

IN THE INCOME TAX APPELLATE TRIBUNAL  
Mumbai "C" Bench, Mumbai.

Before Shri B.R. Baskaran (AM) & Shri Pavan Kumar Gadale

I.T.A. No. 3264/Mum/2022 (A.Y. 2013-14)  
I.T.A. No. 3265/Mum/2022 (A.Y. 2014-15)  
I.T.A. No. 3266/Mum/2022 (A.Y. 2015-16)  
I.T.A. No. 3267/Mum/2022 (A.Y. 2016-17)  
I.T.A. No. 3268/Mum/2022 (A.Y. 2017-18)

Padmashree Dr. D.Y. Patil University Sector 7, Nerul Navi Mumbai-400 706. (Appellant)	Vs.	DCIT, CC-7(1) Aayakar Bhavan M.K. Road Mumbai-400 020. (Respondent)
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I.T.A. No. 673/Mum/2023 (A.Y. 2014-15)  
I.T.A. No. 674/Mum/2023 (A.Y. 2016-17)  
I.T.A. No. 675/Mum/2023 (A.Y. 2017-18)

DCIT, CC-7(1) Aayakar Bhavan M.K. Road Mumbai-400 020. (Appellant)	Vs.	Padmashree Dr. D.Y. Patil University Sector 7, Nerul Navi Mumbai-400 706. (Respondent)
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PAN : AABTP2448L

Assessee by	Shri Neelkanth Khandelwal
Department by	Shri K.C. Selvamani
Date of Hearing	12.10.2023
Date of Pronouncement	04.01.2024

ORDER

PER BENCH:-

The assessee has filed appeals for AY 2013-14 to 2017-18. The revenue has filed appeals for AY 2014-15, 2016-17 and 2017-18. All of them are directed against the common order dated 15-12-2022 passed by Ld CIT(A)-49, Mumbai. Since most of the grounds urged by the assessee are common in nature and since they arise out of common set of facts, all these

appeals were heard together and are being disposed of by this common order, for the sake of convenience.

2. The facts relating to the case are set out in brief. The assessee is a charitable trust. It has been granted registration u/s 12A of the Act by DIT (Exemptions), Mumbai, vide Registration No.40651 dated 21.03.2007 w.e.f 01-04-2006. It is also approved u/s 80G of the Act. The assessee, inter alia, runs a Medical college, Dental college, physiotherapy, Biotechnology and Nursing colleges at Nerul, Navi Mumbai. Shri Vijay D Patil and Smt. Shivani Patil are the main trustees. Shri Vijay D Patil is the President/Chancellor. Smt. Shivani Patil is the spouse of Shri Vijay D Patil.

3. The revenue carried out search and seizure operations in the hands of the assessee on 27-07-2016 u/s 132 of the Act. It was concluded on 01-08-2016. Consequent thereto, the assessments of AY 2013-14 to 2016-17 were completed u/s 153A r.w.s 143(3) of the Act. The assessment of AY 2017-18, being the year of search was completed u/s 143(3) of the Act. The case of the revenue is that the assessee has collected Capitation fees through various employees for giving admission to students in various courses conducted by it. Such collection of capitation fees has not been accounted in the books and further, it was in violation of the clauses of the Trust deed and also Maharashtra Educational Institutions (Prohibition of Capitation fee) Act. Accordingly, the AO held that the assessee cannot be considered to be carrying on any charitable activity and accordingly denied exemption u/s 11 of the Act in all the years under consideration. The documents seized from the employees also revealed various types of payments made outside the books of account. Accordingly, he took the view that the books of accounts of the assessee are not reliable and accordingly, rejected them. The assessee contended before the AO that it has not collected any capitation fees as alleged by him. However, the AO did not accept the same and accordingly assessed the capitation fees computed from the material seized from various

employees from their residences as income of the assessee. Consequent to the denial of exemption u/s 11 of the Act, the AO computed income under normal provisions of the Act and also levied tax u/s 115BBE of the Act. Accordingly, various types of exemptions claimed by the assessee in terms of sec. 11 of the Act were also denied by the AO, i.e., the AO

- (a) rejected claim of exemption u/s 11(1)(d) of the Act in respect of development fees and other corpus donations;
- (b) rejected claim of Capital expenditure as application of income,
- (c) rejected claim for set off of carry forward amount of deficit as application,
- (d) rejected depreciation on opening balance of assets etc.

In some of the years, the AO made certain other additions also out of which some were added on substantive basis and others were added on protective basis also. We shall deal with all of them in the ensuing paragraphs.

4. In the appellate proceedings before Ld CIT(A) also, the assessee contended that it has not collected capitation fees as alleged by the AO. It submitted that the employees might have done so without the knowledge and authority of the trustees. However, the Ld CIT(A) also did not accept the contentions of the assessee and accordingly confirmed additions relating to Capitation fees. Consequent thereto, he held that the protective additions made by AO are not required. Accordingly, he deleted additions made on protective basis and also granted partial relief in respect of certain additions. The Ld CIT(A) also confirmed the denial of exemption u/s 11 of the Act and consequential additions. The assessee had also raised certain legal contentions before Ld CIT(A). All of them were rejected by Ld CIT(A). The assessee is in appeal challenging the additions confirmed by the first appellate authority. The revenue is in appeal challenging the decision of Ld CIT(A) in deleting the protective additions in some of the years.

5. We notice that all the issues revolve around the question as to whether the assessee has collected Capitation fees or not?. All the additions made by

the AO were consequent to his view that the assessee has collected capitation fees. While the assessee denies collection of any capitation fee, the case of the AO is that the various evidences coupled with the Statements recorded from key employees prove that the assessee has collected capitation fees from students for giving admissions to them. Hence, we are of the view that we should first adjudicate above question. In our view, the decision rendered to the above said question will determine the sustainability of most of other additions made by the AO.

6. It is pertinent to note that the search officials did not unearth any material from the assessee which revealed collection of capitation fees. All the materials were seized from the residences of employees only. We notice that the assessing officer has relied upon the statements given by employees of the assessee and also upon documents evidencing collection of capitation fees seized from them. The names of those employees are given below:-

- (a) Shri Pratap Patil
- (b) Shri Tukaram Patil
- (c) Shri D D Kolte
- (d) Shri Unmesh Khanvilkar
- (e) Shri Sunil Gaikwad

We shall examine the details of documents found from each of them and also statement taken from each of them.

7. We shall first deal with the case of **Shri Pratap Patil**. This person is an accountant in D Y Patil Medical College. *The search officials seized one pen drive and a diary from his residence*, which contained the details of capitation fees collected in cash. The AO has relied upon those documents and also the answers given by Shri Pratap Patil to various questions posed to him in the statement taken u/s 132(4) of the Act. The gist of observations made by the AO is given below:-

- (a) Three blank cheques were found at his residence and Shri Pratap Patil replied that these blank cheques were collected from students from whom

a portion of cash is yet to be received. It was further submitted that the cheques will be returned after receipt of cash.

(b) He submitted that the capital fees/donations are not accounted in the books of accounts.

(c) He also explained the process of collection of capitation fees as under in answer to Q no.15:-

*“Sir, the students/parents approach the admission cell department **which in front of the Presidents’** Office in Dr D Y Patil University Building. The Students/parents first meet the receptionist who directs the parents/students to people sitting in the administration cell department. There are four people who sit in the administration cell department namely Tukaram Patil, Dr Unmesh Khanvilkar, D D Kolte and myself. We are told in advance about the rates (payment per seat) of seat in different courses by Mr Vijay Patil (President, D Y Patil University, Nerul) and **Mrs. Shivani Patil**. These rates are told to us verbally on weekly basis. Once the student agrees to pay the donation/capitation in cash we ask for Xerox of the Basic Documents like college leaving certificate and mark-sheet. The names of students and the capitation fee that they are willing to pay are discussed with Mr. Vijay Patil (President, D Y Patil University, Nerul) and **Ms Shivani Patil**. The capitation fee is collected once Mr Vijay Patil (President, D Y Patil University, Nerul) **and Shivani Patil** approve the names discussed. After the approval the cash is collected and if there is any balance remaining to be paid blank cheques are **taken as a surety** for future payment and same is returned/destroyed once cash is received finally. Further there are certain brokers who meet the management directly. After approval from Mr Vijay Patil (President, D Y Patil University, Nerul) and Mrs Shivani Patil names are finalized and list is sent to University Registrar for enrollment. My role in whole process is of taking basic details of students interested in paying capitation fees and getting the same approved from Mr Vijay Patil (President, D Y Patil University, Nerul) and Mrs Shivani Patil and sequent collection of cash. Further I spent/disburse the cash as per direction of **Sh Vijay Patil**. (President, D Y Patil University, Nerul)”*

(d) He admitted that the brown diary titled “Royal Diary – JAYPEE” belongs to him and entries therein were made by him. He admitted that the entries represented cash collected by him and expenditure met by him as per the directions of Shri Vijay Patil.

(e) The amounts were written in codes/symbols and Shri Pratap Patil deciphered the same. He explained that all the receipts and payments were entered as per the instructions received from Shri Vijay Patil.

(f) The data found in the Pen drive was explained by Shri Pratap Patil. He admitted that the entries made in “kilo meter” refer to cash received from the students over and above the normal fees charged. It was explained that “1 Km” refers to One Lakh rupees.

(g) He admitted that cash received outside books less refund given is Rs.5.85 crores in 2016-17 as per pages no.2, 3 & 4 of Annexure-1. He also stated that Rs.10 lakhs paid to towards Gynecology inspection. He also admitted that a sum of Rs.4.89 crores was collected from medical stream students as per page nos. 9 & 10 of Annexure-1.

(h) He also explained the details of other collections and payments noted in the pen drive in various years. It was noticed by the AO that cheque receipts noted in an Excel file has been duly accounted in the books of the assessee trust. However, payments noted down in another excel file has also not been accounted for in the books of assessee trust. Hence, the AO has expressed the view that both these files have to be read in totality, meaning thereby, it has to be taken that the payments mentioned in another file should also be considered to be true. With regard to certain details, he admitted that he received names only from Ms. Shivani Patil and did not collect any cash as capitation fees.

(i) Based on the details found in the pen drive and diary, the assessing officer collated the amount of capitation fees year wise as under and added the same in the hands of the assessee in the respective assessment years:-

<u>Financial Year</u>	<u>Asst. Year</u>	<u>Amount (Rs. In lakhs)</u>
2012-13	2013-14	229
2013-14	2014-15	1848
2014-15	2015-16	319
2015-16	2016-17	104
2016-17	2017-18	1330

The Ld CIT(A) confirmed the additions in AY 2013-14 to 2016-17 (FY 2012-13 to 2015-16). In AY 2017-18, the assessee contended before Ld CIT(A) that there is double addition to the extent of Rs.5.85 crores. Hence the first appellate authority asked the AO to examine the above said contention. It appears that the AO has deleted the double addition and hence the assessee is in appeal in AY 2017-18 in respect of Rs.7.45 crores only.

8. We shall now deal with the case of **Shri Tukaram Patil**. He is an employee of D.Y Patil University and is mentioned as personal confidant of Shri Vijay Patil. His chamber is located in the President's office. *Two pen drives were seized from him.* However, it was noticed that the data in the pen drives was deleted/modified by Shri Tukaram Patil. Hence, he has given

details of capitation fees out of his memory. Accordingly, the AO has mainly relied upon the answers given by Shri Tukaram Patil to various questions posed to him in the statement taken u/s 132(4) of the Act. The gist of observations made by the AO is summarised below:-

(a) Since the data in those pen drives were deleted by Shri Tukaram Patil, he has given the details of collection of capitation fee out of his memory.

(b) He has admitted that capitation fees are being collected and also identified persons who are handling cash with regard to each of the institutions.

(c) Out of his memory, he could furnish the names of 18 students, the course in which they were admitted and also the exact amount of capitation fee collected from each of the students. He also stated that the capitation fees were refunded to five students.

(d) He also furnished details of payments made by him, which was noted in the modified excel sheet "cheque print.xls". While giving answer to Q. No.38, he could summarise the details of aggregate receipts amounting to Rs.15.15 crores and total payments aggregating to Rs.15.15 crores made out of those receipts.

(e) The AO has noted that the total amount of capitation fee received by Shri Tukaram Patil was Rs.6.45 crores in financial year 2013-14 (AY 2014-15). Accordingly, the AO assessed the above said amount in assessment year 2014-15. The balance amount of Rs.9.05 crores (Rs.15.15 less Rs.6.45) was found to have been received from other employees, who had also collected capitation fee separately. Since the AO had assessed the capitation fees received by other employees as income of the assessee, he found it not necessary to make addition of Rs.9.05 crores separately.

9. We shall now take up the case of **Shri Unmesh Khanvilkar**. He is said to be a close confidant of Shri Vijay D Patil. He is an employee of a college run by assessee trust. He was also subjected to search and substantial amount of cash and digital data relating to capitation fee were found and seized. He had kept cash at different places. *Two laptops were found and seized from his residence*. He also admitted collection of capitation fees from students. The gist of observations made by the AO is summarized below:-

(a) An aggregate amount of Rs.19,40,26,500/- in aggregate was seized from his residence at Vashi, residence at Chembur (E), residence of

Santosh Navalkar (Driver of Shri Unmesh Khanvilkar) and Room no.702 of P G Hostel in D Y Patil University.

(b) He has admitted that a sum of Rs.40.00 lakhs only belongs to him and the remaining amount of cash belongs to the assessee trust. He admitted that the cash represented capitation fees collected from 2014 onwards from students. He also admitted that the capitation fees have been received as per the directions given by Shri Vijay Patil.

(c) He also gave details of capitation fees charged for each of the course and also stated that the capitation fee is determined in consultation with the trustees. Some of replies were given out of his memory. Preprinted forms with the subject "donation to corpus of the trust" were found. It is noticed that certain donations were diverted to M/s D Y Patil Sports Academy and M/s Ramrao Adik Education Society. The AO interpreted that the cheques were taken as donations from parents who could not give amount in cash, instead of taking the same capitation fee in cash.

(d) One of the documents showed that a parent has asked for refund of Rs.50.00 lakhs, which was paid by him earlier as part NRI fees. The AO made enquiries with the parent (named Shri Shahnawaz Kheraj) u/s 131 of the Act and he admitted that he has given Rs.50.00 lakhs to the representatives of assessee trust in the Nerul office for admitting his daughter into MBBS. He got the refund, since his daughter changed her mind.

