure development projects in the field of water supply, irrigation, roads etc. The income of the assessee is eligible for deduction u/s. 80IA(4) of the Act. The assessee has filed its return of income for the year under consideration, i.e., A.Y. 2009-10 on 31.10.2009. Thereafter, on 15.06.2010 the search and seizure action u/s. 132 of the Act was carried out at the premises of the assessee. It may kindly be noted that since the time limit for issuing notice u/s. 143(2) of the Act was not expired on the date of search, the pending assessment proceedings were abated. Subsequently, a notice u/s. 153A of the Act was issued on 30.05.2011 in response to which the assessee filed return of income in which deduction u/s. 80IA(4) of the Act has been claimed at Rs.14,22,78,057/- (It has been wrongly mentioned in the assessment order that the assessee has stated that return filed earlier may be treated as return in response to S. 153A of the Act.)

*19. In the return of income the assessee has claimed deduction u/s. 80IA(4) of the Act of Rs.14,22,78,057/-. This amount also **included Rs.7 crores** on account of additional income declared during the course of search. The core dispute in this ground of appeal is regarding eligibility of deduction u/s. 80IA(4) of the Act.*

20. It is imperative to understand the nature of transactions for which the declaration has been made during the course of search. Certain seized documents were found during the course of search which reflected certain cash expenditure. It is the case of the assessee that it has inflated certain expenditure like wages in its books of account and thereby generated cash. The said cash has been utilized for various purposes which have been reflected in the seized page. Similarly, certain cash was found from the residential premises of the director of the assessee and it is the stand of the assessee that the said cash was also generated by inflating the expenditure in the regular books of account. Thus, it is the case of the assessee that the source of the cash is inflation of expenditure and there is no other revenue in the hands of the assessee.

21. So far as the inflated expenditure is concerned it is the case of the assessee that if the effect of the inflated expenditure would be removed the profit of the assessee would be increased but the enhanced profit would also be eligible for the deduction u/s. 80IA(4) of the Act for which the assessee is entitled.

22. The AO has discussed the above submission of the assessee in his assessment order at great length. Initially, the AO has disputed the entitlement of the assessee for deduction u/s. 80IA(4) of the Act. However, this is not

relevant for the purpose of present discussion because the said finding of the AO has been reversed by CIT (A). The AO, on page No. 47 onwards, has discussed the issue regarding eligibility of additional income for the purpose of S. 80IA(4) of the Act. The AO has held that the assessee cannot claim the deduction in the return filed u/s. 153A of the Act, the undisclosed income is not business income but the same is income from other sources the assessment was being made pursuant to the search, the expenditure is covered by Explanation 1 to 37(1), as per provisions of S. 69C deduction cannot be allowed, and the deduction cannot be allowed also because the assessee has failed to file the necessary audit report in Form No. 10CCB.

23. The assessee took up the matter before the CIT (A) who has held that the additional income would form part of the eligible profit and following the decision of Bombay High Court in the case of **Seth Developers** the assessee is entitled to deduction u/s. 80IA(4) of the Act.

24. The assessee submits that the CIT (A) has correctly appreciated the facts of the case, the objections raised by the AO are not sustainable as discussed hereinbelow.

25. As regards the objection of the AO to the effect that the claim cannot be made in the return of income filed u/s. 153A of the Act. It is submitted that the present assessment proceedings are abated proceedings and, hence, there is no such embargo on the AO so far as the issues to be considered by him. As pointed out hereinabove, on the date of search i.e. 15.06.2010, the time limit for issuing the notice u/s. 143(2) of the Act had not expired. This is in light of the fact that the return of income for the year under consideration, i.e. A.Y. 2009-10 was filed on 31.10.2009 and the time limit u/s. 143(2) of the Act as up to 30.09.2010. Once, an assessment has been abated, the AO is not only entitled to consider all issues but duty bound to do so. Various decisions relied upon by the AO are in respect of non-abated years.

26. The next objection of the AO is that the undisclosed income is not a business income. In this regard, it is submitted that the assessee has been found to have generated certain cash. The source of the cash is inflation of expenditure. Once, the expenditure has been reduced by removing the inflated portion, the profit of the business would increase. The source of such increased profit could not be anything else than the eligible business. The source of the revenue remains the same irrespective of quantum of expenditure. Thus, the whole premise of the AO is conceptually incorrect.

27. The next objection of the AO is regarding the object of the search and the scope of the consequential proceedings. While there is no dispute about the object of the search, the total income of the searched assessee in respect of the abated year has to be computed as per the provisions of law. There are no separate rules for computation of income in respect of the assessee who is searched. The AO has also misdirected himself by relying upon certain decisions over here which are in respect of non-abated years.

28. The AO has also invoked Explanation 1 to S. 37(1) of the Act in order to deny the benefit u/s. 80IA(4) of the Act. In this regard, it is submitted that the assessee is not claiming any deduction u/s. 37(1) of the Act in respect of the expenditure reflected on the seized pages. The case of the assessee is that the source of cash is inflated expenditure and, hence, no separate addition on account of cash expenditure is called for. Similarly, no addition is called for on account of disallowance of such inflated expenditure as effectively the enhanced income would also be eligible for deduction u/s. 80IA(4) of the Act. In this regard, the assessee is relying upon following decisions.

29. In this connection, reliance is first placed upon the judgment of the Hon'ble Bombay High Court in the case of CIT v. Gem Plus Jewellery India Ltd. (330 ITR 175), **(Refer Page No. 224 – 230 of Paperbook for Case Laws)**. One of the issues for consideration before the Hon'ble Bombay High Court was:

“(b) Whether on the facts and in the circumstances of the case, the Tribunal was justified in directing the Assessing Officer to grant the exemption under section 10A of the Act on the assessed income, which was enhanced due to disallowance of the employer's as well as employees' contribution towards PF/ESIC?”

(Refer Para 2 (b) on Page No. 224 – 230 of Paperbook for Case Laws)

30. The relevant facts, as culled out from the aforesaid judgment, are in the way following. The assessee had deposited the employer's and employees' contribution towards PF and ESIC beyond the due date, as a result of which the Assessing Officer made an addition of Rs. 71.59 lakhs. However, while granting deduction u/s. 10A of the Act the additions made were ignored on the ground that they were not generated out of the manufacturing activity of the assessee. In the further proceedings before the Hon'ble Court at the instance of the revenue, it was found that since the addition made on account of employer's contribution was not assailed by the assessee, the only issue for consideration pertained to allowability of deduction u/s. 10A of the Act qua the additional income due to the disallowance pertaining to employees' contribution. In answering the subject-issue in favour of the assessee, the Hon'ble Court held as under:

“12. By reason of the judgment of the Supreme Court in CIT v. Alom Extrusions Limited [2009] 319 ITR 306 the employer's contribution was liable to be allowed, since it was deposited by the due date for filing of the return. The peculiar position, however, as it obtains in the present case arises out of the fact that the disallowance which was effected by the Assessing Officer has not, the court is informed, been challenged by the assessee. As a matter of fact the question of law which is formulated by the Revenue proceeds on the basis that the assessed income was enhanced due to the disallowance of the employer's as well as the employees' contribution towards provident fund/ESIC and the only question which is canvassed on behalf of the Revenue is whether on that basis the Tribunal was justified in directing the Assessing Officer to grant the exemption under section 10A. On this position, in the present case it cannot be disputed that the net consequence of the disallowance of the employer's and the employees' contribution is that the business profits have to that extent been enhanced. There was, as we have already noted, an add back by the Assessing Officer to the income. All profits of the unit of the assessee have been derived from manufacturing activity. The salaries paid by the assessee, it has not been disputed, relate to the manufacturing activity. The disallowance of the provident fund/ESIC payments has been made because of the statutory provisions – section 43B in the case of the employer's contribution and section 36(v) read with section 2(24)(x) in the case of the employees' contribution which has been deemed to be the income of the assessee. The plain consequence of the disallowance and the add back that has been made by the Assessing Officer is an increase in the business profits of the assessee. The contention of the Revenue that in computing the deduction under section 10A the addition made on account of the disallowance of the provident fund/ESIC payments ought to be ignored cannot be accepted. No statutory provision to that effect having been made, the plain consequence of the disallowance made by the Assessing Officer must follow. The second question shall accordingly stand answered against the Revenue and in favour of the assessee.”