(e) Shri Unmesh Khanvilkar also explained the process of taking capitation fee or donation in the form of cash over and regular fees as under:-

*"Sir, the students/parents approach the admission cell department **which in front the Presidents' Office in Dr D Y Patil University Building.** The Students/parents first meet the receptionist who directs the parents/students to people sitting in the administration cell department. There are four people who sit in the administration cell department namely Tukaram Patil, D D Kolte, Pratap Patil and myself. We are told in advance about the rates (payment per seat) of seat in different courses by Mr Vijay Patil and **Mrs Shivani Patil.** These rates are told to us verbally on weekly basis. Once the student agrees to pay the donation/capitation in cash we ask for Xerox of the Basic Documents like college leaving certificate and mark-sheet. The names of students and the capitation fee that they are willing to pay are discussed with Mr. Vijay Patil and **Ms Shivani Patil.** The capitation fee is collected once Mr Vijay Patil **and Shivani Patil** approve the names discussed. After the approval the cash is collected and if there is any balance remaining to be paid blank cheques are **taken as a surety** for future payment and same is returned/destroyed once cash is received finally. Further there are certain brokers who meet the management directly. After approval from Mr Vijay Patil and Mrs Shivani Patil names are finalized and list is sent to University Registrar for enrollment. My role in whole process is of taking basic details of students interested in paying*

*capitation fees and getting the same approved from Mr Vijay Patil and Mrs Shivani Patil and subsequent collection of cash. Further I spent/disburse the cash as per direction of **Sh Vijay Patil.**”*

*(We have extracted the answer given by Shri Pratap Patil earlier to the similar question posed to him. It can be noticed that this reply of Shri Unmesh Khanvilkar is verbatim copy of the reply given by Shri Pratap Patil with same grammatical mistakes and different type of salutation to the name of trustees.)*

(f) With regard to cash kept with his driver named Shri Santosh Narvekar, he stated that he received a phone call from Shri Vijay Patil directing him not to keep cash and documents in D Y Patil Campus on the night of 26/7/2016, i.e., the prior to the date of search. Hence he kept the cash with his driver.

(g) He also gave the details of range of capitation fee that is being collected for various courses. With regard to the capitation fees collected, he submitted that he is looking after collection from academic year 2014-15 onwards. He also submitted that the details of capitation fee collections made during academic year 2014-15 & 2015-16 are not available with him in the paper form and may be available in the laptop. He stated that he could remember data relating to capitation fee taken for academic year 2016-17 and furnished details of 50 students (meaning, he has given the details out of his memory). The details furnished by him included the name of student, course in which they are admitted and the amount collected from each of them. He also submitted that he used furnish details of amount collected to Shri Vijay Patil, whenever he meets him in person.

(h) He also expressed his ignorance as to how Shri Vijay Patil maintains the data of total collection of capitation fee in cash.

(i) Shri Unmesh Khanvilkar had stated that a sum of Rs.1.25 crores was collected from a student named Shri Choudhary for admitting him in PG-pediatrics. The AO examined Shri Mohsin Abbar Chaudhary, father of the student. He admitted in his statement that he has paid a sum of Rs.1.25 crores by way of cheque to M/s D Y Patil Sports Academy. He also admitted that he was guided by the persons in the University to pay donation of Rs.1.25 crores to M/s D Y Patil Sports Academy for securing M D Pediatrics seat for his daughter. The AO has noted that the assessee was given opportunity of cross examination, but the assessee did not avail the same.

(j) Shri Unmesh Khanvilkar also confirmed the data available in his laptops regarding collection of capitation fee. As per the same, the total capitation fees collected year wise was noted by the AO as under and the same was assessed in the respective years:-

<u>Assessment year</u>	<u>Amount in lakhs</u>
2015-16	2858.00
2016-17	5243.50
2017-18	4476.00

(k) The AO also assessed aggregate amount of cash of Rs.19,40,26,500/- seized from various places of Shri Unmesh Khanvilkar in AY 2017-18 on protective basis.

10. We shall now take up the case of **Shri D D Kolte**. He is the Assistant Registrar in D Y Patil College of Architecture (run under a related trust named M/s Ramrao Adik Education Society). Certain incriminating evidences in the form of loose papers, in the form of pages torn from a spiral diary, were seized and they contained details of capitation fees received in cash. The observations of AO in this regard are summarized below:-

(a) Shri D D Kolte explained meticulously the contents of the loose papers. He admitted that the capitation fee is accepted in cash for admission in BAMS, Architecture and physiotherapy courses.

(b) He explained the process of taking capitation fee or donation as under:-

*“Sir, the students/parents approach the admission cell department **which in front the Presidents’** Office in Dr D Y Patil University Building. The Students/parents first meet the receptionist who directs the parents/students to people sitting in the administration cell department. There are four people who sit in the administration cell department namely Tukaram Patil, Dr Unmesh Khanvilkar, Pratap Patil and myself. We are told in advance about the rates (payment per seat) of seat in different courses by Mr Vijay Patil and **Mrs Shivani Patil**. These rates are told to us verbally on weekly basis. Once the student agrees to pay the donation/capitation in cash we ask for Xerox of the Basic Documents like college leaving certificate and mark-sheet. The names of students and the capitation fee that they are willing to pay are discussed with Mr. Vijay Patil and **Ms Shivani Patil**. The capitation fee is collected once Mr Vijay Patil **and Shivani Patil** approve the names discussed. After the approval the cash is collected and if there is any balance remaining to be paid blank cheques are taken **as a surety** for future payment and same is returned/destroyed once cash is received finally. Further there are certain brokers who meet the management directly. After approval from Mr Vijay Patil and Mrs Shivani Patil names are finalized and list is sent to University Registrar for enrollment. My role in whole process is of taking basic details of students interested in paying capitation fees and getting the same approved from Mr*

*Vijay Patil and Mrs Shivani Patil and subsequent collection of cash. Further I spent/disburse the cash as per direction of **Sh Vijay Patil.**”*

*(We have extracted earlier the answer given by Shri Pratap Patil and Shri Unmesh Khanvilkar to an identical question posed to both of them. It can be noticed that this reply given by Shri D D Kolte verbatim copy of the replies given by Shri Pratp Patil and Shri Unmesh Khanvilkar with same grammatical mistakes and different types of salutation to the name of trustees.)*

(c) The revenue also seized some loose papers from Shri Datta Patil, who was attendant of Shri D D Kolte. When questioned about the same, Shri DD Kolte admitted that they were given to Datta Patil on 26-07-2017, being the day prior to the date of search. He also explained the contents of the documents, which were in the nature of list of students who have applied for admission and the students, who were given admission in various courses. The documents also contained details of cash given to Shri Tukaram Patil, details of students who paid cash. Some pages of the documents contained the details of names of students and cash paid by them for admission into Ayurveda course, Architecture course.

(d) The revenue also found cash of Rs.96.30 lakhs from the Car of Shri D D Kolte. The source of cash was presumed by the AO as unaccounted capitation fees.

(e) It was noticed that a sum of Rs.3.54 crores has been shown as capitation fee in the seized documents, out of which a sum of Rs.80 lakhs pertained to Architecture course, which is being run by a related trust named M/s Ramrao Adik Education society. Hence the remaining amount of Rs.2.74 crores was considered as related to the assessee trust herein and the same was assessed as income of the assessee in AY 2017-18.

(f) Out of Rs.2.74 crores, the AO noticed that Shri D D Kolte has handed over a sum of Rs.2.50 crores to Shri Tukharam Patil. Hence the remaining amount that could be available with Shri D D Kolte was Rs.24 lakhs. We noticed earlier the search official found cash of Rs.96.30 lakhs from the car of Shri D D Kolte. The AO took the view that above said cash of Rs.96.30 lakhs consisted of cash of Rs.24 lakhs belonging to the assessee and the balance amount of Rs.72.30 lakhs belonging to Ramrao Adik Education society. Since the AO made addition of Rs.2.74 crores towards the collection of capitation fees by D D Kolte, no separate addition was made towards cash amount of Rs.96.30 lakhs seized from him.

11. We shall now take up the case of **Shri Sunil Maruti Gaikwad**. He is the Registrar for M/s Ramrao Adik Education Society, which runs an Engineering College. The observations of the AO in respect of Shri Sunil Gaikwad are summarized below:-

(a) Shri Tukaram Patil has admitted that the cash matters of engineering college are being handled by Shri Sunil Gaikwad.

(b) He also explained the modus operandi of taking capitation fee. He stated that he would complete negotiations with the parents and then give necessary instructions to his assistant Shri Rajesh Sawant to collect cash. He also stated that the cash so collected is kept in his locker and thereafter handed over to the person deputed by the management.

(c) An amount of Rs.1.90 crores was seized from the bank locker of Shri Sunil Gaikwad and further cash of Rs.59.75 lakhs was seized from the residence of Shri Rajesh Sawant, his assistant. When questioned about the cash, Shri Sunil Gaikwad has admitted the same was collected as capitation fees/donations. Shri Rajesh Sawant admitted that the cash of Rs.59.75 lakhs was given by Shri Sunil Gaikwad.

(d) A laptop was collected from Shri Sunil Gaikwad and it contained data relating to collection of capitation fees.

(e) The total capitation fees received by Shri Sunil Gaikwad was determined as Rs.4.55 crores in FY 2016-17 (Cash of Rs.1.90 crores and Rs.59.75 lakhs seized plus cash of Rs.2.05 crores handed over to Shri Tukaram Patil). Since all these collections were related to another trust, viz., M/s Ramrao Adik Education Society, the AO did not assess the above said amount in the hands of the assessee.

(f) The AO has stated that Shri Sunil Gaikwad has also collected Rs.161.50 lakhs in aggregate from three students in 2014 for admission into BDS, MD-Medicine and MDS –Pedo). All these three courses are conducted by the assessee herein. Hence, the AO assessed the same in the hands of the assessee in AY 2015-16.

12. It is pertinent to note that all these five persons have retracted their statements given by them on 16-08-2016, i.e., within 15 days from the date of conclusion of search. The AO, however, held that these retractions are afterthought. He has given the reasons for ignoring the retractions at pages 94 – 95 of the assessment order relating to AY 2017-18. The reasons given by the AO are summarized as under:-

- (a) They had given statements on the basis of seized papers/diaries/digital data maintained by each of them.
- (b) The statement given by each of the employees corroborate with the statement given by other employees.
- (c) The search has been conducted in the presence of two witnesses.

- (d) The retraction statements do not explain the source of cash seized or explanation given for the evidences found in their possession.
- (e) The denial of Shri Vijay D Patil about receipt of capitation fee is not correct. He has no answer/explanation for the cash seized from his employees. Explanation of gifts received from marriage with regard to cash and jewellery found in his house is not correct. The source of the cash and jewellery shall be unaccounted capitation fees only. It is in direct violation of sec. 13(1)(c) and sec. 13(2)(g) r.w.s 13(3) of the Act as the capitation fees collected by the assessee trust has been diverted for the persons specified u/s 13(3) of the Act.
- (f) In the survey conducted on 3 students/parents, they have accepted payment of capitation fees.
- (g) These employees did not complain about any coercion or pressure put in by the search officials. No police complaint was made.

Subsequently, the AO again examined all these employees u/s. 131 of the Act during the course of assessment proceedings. These employees said that they were not well when the statements were taken u/s. 132(4) of the Act. They also said that their employer has not taken any action against them yet. The AO also confronted the admissions made by these employees before Shri Vijay D Patil, but he has denied collection of capitation fees either by the University or himself. He submitted that the employees might have collected money on their own without the knowledge of the University or authority.

13. Another important point noticed by the AO is that all these persons have owned up the cash seized from them as their own and have declared them as their respective income under Income Declaration Scheme (IDS), 2016. All of them have filed the declaration on 30-09-2016, i.e., on the last date of the IDS. The AO took the view that these persons have owned up cash and filed declarations on the direction of the assessee-trust only. He also took support of the decision rendered by Hon'ble Supreme Court in the case of ITO vs. Atchiaiah (1996)(1 SCC 417), wherein the Hon'ble Apex Court has held that the right person and the right person alone has to be taxed by the I T Authorities. Accordingly, the AO has expressed the view that these

employees cannot be considered as right persons to be taxed, when one looks at their earning capacity, statements, incriminating evidences and other surrounding circumstances. Accordingly, the AO held that the capitation fees collected by these persons are taxable as income of the assessee trust only.

14. The AO has also referred to the statement given by the trustee Smt Shivani Patil, more particularly, following answer given by her:-

**Q 52** Please provide the fees for management seats reserved in each of the college specified above.

**Ans:-** I don't know about the management seats for engineering college. This year the admission for Dental College have not been done. As per my knowledge, last year **the seats were sold** for typically 7 – 8 lakhs per seat. For MBBS the price is typically 30 – 40 lakh. However for post graduate seats the prices is higher than MBBS. However, I don't know the exact figure. The management rates for Ayurveda and Physiotherapy is typically 4 – 5 lakhs per seat as these are not sought after courses.”

In the answer given to another question, she has stated that the fees are collected in cash. Since Smt Shivani Patil has used the expression “seats are sold” and the fees are collected in cash, the AO presumed that she has admitted about collection of capitation fees. The revenue has also seized cash of Rs.2,38,87,500/- and jewellery worth Rs.8,89,50,820/- from the lockers belonging to Smt Shivani Patil. The AO noted that she could not explain their sources properly. But no separate addition of these two items was made in the hands of the assessee. It is also pertinent to note that Smt Shivani Patil has also retracted her statement and the same was ignored by the AO.

15. The revenue also seized cash of Rs.65.00 lakhs from a person named Shri Bhagirath Patil. A statement was taken from him on 29-07-2016 u/s 132(4) of the Act. He admitted that the said cash belongs to Smt Shivani Patil and it was handed over to him by her on 26-07-2016 for safe custody, i.e., one day prior to the date of search. However, he owned up the money

later in another statement taken from him on 26-12-2018, wherein he explained that the said cash represented his cash in hand as per return of income, which included his agricultural income. He also filed revised return of income for AY 2016-17 and proved availability of cash balance with him. The AO, however, did not accept the same. He took the view that the above said amount of Rs.65.00 lakhs has been generated through collection of Capitation fees only. The reason is that Smt Shivani Patil had stated in her statement (Q No.60) that Mr Pratap Patil had sent approx Rs.60 lakhs to her residence one week back. Since Pratap Patil was considered to be collecting capitation fees, the AO took the view that the amount of Rs.65.00 lakhs handed over to Shri Bhagirath Patil included the above said amount of Rs.60.00 lakhs received from Shri Pratap Patil. Accordingly, the AO assessed the amount of Rs.65 lakhs in the hands of the assessee-trust in AY 2017-18.

16. From the seized documents, it was noticed that, apart from cash collection details, it contained the details of payments made by various employees. It was noticed that the said payments were also not accounted for in the books. The AO took the view that these payments have been given out of capitation fees collected by them. The AO also noticed that the search conducted in the hands of certain other persons, viz., Smt Taruna Maheswari and Shri Pravin Patil, also revealed that they have received money allegedly from Shri Vijay D Patil or from the employees on his instructions. The AO took the view that those money transactions have also been done out of capitation fee collections only. Accordingly, he assessed those payments on protective basis. Apart from the above, the AO held that some of the expenses accounted for by the assessee represent bogus purchases. Though the assessee contended that it is genuine purchase, yet the AO did not accept the same and accordingly disallowed the purchases amount. The details of those transactions are discussed below:-

- (a) The AO has referred to the search conducted in the hands of Smt Taruna Maheswari, the CFO of another trust named Ajeenkya D Y Patil

University, Pune. One diary was recovered from her (which was kept with her sister named Smt Poornima Chechani), where contained the details of payments received from Shri Vijay D Patil or his employees Tukaram Patil or Sadhashiv Patil. It was explained by her that Shri Vijay D Patil has made investments in the projects floated by Shri Ajeenkya Patil and these payments have been received in connection therewith. The entries made in the diary showed that a sum of Rs.30.20 crores was noted as received from Shri Vijay D Patil and other employees during the financial year 2016-17 relevant to AY 2017-18. The AO took the view that the source of above said payments is the capitation fees collected by the assessee trust. Since the AO had made addition of Capitation fee on the basis of information seized from various employees, he took the view that no separate addition of Rs.30.20 is called for. Accordingly, the AO assessed the amount of Rs.30.20 crores on protective basis to save the interests of revenue.

(b) The AO also referred to the documents seized from Shri Pravin Patil, the Chief Administrator of another trust M/s Ajeekya D Y Patil University, Pune. The said documents revealed that he has received a sum of Rs.25.00 crores from a person noted as "TP" during the financial year 2015-16 relevant to AY 2016-17. The said person was identified as 'Tukaram Patil' by Shri Pravin Patil. Accordingly, the AO took the view that the source of payment of Rs.25.00 crores is the capitation fee collected by the assessee trust and assessed the same on protective basis in AY 2016-17.

It is pertinent to note that both Smt Taruna Maheswari and Shri Pravin Patil have retracted the statement given by them u/s 132(4) of the Act. The AO declined to accept the retraction for the reason that they had given the statement earlier without coercion and they did not lodge any complaint with Police people. Accordingly, the AO held that the retraction is an afterthought.

(c) From the documents seized from Shri Unmesh Khanvilkar, it was noticed that an aggregate amount of Rs.43.51 crores has been collected as capitation fees. However cash found with him was Rs.19.49 crores only. Accordingly, he was asked to explain the difference amount of Rs.24.02 crores. Mr Khanvilkar submitted that he has given Rs.15 crores to a person named Shri Devan Mehta for increasing the medical PG seats; Rs.2 crores to Smt Taruna Maheshwari and Rs. 5 crores to a person named Mr Om. He could not explain the balance amount of Rs.2.02 crores. He submitted that all these payments have been made as per the direction given by Shri Vijay D Patil. The AO assessed the above said amount aggregating to Rs.22 crores (15+2+5) on protective basis in AY 2017-18.

(d) From the documents seized from Shri Tukaram Patil, expenses and payments aggregating to Rs.1915.77 lakhs was noticed. The AO assessed the same on protective basis in AY 2017-18 holding the same as application of amount collected as capitation fee.

(e) The AO has also examined the Answer/OMR sheets relating to Entrance Examination and noticed that there were differences in signature between attendance sheet and OMR sheets in respect of certain students. In some place, the signature of student was found missing. The AO compared the name of the student whose signature was not available with the list of students who have alleged to have paid capitation fee and accordingly drew inference that these manipulations have happened in respect of those students only. Accordingly, he examined some of those students. However, all of them replied that they do not remember about the signature part. It is pertinent to note that the AO did not ask specific questions about payment of capitation fee, if any, by the students. The reasoning given by the AO in this regard is that the students are under the control of college management and hence they will not tell the truth. Accordingly, the AO presumed that these discrepancies prove that the assessee trust was accommodating students from whom capitation fees were collected.

(f) The AO also conducted surveys u/s 133A of the Act in the hands of parents of three students and according to the AO; they have admitted payment of capitation fees. The names of the parents are Dr Bhupendra P badhe, Dr Pramod Gandhi and Dr Santosh Pillai.

(g) It is the case of the AO that many parents have admitted payment of donation to various institutions belonging to the assessee's group. A list of 10 students is given at pages 137 & 138 of the assessment order relating to AY 2017-18. Out of them, Shri Hetal Kumar Joshi, Dr Shreyak Prafulla Kadu, Shri Shah Nawaz Khairaj and Shri Tariq Ahmed Ansari have admitted payment of cash to the assessee. However, they have also admitted that the cash was returned to them, since they did not take admission. Remaining parents had given donation by way of cheque only. Accordingly, this fact also reinforces his conclusion that the assessee has collected capitation fees.

(h) During the search conducted in the case of Ajeenkya D Y Patil Group, it was noticed that they were obtaining bogus bills towards purchases. During the course of their assessment proceedings, certain evidences indicating bogus purchases made by the assessee trust were found. The total value of bogus purchases was Rs.99.51 lakhs. However, the assessee submitted that the purchases to the tune of Rs.84.50 lakhs were not bogus. The AO did not accept the same and added the amount of Rs.84.50 lakhs as income of the assessee in AY 2014-15 u/s. 69C of the Act.

(i) The AO has also noticed that some of the employees have confirmed receipt of capitation fee, but they have not retracted their statement. They are (a) Shri Rajesh Sadashiv Sawant, Office Assistant and Personal assistant of Shri Sunil Gaikwad; (b) Smt Mansvi Naik, Manager.

(j) The AO, throughout the assessment, has observed that the assessee was aware of intending search action and accordingly removed

cash/documents in the night of 26-07-2016, i.e., the day earlier to the date of search and hence could transfer cash and records.

17. We noticed earlier that all the statements given by various persons were retracted. Those statements were also confronted with Shri Vijay Patil. According to the AO, he neither denied nor accepted the receipt of capitation fee. The assessing officer has listed out the cash found at various places aggregating to Rs.3072.19 lakhs at page 145 of the assessment order relating to AY 2017-18. Shri Vijay D Patil expressed his inability to explain the same. According to Ld A.R, the said list contained items, which are not related to the persons connected with the assessee-trust. With regard to the capitation fee, Shri Vijay Patil stated that the employees might have collected it on their own without his knowledge or University or without his authority. He also categorically stated that he has not given any instruction to anyone on money matters not recorded in the books.

18. We heard the parties and perused the record. It is the case of the assessee that none of these materials was seized from it. Further, they do not belong to it also. All these materials were seized from the residences of the respective employees and the assessee was not aware of those transactions. It was also contended that the revenue did not seize any material from the assessee that will corroborate the documents seized from the residence of employees. Accordingly, it was contended that the assessee cannot be burdened with or put to liability on the basis of those materials. In this regard, the assessee has also taken support of the provisions of sec. 132(4A) of the Act, as per which the presumption is that the material seized from a person shall belong to that person only. The alternative contention of the assessee is that the various evidences are dumb and inconclusive documents, i.e., they do not lead to the conclusion that the assessee-trust was collecting capitation fees. On the contrary, the Ld D.R fully relied upon the assessment order and submitted that the AO has made thorough enquiries relating to this issue, i.e., the AO has brought on record a number

of materials and also relied upon the statements given by various persons. Accordingly, the Ld D R submitted that all of them establish the fact that the assessee was collecting capitation fees.

19. The nature of materials collected by the revenue and their place of seizure has been tabulated by Ld A.R as under. We notice that the AO has relied upon these materials in order to conclude that the assessee was collecting capitation fees by way of cash from students for giving admissions to them.

S.No.	Name of Employee	Items seized	Place of seizure
1.	Shri Pratap Patil	Pen drive and brown diary	Residential premises of Shri Pratap Patil
2.	Shri Tukaram Patil	2 pen drives	First pen drive kept with Narendra Gaikwad and  Second pen drive kept in DY Patil Sports Stadium Office.
3.	Dr Unmesh Khanvilkar	Laptop	His residence at Chembur
4.	Shri D D Kolte	Loose Papers	Kept with attendant Datta Patil
5.	Shri Sunil Gaikwad	Laptop	Residential premises of Sunil Gaikwad.

In addition to the materials listed above, the revenue has seized cash from various employees from different places. The details of the persons from whom and the place from which cash was seized are tabulated below:-

S. No.	Name of Person	Cash seized	Place of seizure
1.	Dr. Unmesh Khanvilkar	5,10,76,500 1,39,68,000 2,89,82,000 <u>10,00,00,000</u> 19,40,26,500 =====	Vashi residence Chembur residence Residence of his driver Room No.702, PG Hostel
2.	Shri Pratap Patil	74,96,500	Store room in Medical college
3.	Shri Sunil Gaikwad	1,90,00,000  <u>59,75,000</u> 2,49,75,000 =====	Personal locker in bank Residence of attendant
4.	Shri D D Kolte	96,30,000	In his Car parked in DY Patil campus
5.	Shri Bhagirath Patil	65,00,000	In his Parel residence
	<b>TOTAL</b>	<b>24,26,28,000</b>	

Apart from the above, cash aggregating to Rs.2,38,87,500/- and jewellery worth Rs.11,62,50,820/- was seized from the lockers/residence of Smt. Shivani Patil. Even though the AO has discussed about these items, as noticed earlier, the AO did not make any addition in the hands of assessee in respect of the cash/jewellery seized from Smt Shivani Patil. Further, a sum of Rs.65.00 lakhs was seized from Shri Bhagirath Patel, who has claimed initially that the said sum was received from Smt Shivani Patil, but retracted from it later.

20. We noticed that the AO had relied upon on the evidences seized from various persons. He has also relied upon the statements given by them. Based on the above, the AO has drawn adverse inferences against the assessee and has also come to the conclusion that the assessee has received capitation fees for admitting students. The assessee, however, has contended that the inferences drawn by the AO are not correct. The Ld A.R advanced his arguments to rebut the observations made/presumption drawn by the AO. The contentions of the assessee in this regard are summarized below in respect of each of the employees:-

**(A) PRATAP PATIL:-**

(a) The pen drive and diary have been seized from the residence of Shri Pratap Patil. It is not mentioned anywhere that both the above said items belong to the assessee trust. Hence they should be considered as his personal items. The revenue did not find any material with the assessee which could link it with the documents seized from Shri Pratap patil.

(b) Blank cheques are also found at his residence only. He has stated that the cheques were collected as security for the balance amount due from students. If the assessee trust is collecting capitation fee, then it would not have kept the blank cheques with him, since they are the 'security' for ensuring receipt of balance amount of money.

(c) Modus operandi of taking capitation fee has been explained by Shri Pratap Patil, Shri Unmesh Khanvilkar and Shri D D Kolte. It can be noticed that all the three answers are similarly worded, i.e., they match word by word that too suffering from same type of grammatical mistakes; that types of salutations used against the name of trustees at different places are also

identical. It is pertinent to note that the answer was given by each of them at different places/timing. In that case, how the identical answers with same type of grammatical mistakes were given. In view of the above, it was contended that the above fact would prove that it is the search officials, who have prepared answers. Accordingly, it was contended that it cannot be said that the answers to various questions were given by these employees and the same proves that the statements given by employees are not reliable.

(d) No document or material corroborating the entries found in the Pen drive or diary was found from the premises of the assessee trust.

(e) In question no.19, he has stated that he has given Rs.20.50 lakhs to Abhijit Shirke on the instructions of Shri Vijay Patil. In Question No.21, he has stated that he is making entries for Abhijit Shirke. These answers were not cross verified with Abhijit. It is pertinent to note that the very same person, viz., Shri Abhijit Shirke was arrested in 2015 in connection with accepting money of Rs.62.50 lakhs for securing a medical seat in D Y Patil Medical College, Nerul. The Ld A.R submitted that the relevant news paper report is placed at pages 279 & 280 of paper book relating to AY 2015-16. This information further supports the case of the assessee trust that it is not collecting capitation fees. Some employees may be doing it without the knowledge of the assessee trust.

(f) With regard to the entries made in the Diary, Shri Pratap Patil could explain the contents of the same, since he only has maintained it. In the diary, he has also noted the name of

brokers and doctors. However, none of the brokers/doctors has been examined to corroborate the entries and to link the same with the assessee trust.

(g) If the contents of pen drive & diary are presumed for a moment to be in the knowledge of the assessee trust, then the trust will not take the risk of allowing Shri Pratap Patil to keep the secret data with him, as there is a possibility of manipulating the entries to his advantage and to the detriment of the assessee trust.

(h) Though Shri Pratap Patil has originally stated that the capitation fees are collected on behalf of the assessee trust, later he has filed retraction affidavit on 16-08-2016 (within 15 days from the date of conclusion of search). The retraction has also been confirmed by him in the statement taken u/s 131 of the Act during the course of assessment proceedings. Hence the statement given by him could not have been relied upon by the AO.

(i) While the AO has accepted the statement that the capitation fee has been collected on behalf of the assessee trust, he did not accept his retraction. Both admission of certain information and retraction of the same have been done by the concerned employee. The assessee trust is not concerned as to what he said in admission/retraction. Hence assessee-trust cannot be subjected to addition on the basis of the statement of the employees.

(j) Shri Pratap Patil has owned up the cash of Rs.74,96,500/- seized from store room and declared the same as his income under Income Declaration Scheme, 2016.

(k) Hence the entries found in the pen drive and dairy will not have any evidentiary value. Accordingly, both receipts and payments noted therein cannot be used against the assessee.

(l) It is pertinent to note that the AO has accepted the payments at its face value and did not bother to ascertain truth of the same. This is for the reason that amounts received in cheques were found to have been accounted for in the books of the assessee trust. Hence the AO has taken the stand that all the information available in the pen drive should be read together. However, the above said view of the AO is not correct. The details of receipts and the details of payments have been kept in separate files, i.e., it is not the case that both receipts and payments have been noted in the very same page/file. It is possible that Shri Pratap Patil might have got access to the information about receipt of payments by way of cheques. Hence to protect himself, he might have copied it in his pen drive also. Further, the payments noted in the separate file have not been corroborated with any other independent evidence. Hence the said payments could be taken as conclusive evidence warranting addition.

**(B) TUKARAM PATIL:-**

(a) Shri Tukaram Patil has partially deleted the documents in the pen drives and it actually incriminates him.

(b) The pen drives were found at his premises. It is not mentioned anywhere that both the pen drives belong to the assessee trust. Hence they are as his personal items only. The revenue did not find any document or material from the possession of the assessee that would corroborate the entries found in the Pen drives.

(c) Since the data has been deleted by him, the information about details of students and amount of capitation fees collected from them have been given by him 'out of his memory'. Hence it is a case of oral evidence, which is not supported by any credible material. Hence the information so furnished by him could not have been relied upon by the AO. In any case, the AO did not conduct any enquiry with any of those students in order to find out the veracity of the said information.

(d) He also claims to have remembered name of five students to whom amounts were refunded. Again it is a case of oral evidence only and the same is not supported by any other material. No enquiry was conducted by the AO with those five students to find out its veracity.

(e) Statement of oath dated 31-07-2016 has been signed by witnesses on 30-07-2016. Hence the statement loses its credibility.

(f) Though Shri Tukaram Patil has originally stated that the capitation fees are collected on behalf of the assessee trust, later he filed retraction affidavit on 16-08-2016 (within 15 days from the date of conclusion of search). The retraction has been

confirmed by him in the statement taken u/s 131 of the Act during the course of assessment proceedings.

(g) While the AO has accepted the statement that the capitation fee has been collected on behalf of the assessee trust, the AO did not accept his retraction. It is case of admission and retraction by the employee of the assessee trust. The assessee trust is not concerned as to what he said in admission/retraction. Hence assessee-trust cannot be subjected to addition on the basis of the statement of the employees.

(h) Hence the entries found in the pen drives will not have any evidentiary value. Accordingly, both receipts and payments noted therein cannot be used against the assessee.

(i) It is pertinent to note that the AO has accepted the payments noted in the pen drives at its face value. He did not bother to ascertain truth of the same by making enquiries with the payees.

**(C) SHRI UNMESH KHANVILKAR: -**

(a) All details were given from out his laptop and other documents kept at his residence. He has kept cash at various places. Aggregate amount of cash found with him was Rs.19.40 crores. It is beyond human probabilities that the assessee-trust would allow to keep such huge amount with an employee.