(Refer Para 12 on Page No. 228 – 229 of Paperbook for Case Laws)

31. Reliance is next placed upon a subsequent judgment of the Hon'ble Bombay High Court in the case of CIT v. Sheth Developers (P) Ltd. (254 CTR 127),),**(Refer Page No. 177 – 181 of Paperbook for Case Laws)**in which also allowability or otherwise of deduction u/s. 80-IB of the Act with respect to the undisclosed income in the form of cash was the subject matter of consideration. The relevant substantial question of law on which decision was sought by the revenue read as under:

“(1) Whether on the facts and circumstances of the case and in law the Tribunal was justified in holding that deduction under s. 80-IB(10) has to

be allowed from the income computed as undisclosed income under s. 69A of the I.T. Act, 1961?”

(Refer Para 2 (1) on Page No. 178 of Paperbook for Case Laws)

32. In agreeing with the decision arrived at by the Hon'ble Tribunal holding that such a claim was allowable, the Hon'ble High Court held as under:

“10. Chapter XIV-B of the said Act provides for special procedure for assessment of search cases and is contained in s. 158B to s. 158BI of the said Act. Further, this chapter applies only in cases of search initiated before 31st May, 2003. In this case, the search took place in 2002 and therefore, the present case is governed by Chapter XIV-B of the said Act. Sec. 158BB of Chapter XIV-B of the Act deals with computation of undisclosed income of the block period. The above Explanation to sub-s. (1) of s. 158BB of the Act was amended by the Finance Act, 2002 with retrospective effect from 1st July, 1995. Prior to the amendment, according to the Explanation the total income or loss was to be computed in accordance with Chapter IV of the said Act. Consequent to the amendment by Finance Act, 2002 with retrospective effect from 1st July, 1995 the total income or loss has to be computed in accordance with the provisions of this Act i.e. the said Act. Consequently, w.e.f. 1st July, 1995 the total income/loss for the block period has to be computed in accordance with the provisions of the said Act and the same would include Chapter VI-A of the said Act. Sec. 80-IB of the said Act is a part of Chapter VI-A of the Act. In view of the above, while computing the undisclosed income for the block period the respondent-assessee is entitled to claim deduction from its income under s. 80-IB of the Act. In fact, to the same effect is the decision of the Madras High Court in the matter of Anbu Textiles (supra).

11. The further case of the appellant-Revenue that in view of s. 69A of the said Act the benefit of deduction under Chapter VI-A of the said Act would not be available to the respondent-assessee is not well founded. In the present facts it is not the case of the Revenue that the money found in possession of the respondent-assessee could not be explained and/or its source could not be explained to the satisfaction of the AO. In the present case undisclosed income found in the form of cash was explained as having been acquired while carrying on business as a builder and this explanation was accepted by the AO by having assessed the undisclosed income for the block period as income from profits and gains of business or profession. Therefore, the reliance by the Revenue upon the decision of the Gujarat High Court in the matter of Fakir Mohmed Haji Hasan (supra) is not correct as the facts of that case are completely distinguishable from the present facts. In the present case, no question of application of ss. 68, 69 and 69A, 69B and 69C of the said Act arises as the same have not been invoked by the Department. It is an admitted position between the parties as reflected even in the order of the AO that undisclosed income was in fact received by the respondent in the course of carrying out its business activities as a builder. The same was returned by the respondent as income arising from profits and gains of business or profession and the same was accepted by the Department unlike in the matter of Fakir Mohmed Haji Hassan (supra).

12. In view of the above the order dt. 12th Oct., 2009 of the Tribunal cannot be faulted. Therefore, question (1) above is answered in the affirmative in favour of the respondent-assessee and against the appellant-Revenue.....”

(Refer Para 10,11,12 on Page No. 180 - 181 of Paperbook for Case Laws)

33. Further we rely on the case of Asst. Commissioner of Income Tax Circle 1, Kolhapur vs. Mahalaxmi Infraprojects Limited ITA No. 142 – 145 / PUN / 2016 and ITA No. 146 – 147 / PUN / 2016, ITAT Pune.

(Refer Page No. 133 – 148 of Paperbook for Case Laws)

The following grounds of appeal were raised reproduced below:

1. Whether on the facts and in the circumstances of the case and in law, the learned CIT(Appeals) erred in allowing deduction u/s.80IA(4) of the Act of Rs.35,98,460/- on the additional income offered on account of purchases.

2. Whether on the facts and in the circumstances of the case and in law, the learned CIT(Appeals) erred in holding that the ratio laid down by the Hon'ble Mumbai High Court in the case of CIT Vs. ABG Heavy Industries Ltd. (2010) (322 ITR 323) (Bom) is applicable to the facts and circumstances of assessee's case?

Whether on the facts and in the circumstances of the case and in law, the CIT(A) erred in holding that the enterprise carrying on the business [of (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining] be read cumulative though it was not the issue prevailing in the case of the assessee.

(Refer Para 3 on Page No. 134 – 135 of Paperbook for Case Laws)

Briefly, in the facts of the case, the assessee for the year under consideration had furnished the return of income declaring total income of Rs.1,26,07,123/- on 31.10.2007. Search and seizure operations were carried out on the premises of assessee on 23.09.2009. In response to notice issued under section 153A of the Act, the assessee filed return of income on 20.07.2010 declaring total income of Rs.1,57,43,879/-. The assessment was finalized under section 143(3) r.w.s. 153A(b) of the Act vide assessment order dated 27.12.2011 at Rs.12,69,30,330/-. The order was rectified under section 154 of the Act on 02.02.2012 and the revised assessed income was Rs.12,08,15,377/-. Survey action under section 133A of the Act was conducted on the business premises of assessee and group cases on 04.01.2013. Statement on oath of Mr. Ravindra Dhondiram Shinde, Managing Director of assessee company and Shri Balwant Patil, Accountant was recorded. During the course of Survey action, purchases made by the assessee from financial year 2005-06 till the date of search were verified. However, purchases amounting to Rs.48,78,977/- from the parties M/s. Manvir Metal Pvt. Ltd. and M/s. B.A. Trading & Co. Pvt. Ltd. amounting to Rs.41,00,611/- were found to be not genuine and on verification during Survey were proved to be bogus. The assessee had declared different amounts against said parties' names in different financial years, which were not supported by adequate documentary evidence. In the absence of any documentary evidence i.e. purchase order, delivery challans, goods received, the Director was asked during the course of Survey action how the said purchases could be proved to be genuine. The assessee after going through the said list of parties and amount mentioned, admitted that supporting bills were not there nor any supporting evidence of purchase of goods were available. However, since the old records were kept at different sites, he should be given time to collect the evidence. It was also mentioned by him that search action under section 132 of the Act was conducted in 2009 by the Income Tax Department, Kolhapur and both the above companies have disclosed sum of Rs.24.71 crores and Rs.6.29 crores, respectively in the block period on account of inflation of expenses. He asked for set off of said disclosure while estimating the amount of non-genuine purchases. The Assessing Officer noted that the assessee had booked bogus expenses amounting to Rs.89,79,588/- under the head 'Purchase of stilt and cement' for the year under consideration, which was added in his hands. The assessee had sought set off with the disclosure already made and also it was contended that the said income offered in respect of purchases was part of business income and infrastructural activities and was eligible for deduction under section 80IA(4) of the Act.

Decision for AY 2011 – 12 :

.... issue which is arising in the present appeal is whether the assessee is entitled to claim the aforesaid deduction under section 80IA(4) of the Act on additional income offered. We have already decided the said issue also in the

paras hereinabove and following the same parity of reasoning as in the proceedings initiated under section 153A of the Act and order of the Tribunal dated 09.12.2015, we hold that the assessee is entitled to claim the deduction under section 80IA(4) of the Act on additional income offered. Accordingly, the grounds of appeal No.1 to 4 raised by the Revenue are dismissed.

(Refer Para 22 on Page No. 147 – 148 of Paperbook for Case Laws)

34. It is submitted that there are several other decisions holding that statutory deductions are admissible on additional income offered during the course of search and/or survey. However, for the sake of brevity, we refrain from entering into discussion on all such rulings but to invite kind attention of the Hon'ble Members to some of them rendered by co-ordinate Bench of this Hon'ble Tribunal. Such orders, along with the relevant observations made therein, are:

(a) Naresh T. Wadhwani v. DCIT [2014] 52 taxmann.com 360 (Pune)]

(Refer Page No. 149 – 176 of Paperbook for Case Laws)

“35. In the above background, the moot question is whether such additional income declared in the course of search is eligible for the benefits of section 80-IB(10) of the Act, especially when the relevant project is otherwise eligible for the benefits of section 80-IB(10) of the Act.

36. In this context, it was a common point between the parties that an identical controversy has been considered by the Pune Bench of the Tribunal in the case of *Malpani Estates v. Asstt. CIT [2014] 64 SOT 105/44 taxmann.com 242*. The relevant discussion in the order of the Tribunal dated 30.01.2014 (*supra*) is reproduced hereinafter to facilitate appreciation of reasoning that prevailed with the Tribunal to allow the claim of the assessee therein:

‘11. In the course of search, in a statement deposed u/s. 132(4) of the Act, assessee declared certain additional income pertaining to the housing project in question. The additional income declared was on account of on-money received from the customers to whom flats were sold in the said project. At the time of hearing, learned counsel referred to the copy of statement recorded u/s. 32(4) of the Act of *Shri Rahesh Malpani*, a partner of the assessee firm and also copies of some of the seized papers, which indicated receipt of on-money, and the same have placed in the Paper Book at pages 35 to 52. A perusal of the seized material shows that a complete detail of that on-money received is enumerated, viz. name of the customers, amount and the respective flat sold in the project. Even in the deposition made u/s. 132(4) of the Act, the partner of the assessee firm made a year-wise detail of additional income declared on account of on-money received on sale of flats in the project. Accordingly, the impugned sum has been declared as unaccounted income from the housing project in question.

.....

17. In-fact, the Hon'ble Bombay High Court in the case of *Sheth Developers (P) Ltd. (supra)* was considering the claim of deduction u/s. 80-IB(10) of the Act in relation to the undisclosed income declared consequent to the search. In the case before the Hon'ble High Court, it was factually emerging that undisclosed income was earned by the assessee in the course of carrying on his business activity of a 'builder' and the same was accepted by the department, but the claim of the deduction u/s. 80-IB(10) was denied in relation to such income. However, the claim was upheld by the Hon'ble Bombay High Court. In the present case, factually, there is no material to negate the assertion of the assessee, which are borne out of the material on record, that the additional income in question has been received in the course of carrying on its business activity of

developing the housing project, 'The Crest' at Pimple Saudagar, Pune, which is eligible for section 80-IB(10) benefits. Therefore, in terms of the parity of reasoning laid down by the Hon'ble Bombay High Court in the case of Sheth Developers (P) Ltd. (supra), the claim of the assessee is justified.

18. In fact, once it is factually explicit that the additional income in question is derived from the housing project, 'The Crest' at Pimple Saudagar, Pune, which is eligible for section 80-IB(10) benefits, such an income merely goes to enhance the 'business income' derived from the eligible housing project and shall be entitled for section 80-IB(10) benefits, even as per the ratio of the judgment of the Hon'ble Bombay High Court in the case of Gem Plus Jewellery India Ltd. (supra).

19. In the result, on the basis of the aforesaid legal position and the material and evidence on record, assessee is eligible for deduction u/s.80-IB(10) of the Act in relation to impugned additional income offered in a statement u/s. 132(4) of the Act in the course of search and subsequently declared in the return filed in response to notice u/s. 153A(1)(a) of the Act. In the result, appeal of the assessee for assessment year 2008-09 is allowed.'

37. In view of the legal position explained in the above precedent and the material and evidence on record, assessee is eligible for deduction u/s. 80-IB(10) of the Act even in relation to impugned additional income offered in a statement deposed u/s. 132(4) of the Act during the course of search and subsequently declared in the return of income filed in response to notice u/s. 153A(1)(a) of the Act. Thus, assessee's claim for deduction u/s. 80IB(10) of the At in relation to the impugned additional income of Rs. 60,00,000/- is liable to be upheld.

38. Before parting, we may refer to the decision of the Chandigarh Bench of the Tribunal in the case of Liberty Plywood (P) Ltd. (supra) relied upon by the learned CIT-DR, for the proposition that income surrendered during the course of a survey action was to be assessed separately as 'deemed income'. On the basis of the said proposition, the Chandigarh Bench of the Tribunal denied the claim of the assessee to set off business losses against such surrendered income, in the context of sections 70 and 71 of the Act. By drawing an analogy from the said precedent, it is canvassed by the Revenue that the impugned additional income is not eligible for the benefits of section 80IB(10) of the Act.

39. We have carefully perused the fact-situation in the case before the Chandigarh Bench of the Tribunal and find that the ratio of the said decision has to be understood with reference to peculiar facts of the case. In the case before the Chandigarh Bench of the Tribunal, the undisclosed income surrendered by the assessee in the course of search was in the shape of unaccounted cash, investments etc. and the material seized did not show the sources of acquisition of the undisclosed income reflected by such unaccounted cash, etc. So however, in the present case, it is factually clear that the impugned additional income is nothing but monies received by the assessee from customers against sale of flats in its housing project, Sai Nisarg Park – Mayureshwar, which was not recorded in the regular account books. Clearly, in the case before us, source of additional income is the execution of the housing project and once the source of income is established, the assessability has to be has to follow. The said fact-position is quite different and distinct from what was before the Chandigarh Bench of the Tribunal and therefore the proposition laid down by the Chandigarh Bench of the Tribunal is not applicable to the

present fact-situation. Hence, reliance placed by the learned CIT-DR on the said decision does not help the case of the Revenue.

(Refer Para 36,37,38 and 39 on Page No. 169 to 174 of Paperbook for Case Laws)

40. In the result, we set aside the order of the CIT(A) and direct the Assessing Officer to allow the deduction u/s. 80IB(10) of the Act even in relation to the income surrendered during the course of survey on account of the undisclosed receipts from the housing project, Sai Nisarg Park – Mayureshwar amounting to Rs. 60,00,000/-. Thus, on this Ground assessee succeeds.”

(Refer Para 40 on Page No. 174 of Paperbook for Case Laws)

(b) ITO v. Gajraj Constructions [70 ITD 634 (Pune)]

“5. The issue raised in the present appeal is against the additional claim of deduction under section 80-IB(10) of the Act in respect of undisclosed receipts.

13. The issue in the present appeal is identical to the issue before the Pune Bench of the Tribunal in Naresh T. Wadhwani (supra) and following the same parity of reasoning, we hold that the assessee is entitled to the claim of deduction under section 80-IB(10) of the Act on the additional receipts offered by the assessee against the project undertaken by the assessee during the year under consideration. Thus, the grounds of appeal raised by the Revenue are dismissed.”

(c) Commissioner of Income Tax vs. V Subramaniam (Late), (2008), 305 ITR 289, Madras HC. **(Refer Page 222 - 223 of Paperbook for Case Laws)**

The question raised in the appeal is whether the deduction under Chapter VIA could be allowed while computing the undisclosed income for the block period 01.04.1988 to 09.09.1998.

(Refer Page 222 of Paperbook for Case Laws).

Decision:

The Ld Standing Council appearing for the revenue fairly stated that the first question stands covered in favour of the assessee by judgement of this court in case of Anbu Textiles & Eastern Produce Companies vs. ITO (2006) and following the above judgements, no substantial question of law arise and accordingly the case is dismissed.

(Refer Page 223 of Paperbook for Case Laws).

(d) Reliance is next placed upon the order of this Hon’ble Tribunal in the case of Construction Portal Pvt. Ltd. v. ITO for A.Ys. 2005-06 and 2006-07 in ITA Nos. 1607 and 1608/PUN/2014, dated 06.06.2018. In both the appeals, the only grievance was against the treatment given to the income declared during the course of survey as deemed income u/s. 69A of the Act as against ‘business income’.

Decision relied upon by Assessing Officer is distinguishable

35. In support of his decision to make the impugned disallowance, the Assessing Officer has relied upon the order of Ahmedabad Bench of the Hon’ble Tribunal in the case of DCIT v. Rameshbhai C. Prajapati for A.Y. 2006-07 in I.T.A. No. 226/Ahd/2010 dated 21.09.2012. It is submitted that the aforesaid order does not advance the case of the revenue for more than one reason as discussed hereinbelow.