(b) The answers given by him with regard to cash found from him at various places would show that he has been giving answer to suit his convenience.

(c) If it is presumed that Shri Vijay Patil had actually asked him to remove cash from D Y Patil University premises apprehending income tax raid, how Shri Vijay Patil would allow Shri Unmesh Khanvilkar to keep Rs.10.00 crores at Room No 702 in PG Hostel?. This proves that there was no instruction from Shri Vijay Patil.

(d) Modus operandi of taking capitation fee has been explained by Shri Pratap Patil, Shri Unmesh Khanvilkar and Shri D D Kolte. It can be noticed that they are worded in identical manner, i.e., the answer given by each of them at different places/occasions tally with each other, i.e., they matches word to word; they suffer from same type of grammatical mistakes; that different types of salutations used against the name of trustees is also identical. It was contended that this fact proves that the search officials only have prepared the answers. Accordingly, it was contended that it cannot be said that the answers to various questions were given by these employees.

(e) If the information available in his laptop is considered to be in the knowledge of the assessee trust, then the trust will not take the risk of allowing him to keep the records, as there is a possibility of manipulating the entries to his advantage and to the detriment of the assessee trust.

(f) No document or material corroborating the entries found in the laptop was found from the premises of the assessee trust.

(g) The AO has presumed that the donation of Rs.1.25 crores given by a parent named Shri Mohan Abbas Chaudhary to D Y Patil Sports Academy is the capitation fee collected to give seat in the Medical college. However, it is only a presumption of the AO.

The seat was given on merit. The donation was voluntary and it has been duly accounted for.

(h) Though he has originally stated that the capitation fees are collected on behalf of the assessee trust, later he has filed retraction affidavit on 16-08-2016 (within 15 days from the date of conclusion of search). The retraction has been confirmed by him in the statement taken u/s 131 of the Act during the course of assessment proceedings.

(i) While the AO has accepted the statement that the capitation fee has been collected on behalf of the assessee trust, the AO did not accept his retraction. It is a case of admission and retraction of the employee of the assessee trust. The assessee trust is not concerned as to what he said in admission/retraction. Hence assessee-trust cannot be subjected to addition on the basis of the statement of the employees.

(j) The AO has referred to a pre-printed form and statement on oath u/s 131 of Mr Shahnawaz Kheraj. It is submitted that there is nothing written on this pre-printed note to suggest that the assessee-trust has been collecting capitation fees.

(k) Shri Unmesh Khanvilkar has owned up the cash of Rs.19.40 crores seized from him and declared the same as his income under Income Declaration Scheme, 2016.

(l) He has stated that he could remember data relating to capitation fee taken for academic year 2016-17 and furnished details of 50 students, meaning thereby, he has given those details out of his memory. Hence it is a case of oral evidence,

which is not supported by any material. Hence AO could not have relied upon those oral statements.

**(D) D.D KOLTE:-**

(a) The loose papers kept with his attendant Shri Datta Patil has been considered by the AO to make addition. The loose papers are dumb documents and do not have any evidentiary value.

(b) Modus operandi of taking capitation fee has been explained by Shri Pratap Patil, Shri Unmesh Khanvilkar and Shri D D Kolte. It can be noticed that they are worded in identical manner, i.e., the answer given by each of them at different places/occasions tally with each other, i.e., they matches word to word; they suffer from same type of grammatical mistakes; that different types of salutations used against the name of trustees are also identical. It was contended that this fact proves that the search officials only have prepared the answers. Accordingly, it was contended that it cannot be said that the answers to various questions were given by these employees.

(c) No document or material corroborating the entries found in the Pen drive or diary was found from the premises of the assessee trust.

(d) Though he has originally stated that the capitation fees are collected on behalf of the assessee trust, later he filed retraction affidavit on 16-08-2016 (within 15 days from the date of conclusion of search). The retraction has been confirmed by him in the statement taken u/s 131 of the Act during the course of assessment proceedings.

(e) While the AO has accepted the statement that the capitation fee has been collected on behalf of the assessee trust, the AO did not accept his retraction. It is a case of admission and retraction of the employee of the assessee trust. The assessee trust is not concerned as to what he said in admission/retraction. Hence assessee-trust cannot be subjected to addition on the basis of the statement of the employees.

(f) Cash of Rs.96,30,000/- was seized from his car. He has owned up the same and declared the same as his income under Income Declaration Scheme, 2016.

**(E) SUNIL GAIKWAD:-**

(a) The data is kept in his personal laptop. If they are within the knowledge of the assessee trust, then the trust will not take the risk of allowing him to keep the records, as there is a possibility of manipulating the entries to his advantage and to the detriment of the assessee trust.

(b) Total cash of Rs.2.49 crores was found from his locker & residence of his attendant. If it belongs to trust, why should they keep the cash with him?

(c) Though he has originally stated that the capitation fees are collected on behalf of the assessee trust, later he filed retraction affidavit on 16-08-2016 (within 20 days from the date of search). The retraction has been confirmed by him in the statement taken u/s 131 of the Act during the course of assessment proceedings.

(d) While the AO has accepted the statement that the capitation fee has been collected on behalf of the assessee trust, the AO did

not accept his retraction. It is a case of admission and retraction of the employee of the assessee trust. The assessee trust is not concerned as to what he said in admission/retraction. Hence assessee-trust cannot be subjected to addition on the basis of the statement of the employees.

(e) He has owned up the cash of RS.2.49 crores and has declared it as his income under Income Declaration Scheme, 2016.

**(F) Smt. SHIVANI PATIL: -**

(a) Smt Shivani has retracted her earlier statement and hence it cannot be relied upon.

(b) She has nowhere stated that the assessee trust has accepted capitation fees. The answer given by her has been misinterpreted by the AO.

(c) She has nowhere stated that the cash and jewellery found with her has been acquired out of capitation fees.

(d) Her husband has explained the answers given by Smt Shivani Patil and cleared the possible doubts in her answers.

(e) She has declared the cash and jewellery as her income under Income Declaration Scheme, 2016.

**(G) OTHERS:-**

(a) Cash of Rs.65.00 lakhs seized from Shri Bhagirath Patil. But there is no evidence to show that it is part of capitation fees.

(b) Statement of Smt Taruna Maheshwari. She has retracted her statement. In any case, she is an employee of another trust namely Ajeenkya D Y Patil, which is a separate group. Hence the entries made by her are not binding upon the assessee. In any case, no corresponding entries were found in the records of the assessee. If at all there is some transaction with the employees of assessee trust, the same may be in their personal capacity only.

(c) Statement of Shri Pravin Patil. He has retracted his statement. In any case, he is an employee of another trust, viz., Ajeenkya D Y Patil, which is a separate group. Hence the entries made by her are not binding upon the assessee. In any case, no corresponding entries were found in the records of the assessee. If at all there is some transaction with the employees of assessee trust, the same may be in their personal capacity only.

(d) Survey on three parents. The statement given by them is not binding upon the assessee.

(i) Dr Bhupendra Badhe has stated to have given capitation fee to a person named Shri Sanjay Pawar, who is not an employee of trust. He has not stated that he has paid cash to the trust.

(ii) It can be noticed that the survey officials did not ask Dr Pramod Gandhi any question on payment of capitation fees to the trust.

(iii) It can be noticed that the survey officials did not ask Dr Santhosh Pillai any question on payment of capitation fees to the trust.

(e) Statements taken from various Parents:-

(i) Most of the persons have paid donation through banking channels. Those donations cannot be considered to be Capitation fees. All the donations have been recorded in the books.

(ii) Those parents, who had paid cash, have admitted that they have received cash from the trust.

(iii) None of the parents has admitted that they have paid capitation fee to the trust.

(iv) Shri Vijay Patil has also admitted that they used receive fees in cash also.

(f) Statements taken from 3 more parents:-

All the three parents have stated that they have given donations only and admission was obtained on merits.

(g) Statements taken from driver (Mr Rajesh Sadashiv Sawant); Shri Sandeep Gopalrao Patil and Mrs Manasvi Naik.

They are low level employees. How they can be aware of the intricate details of admission process?. Their statement was not taken on Oath. Hence the AO cannot rely on their statement. Shri Sandeep Gopalrao Patil and Mrs Manasvi have stated about the Mac Desktop of Shri Vijay Patil. The AO did not refer to the said computer in the entire assessment order. The AO also refers to the statement taken from Dr V R Badhwar, Dean. There is no mention about capitation fees.

21. The contentions of the assessee, as noticed earlier, are that these materials have not been recovered from its premises or possession. Hence they cannot be relied upon for making additions in its hands. According to the assessee, the presumption u/s 132(4A) of the Act cannot be invoked in

its hands, since these materials have not been seized from its premises. The presumption u/s 132(4A) is that the said materials shall belong to the person from whom they were seized. Accordingly, it was submitted that the AO should not have made additions in the hands of the assessee relying upon the evidences seized from the employees and others. When the bench asked the assessee as to when the AO could have taken support of those documents, the Ld A.R further submitted that the revenue could rely upon the materials that were seized from other persons, only in a case where the revenue has found/seized any other corroborative material from the assessee. In the instant case, the revenue did not seize any material from the assessee which will vindicate the contents of the evidences seized from the employees. It was further submitted that the president of the assessee trust, Shri Vijay D Patil has categorically denied receipt of capitation fees by the assessee trust and has further stated that the concerned employees might be doing so without the knowledge of the assessee trust. Accordingly, the Ld A.R contended that, in the facts and circumstances of the present case and also in view of the presumption enshrined in sec. 132(4A) of the Act, the materials seized from the employees shall belong to the concerned employees only and hence they cannot be used against the assessee.

22. The alternative contention of the assessee is that, even if it is taken that the AO could not have used the materials seized from the employees without corroborating the same with any other material available with the assessee, i.e., it is the case of the assessee that these materials, per se, do not have any evidentiary value for arriving at the conclusion that the assessee-trust was collecting capitation fees, unless any other independent material was brought in to corroborate such a conclusion. In support of this contention also, the assessee placed reliance on certain case laws.

23. Before us, the Ld A.R has filed written submissions summarizing his contentions on the above said two points discussed in the earlier paragraphs.

The relevant portion of the written submissions is extracted below, for the sake of convenience:-

*“14.1. The impugned additions are based on seizure of (i) laptops (ii) loose papers (iii) pen drives and (iv) diary. Further, there is no dispute that all these evidences are found in the possession of others and **not in the possession of the assessee**. They are either print-out taken from laptops or loose papers. The name of the assessee-trust is not mentioned on any document found/print-out taken from the pen-drives/laptops, loose papers. Hence they have to be treated as dumb documents/documents having no evidentiary value. No addition can be made simply on the basis of notings on such sheets/loose papers in the absence of corroborative materials. No circumstantial evidence in the form of any unaccounted cash belonging to the appellants or investment outside the books was found during search. Further, even the diary was not found in possession of Trust and hence, it is submitted that, it cannot be considered as regular books of account maintained by the appellant-trust in absence of any such marking or name on the diary.*

*14.2. The appellants, from the very inception, have denied having any nexus with the seized papers and documents. The said seized items namely, laptops, pen-drives, loose papers were found from the residence of various employees. It is submitted that the presumption of section 132(4A) and section 292CC is only vis-a-vis the person in whose possession or control the books of account, documents, etc are found, and not against any other person. For ready reference, the section 132(4A) is reproduced below –*

*“(4A) Where any books of account, other documents, money, bullion, jewellery or other valuable article or thing are or is found in the possession or control of any person in the course of a search, it may be presumed—*

*(i) that such books of account, other documents, money, bullion, jewellery or other valuable article or thing belong or belongs to such person;*

*(ii) that the contents of such books of account and other documents are true; and*

*(iii) that the signature and every other part of such books of account and other documents which purport to be in the handwriting of any particular person or which may reasonably be assumed to have been signed by, or to be in the handwriting of, any particular person, are in that person's handwriting, and in the case of a document stamped, executed or attested, that it was duly stamped and executed or attested by the person by whom it purports to have been so executed or attested.”*

*From the above, the seizure should be of “books of account, other documents” etc. The diary found in the possession of Mr Pratap Patil is held by Courts to be books of account, and loose sheets, print-out from pen-drives, laptops, etc would qualify as “other documents” The diary, documents, etc in the case on hand are found **in possession of or in the***

**control of the employees**, and not the appellants or its trustees. As such, per sub-section (4A) it is presumed that –

- (i) such books of account, other documents and cash belong to such person
- (ii) the contents of such books of account and other documents are true, vis-à-vis the persons in whose possession or control they are found
- (iii) the appellants, not being person from whose possession the said books of account and other documents are bound, the presumption of section 132(4A) in respect of these books of account, and other documents, etc shall not apply and consequently, the appellants are not required to rebut or explain the documents seized from other persons, being the employees.

Reliance is placed on following case laws: –

- **Startex (India) (P.) Ltd vs DCIT – 84 ITD 320 (Mum)**

“The presumption under section 132(4A) is in respect of the person in whose possession the books or documents are found. The use of the words ‘to such person’ in the said section means the person in whose possession the books of account or documents are found. Clause (ii) of section 132(4A) provides that the contents of such books of account or documents are true. This presumption can be applied only against the person in whose possession the books of account or the documents are found. Therefore, so far as the case of N.S. was concerned, the revenue authorities might presume that the books of account or documents found from his possession were correct. However, while utilising those documents in the case of any other person (i.e., the person other than N.S.), there could not be any presumption about the correctness of such books or documents.

Therefore, the presumption under section 132(4A) is applicable only against the person in whose possession books of account or other documents are found and not against any other person. Moreover, the presumption under section 132(4A) is a rebuttable presumption and not a conclusive one. Certainly, the burden to rebut the presumption is upon the person against whom the presumption is applicable. The assessee, in its statement before the Assessing Officer, had denied having borrowed any money from ‘N.S.’ in cash.”

- **Sheth Akshay Pushpavadan vs DCIT – 130 TTJ 42 (Ahd)**

“The submission of the assessee had not been rebutted by the AO. It therefore, stands proved that there was no evidence on record that assessee paid any money to any person including the seller. The presumption under s. 132(4A) would not apply in the case of the assessee therefore, it was necessary for the AO to have brought some reliable and cogent material and evidence on

record to support his findings or to corroborate the statement of Arora Brothers. It may also be noted that Shri Ajay Arora in his statement later on retracted from his earlier statement as the same fact is mentioned by the AO in his assessment order dt. 28th Feb., 2008 (paper book 8-paper book 18) Therefore, no reliance could be placed on the statements of the Arora Brothers. Moreover, the AO has not mentioned any fact in the assessment order if the statements of Arora Brothers were ever put to the assessee for the purposes of cross-examination on behalf of the assessee. It is settled law that unless the statement is tested under the cross-examination, the same cannot be read in evidence against the assessee. Since, in this case, AO did not allow any cross-examination to the statements of Arora Brothers on behalf of the assessee therefore, their statements cannot be read in evidence against the assessee. The AO tried to use the admission of Arora Brothers made in their statements under s. 132(4) in their cases against the assessee but he has failed to note that admission of others cannot be read in evidence against third party unless there is corroborative evidence on record. The maker of the admission can bind himself but how he can bind others from his statement without there being any corroborative evidence on record is not known in the law. As noted above, even Shri Ajay Arora in his statement, denied any on money paid by the assessee. No evidence was found in the case of the assessee that assessee has paid any on money before the date of the search or that the assessee was required to pay any on money after the date of the search. The AO merely considering the business relation between assessee and Arora Brothers presumed that since they have admitted payment of on money therefore, assessee might have also paid the on money. If Arora Brothers have not recorded any entry in their books of account as noted by the AO, how assessee could be blamed. The above conclusion of the AO is not supported by any material or evidence. The conclusion of the AO is purely based upon suspicion and surmises. It is settled law that suspicion howsoever strong may be could not take place of legal proof.”