36. The issue involved in the aforesaid case was as to the allowability or otherwise of deduction u/s. 80-IB(10) of the Act with respect to disallowance u/s. 40(a)(ia) of the Act. The ground on which the benefit u/s. 80-IB(10) of the Act was denied was that the impugned disallowance was made for ‘infringement of law’ in as much it was for lack of compliance to deposit the

amount of tax deducted by the assessee to the government treasury within the specified time limit. We submit that the aforesaid order runs contra to the binding judgment of the Hon'ble jurisdictional High Court in CIT v. Gem Plus Jewellery India Ltd. [330 ITR 175 (Bom)] in which a similar argument raised by the revenue that addition made on account of disallowance of PF/ESIC payments should be ignored for the purpose of granting exemption u/s. 10A of the Act was rejected. It was categorically held by the Hon'ble jurisdictional High Court that the assessee was eligible for such benefit on the assessed income, as enhanced due to disallowance of employer's as well as employees' contribution towards PF/ESIC.

37. In addition to the above, the issue of higher deduction on the enhanced profits has been considered by the CBDT and by their circular No. 37/2016 [F. No. 279/Misc/140/2015/ITJ] dated 02.11.2016 have issued the following instructions:

"2. The issue of the claim of higher deduction on the enhanced profits has been a contentious one. However, the courts have generally held that if the expenditure disallowed is related to the business activity against which the Chapter VI-A deduction has been claimed, the deduction needs to be allowed on the enhanced profits. Some illustrative cases upholding this view are as follows:

(i) If an expenditure incurred by assessee for the purpose of developing a housing project was not allowable on account of non-deduction of TDS under law, such disallowance would ultimately increase assessee's profits from business of developing housing project. The ultimate profits of assessee after adjusting disallowance under section 40(a)(ia) of the Act would qualify for deduction under section 80-IB(10) of the Act. This view was taken by the courts in the following cases:

*Income-tax Officer, Ward 5(1) vs. Keval Construction, Tax Appeal No. 443 of 2012, December 10, 2012, Gujarat High Court:

*Commissioner of Income-tax-IV, Nagpur vs. Sunil Vishwambharnath Tiwari, IT Appeal No. 2 of 2011, September 11, 2015, Bombay High court.

(ii) If deduction under section 40A(3) of the Act is not allowed, the same would have to be added to the profits of the undertaking on which the assessee would be entitled for deduction under section 80-IB of the Act. This view was taken by the court in the following case:

*Principal CIT, Kanpur vs. Surya Merchants Ltd., I.T. Appeal No. 248 of 2015, May 03, 2016, Allahabad High Court.

The above views have attained finality as these judgments of the High Court of Bombay, Gujarat and Allahabad have been accepted by the Department.

3. In view of the above, the Board has accepted the settled position that the disallowances made under sections 32, 40(a)(ia), 40A(3), 43B, etc. of the Act and other specific disallowances, related to the business activity against which the Chapter VI-A deduction has been claimed, result in enhancement of the profits of the eligible business, and that deduction under Chapter VI-A is admissible on the profits so enhanced by the disallowance."

38. Similarly, the reliance placed by the AO on Explanation to S. 69C of the Act would not be of any relevance as S. 69C would be applicable only in a case where the source of expenditure is not established and the assessee has claimed deduction in respect of such expenditure. In the present case, the source of expenditure has been explained and the assessee has not claimed any deduction in respect of expenditure. The AO has observed that the

assessee has never come forward to explain which were the expenses which were inflated and to what extent. In this regard, it is submitted that the AO has completely ignored the evidence and material available on the record.

39. It is submitted that if the evidence unearthed at the time of search and other circumstances of the case are taken note of, irresistible conclusion which would emerge is that the sole source of cash is inflated expenditure. In this regard, Your Honours' kind attention is invited towards the statement of Anuradha Amrut Gulavani, who is looking after cash, vouchers, expenditure and other accounting function of the assessee. She was pointed out the deficiency found during the course of search in the maintenance of ledger accounts and vouchers. In her reply, she agreed that the vouchers for the wage payments are prepared by her on the instructions of Shri Vijaykumar Shah and Shri Rajendra Doshi (directors of assessee company). The names of sites are also told by them. On such instructions, she used to prepare the vouchers and mention any name as of the labourer. She used to prepare such undated vouchers and later on dates are mentioned as per the instructions. She categorically admitted that no payments are made against such vouchers. She also explained that such vouchers are not entered into the manual cash book but are entered directly in the accounts maintained on computer. Question Nos. 4 to 6 of her statements are relevant and reproduced hereinbelow:

“Q. 4 On perusal of P&L A/c for F.Y. 2009-10 of Laxmi Civil Engineering Services Pvt. Ltd., maintained on the computer of Sou. Swati Kulkarni, Accountant, it is seen that there are two heads of expenditure namely ‘wages’ and ‘wages a/c’. She has explained that those payments made on the basis of site reports are grouped as ‘wages a/c’ and those payments whose vouchers are prepared by you are grouped as ‘wages’. Please explain what type of vouchers are you preparing?”

Ans. The vouchers for wage – payments are prepared by me on the oral instructions of Shri Vijaykumar Shah or Shri Rajendra Doshi. The names of the sites and amounts are told by them. Accordingly, I prepared vouchers with small amounts and mentioning any name as the labourer. Such undated vouchers are prepared and kept. Later on the dates on such vouchers are written as per the instructions of Shri Vijaykumar Shah or Shri Rajendra Doshi.

Q. 5 Is any payment made against such vouchers?

Ans. No. I prepare the vouchers but do not make any payment against them.

Q. 6 Does these transactions are entered in your cash book?

Ans. No. These transactions are not entered in the cash books which are maintained manually. They are directly entered into the books maintained in Tally on the computer on the instructions of Shri Vijaykumar Shah or Shri Rajendra Doshi.”

40. The above statement of Anuradha Gulavani was shown to her senior Swati Kulkarni who has also agreed and accepted the entire modus operandi and explained the booking of expenditure without making actual cash payment. Her answer to Q. No. 4 is reproduced hereinbelow:

“Ans. Yes, I do confirm that the facts stated by Sou. Anuradha Gulavani are true. The expenditure under the head of ‘wages’ debited to the P&L A/c of Laxmi Civil Engineering Services Pvt. Ltd. are accounted for the in the books by me on the basis of such self-made vouchers. The actual payment against such vouchers is not made.”

41. Attention is next invited towards the statement of Shri Rajendra Mohanlal Doshi, director of the assessee-company recorded u/s. 132(4) of the Act on the date of search itself, i.e. 15.06.2010. His attention was drawn to the statements of Anuradha Gulavani and Swati Kulkarni to which he admitted modus operandi and also admitted that the corresponding payments were not

made. Only the vouchers were made and the expenditure was debited in the books of account. The subsequent question, i.e. Q. No. 7 and its answer is also important and the same is reproduced hereinbelow.

“Q. 7 This means the expenditure to this extent was inflated and the income to that extent was suppressed. Do you admit this?”

Ans. I admit that the income to some extent was suppressed due to such false vouchers. However, I sincerely state that not at all of the expenditures claimed under the head ‘wages’ are false and some of the expenditure is genuine. However, it is not possible for me to state the exact amount of expenditure which is not genuine.”

42. The statement of another director of the assessee, Shri Vijay Rajaram Shah was also recorded during the course of search on 16.06.2010. The following questions and answers are relevant for the purpose of discussion.

“Q. 6 I am showing you bundle no. 2 of Annexure A of panchnama dated 16.06.2010 seized from office of Laxmi Civil Engineering Services Pvt. Ltd., 1148, E, Sykes Extension, Kolhapur. Please explain the contents of this diary.

Ans. I confirm that this diary belongs to me and has been written by me by pencil. I also confirm that the content of the same are true. This diary contains the unexplained cash expenditure relating to various projects undertaken by us.

Q. 7 Please explain whether the above expenses are accounted for in regular books of account of the Laxmi Civil Engineering Services Pvt. Ltd. and which heads?

Ans. These are the unexplained expenditures made for facilitating the execution of various projects undertaken by our concerns. These expenses are not accounted for in the regular books of account of our company.

Q. 8 Please explain the source of these unaccounted expenses.

Ans. the above expenses are met out by inflating the construction expenses including wages expenses.

Q. 10 I am showing you bundle No. 4, 5 and 6 of Annexure A of panchnama dated 16.06.2010 seized from office of Laxmi Civil Engineering Services Pvt. Ltd., 1148, E, Sykes Extension, Kolhapur. Please explain as to why signatures of recipients have been taken many blank vouchers. Also explain whether the expenses mentioned on these vouchers are genuinely incurred.

Ans. These vouchers contain various expenditures debited to various expense heads. All of the above vouchers are not genuine or fully substantiated. As explained in my earlier answer the unexplained expenditure for facilitating various projects is met out through debiting certain unsubstantiated expenses. We shall provide further details in due course of time.”

43. The statement of Shri Vijaykumar Rajaram Shah was again recorded on the same day and he was asked about the source of cash of Rs. 2.51 crores found during the course of search. In answer to question he has categorically replied that the source of cash is inflation of expenditure. The relevant question and answer is reproduced herein below.

“Q. 4 During the course of search at your residence on 15.06.2010, cash of Rs. 2,51,44,400/- was found. Please explain the source of the same along with documentary evidence.

Ans. the cash of Rs. 2.51 crores was generated by inflating the expenses under various heads like wages etc. for which self-made vouchers were prepared. I offer the same as undisclosed income in the hands of Laxmi Civil Engineering Services Pvt. Ltd. for F.Y. 2010-11. Balance cash of Rs. 44,400/- was out of my own savings.”

44. All the above statements were recorded on the date of search and, hence, these are spontaneous statements which are incriminating in nature and given in response to the hard evidence found during the course of search. The Department has not controverted any of the facts. Rather, it is the case of the Department that the assessee has generated cash. At no stage of the proceedings, the Department has ever claimed that the assessee has any other source of generating the cash. In fact, during the course of search, when the revenue came with only motive to investigate the facts, question regarding the source of the cash was raised and the same was replied by assessee's directors and employees. The evidence in the form of self-made vouchers and accounting entries were found out. Based on these material, the officers of the Department, who were on fact finding mission, accepted the source of cash to be inflated expenditure. The Assessing Officer now at a belated stage has tried to disbelieve the source of cash to be inflated expenditure. However, while doing so, the Assessing Officer has neither pointed out as to what is the source of cash or even the probable source of cash nor discussed or doubted any of the aforesaid evidence. It is only in the assessment order, that we find a bald statement of the Assessing Officer stating that the source of cash is not proved. The Assessing Officer has not carried out any enquiry or investigation or even the examination of the evidence available on record. In light of this, the conclusion of the Assessing Officer is wholly untenable.

45. At the cost of repetition, it is submitted that the assessee is a private limited company and it carries on its activity of infrastructure development as per its object clause of Memorandum of Association. It has no other business activity and, hence, there is no question of generation of cash from any other source.

46. Finally, the objection of the AO regarding non-filing of report of Form No. 10CCB from a Chartered Accountant is not relevant because as noted by the AO himself on page no. 57 of his order at para 17.6 the assessee has submitted the report in Form No. 10CCB during the course of the assessment proceedings. It has also been recorded by the AO that it was not possible to attach the report along with the e-return. In light of this, the above objection of the AO is not valid."

(..... end of the extraction from the written note)

33. While the ld. AR for the assessee relies on the written submission, the ld. DR for the Revenue submitted that the order of the Assessing Officer should be approved. However, it is not the case of the Revenue supported by any direct evidences that the additional income offered by the assessee is not a business income-company.

34. After hearing both the sides, we find the issue of granting of deduction u/s 80IA(4) of the Act in respect of the undisclosed business income of the assessee, is a covered issue by a series of judgements extracted above. A special reference is made here to the Co-ordinate Bench decision in the case

of (i) M/s. Gajraj Constructions (supra) and (ii) Naresh T. Wadhwani (supra). In these cases, the Tribunal granted deduction u/s 80IA of the Act in respect of the undisclosed business income of the assessee. In our view, the issue is now covered one in favour of the assessee. Therefore, we find the order of the CIT(A) is fair and reasonable and it does not call for one intervention. Accordingly, ground no.2 raised by the Revenue is dismissed.

35. In the result, the appeal of the Revenue in ITA No.1245/PUN/2015 for the assessment year 2009-10 is partly allowed for statistical purposes.

**ITA Nos.1178 & 1179/PUN/2015 –
A.Y. 2010-11 & 2011-12 – By Assessee**

**ITA Nos.1246 & 1247/PUN/2015 –
A.Y. 2010-11 & 2011-12 – By Revenue**

36. Since, in the both these cross appeals, barring assessee's ground nos.3 and 4 for the assessment year 2010-11, the grounds are common to that of the cross appeals in ITA No.1177/PUN/2015 and ITA No.1245/PUN/2015 for the assessment year 2009-10 and the arguments of both the parties are similar, our decision in ITA No.1177/PUN/2015 and ITA No.1245/PUN/2015 for the assessment year 2009-10 shall apply *mutatis mutandis* to these cross appeals vide ITA Nos.1178 & 1179/PUN/2015 and ITA Nos.1246 & 1247/PUN/2015 for the assessment years 2010-11 & 2011-12. Accordingly, relevant grounds raised in both the cross appeals in ITA Nos.1178 & 1179/PUN/2015 and ITA Nos.1246 & 1247/PUN/2015 for the assessment years 2010-11 & 2011-12 are **partly allowed for statistical purposes.**

37. Regarding the ground nos.3 and 4 in the **assessee's appeal** for the assessment year 2010-11, we find that assessee raised an issue and it relates

to the non-appropriation of seized cash toward the advance tax liabilities and consequent levy of interest u/s 234 of the Act. Referring to the said ground nos. 3 and 4, ld. Counsel for the assessee filed a written note and the same are extracted hereunder :-

“48. The ground No. 3 and 4 of the assessee’s appeal pertain to levy of interest u/s. 234B of the Act. The facts which are relevant to this ground are in the way following. A search action u/s. 132 of the Act was carried out against the assessee on 15.06.2010. During the course of search, cash of Rs.2,55,00,000/- was seized by the officers of the Department. The assessee vide letter dated 13.09.2010 (filed on 16.09.2010) and vide letter dated 21.01.2013 (filed on 23.01.2013) requested the Department to adjust the seized cash against the self-assessment tax liability for A.Y. 2010-11 However, no adjustment has taken place despite the specific request by the assessee. The Assessing Officer completed the assessment u/s. 143(3) of the Act vide his order dated 22.03.2013. The credit for the seized cash was given with effect from 31.03.2013 and not from the date on which the request for adjustment was made. The Assessing Officer calculated the interest u/s. 234B of the Act accordingly. This was challenged before the CIT (A) who has confirmed it by stating that the liability of interest is consequential and depends on the amount of tax.

49. It is respectfully submitted that once a request has been made for appropriation of seized cash, in all fairness, the Department is bound to act upon it. The officers of the Department cannot keep the seized cash idle on the one hand and levy the interest u/s. 234B of the Act. Your Honours are aware that seized cash has to be dealt with according to the provisions of section 132B of the Act. As per sub-section 1 of that section, the asset seized u/s.132 may be utilized towards discharge of any existing liability under the Act, Therefore, once a request has been made by the assessee vide which the assessment year and nature of existing liability has been specified, the adjustment of the seized cash ought to have been carried out. In failure of doing so, the assessee cannot be said to be responsible and certainly cannot be penalised.

50. In this regard, it is respectfully submitted that Explanation 2 to section 132B has been inserted by Finance Act, 2013 w.e.f. 1-6-2013 and it reads as under:

“Explanation 2- For removal of doubts, it is hereby declared that the “existing liability” does not include advance tax payable in accordance with the provisions of Part C of Chapter XVII.”

51. Vide the above amendment it has been specified that the existing liability would not include advance tax liability. Firstly, it is submitted that in the present case, the assessee had requested adjustment towards self-assessment tax and not towards advance tax liability. Secondly, the above amendment is prospective in nature and hence, this amendment is not relevant in deciding the issue.