14.3 The AO has assumed that cash, papers and documents found in the possession of the employees actually belong to the assessee-trust. The AO has also assumed that the employees are acting at the behest of the assessee-trust. It is submitted that such an assumption by the AO is baseless, incorrect and hence, bad in law. There is no dispute that cash and other evidence are found from the residential premises of the employees. Further, wherever the cash and other evidence are found in the premises of the Institute, it was found in the control of the employees. As such, it is submitted that the AO cannot assume that the cash and documents belong to or are in control of the assessee-trust. **Reliance is placed on R.Bharathan vs ITO – 182 ITR 146 (Ker)**

14.4 It is submitted that no corresponding entries/evidence have been found from the possession of the appellants. It is submitted that there has to be a direct and clinching evidence to prove that the appellants have indeed accepted capitation fees. Courts have time and again held that **suspicion however strong cannot take place of hard evidence and suspicion cannot be a basis of making huge additions.**

14.5 Even otherwise, since the said papers are unsigned and the entries therein are not sufficient to fasten liability on the assessee, the impugned addition requires to be deleted.

14.6. The print out taken from the files contained in the laptops, pen-drives and the loose papers found from the employees do not constitute books of account. Revenue has not even alleged that the entries in these loose sheets and electronic data have been kept regularly during the course of business. The Apex Court in the case of **Common Cause (A Registered Society) reported in 394 ITR 220** has held that such detailed documents recovered by the authorities have no evidentiary value. Uncorroborated loose papers found in the search cannot be taken as a sole basis for determination of undisclosed income.

14.7. The Supreme Court in the case of *CBI vs V.C. Shukla and Ors* has held that –

*“In Mukundram (supra) after dealing with the word 'book' (to which we have earlier referred) the Court proceeded to consider what is meant by a 'book of account' under Section 34 and stated as under:*

*"To account is to reckon, and I am unable to conceive any accounting which does not involve either addition or subtraction or both of these operations of arithmetic. A book which contains successive entries of items may be a good memorandum book; but until those entries are totalled or balanced, or both, as the case may be, there is no reckoning and no account. In the making of totals and striking of balances from time to time lies the chief safeguard under which books of account have been distinguished from other private records as capable of containing substantive evidence on which reliance may be placed."*

*We have no hesitation in adopting the reasoning adumbrated in the above observations. The underlined portion of the above passage supports the contention of Mr. Altaf Ahmed and rebuts that of Mr. Sibal that Mr 71/91 is only a memorandum for the entries made therein are totalled and balanced. We are, therefore, of the opinion that MR71/91 is a 'book of account' as it records monetary transactions duly reckoned.*

.....

*In response Mr. Sibal submitted that the evidence that has been collected during investigation only shows that the entries were made by J. K. Jain and that the Jain brothers had put certain signatures*

*against some of those entries it there is no evidence whatsoever to prove that monies were actually paid by the Jains and received by the payees as shown in the entries, without proof of which no case, even prima facie, could be said to have been made out against any of them. According to Mr. Sibal and Mr. Jethmalani, learned Counsel for Shri Advani by more proof of a document the truth of the contents thereof is to proved and independent evidence for that purpose is required. In absence of any such evidence, they contended, no liability can be foisted under Section 34.*

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

*The probative value of the liability created by an entry in books of account came up for consideration in Chandradhar vs. Gauhati Bank [1967 (1) S. C. R. 898]. That case arose out of a suit filed by Gauhati Bank against Chandradhar (the appellant therein) for recovery of a loan of Rs. 40,000/- . IN defence he contended, inter alia, that no loan was taken. To substantiate their claim the Bank solely relied upon certified copy of the accounts maintained by them under Section 4 of the Bankers' Book Evidence Act, 1891 and contended that certified copies became prima facie evidence of the existence of the original entries in the accounts and were admissible to prove the payment of loan given. The suit was decreed by the trial Court and the appeal preferred against it was dismissed by the High Court. In setting aside the decree this Court observed that in the face of the positive case made out by Chandradhar that he did not ever borrow any sum from the Bank, the Bank had to prove that fact of such payment and could not rely on mere entries in the books of account even if they were regularly kept in the course of business in view of the clear language of Section 34 of the Act. This Court further observed that where the entries were not admitted it was the duty of the Bank, if it relied on such entries to charge any person with liability, to produce evidence in support of the entries to show that the money was advanced as indicated therein and thereafter the entries would be of use as corroborative evidence.*

.....

*The same question came up for consideration before different High Court on a number of occasions but to eschew prolixity we would confine our attention to some of the judgements on which Mr. Sibal*

relied. In *Yesuvadiyan Vs. Subba Naicker* [A. I. R. 1919 Madras 132] one of the learned judges constituting the Bench had this to say:

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

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

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

In *Beni Vs. Bisan Dayal* [A. I. R 1925 Nagpur 445] it was observed that entries in books of account are not by themselves sufficient to charge any person with liability, the reason being that a man cannot be allowed to make evidence for himself by what he chooses to write in his own books behind the back of the parties. There must be independent evidence of the transaction to which the entries relate and in absence of such evidence no relief can be given to the party who relies upon such entries to support his claim against another. In *Hira Lal Vs. Ram Rakha* [A. I. R. 1953 Pepsu 113] the High Court, while negating a contention that it having been proved that the books of account were regularly kept in the ordinary course of business and that, therefore, all entries therein should be considered to be relevant and to have been proved, said that the rule as laid down in Section 34 of the Act that entries in the books of account regularly kept in the course of business are relevant whenever they refer to a matter in which the court has to enquire was subject to the salient proviso that such entries shall not alone be sufficient evidence to charge any person with liability. It is not, therefore, enough merely to prove that the books have been regularly kept in the course of business and the entries therein are correct. It is further incumbent

upon the person relying upon those entries to prove that they were in accordance with facts.

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

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

14.8 The Apex Court in the aforesaid case in para 44 held that "even correct and authentic entries in books of account cannot **without independent evidence of their trustworthiness, fix a liability upon a person**" (emphasis ours).

14.9 Thus, it is submitted that only evidence in the form of notings in the hands of a third person is not enough evidence to fasten liability on the assessee-trust. There has to be some evidence found in the hands of the assessee-trust to corroborate what was found in the hands of that third person – such evidence can be in the form of any paper found, noting found, or even acceptance by the assessee in the statement on oath. In other words, it is contended that evidence in form of records (laptop or diary) found in the possession of the employees of the assessee-trust are not

sufficient to establish that the assessee-trust has accepted capitation fees. Reliance is also placed on the following case laws –

- (i) *Common Cause vs UOI – 394 ITR 220 (SC)*
- (ii) *Sunil Kumar Sharma vs DCIT – 448 ITR 485 (Kar)*
- (iii) *ACIT vs Katrina Rosemary Turcotte – 190 TTJ 681 (Mum T)*
- (iv) *ACIT vs Kishore Lal Balwant Rai – 17 SOT 380 (Chandigarh T) – **the Tribunal has held that addition cannot be sustained as statement of ‘third party’ was not supported by independent and corroborative evidence.***

24. We shall now examine the facts prevailing in the instant case. We noticed earlier that the AO has come to the conclusion that the assessee-trust has collected capitation fees on the basis of data found in laptops, pen drives, diary, loose papers seized from various employees from their residences. The AO has also concluded that the cash found from the employees of the Trust are part of capitation fees collected by the assessee. But the fact remains that the revenue did not find any document/material/evidence with the assessee, which will corroborate the allegation of collection of capitation fees from the students.

25. We also notice that the presumption given in sec. 132(4A) and section 292CC of the Act has been explained by the Tribunal in the case of Startex (India)(P) Ltd (supra), wherein it was held that the presumption shall apply to the person from whom the documents were seized. In Sheth Akshay Pushpavadan vs. DCIT (supra), it was held that the addition cannot be made on the basis of material seized from/statement given by a third party, unless those materials were corroborated with any other evidence and opportunity of cross examination was given. The Law on presumption given in sec. 132(4A) has been explained by Hon’ble Delhi High Court in the case of CIT vs. Radico Khaitan (2017)(83 taxmann.com 375)(Delhi) as under:-

**“24.** Section 132 no doubt mandates a presumption in respect of search and seizure operations; yet textually the presumption relates to material documents and books of account seized of from the assessee's premises and the presumption that can be made from it, not from materials seized and statement recorded, of third parties. Only if

the materials that are sought to be relied upon emanate from the premises of the party subject to assessment, that the presumption can be drawn. This is evident from Sections 132 (4) and (4A) of the Act, which read as follows:

"Section 132.... (4) The authorised officer may, during the course of the search or seizure, examine on oath any person who is found to be in possession or control of any books of account, documents, money, bullion, jewellery or other valuable article or thing and any statement made by such person during such examination may thereafter be used in evidence in any proceeding under the Indian Income- tax Act, 1922 (11 of 1922 ), or under this Act.

*Explanation.-* For the removal of doubts, it is hereby declared that the examination of any person under this sub- section may be not merely in respect of any books of account, other documents or assets found as a result of the search, but also in respect of all matters relevant for the purposes of any investigation connected with any proceeding under the Indian Income- tax Act, 1922 (11 of 1922 ), or under this Act.]

(4A) Where any books of account, other documents, money, bullion, jewellery or other valuable article or thing are or is found in the possession or control of any person in the course of a search, it may be presumed-

- (i) that such books of account, other documents, money, bullion, jewellery or other valuable article or thing belong or belongs to such person;
- (ii) that the contents of such books of account and other documents are true; and
- (iii) that the signature and every other part of such books of account and other documents which purport to be in the handwriting of any particular person or which may reasonably be assumed to have been signed by, or to be in the handwriting of, any particular person, are in that person' s handwriting, and in the case of a document stamped, executed or attested, that it was duly stamped and executed or attested by the person by whom it purports to have been so executed or attested."

**It is evident that in the absence of these foundational facts, the revenue is under an obligation to establish through materials relatable to the assessee, what it alleged against it.** What were the best pointers for further investigation were the discovery of material and evidence, which the revenue claim pointed to the assessee's failure to disclose full facts and income, should have resulted in further investigation and unearthing of material in the form of seized documents from the assessee's premises. **Unfortunately the linkage between the material seized from the assessee's premises and those from UPDA's premises as well as the statement of Sh. Miglani was not established**

**through any objective material.** It is now settled law that block assessments are concerned with fresh material and fresh documents, which emerge in the course of search and seizure proceedings; the revenue has no authority to delve into material that was already before it and the regular assessments were made having regard to the deposition, the inability of the revenue to establish as it were, that the assessee's expenditure claim was bogus, or it had underreported income and that it resorted to over invoicing and diversion of funds into the funds allegedly maintained by the UPDA, was not established. The findings of the Commission therefore cannot be faulted as contrary to law.

The Hon'ble Delhi High Court has explained that the presumption given in sec. 132(4A) could be applied only to the materials found with the searched person. If any material is found from some other person, the above said presumption could not be extended to the assessee. In that case, the revenue is under an obligation to establish that the information available in the materials is relatable to the assessee and allegation made in that material against the assessee has to be proved with some other independent material. In the case before Hon'ble Delhi High Court, alleged details of payment of money by the assessee for illegal purpose was found in the place of UPDA (trade association). Based on the above said information, the addition was made by the AO in the hands of the assessee. The Hon'ble Delhi High Court noticed that the assessing officer did not carry out further investigation and further no material that could link the above information with the assessee was found from the premises of the assessee. Accordingly, it was held that the decision reached by Hon'ble Settlement Commission in not making addition was justified.

26. On the basis of legal principles explained in the above said cases, it can be noticed that the AO cannot invoke the presumption given in sec. 132(4A) in respect of materials seized from the employees, particularly when the revenue has not found any material from the assessee that will corroborate them. Further, it is not the case that the assessee trust has owned up the contents of documents/materials seized from the employees to

be true. On the contrary, the trustees have categorically denied the receipt of capitation fees.

27. The Hon'ble Delhi High Court has examined the issue as to whether the evidences found from a third party could be used against the assessee in yet another case of CIT vs. Ansal Properties (2018)(98 taxmann.com 398)(Delhi). The relevant observations made by Hon'ble Delhi High Court in the above said case are extracted below:-

**“23.** The ITAT which rejected the Revenue's appeal on this point held as follows:

"Since the diary in question was not recovered from the premises of the assessee, which is independent public limited co., therefore, no presumption under section 132(4A) could be drawn against the assessee. In the block assessment, the burden is upon the AO to prove that the particular item is undisclosed income. Admittedly, no other evidence is recovered during the course of search to prove that in fact any payment of Rs. 30 crores outside the books of account has been made by the assessee to Sri S.K. Jatia. The AO has made addition in the case of the assessee in respect of payment of Rs. 30 crores made to Sri S.K. Jatia. Even in the seized diary the narration is "Adharshila Jatia [Anil Bhalla]". Neither Sri S.K. Jatia nor Anil Bhalla were examined by the AO during the course of assessment proceedings. Therefore, we fail to understand as to how the addition could be sustained in the hands of the assessee. It appears from the above circumstances that the department has made subsequent enquiries against the assessee in order to connect the assessee with the diary in question but such things are not permitted as is held by Bombay Bench of I.T.A.T. in the case of Sundar Agencies (supra). No addition could be made in the block assessment on the basis of assumption and presumptions. Merely some material is recovered during the search, no addition could be made in the hands of the assessee on the basis of some subsequent enquiries and that too purely on assumption and presumptions. The AO observed in the assessment order while making the addition that he made enquiries from the villagers. This was the main reason to make up the theory of the payment made outside the books of account on the basis of inference drawn on estimate basis. It is an admitted case that the villagers had a dealing with M/s Aadharshila Towers Private Ltd. for selling of their land. These transactions were not at all connected with the assessee. The villagers have not made any incriminating statement against the assessee.

The inference drawn by the AO that initially M/s ATPL was owned by Sri S.K. Jatia and then subsequently was taken by the assessee by itself is no ground to draw the presumption against the assessee that since some dealing outside the books of account had happened between the villagers and M/s ATPL, there is no presumption that such transaction would have also happened in between ATPL and the assessee.

**24.** The Revenue contests the findings of the ITAT and submits that the presumption drawn in the circumstances of the case was upon analysis of materials and that AO's view was justified. It was pointed out that independent corroboration in regard to the seized diary was by way of consideration paid for acquisition of shares in Aadharshila Towers for Rs. 70 crores. The diary clearly stated that the total cost was Rs. 100 crores. The farmers who received the consideration were paid partly in cash. These corroborative materials were insufficient in income tax proceedings, on an application of principles of evidence to hold that Rs. 30 crores was the undisclosed cash component of the consideration.