52. In this respect, Your Honour’s kind attention is invited to the order of the Supreme Court in the case of CIT v. Cosmos Builders & Promoters Ltd. [76 taxmann.com 377] wherein the Supreme Court dismissed the Special Leave Petition filed by the Revenue against the order of the Punjab & Haryana High Court wherein it was held that Explanation 2 to section 132B inserted by

Finance Act, 2013 does not have retrospective operation and hence, no interest u/s. 234A and 234B of the Act could be charged in event the Department did not respond to the assessee's request for adjustment of cash seized against its advance tax liability.

53. Your Honours' kind attention is also invited to Circular no. 20/2017 dated 12.06.2017 issued by the CBDT wherein it has considered the order of the Supreme Court in the case of *Cosmos Builders and Promoters Ltd.* (supra) and several other cases on this issue and it has been clarified that CBDT has accepted the view taken by the Court that Explanation 2 to section 132B of the Act is **prospective** in nature and accordingly, it is directed that appeals on this issue for cases prior to 01.06.2013 and those already filed may be withdrawn/not pressed upon.

54. Your Honours' kind attention is also invited to the order of the Tribunal, Pune Bench, in the case of **Happy Home Developers v ACIT [87 taxmann.com 10]**, In this case, the Department had seized cash of Rs.32,24,000/- in the search action taken on 06.01.2010 u/s. 132 of the Act at the premises of the assessee. The Assessing Officer completed the assessment u/s.153A of the Act and charged interest u/s.234B and 234C of the Act by ignoring the letter dated 14.10.2010 filed by the assessee requesting to adjust cash seized towards its advance tax liabilities. The assessee sought rectification thereof but the same was denied by the Assessing Officer and on further appeal, by the CIT(A) after taking into account provisions of Explanation 2 to section 132B of the Act and holding that this explanation was clarificatory in nature and hence, it covered pending cases also. The assessee filed further appeal before the Tribunal by taking, inter alia, the following grounds :

“[3] The learned CIT (A) failed to appreciate that —

a. Explanation 2 to section 132B has been inserted w.e.f 01.06.2013 and the legislature, in its own wisdom, has not made it applicable retrospectively and hence, there is no reason to hold that the said explanation inserted w.e.f. 01.06.2013 is applicable even to the earlier years.

b. When two contradictory views are possible, the view favourable to the assessee should be adopted in view of the Supreme Court decision in the case of *Vegetable Products Ltd.* [88 ITR 192] AND therefore, the view taken by ITAT, Ahmedabad in the case of *Kanishka Prints Pvt. Ltd.* [143 ITD 716] should have been followed over the view taken by ITAT, Delhi in the case of *Spaze Tower Pvt. Ltd.*

Without prejudice to the above grounds, the assessee submits as under—

[4] The learned CIT (A) further erred in holding that as per the provisions of section 132B, the seized cash cannot be adjusted against self- assessment tax liability u/s. 140A determined at the time of filing of return u/s. 139(1) for the year in which search action was conducted and hence, the computation of interest u/s. 234B made by the A.O. is correct."

55. After taking into account the various case laws referred by the parties and CBDT circular no. 20 of 2017, the Tribunal accepted the contentions of the assessee and held as under:-

“12. Therefore, the issue is now settled and the expression 'any existing liabilities' does include the advance tax liabilities prior to 01.06.2013. The case of the assessee falls prior to the said date of 01.06.2013. The cash

was seized in the search initiated on 06.01.2010. Assessee requested for adjustment of the same towards the advance tax liabilities vide his letter dated 11.03.2010. Considering the above legal position in the matter and facts of the present case, we are of the opinion, the Ground Nos. 1 to 3 raised by the assessee have to be decided in his favour and against the Revenue. Considering the relief, the adjudication of Ground 4 which was raised without prejudice, becomes an academic exercise. Therefore, the same is dismissed as academic.”

56. Your Honours’ kind attention is also invited to the order of the Tribunal, Kolkata Bench, in the case of *ACIT, Kolkata v. Narendra N. Thacker* in IT(SS)A No.01/Kol/2012 dated 28.09.2015. In this case, the Department had seized cash of Rs.20,00,000/- found in the bank locker pursuant to the search action taken on 27.07.2006 u/s.132 of the Act. The assessee filed return of income u/s.153A of the Act and requested for adjustment of cash seized **towards the self-assessment tax** payable by the assessee. The Assessing Officer completed the assessment u/s.153A of the Act on 01.07.2008. The Assessing Officer gave credit of Rs.20,00,000/- for cash seized against the self-assessment tax but later rectified the order u/s.154 of the Act on 02.03.2010 as, according to the Learned AO, there was no existing liability, and consequentially charged interest u/s 234B and 234C of the Act. This action was not confirmed by the CIT(A) and hence, the Revenue filed further appeal before the Tribunal with following grounds:

“1. That in the facts and circumstances of the case and in law, the Learned CIT(A) has erred in allowing the adjustment of seized cash against self-assessment tax liability though Income Tax Act does not provide for adjustment of seized cash before determination of tax liability.

2. That the Department craves leave to add, modify or alter any of the ground(s) of appeal and/or adduce additional evidence at the time of hearing of the case.”

57. The Learned DR argued that there is no provision in the Income Tax Act to adjust the seized cash towards the self-assessment tax payable by the assessee and accordingly supported the order of the Learned AO. The AR argued that the order passed u/s.153A of the Act was in accordance with law but subsequent action of the Assessing Officer revoking the adjustment of cash was illegal.

58. The Tribunal considered the provisions of the section 132B of the Act, case laws on the issue and dismissed the appeal filed by the Revenue by observing as under:-

“7. We find that the subsequent action of Learned AO in revoking the credit given for seized cash towards existing tax liability under proceedings u/s 154 of the Act is illegal. The provisions of section 132B of the Act makes it clear that the terms ‘existing liability’ does not include advance tax payable in accordance with the provisions of Part C of Chapter XVII. But this amendment was brought in the statute by Finance Act 2013 with effect from 1.6.2013 only. Hence it can be safely concluded that what is precluded in the statute is adjustment of seized cash towards advance taxability only and not self-assessment tax or regular tax and that too only with effect from 1.6.2013. We hold that the action of the assessee in seeking to adjust the seized cash with self-assessment tax payable along with the return of income is in order and in accordance

with section 132B of the Act as admittedly self-assessment tax payable becomes 'existing liability' on the part of the assessee to settle. Similarly we hold that the action of the Learned AO in adjusting the seized cash towards the tax liability determined pursuant to completion of section 153A assessment also is in order and is in accordance with the provisions of section 132B of the Act.

8. We don't appreciate the arguments of the Learned DR that the amendment brought in section 132B to this effect is to be construed retrospective in operation. We find that this is a substantive law and not procedural law and is a substantive levy

on the part of the government on the assessee and hence could be held to be prospective in operation only.

9. Moreover, even if we hold that the said amendment in section 132B of the Act is to be construed as retrospective in operation, still it will not disturb the impugned case as in the facts of the instant case, the assessee never requested for adjustment of seized cash towards advance tax liability. He only requested for adjustment of seized cash towards self-assessment tax. It is beyond doubt that the terms 'advance tax' and 'self-assessment tax' are distinct and separate.

.....

.....

11. We find that the various case laws cited by the Learned AR in the paper book filed by him need not be considered as those case laws pertain to the adjustment of seized cash towards advance tax liability. But the impugned issue before us is adjustment of seized cash towards self-assessment or regular tax payable and not advance tax.

In conclusion, we hold that the action of the Learned AO in adjusting the seized cash towards the tax liability determined on completion of search assessment is in order. With regard to charging of interest u/s 234B and 234 C of the Act for non-payment and short payment of advance tax is concerned, we have already held that the amendment in section 132B of the Act is held to be prospective in operation from 1.6.2013 and accordingly not applicable for Asst Year 2006-07. Hence we hold that no interest u/s 234B and 234 C of the Act shall be charged by the Learned AO from the date of seizure of cash to the date of completion of assessment in respect of seized cash of Rs.20,00,000/-.

In the result, the appeal of the revenue is dismissed. “

59. In view of the above, it is respectfully submitted that Your Honours may direct the Assessing Officer to give credit of cash seized as requested by the appellant and consequentially, work out the interest payable/refundable.”

38. On hearing both the sides and also considering the above facts of the case, we find the seized cash is available for adjustment towards “advance tax

liability” which constitutes “any existing liability” as defined in effect prior to the amendment by the Finance Act, 2013. This interpretation is supported by the Co-ordinate Bench of the Tribunal in the case of **Happy Home Developers (supra)**. The contents of para 12 of the said decision of the Tribunal in the case of Happy Home Developers (supra) is relevant and the same is extracted hereunder :-

“12. Therefore, the issue is now settled and the expression ‘any existing liabilities’ does include the advance tax liabilities prior to 01.06.2013. The case of the assessee falls prior to the said date of 01.06.2013. The cash was seized in the search initiated on 06.01.2010. Assessee requested for adjustment of the same towards the advance tax liabilities vide his letter dated 11.03.2010. Considering the above legal position in the matter and facts of the present case, we are of the opinion, the Ground Nos. 1 to 3 raised by the assessee have to be decided in his favour and against the Revenue.”

39. Considering the above decision of the Tribunal in the case of Happy Home Developers (supra), we find the ground nos.3 and 4 should be allowed in favour of the assessee. Accordingly, we order.

40. In the result, the both the cross appeals in ITA Nos.1178 & 1179/PUN/2015 and ITA Nos.1246 & 1247/PUN/2015 for the assessment years 2010-11 & 2011-12 are partly allowed for statistical purposes.

**ITA No.608/PUN/2016 – By Revenue
(In the case of Vijaykumar Rajaram Shah)**

41. The grounds raised by the **Revenue** are as under :-

“1) On the facts and the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition of Rs.2,51,00,000/- made by the AO on account of unexplained cash by holding that the addition made by the AO on protective basis in the assessee’s hand whereas the AO in the assessment order in the case of Laxmi Civil Engineering Services Pvt. Ltd. clearly mentioned that addition is being made in the assessee’s company on protective basis and substantive basis in the case of the assessee.

2) On the facts and the circumstances of the case, the Ld. CIT(A) has erred in holding that the cash was found from the assessee's possession does not belong to him clearly ignoring the provision of Sec. 292C(1) whereby it is incumbent upon the assessee to prove that the same did not belong to him.

3) On the fact and the circumstances of the case, the Ld. CIT(A) the Ld. CIT(A) has erred in ignoring the ratio laid down of the Hon’ble Apex Court in the

case of CIT Vs. M. Ganapathi Mulidhar (1964) 53 ITR 623 (SC) which is squarely applicable to the present case.

4) *The order of the Ld. CIT(A) may be vacated and that of the Assessing Officer be restored.*

5) *The appellant craves leave to add, alter, amend and modify any of the above grounds of appeal."*

42. Briefly stated the relevant facts include that the assessee is an individual and derives his income from salary, interest, etc. The assessee is also Managing Director of Laxmi Engineering Services P. Ltd. which is engaged in the business of infrastructure and other project developments. A search was carried out on 15.06.2010 u/s. 132 of the Act in the case of Laxmi Engineering Services P. Ltd. and the assessee. During the course of the search, various documents and cash amounting to Rs.2,51,44,400/- was seized were seized. The cash seized was found in the possession of the assessee. The Assessing Officer issued a show cause to the assessee as to why cash seized should not be taxed as additional income of the assessee. In reply thereto, the assessee submitted that in the statements recorded during search, it was categorically stated that this cash was generated by inflating the expenses of Laxmi Engineering Services Ltd. and it was kept for the safety purpose, in the possession of the assessee. Thus, out of cash seized, Rs.2,51,00,000/- represented that of Laxmi Engineering Services Ltd. and balance Rs.44,400/- represented savings of the assessee. However, the Assessing Officer did not accept the contentions of the assessee and made addition of entire cash seized i.e. Rs.2,51,44,400/- as unexplained money. It may be noted that although in the body of the assessment order the Assessing Officer had mentioned that the said cash is being considered as protective addition in his hands. However, while computing the income vide para 7, Assessing Officer stated that "cash found at residence is added in his hands on substantive basis". Thus, Assessing Officer added the seized cash

both on protective as well as substantive basis. Assessing Officer created an ambiguous situation in his order.

43. Before the CIT(A), the assessee submitted that he did not have any other business for earning such cash and relied on the statement recorded u/s.132(4) of the Act. Assessee pleaded that Rs.2,51,00,000/-, the seized cash belongs to Laxmi Civil Engineering Services P. Ltd.. The same has been accordingly accepted by the said company and paid taxes. On evaluating the merits of the case and the reasons given by the Assessing Officer in his order in support of making addition, the CIT(A) found it appropriate to delete the addition of Rs.2,51,00,000/-.

44. Aggrieved with the above decision of the CIT(A), the Revenue is in appeal before us with the above extracted five grounds.

45. On going through them, we find they are argumentative in nature and the core issue arising out of them, relates if the said cash was added in the hands of Shri Shah is protective or substantive.

46. On the said core issue, Id. Counsel for the assessee submitted that the Revenue is aggrieved with the decision of deletion of Rs.2,51,00,000/- by the CIT(A). It is further submitted that it is necessary to refer to the observations made /reasons given by the Assessing Officer in the assessment order, which is reproduced as under :-

*“However, this cash is being considered here as **protective addition** because this has been offered as undisclosed income in the hand of the company. In future, if at stage during the course of appellate proceedings if it is decided that this cash amount is eligible for deduction under section 80IA(4) of the I. T. Act 1961, in such circumstances, this cash of Rs. 2,51,44,400/- will become substantive income of the assessee.*

In view of the foregoing facts, the cash of Rs.2,51,44,400/- is treated as unexplained money. Accordingly, the said amount of Rs.2,51,44,400/- is

hereby brought to tax for the A.Y. 2011-12. Penalty proceedings u/s. 271(1)(c) & 271AAA are being initiated separately.”

47. From the above, it is evident that there is no categorical finding of Assessing Officer if the said cash belongs to assessee or his company. Assessing Officer opines that the said cash is needed to be added only on protective basis. In case deduction u/s 80IA(4) is claimed by the company, in the hands of Shah, Assessing Officer opines that the addition becomes “substantive”. The contents of para 8 of Assessing Officer’s order is relevant. The same is extracted as under :-

“08. In view of the above, information, explanation submitted, and on verification of the seized materials etc. the total income of the assessee for the assessment year under the consideration is assessed as under:

<i>Salary</i>	<i>Rs. 12,00,000/-</i>
<i>Income from business</i>	<i>Rs. 2,18,419/-</i>
<i>Short term capital gain</i>	<i>Rs. 2,41,756/-</i>
<i>Income from other sources</i>	<i>Rs. 27,54,763/-</i>
Add : Cash found at residence discussed as per para 7 on substantive basis.	Rs. 2,51,44,400/-
Gross total income	Rs. 2,95,59,338/-
<i>Deduction under Chapter VIA</i>	<i>Rs. 75,000/-</i>
Total Income	Rs. 2,94,84,338/-
Rounder off u/s 288A	Rs. 2,94,84,340/-“

(Extracted from Assessment Order)”

48. Further, on the issue of protective versus substantive addition, assessee filed the written submission and the contents of para 10 to 19 of the written submission are extracted hereunder :-

10. Thus, although while recording reasons the Assessing Officer had mentioned the cash seized was considered as protective addition while computing taxable income the Assessing Officer had made addition on substantive basis.

11. On perusal of the ground, it is evident that the Assessing Officer has sought to justify the addition on the ground that he had made addition of the seized said cash in the hands of Laxmi Civil Engineering Services Ltd. on protective basis and on substantive basis in the hands of the assessee.

12. Thus, it is evident that the Assessing Officer has given different reasoning for justifying the addition made in the hands of the assessee.

It is submitted that the learned CIT(A), after taking the due cognizance of deduction granted to Laxmi Civil Engineering Services Ltd, has held that there is no reason to tax the said income in the hands of the assessee.

13. It is further submitted that irrespective of the outcome of addition made in the hands of Laxmi Civil Engineering Services Ltd., the CIT(A) has evaluated the merits of the addition and held that the assessee had kept impugned cash on behalf of the said company and that it was not the case of the Assessing

Officer that the cash so given to the assessee as remuneration or compensation etc. so that it can be treated as assessee's income. The CIT(A) has also taken due cognizance of the fact that in the statement recorded during the search and post search enquiries that the impugned cash was included in additional income of the said company and its source was inflation of expenditure in the case of the said company.