**25.** This Court is of the opinion both the CIT and ITAT have rendered findings that were sound and reasonable on the question of whether the seized diary per se could in the overall circumstances of the case result in the addition of Rs. 30 crores. The assessee's explanation consistently was that Rs. 30 crores was towards internal and external development charges. This was an aspect which could be easily decided by securing relevant information from the statutory authority, *i.e.* HUDCO who received the payments. **Independent corroboration of these too could have been sought otherwise the relevant books of account could have been checked. Furthermore, the statute does not compel the Revenue to raise a presumption; even when a tax authority does so, the sole basis of an addition entirely hinging upon the interpretation of certain figures in a diary would be flawed.** For these reasons, this Court is of the opinion that since the inference drawn with respect to findings are based on essentially factual materials which were analyzed by the CIT and the ITAT, there is no reason to interfere with those findings. This question is accordingly answered against the Revenue and in favour of the assessee.”

In this case also, it has been reiterated that corroboration of material seized from other persons with any other independent material is necessary for making addition on the basis of materials seized from other persons.

28. In the instant case, all the documents/materials have been seized from the employees only. It has been categorically stated by the trustees of the assessee trust that have not authorized anyone to collect capitation fees. The trustee has also stated that the employees might have collected it without the authority of the trust. Under the principle of vicarious liability,

the employer is normally liable for any act performed by his employees during the course of employment. However, when an employee does anything that is neither directed nor controlled by the employer, then the said action of employee cannot be considered to be within the scope of his employment. In that kind of situation, the employer is not liable for the action of the employee and hence is not liable for damages. We noticed earlier that Shri Pratap patil had stated that he has recorded transactions on instruction from Shri Abhijit Shirke. The Ld A.R submitted that the very same Shri Abhijit Shirke was arrested in 2015 in connection with accepting money of Rs.62.50 lakhs for securing a medical seat in D Y Patil Medical College, Nerul. The Ld A.R further submitted that the relevant news paper report is placed at pages 279 & 280 of paper book relating to AY 2015-16. This information further supports the case of the assessee trust that it is not collecting capitation fees and only the employees might have collected money without its authority. We notice that the co-ordinate bench of Tribunal, in the case of Anil Mahavir Gupta (2017)(82 taxmann.com 122)(Mum Trib) has considered the issue as to whether the documents seized from employees could be relied upon for making addition in the hands of the assessee. It was decided in favour of the assessee as under:-

**11.** Now the Grounds remaining in the appeal of the Revenue are Ground Nos. 9 & 10, which relate to an addition of Rs.30,00,000/- made by the Assessing Officer as unaccounted receipts.

**11.1** In this context, the brief facts are that the said addition is in terms of the discussion in para 13 of the assessment order. The Assessing Officer has made an addition of Rs.30.00 lacs on the basis of a loose paper being page 13 of Annexure A-4 seized from the residence of one Mr. Bharat G. Shah, an employee of the assessee. The Assessing Officer notes that in the course of search, said Mr. Bharat G. Shah stated that such loose papers were given to him by the assessee to be kept with him. As per the Assessing Officer, the contents of the relevant seized material, which has been reproduced in para-13 of the assessment order, indicates that one Mr. Suresh Agarwal paid the assessee Rs.30,00,000/- in March, 2006 in two instalments of Rs.15,00,000/- each. It is further noticed by the Assessing Officer that though there was an account of Mr. Suresh Agarwal in the account books of assessee's proprietary concern, M/s. Gupta Steel Corporation, but the aforesaid amount was not accounted for. For the said

reasons, the Assessing Officer treated the sum of Rs.30,00,000/- as unaccounted income of the assessee.

**11.2** Before the CIT(A), assessee reiterated that the paper was found and seized from Mr. Bharat G. Shah and not from the assessee. Further, there was no material to say that such seized material related to the assessee for any of his activities. The assessee also pointed out that such loose papers were printed account papers and on top of it is written "Trial Data" and that assessee had no knowledge as to who has written or printed the same.

**11.3** The CIT(A) has considered the submissions put forth by the assessee and found that there was no material brought on record to establish that the seized papers belonged to the assessee. The CIT(A) also found that the seized documents do not indicate who is the recipient of the amounts mentioned and in what connection the money was paid. According to the CIT(A), merely because there is an account appearing in the account books of the assessee in the name of Mr. Suresh Agarwal, it would not lead to an assumption that the seized document reflect transactions between assessee and Mr. Suresh Agarwal. In fact, the CIT(A) infers that the document reflects transaction between Mr. Bharat G. Shah and Mr. Suresh Agarwal, as the document was found in the possession of Bharat G. Shah. Under these circumstances, CIT(A) has deleted the addition in the hands of the assessee.

**11.4** Before us, the Id. Departmental Representative pointed out that the employee from whom the impugned loose papers were found is a trusted employee of the assessee and the notings in the seized paper showed that it pertain to the assessee. It was, therefore, contended that the addition has been wrongly deleted by the CIT(A).

**11.5** On the other hand, the Id. Representative for the assessee pointed out that the CIT(A) was justified in deleting the addition as there was no material to link the said seized document with the transactions undertaken by the assessee with Mr. Suresh Agarwal; which were duly accounted for in the account books.

**11.6** We have carefully considered the rival submissions. Quite clearly the seized paper in question was found from the premises of Mr. Bharat G. Shah, who is an employee of the assessee. Therefore, the primary onus was on Mr. Bharat G. Shah to explain the contents of the document so as to justify the inference of the Assessing Officer that it reflected unaccounted transactions of the assessee, and, such an onus does not appear to have been discharged, having regard to the material on record. Even otherwise, we do not find any infirmity in the conclusion of the CIT(A) that there is no material to connect the assessee with such loose papers. Therefore, under these circumstances, we find no reasons to interfere with the conclusion of the CIT(A) in deleting the impugned addition. The order of CIT(A) is hereby affirmed and accordingly Revenue fails on Grounds of appeal Nos.9 & 10 also.”

29. In the instant case, we notice that the AO has relied upon statements taken from the trustees and also certain discrepancies in OMR Sheets found from the premises of the assessee in order to support his conclusion that the assessee has, in fact, collected capitation fees. We shall examine whether those materials actually support the case of the assessing officer.

(a) The AO has referred to the Statement given by Chairman/President of the trust Shri Vijay Patil. However, we notice that he has denied collection of capitation fee. No material was found from the assessee to disprove the said statement of the Chairman. Hence the statement of Shri Vijay D Patil cannot be taken support of by the AO.

(b) The AO has relied upon the statement given by another trustee Smt Shivani Patil, who is the spouse of Shri Vijay Patil, particularly on the following answer given by Smt Shivani Patil to arrive at the conclusion that she has admitted that the trust was collecting capitation fee.

**Q 52** Please provide the fees for management seats reserved in each of the college specified above.

**Ans:-** I don't know about the management seats for engineering college. This year the admission for Dental College have not been done. As per my knowledge, last year the seats were sold for typically 7 – 8 lakhs per seat. For MBBS the price is typically 30-40 lakh. However for post graduate seats the prices is higher than MBBS. However, I don't know the exact figure. The management rates for Ayurveda and Physiotherapy is typically 4-5 lakhs per seat as these are not sought after courses.”

However, it is the contention of the assessee that she has not mentioned about Capitation fee at all. She has only stated that the fees of management seats are higher than the regular seats. A perusal of the above said reply given by Smt Shivani Patil, in our view, does not show that she has confessed anything about collection of capitation fee. We notice that this aspect has been clarified by Shri Vijay Patil also in his statement in the following questions & answers:-

**Q 8:-** I am showing you the statement of Smt Shivani Patil recorded u/s 132(4) from 27-07-2016 to 31-07-2016 wherein at Q.51

onwards it has been stated capitation fee in cash is collected at Colleges under D Y Patil University, Nerul. Please Comment.

Ans.:- As per my understanding, Smt Shivani Patil has stated that D Y Patil University has management seats and fees is collected for the same. I agree that various colleges under D Y Patil University, Nerul have management Quota as allowed by the relevant rules upto 15% and fees is collected for the same. The fees for the management quota is higher than other seats. Apart from the 15% management quota, there is no other seat for which higher fees is charged.

Q 9:- In the statement of Smt Shivani Patil, she has stated at Q 53 that fees for management quota is collected in cash. How is it you are able to say that no capitation fees is collected?

Ans.: I agree that fees is paid in cash by some students. We don't refuse cash payments. However, all cash payments are accounted in the books of accounts. Such cash payments are either regular fees for regular seats or fee for management quota fees. There is no cash collected towards capitation fee in the colleges under DY Patil University, Nerul, as no capitation fees is collected by our colleges.

Accordingly, we agree with the contentions of the assessee that neither Shri Vijay Patil nor Smt Shivani Patil has stated that the assessee trust is collecting capitation fees. Hence the AO could not have placed reliance on the statement given by Smt Shivani Patil.

(c) The AO has also found a file containing cheque details of certain amounts received by the assessee, in the pen drive of Shri Pratap Patil. It was noticed that those cheque receipts were found accounted for in the books of the assessee trust. Another file found in the pen drive was containing details of payments made outside the books of accounts. Accordingly, the AO has expressed the view that the information found in the pen drive should be considered in totality and the payments details should also be considered to be true, since details of receipts by way of cheques were found to be true. We are unable to agree with the said opinion expressed by the AO. We notice that the AO is referring to two different files found in the pen drive, i.e., one file contained details of receipts by way of cheques, another file contained details of receipts by

way of cash and yet another file contained payment details. There should not be any dispute that the pen drive is in the nature of 'Storage vault' containing several files. Each file may contain different details and hence it may not be proper to hold that the contents of one file, if found to be correct then the content of other files are also to be considered as true. The opinion of the AO may be accepted, if the same file contains details of partly accounted and partly unaccounted transactions, which is not the case. Further, the assessee herein is contending that the collection of capitation fee is an un-authorised act of the employees. The assessee is not accepting the transactions noted down in the pen drive. Hence, we are of the view that the AO was not right in extending the interpretation given to one file to another file. The Ld A.R contended that Shri Pratap patil was having access to the records of the college and it is quite possible that he might have copied the file relating to receipt of fees by way of cheques. Accordingly, he contended that it does not mean that the information contained in other files should also be considered to be correct. In any case, since there is no material to link these payment details to the assessee, the same cannot be used against the assessee. The details/documents which have not been accepted by the assessee can be used only by bringing any other corroborate/independent material on record which would vindicate those information. Accordingly, we are of the view that the AO was not justified in accepting the details of payments without carrying out due examination and bringing any other corroborative evidence.

(d) The AO has also relied upon certain discrepancies found in the OMR answer sheets pertaining to entrance examinations conducted by the assessee trust for admitting students in the management quota. According to AO, signatures were missing in the attendance sheets in some cases or it did not tally with the signature available in OMR sheets. According to the AO, those discrepancies are available in the case of students from whom capitation fees has been collected. We notice that the assessee has given explanations with regard to this deficiency. Be that as it may, the point to be considered here is whether the deficiencies

found in the OMR sheets would show that the assessee was collecting capitation fees?. First of all, the explanation given by the assessee for the deficiencies has not been proved to be incorrect by the AO. Secondly, in the enquiry conducted by the AO with the students, all of them have expressed ignorance about the deficiencies. Thirdly, the deficiencies noticed were related to the signature in attendance sheets. There is no evidence to show that the answer sheets themselves were manipulated, which might be an important incriminating material. Fourthly and most importantly, the AO did not ask any question with the students about payment of capitation fees. Hence, we are of the view that the deficiencies noted in the OMR sheets do not prove the receipt of capitation fees by the assessee trust. The Ld A.R also submitted that some students have also filed affidavit stating that they have not paid any capitation fee. Accordingly, in our view, this detail also does not support the case of the AO.

(e) We also notice that the revenue has questioned the trustees, viz., Shri Vijay Patil and Smt Shivani Patil. We noticed earlier that both of them have denied collection of capitation fees. We notice that the revenue did not question other trustees with regard to the allegation of collection of capitation fees. We also notice that the officials at helm of affairs, viz., Vice Chancellor, Controller of Examinations were also not questioned.

(f) The AO had placed reliance on the statements given by the employees, trustee and certain employees of another trust. However, all of them have retracted the statements given by them. We notice that most of them have retracted within 15 days from the date of conclusion of search. The AO however rejected the retraction by holding that the same is an afterthought and without any reasoning. However, we notice that they have stated that they were under mental pressure when the statement u/s 132(4) of the Act was taken from them and could not give proper reply. The Ld A.R also submitted that, since the employees have collected capitation fees without the authority of the assessee trust, naturally they would be under the threat of exposure. Hence, in order to save their skin,

they might have stated initially that the capitation fees were collected upon the instruction of Shri Vijay Patil. Subsequently, when they reached proper mental state, they have filed retraction statements. The Ld A.R also submitted that the cash was recovered from the employees only and not from the assessee trust. The Ld A.R submitted that, it reinforces the fact that the employees were only collecting capitation fees without the authority. The Ld A.R also submitted that the employees have owned up the cash seized from them and have declared the same as their respective income under Income Declaration Scheme, 2016. This fact would support their respective retraction statement and also the stand of the assessee trust. The Ld A.R submitted that the income declared by the employees have been accepted by the revenue. Accordingly, it was contended by the Ld A.R that the original statements given u/s 132(4) could not have been relied upon by the AO. Considering the facts and circumstances of the case discussed above, in our view, these contentions of Ld A.R merit acceptance.

(g) We notice that the AO has also conducted enquiries with some of the parents. The Ld A.R has advanced his arguments on the reliability/effectiveness of their statements, which we have summarized in the earlier paragraphs. We have noticed that most of them have given donations by way of cheques only. The parents who had given cash had taken back the cash, as their respective children changed their minds. None of the parents have admitted that the assessee trust has collected capitation fees in the form of donations, i.e., there is no material to show that the donations were not voluntary. It is only the AO who has presumed that the donations given by the parents are in the nature of capitation fee collected by way of cheque. Hence, we are of the view that the AO could not have placed reliance on the statements given by the parents.

(h) The AO has also relied upon the documents seized from employees of another trust, viz., Taruna Maheswari and Pravin Patil and made additions on protective basis towards receipts of money recorded in those

statements. Both of them said that the payments were received on behalf of Vijay D Patil. However, no corroborative material was brought on record to prove the trustworthiness of the transactions recorded therein. We notice that the AO has only presumed that the payments have been given by Shri Vijay Patil, as noted in the above said documents, out of the capitation fees only. However, no material was available to support the above said presumption of the AO. If at all any such payment has been made by Shri Vijay D Patil, it may be his personal transaction and hence it is nothing to do with the assessee trust. Both the above said parties have initially stated that they had received money from Tukaram Patil and others, but later retracted it. In any case, no contra entry was available in the record maintained by Shri Tukaram Patil. Further, the revenue did not examine Tukaram Patil with regard to the entries of receipt of cash noted by Taruna Maheswari and Pravin Patil. In any case, those transactions are between two parties and there is no other material to show that the said transactions, if at all true, were related to the assessee.

The foregoing discussions would show that the above said statements/materials do not vindicate or link the information/evidences found from the employees. The revenue also did not find/seize any credible material from the assessee trust to corroborate the information/document seized from the employees. In respect of alleged receipt of capitation fee and in respect of payments recorded in the materials, the AO did not make enquiries with the payer/recipient of money. In the absence of any independent material to link/vindicate the information found from the employees, we are of the view that the AO could not have made additions on the basis of that information.