14. In this respect, further reliance is placed on the statements of the employees of the said companies. It is submitted that if the evidence unearthed at the time of search and other circumstances of the case are taken note of, irresistible conclusion which would emerge is that the sole source of cash is inflated expenditure in the hands of Laxmi Civil Engineering Pvt. Ltd. In this regard, Your Honours' kind attention is invited towards the statement of Anuradha Amrut Gulavani, who is looking after cash, vouchers, expenditure and other accounting function of the assessee. She was pointed out the deficiency found during the course of search in the maintenance of ledger accounts and vouchers. In this reply, she agreed that the voucher for the wage payments are prepared by her on the instructions of Shri Vijaykumar Shah and Shri Rajendra Doshi. The name of sites are also told by them. On such instructions, she used to prepare the vouchers and mentioned any name as of the labourer. She used to prepare such undated vouchers and later on dates are mentioned as per the instructions. She categorically admitted that no payments are made against such vouchers. She also explained that such vouchers are not entered into the manual cash book but are entered directly in the accounts maintained on computer. The relevant questions and answers given by Anuradha Gulavani in her statement are reproduced hereinbelow :-

"Q. 4 On perusal of P&L A/c for F.Y. 2009-10 of Laxmi Civil Engineering Services Pvt. Ltd., maintained on the computer of Sou. Swati Kulkarni, Accountant, it is seen that there are two heads of expenditures namely 'wages' and 'wages a/c'. She has explained that those payments made on the basis of site reports are grouped as 'wages a/c' and those payments whose vouchers are prepared by you are grouped as 'wages'. Please explain what type of vouchers are you preparing? "

Ans. The vouchers for wage – payments are prepared by me on the oral instructions of Shri Vijaykumar Shah or Shri Rajendra Doshi. The names of the sites and amounts are told by them. Accordingly, I prepared vouchers with small amounts and mentioning any name as the labourer. Such undated vouchers are prepared and kept. Later on the dates on such vouchers are written as per the instructions of Shri Vijaykumar Shah or Shri Rajendra Doshi.

Q. 5 Is any payment made against such vouchers?

Ans. No. I prepare the vouchers but do not make any payment against them.

Q. 6 Does these transactions are entered in your cash book?

Ans. No. These transactions are not entered in the cash books which are maintained manually. They are directly entered into the books maintained in Tally on the computer on the instructions of Shri Vijaykumar Shah or Shri Rajendra Doshi."

15. The above statement of Anuradha Gulavani was shown to her senior Swati Kulkarni who has also agreed and accepted the entire *modus operandi* and explained the booking of expenditure without making actual cash payment. The relevant portion of the statement of Mrs. Swati Kulkarni is reproduced hereinbelow:

"Q. 3 Please explain the nature of your work

Ans. I am looking after accounting of Laxmi Civil Engineering Services Pvt. Ltd. I maintain the book of account in Tally in computer. The bills / vouchers received from the sites are verified and accounted for. The Bank details are maintained and accounted for. The payments through cheque are made by me according to the instructions of Shri Vijaykumar Shah and Shri Rajendra Doshi. The same are entered in the books immediately. The details of cash payments are received from the cashier which are also entered in books."

"Q. 6 Please confirm the above facts

Ans. Yes, I do confirm that the facts stated by Sou. Anuradha Gulavani are true. The expenditure under the head of 'wages' debited to the P&L A/c of

Laxmi Civil Engineering Services Pvt. Ltd. are accounted for in the books by me on the basis of such self-made vouchers. The actual payment against such vouchers is not made.”

16. *Most importantly the above statements have been confirmed and reiterated repeatedly by both the directors during the course of search itself. The spontaneous statements recorded during the course of the search has to be believed in absence of any contrary evidence. It would not be out of context to point out that subsequently the same cash has been adjusted by the Revenue towards outstanding tax demand of M/s Laxmi Civil Engineering Services P. Ltd. Thus, it can be seen that at the time of search itself it was clarified to the Department that the assessee was holding cash of Rs. 2,51,00,000/- on behalf of the said company and its source was explained i.e. impugned cash was generated by recording inflated expenses in the books of the said company. It is submitted that no evidence to the contrary has been brought on record by the Assessing Officer to negate the explanation given during the course of the search by various persons including the assessee and hence, the CIT(A) has rightly deleted the addition made by the Assessing Officer by disapproving the reasons for such additions.*

17. *In the second ground, an argumentative one, the Assessing Officer has sought to rely on the provisions of section 292C(1) of the Act in support of his proposition that it is incumbent upon the assessee to prove that the cash found did not belong to him.*

18. *It is respectfully submitted that on perusal of section 292C(1) of the Act, the word “may” used in the section clearly indicate that the presumption is subject to the rebuttal and it is not mandatory to presume that money, bullion, etc. found during the search/survey belong the person in whose possession such money, bullion, etc. was found. It is submitted that it has been clarified to the Department in the statements recorded u/s.132(4) of the Act during the course of the search itself about the source and nature of cash found in the possession of the assessee. Further, there is no inconsistency noticed in the statements of various persons, as discussed above, in respect of nature and source of the cash found in the possession of the assessee. No evidence to the contrary has been found by the Assessing Officer to disprove the explanation given by the assessee and other related persons. It is undisputed that the assessee has no other source of income and hence, it cannot be said that such a huge amount of cash is out of some other undisclosed source of income. Thus, taking into account the facts and circumstances of the case, it is submitted that the assessee has sufficiently discharged the initial onus to show that the cash found in his possession was kept in the custodial capacity and the ownership of the cash so found vested with the said company. Hence, the presumption sought to be invoked by the Assessing Officer is misplaced.*

19. *In the third ground, the Assessing Officer has relied on the judgment of the Apex Court in the case of CIT v. M. Ganapathi Mulidhar [53 ITR 623]. In the said case, the issue was regarding taxability of remittances received by the assessee from abroad. The Hon’ble Supreme Court, in the facts of that case, after evaluating the material on record, upheld the addition made by the Revenue. While holding so, the Hon’ble Supreme Court took into account inconsistencies in the explanation offered by the assessee at different point of time Thus, the judgment given by the Supreme Court is totally based on the facts of that case and no ratio as such has been laid down.”*

49. On hearing both the sides and after considering the above extracted written submission of the assessee, we analyzed the following facts relating to the (i) facts seized cash from the residence of Sri Shah, (ii) the evidences gathered during the search action, (iii) statements recorded by the search

team, (iv) the offer of the explanation of the assessee why the said cash is discovered at his residence, (v) the fact of offering the same as an additional income of company etc. We have also considered the fact that Shri Shah does not have any other source leave alone the business income sources to earn such huge cash. We have also noticed that the assessee company offered the said income as income of the company and the same is approved by the CIT(A) and also confirmed the same by us in the Tribunal. Therefore, met the consistency, we are of the considered opinion, the Assessing Officer's attempt to make this as protective addition appears logical and reasonable. The alternative addition made by the Assessing Officer on substantive basis is unsustainable for the reason that the addition becomes substantial if the assessee company makes any deduction u/s 80IA(4) of the Act. This is not the reasoning for making any assessment of any assessee's income. The total income of an assessee has to be determined first based on the parameters laid down in the Income Tax Act. If the deductions are allowable as is a case in the case of LCESPL as held by us, the same should be allowed in accordance with the provisions of the Act. Therefore, seized cash belongs to the company will not become income of the assessee merely for the reason the said company claimed the deduction u/s 80IA(4) of the Act. This reasoning given by the Assessing Officer is dismissed. Accordingly, all the grounds raised including the argumentative grounds are dismissed. In the process, the order of the CIT(A) is approved without any interference. Thus, all the grounds of the Revenue are dismissed.

50. In the result, the appeal of the Revenue in ITA No.608/PUN/2016 is dismissed.

51. Resultantly, all the above captioned 7 appeals of the assessee as well as of the Revenue are disposed of as terms indicated above.

Order pronounced on this 26th day of June, 2020.

Sd/-

(S. S. VISWANETHRA RAVI)
न्यायिक सदस्य/JUDICIAL MEMBER

Sd/-

(D. KARUNAKARA RAO)
लेखा सदस्य/ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 26th June, 2020.
Sujeet

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A) concerned.
4. The CIT concerned.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, “ए” बेंच,
पुणे / DR, ITAT, “A” Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.