30. In the decision rendered by Hon'ble Supreme Court in the case of Common Cause (a registered society) reported in 394 ITR 220, it was held that the documents recovered by the authorities will have no evidentiary value unless it is corroborated with any other independent evidence, i.e., uncorroborated loose papers found in the search cannot be taken as sole

basis for determination of undisclosed income. The Hon'ble Supreme Court has held in the case of CBI vs. V C Shukla (supra) that even correct and authentic entries in books of account cannot fix a liability upon a person without independent evidence of their trustworthiness. We notice that the Hon'ble Supreme Court has dealt with the entries made in a diary which was considered to be regular books of account and held that it cannot be relied upon. However, in the instant case, the evidences relied upon by the AO are certain abstract statements maintained by the employees in their respective laptops. Hence, in our view, it cannot be said that those uncorroborated materials have any evidentiary value viz-a-vis the assessee unless any other independent material is brought on record to prove the trustworthiness of those abstract information.

31. At this stage, we may refer to the decision rendered by Hon'ble Madras High Court in the case of The CIT vs. Balaji Educational & Charitable Public Trust (374 ITR 274)(Mad). We notice that the facts considered by the Hon'ble Madras High Court were to some extent identical with the facts of the present case. The relevant portion of the decision rendered by Hon'ble Madras High Court is extracted below:-

**“7.5** As rightly held by the Tribunal, if the Assessing Officer had any doubt about the receipt of capitation fee or the explanation given, he should have conducted enquiry either with the students or with their parents or with any other person interested in the activities carried on by the assessee trust. But, without doing so, the Assessing Officer estimated the collection of contributions on the basis of the number of seats available under management quota multiplied by the amount of contribution attributable to individual seats. Any determination for purpose of tax cannot be based on hypothetical facts or conjectures or surmises. The inference drawn by the Original Authority is based on probability.

**7.6** With regard to the seizure of cash of over Rs.44 Lakhs from the residence of the Chairman of the Assessee Trust, it is not in dispute that the said sum has been assessed in the hands of the Chairman for the assessment year 2008-2009 and the same was received from the petrol pump business, the turnover of which is more than Rs.30 Crores. Moreover, the Assessing Officer has accepted the disclosure of the seized cash as the income of the individual and, therefore, in our considered

opinion, it cannot be said that assessee trust had accepted contributions by way of capitation fee. The said issue cannot be used both ways. The assessment of the undisclosed income at the hand of the individual ends the issue there. It has no relevance to the affairs of the Trust and there is no material to hold so.

**7.7** In our considered opinion, based on the loose sheets and cash seized, which have been held as irrelevant to the present issue, it cannot be held that for all the assessment years the assessee received capitation fee for admission of students in the management quota. This is a perverse inference. Without conducting any enquiry in this regard to make allegation is unsustainable. The information obtained from the Public Information Officer to a query raised under the Right to Information Act to the effect that "There is no any complaint received from any student/parent regarding capitation fee charged by the above institutions so far" also tilts the balance in favour of the assessee. It disproves the department's allegation of involuntary collection of amounts. That apart, the order passed under Section 264 of the Act for the assessment years 1998-1999 to 2001-2002 clearly states that the donation received from students or the parents is not compulsory in nature and, therefore, the same is not capitation fee. There is no material to controvert this fact which is to the knowledge of the department. No endeavour is made to sustain the allegation of involuntary donation. In any event, as rightly held by the Tribunal, it is not relevant in the present case as the allegation is violation of Section 13 r/w Section 11 of the Act.

**7.8** We find that factually the Commissioner of Income Tax (Appeals) and the Tribunal have come to the conclusion that the donations received do not partake the character of capitation fee. There is no element of involuntary nature of donation. A specific finding is given that no investigation has been done to show that any parent or student has complained about the nature of donation. The department has failed to dispel the finding of fact.

**7.9** In any event, the learned Standing Counsel for the department pleads that since the assessee had not submitted the list of students, the Assessing Officer had to make an estimate adopting his own methodology. This we cannot accept for the simple reason that the show cause notice proceeds on the basis that the assessee has to submit the list of donors alone. A reply was submitted by the assessee and in paragraph 6(iii), the Assessing Officer states that all the statements tallied. However, the assessing officer comes to a different conclusion that contribution is not voluntary, and it is relatable to admission of students. We find this finding of the Assessing Officer, as has been rightly held by the Commissioner of Income Tax (Appeals) and the Tribunal, is not supported by documents, but on the basis of Assessing Officer's inference. It cannot be now stated that something was not furnished, nevertheless, he tallied all the materials and came to the conclusion as stated above. If the Assessing Officer has tallied the figures then the assessee's case of actual contribution to Trust has to be accepted. It has been shown in the return of income. A bald statement in paragraph (7) of the assessment order that the assessee is

not carrying on charitable activities for the purpose of Section 13 read with Section 11 of the Act appears to be the mainstay of the department's case.

**7.10** In effect, it is clear that the authority has confused himself with the admission of students in management quota with the carrying on activities of the trust. The distinction is obvious that if the department wanted to make out a case of violation of Section 13 of the Act by the trust, it cannot be based on the perception of the Assessing Officer that donations to the trust are not voluntary. We hasten to add that there is no material to support the plea that the donations are not voluntary.

**7.11** Having invoked Section 13, the mainstay of the case of the department should be based on the activities of the trust to plead that the same are not in consonance with Section 13 of the Act and, therefore, exemption under Section 11 of the Act should be denied, which we find is abysmally silent in the show cause notice and the assessment order.

**7.12** We do not find any reason to come to a different conclusion on facts, as has been addressed by the Commissioner of Income Tax (Appeals) as well as the Tribunal on these two issues relating to seizure of cash and loose sheets. Apparently, there is no dispute on that fact. All that the department is trying to show is that there is something improper in the manner in which the donations are handled. Both these factors clearly establish that the allegations have nothing to do with the trust and its activities in relation to the charitable objects.”

32. In view of the foregoing discussions, we are of the view that documents seized from employees cannot be considered as having any evidentiary value and cannot be considered to have trustworthiness, since no other corroborative material was brought on record to support the veracity of the same. None of the material would show that the assessee trust was collecting capitation fees. Hence, the AO could not have placed reliance on the materials seized from the employees to draw conclusion that the assessee was collecting capitation fees.

33. Another important aspect that was brought to our notice by Ld A.R is that the assessee is prohibited from collecting capitation fees under Maharashtra Educational Institutions (Prohibition of Capitation Fee) Act, 1987. It is the submission of the assessee that there was no complaint against the assessee with regard to collection of capitation fees and the State

Government has not taken any action against the assessee in this regard. This fact also goes against the presumption drawn by the AO.

34. We shall now advert to certain contentions raised by Ld D.R and also to the case laws relied upon by him.

(a) The first case law relied on by Ld D.R is the decision rendered by Pune bench of Tribunal in the case of *Sinhagad Technical Education Society vs. DCIT (2022)(139 taxmann.com 270)(Pune-Trib)*. In this case, the AO had brought corroborative evidences in the form of refund of capitation fees, recommendation seeking waiver/reduction in capitation fee/donation. Further, enquiries were made with three persons and they have confirmed payment of capitation fees. Most importantly, the incriminating materials in the form of loose sheets were found at the premises of the assessee therein. Under these set of facts, it was held that the loose sheets would have evidentiary value. On the contrary, in the instant case, no material was found/seized from the premises of the assessee. The materials were found at the residences of the employees. The assessee has categorically denied collection of capitation fees. The AO could not bring any material on record to link those materials with the assessee or to prove that the assessee only was indulging in collection of capitation fees. Accordingly, we are of the view that the decision rendered by Pune bench of Tribunal in the case of *Sinhagad Technical Education Society (supra)* is not applicable to the facts of the present case.

(b) The Ld D.R also relied upon the decision rendered by Hon'ble Delhi High Court in the case of *CIT vs. Jansampark Advertising & Marketing P Ltd (2015)(56 taxmann.com 286)(Delhi)* and contended that the Tribunal may conduct proper enquiry, if the AO had failed to discharge his functions properly. In our view, this decision will also

not apply to the facts of present case. We have noticed that there was no material to link the assessee with the materials seized from the employees and hence the very inference drawn by the AO was rejected by us. Thus, it is not case of lack of proper enquiry as envisaged in the above said decision rendered by Hon'ble Delhi High Court. Accordingly, this decision also does not support the case of the revenue.

(c) The Ld D.R submitted that the declaration of income by the employees under Income declaration scheme is not sacrosanct. He brought to our notice a news reported in a news paper that a person had declared Rs.13,860 crores under Income declaration Scheme and the same is being probed by the Income tax department. In our view, there is no reason to suspect the facts of the present case on the basis of the facts prevailing in some other case, i.e., the revenue should bring some material to prove that the declarations given by the employees are not correct. On the contrary, the Ld A.R submitted that the declarations of the all the employees have been accepted by the revenue.

(d) The Ld D.R also invited our attention to a newspaper clipping, which described the memory of 12 year old student. Accordingly, he submitted that the statement given by Shri Tukaram Patil and Shri Unmesh Khanvilkar out of their memories should be taken as evidentiary value, since some people are gifted with good memory capacity. However, in the legal process, oral submissions do not carry much evidentiary value.

35. Accordingly, we are of the view that all the additions made by the AO including the protective additions, on the basis information found in the laptops, diaries and other documents found/seized from the employees and third parties (employees of another trust) are liable to be deleted.

Accordingly, we direct the AO to delete the addition made towards Capitation fees and other additions made on the basis of the materials seized from the employees in all the years under consideration. The details of addition of capitation fees made in various years are detailed below:-

<u>Assessment Year</u>	<u>Amount</u> (Rs. In crores)
2013-14	2.290
2014-15	24.930
2015-16	33.385
2016-17	53.475
2017-18	54.950

The order passed by Ld CIT(A) on this issue would stand set aside and the AO is directed to delete these addition in all the years under consideration.

36. We have noticed that the AO has rejected the books of accounts on the reasoning that the assessee has not accounted for capitation fees. Since we have held that there is no evidence to show that the assessee has collected capitation fees, the very foundation for rejecting the book results would fail. Accordingly, we hold that there was no justifiable reason to reject the books of accounts. Accordingly, we set aside the order passed by Ld CIT(A) on this issue in all the years under consideration and hold that the books of accounts of the assessee trust should be accepted in all the years under consideration.

37. We have noticed that the assessing officer has rejected the claim for exemption u/s 11 of the Act on the reasoning that the assessee cannot be considered to be a charitable trust, when it collects capitation fees. In the earlier paragraphs, we have held that there is no evidence to show that the assessee has collected capitation fees. Hence the reasoning given by the AO to reject the claim for exemption u/s 11 would fail. We also notice that the registration granted to the assessee u/s 12A of the Act has not been

withdrawn. Hence, under the provisions of sec.11 to 13 of the Act, the AO is entitled to reject the exemption only when the provisions of sec.13 are attracted, i.e., there is any of the violations mentioned in sec. 13 of the Act. The possible case of the AO, in the instant case, would be that the trustees have siphoned off the capitation fees collected by the assessee trust, by not accounting the same in the books and it may attract the provisions of sec.13. We have noticed earlier that there is no evidence to show that either the trust or the trustees have collected capitation fees. We have also held that the AO has arrived at such a conclusion only on presumptions. In that view of the matter, it cannot be said that the trustees have siphoned off money belonging to the assessee trust. Hence it cannot be said that there was violation as mentioned in the provisions of sec.13 of the Act.

38. Another important point is that the CIT(E) has not withdrawn the registration granted u/s 12A of the Act to the assessee. When the registration granted u/s 12A was intact, the AO could not have denied exemption u/s 11 of the Act.

39. The assessee had received corpus donations in the form of development fees from some of the parents of the students. The assessee claimed the same as exempt u/s 11(1)(d) of the Act. The assessee had also received other corpus donations. The AO took the view that the donation given by the parents are not voluntary and it was given only to secure seats for their children. Since the AO had rejected the claim for exemption u/s 11 of the Act, he also rejected the claim for exemption u/s 11(1)(d) in respect of corpus donations received in the form of Development fees and also in respect of other corpus donations. In the earlier paragraphs, we have held that the assessee cannot be denied exemption u/s 11 of the Act. Further, it was only a presumption on the part of AO that the corpus donations given in the form of development fees were not voluntary. We have seen that none of

the parents have stated that the assessee trust had put such a condition for giving admission to their wards.

40. With regard to the above said issues, we take support from the decision rendered by Hon'ble Karnataka High Court in the case of Kammavar Sangham vs. DDIT (Exemption) reported in (2023)(146 taxmann.com 367)(Kar), wherein identical points were examined. The relevant observations made by Hon'ble Karnataka High Court are extracted below:-

**9.** We have carefully considered the rival contentions and perused the records.

**10.** Assessee claims to be a charitable society and obtained certificate under section 12(A) of the Act.

**11.** The assessee has received donations and shown it in the Income and Expenditure account. By the impugned order, the ITAT has denied the benefit under section 11 of the Act.

**12.** Section 11(1)(d) of the Act relied upon by Shri. Sanmathi, makes it clear that the voluntary donation made with a specific direction shall form a part of the corpus. The person who makes a contribution can make such contribution either with a specific direction or without any direction. Section 11(1)(d) of the Act refers to only such contribution which are made for a specific purpose. For example, the donor may desire that his donation be used for construction of a building. If no direction is given by the donor, the money received by the assessee shall be taxable subject to such exemption which may be claimed under section 11 of the Act.

**13.** In the instant case, it is not in dispute that the entire amount received as 'contribution' has been shown in the Income and Expenditure account. The denial of benefit under section 11 of the Act is on the premise that the donations received are not voluntary in nature. This precise question was considered by Madras High Court in *Balaji Educational & Charitable Public Trust's* case (*supra*) and it is held as follows:

'4.7 The question, as has been posed by the Tribunal, is whether the contributions or donations are voluntary or involuntary and what is the effect of such donation. The Tribunal was of the view that there is no concept of involuntary contributions and went on to hold that voluntary contributions should be treated as income under section 12 of the Act and that corpus donations to be treated as capital receipt under section 11(1)(d) of the Act and corpus donations are not generally in the nature of income. It further held that voluntary contributions are taxable only if not applied for charitable purposes. The emphasis is on, not applying the same for charitable purposes.

4.8 Whether contribution is voluntary or involuntary and its implication in relation to these provisions was considered by the Tribunal in the following manner:

"35. To proceed further, we have to examine the (30) scheme of law of charities provided under the Income-tax Act, 1961. There is no concept of involuntary contributions in that scheme. The only distinction recognized by law is the voluntary contributions to be treated as income under section 12 and the corpus donations to be treated as capital receipt under section 11(1)(d). The corpus donations are not generally in the nature of income. The voluntary contributions are taxable only if not applied for charitable purposes. In the present case, the assessee-trust itself has treated the contributions as voluntary contributions in the nature of income. The assessee claims exemption under section 11 not on the basis of the nature of contributions but for the reason that the contributions were applied for charitable purposes. When the assessee-trust itself has treated the contributions as voluntary contribution in the nature of income, which is the best situation that the Revenue would always welcome, what is the relevance of arguing whether the contributions were voluntary or not?"

36. Even if the contributions are treated as not voluntary what could be the legal consequence of that finding? Whether the Revenue will treat such (31) involuntary contributions as capital and give exemption from taxation? No, it will not. The Revenue will still find such involuntary contribution as income liable for taxation. If so, what is the real distinction between voluntary contribution and involuntary contribution as far as the taxation of charities is concerned? In both cases, it will be brought for taxation if the assessee has not utilised the contributions for charitable purposes.

37. The expression "voluntary contributions" is used in the Act instead of "contributions" to highlight the principle of non-compulsion in matters of participating in charitable activities and to underline the gratuitous nature of donations and charitable activities. There is no compulsion in making contributions to charities. If the expression was "contributions" there could be a naunce of compulsion like contribution to provident fund and the like.

38. Therefore, we find that whether it is treated as voluntary or involuntary, the only course of action available before law is to see whether such contributions have been treated by the assessee as the income and also applied for charitable (30) purposes."

This reasoning of the Tribunal, we are inclined to accept.

4.9 The finding of the Tribunal is that the department has not established a case that the assessee had in this case not utilized the donations or income for charitable purpose. The clear finding of the Tribunal is that if the assessee had not utilized the amount for

charitable purpose, it would automatically become taxable and the assessee would not be entitled to exemption. But, on the contrary, without there being a finding of violation of section 13 of the Act, an inference is drawn on an alleged receipt of donation and consequently, the allegation is made that there is a violation of section 13(1)(d) of the Act. A hypothetical finding is given that because capitation fee is charged, it is not an income in terms of section 11 of the Act and, therefore, there is a violation of section 13(1)(d) of the Act. The Tribunal held that such a reasoning cannot be accepted because if the donations are offered for income and if the department wants to disprove the nature of income on the basis of material, as has been pointed (33) out by the Commissioner of Income-tax (Appeals), it should be borne out by records based on investigation, which the Assessing Officer failed to do, except falling back on a statement which is not supported by materials'.

**14.** We are in respectful agreement with the view taken by the Madras High Court.

**15.** Sri. E.I. Sanmathi, learned advocate is also right in his submission that in each year of assessment, the Assessing Officer will have to examine the case independently. In the case on hand, the Assessing Officer for the A.Y. 2011-2012 has held that he has made enquiry with the parents and collected information that the amount was not made voluntarily.

**16.** It was argued by Shri. Chandrashekar that Assessing Officer's view that capitation fee was collected in violation of the Karnataka Educational Institution (Prohibitions of Capitation Fee) Act, 1984, is not sustainable because it is for the appropriate authority, which deals with the said Act to investigate into the matter. In substance, his contention is, the Assessing Officer under the Income-tax Act cannot deny the exemption under section 11 of the Act on the assumption that there is violation of any other statutory provision. He also adverted to section 12(AA) (4) (b) of the Act and contended that the said provision has been substituted with effect from 1-9-2019, giving power to the Principal Commissioner or the Commissioner of Income-tax to cancel the registration of a trust or institution. Thus, it is clear that should there be any violation with regard to receipt of capitation fee, the Assessing Officer could not have denied the benefit under section 11 of the Act so long as the certificate is in force. Admittedly, assessee's certificate was in force. Though it was cancelled by the Revenue it has been restored by an order passed by this Court in ITA.No.421/2013.

**17.** In view of the above, these appeals merit consideration in favour of the assessee."

Identical view has been expressed by Hon'ble Karnataka High Court in another case, viz., PCIT vs. Rashtreeya Shiksha Samithi Trust (2023)(152 taxmann.com 664)(Kar) as under:-

**“7.** We have carefully considered rival contentions and perused records.

**8.** This court in Kammavari Sangham has held that so long as the exemption certificate is in force, the assessee is entitled for its benefit. In *New Noble Educational Society's* case (*supra*) relied upon by Shri Sanmathi, it is held that the compliance with registration under the different tax law is also a relevant consideration and it can legitimately weigh with the tax authority while deciding the applications for approval under section 10(23C).

**9.** Undisputed facts of this case in hand are, the exemption certificate was in force as on the date of issuance of notice. The AO has denied the benefit of exemption by holding that the assessee had received a sum of Rs. 27,23,55,000/- as capitation fee in the guise of voluntary contribution.

**10.** Shri Huilgol pointed out from para 18 of the impugned order that the assessee had filed an affidavit before the ITAT stating that no action under the KEI (Prohibition of Capitation Fee) Act, was initiated against the assessee. The ITAT has recorded that the learned departmental representative had not contradicted the said affidavit either orally or by filing a counter affidavit. Based on this factual aspect, the ITAT has recorded thus in the impugned order;

"37. In the light of the above, we are of considered opinion that the Appellant is carrying out education which is charitable within the meaning of section 2(15), it has applied and/or accumulated sums as required by section 11(1)(a), the explanation thereto and section 11(2), it is duly registered under section 12A and has not violated section 13. Further there is no private gain and all the funds are ploughed back only into education. Thus accumulations and application are as per the provisions of section 11. Therefore, exemption under section 11 and 12 has to be allowed to the assessee. We hold that the assessee is entitled to exemption u/s.11 and 12 of the Act. In the result grounds 3 to 5 of assessee appeal are allowed."

The AO had held that there was violation under the KEI (Prohibition of Capitation Fee) Act, and accordingly, brought the money collected by the assessee to tax. In challenge before the ITAT, the assessee has filed an affidavit stating that no action was initiated against the assessee by the State and that has remained uncontroverted. The resultant position is, the AO, based on assumption and surmise, has held that there was violation under the KEI (Prohibition of Capitation Fee) Act by the assessee and that incorrect assumption has been rightly reversed by the ITAT. So far as the authority in *New Noble Educational Society's* case (*supra*) is concerned, the Apex Court has held that the registration under different statues is also a relevant consideration while deciding the application for approval under section 10(23C) of the Act. In the case on hand, we are not dealing with a situation where the IT Department was considering any application for granting exemption. On the other hand, the department had issued the exemption certificate and the AO on an incorrect assumption has treated the money collected by the assessee as capitation fee under the KEI

(Prohibition of Capitation Fee) Act. Therefore, the said authority does not lend any support to the Revenue. This court has already taken a view in *Kammavari Sangham's* case (*supra*) and the same is applicable to the facts of this case.

**11.** In view of the above, this appeal by the Revenue must fail ..”

Accordingly, we hold that the assessee should be granted exemption u/s 11 of the Act in all the years under consideration. We order accordingly.

41. In view of the foregoing discussions, we hold that the corpus donations received in the form of development fees and also other corpus donations are eligible for exemption u/s 11 of the Act. The details of additions made by the AO are tabulated below:-

Asst. Year	Development Fees	Other corpus donations
2013-14	9,88,60,344	3,37,58,000
2014-15	12,25,31,425	8,09,60,000
2015-16	13,92,85,176	46,80,000
2016-17	12,03,14,344	1,34,15,000
2017-18	10,13,32,005	1,63,16,749

Accordingly, we set aside the order passed by Ld CIT(A) on this issue in all the years under consideration and direct the AO to grant exemption u/s 11(1)(d) of the Act in respect of above items of corpus donations.

42. The AO did not allow capital expenditure incurred by the assessee as application of income, since he had denied exemption u/s 11 of the Act. Since we have restored the exemption u/s 11 to the assessee, the income of the assessee for all the years under consideration has to be computed in accordance with the provisions of sec.11 of the Act. Hence the capital expenditure incurred by the assessee is required to be treated as application

of income. The capital expenditure disallowed in various years is tabulated below:-

<u>Assessment year</u>	<u>Capital expenditure</u>
2013-14	8,28,49,654
2014-15	19,06,56,436
2015-16	23,13,80,737
2016-17	165,29,88,113
2017-18	49,17,30,341

Accordingly, we set aside the order passed by Ld CIT(A) on this issue in all the years under consideration and direct the AO to allow the above said capital expenditure incurred by the assessee as application of income u/s 11(1) of the Act.

43. Since the AO had rejected the books of account, he denied exemption u/s 11 of the Act and assessed total income by making various additions including alleged capitation fees etc. Accordingly, the AO levied tax u/s 115BBE of the Act. In view of the decision rendered by us in the earlier paragraphs, the income has to be computed for all the years in terms of sec.11 of the Act. Accordingly, the tax could not be levied u/s 115BBE of the Act in all the years under consideration. Accordingly, we set aside the order passed by Ld CIT(A) on this issue in all the years under consideration and direct the AO not to levy tax u/s 115BBE of the Act.

44. The assessing officer has denied depreciation on opening balance of assets on the reasoning that the value of concerned assets has been treated as application of income. We notice that such embargo to claim depreciation on the assets, whose value has been allowed as application of income has been brought into the statute with effect from AY 2015-16 only. Accordingly, we direct the AO to allow depreciation on the opening value of assets in AY 2013-14 and 2014-15. For other years, the disallowance of depreciation

should be restricted only on those assets, whose value has been allowed as application of income in the earlier years.

45. The AO has rejected the claim of set off of deficit brought forward from earlier years. Since we have restored the exemption u/s 11 of the Act to the assessee, the claim of the assessee is allowable as per the decision rendered by Hon'ble Bombay High Court in the cases of DIT (E) vs. Maharashtra Industrial Development Corporation (ITA No.2652 of 2011) and CIT vs. Institute of Banking (264 ITR 110)(Bom). Accordingly, we direct the AO to allow set off of deficit brought forward from earlier years.

46. In AY 2013-14, the assessee has sold assets having value of Rs.20.00 lakhs. The AO assessed the sale value of Rs.20.00 lakhs as income of the assessee. The reasoning given by the AO is that the value of assets was treated as application of income at the time of purchase and hence the sale value should be treated as income. It is the submission of the assessee that the assessee has purchased movable assets aggregating to Rs.3,84,50,974/- during the year relevant to AY 2013-14, but claimed a sum of Rs.3,64,50,974/- only as application of income after deducting the value of assets deleted. In any case, it is the submission of the assessee that the capital gain arising on sale of assets is offered as income. The Ld CIT(A) confirmed the addition by observing that the same is consequential to rejection of benefit of exemption u/s 11 of the Act. Since we have restored the exemption u/s 11 to the assessee, this addition is not called for. Accordingly, we direct the AO to delete the disallowance of Rs.20.00 lakhs made in AY 2013-14.

47. In AY 2014-15, the assessee is challenging the decision of Ld CIT(A) in confirming the addition of Rs.84.50 lakhs treated by the AO as bogus purchases. The assessee has purchased certain materials from a company named M/s Monarch Trading Co in the years relevant to AY 2013-14 and

2014-15. The value of material purchased was Rs.60.00 lakhs and Rs.24.50 lakhs respectively. The assessee made the payment of Rs.84.50 lakhs during the year relevant to AY 2014-15. Based on the statement given by Smt Taruna Maheswari, employee of another trust, the AO treated the above said expenses as bogus in nature and accordingly added the same u/s 69C of the Act.

47.1 We heard the parties on this issue and perused the record. We have noticed that Smt Taruna Maheswari is not the employee of the assessee and the allegation of bogus purchases has been made on the basis of noting made by her. On the contrary, the assessee could prove the genuineness of purchases before the AO. On the contrary, the AO has placed reliance on the statement given by Smt Taruna Maheswari, which has been retracted by her later. When the assessee is able to prove the genuineness of purchases and payments, the AO should have accepted the same, since there was no other material to support the noting made by a third person, i.e., Taruna Maheswari. Accordingly, we are of the view that the Ld CIT(A) was not justified in confirming the addition of Rs.84.50 lakhs made by the AO in AY 2014-15. Accordingly, we direct the AO to delete this addition.

48. We have noticed earlier that the revenue has seized cash from various employees of the assessee. We have also noticed that all the employees have owned up the cash and offered the same as their income under Income Disclosure Scheme, 2016. Since the AO had made addition on account of capitation fee receipts in the hands of the assessee in all the years under consideration and since the cash balance seized from the employees was treated as part of capitation fee, he did not make addition of cash balance separately. However, in order to safeguard the interests of revenue, the AO added the cash balance seized from Shri Pratap Patil (Rs.74,96,500/-) and from Shri Unmesh Khanvilkar (Rs.19,40,26,600/-) on protective basis. The Ld CIT(A) deleted the protective additions. However, he held that the same

shall become substantive additions, if the additions on account of capitation fee are deleted by the higher appellate forum. Hence the assessee has raised an additional ground challenging the above said decision of Ld CIT(A) in Asst.Year 2017-18.

48.1 We heard the parties on this issue and perused the record. We have deleted the additions relating to capitation fee in the earlier paragraphs holding that there is no evidence to show that the assessee trust has collected capitation fee. Hence the additions relating to above said cash balances will have to be treated as substantive additions, as observed by Ld CIT(A). We have earlier held that there is no material to show that the assessee has collected capitation fees. We also notice that there is no material to link the above said cash balances seized from the employees with the assessee trust. Hence there is no reason to make this addition in the hands of the assessee on substantive basis, since the onus to explain the cash balances will lie upon Shri Pratap Patil and Shri Unmesh Khanvilkar. We noticed that both these persons have owned up the cash balances and offered the same as their income under Income declaration Scheme, 2016. Accordingly, we direct the AO to delete both the above said additions in AY 2017-18.

49. We shall now take up the appeal filed by the revenue. In AY 2014-15, the revenue is aggrieved by the decision of Ld CIT(A) in deleting the addition of Rs.2.15 crores relating to unexplained expenditure. In AY 2016-17, the revenue is aggrieved by the decision of Ld CIT(A) in deleting the addition of Rs.6.10 crores relating to unexplained expenditure.

49.1 On examination of pen drive seized from Shri Pratap Patil, an Excel file titled as "Shree Swami" was found. It contained details of payment of Rs.2.15 crores to certain persons in June and July, 2013 to the tune of Rs.2.15 crores as detailed below:-

	Adv Singh Skin VD	25.00 (Amount in lakhs)
27-06-2013	Abhi	80.00
04-07-2013	Tare Akanksha	20.00
12-07-2013	Aditya Saboo (ADV singh)	40.00
	Koparkar Makrand m	40.00
	Vaje	10.00
		-----
	GROSS	215.00
		=====

The assessing officer assessed the amount of Rs.2.15 crores as unexplained expenditure of the assessee in AY 2014-15 and assessed the same u/s 69C of the Act.

49.2 In the similar manner, the details of payments made to various persons in financial year 2015-16 have been noted down in the Excel sheet. The aggregate amount of the same was 609.91 lakhs. The AO has extracted the same at pages 30 & 31 of the assessment order relating to AY 2017-18. The AO treated the same as unaccounted expenditure of the assessee in AY 2016-17 and assessed the same u/s 69C of the Act.

49.3 The Ld CIT(A) noticed that the AO has taken the view, in respect of other payments/expenditure, that they have been incurred out of capitation fees collected. Hence the AO had made the additions of other such kind of payments/expenditure on protective basis. Noticing the same, the Ld CIT(A) took the view that there is no requirement to take a different view in respect of Rs.2.15 crores and Rs.609.91 lakhs referred above. Accordingly, he held that both the above said amounts should also be considered as having been paid out of unaccounted capitation fees. Since the Ld CIT(A) has confirmed the additions relating to capitation fees, he took the view that payments made out of the same should not be assessed again. Accordingly, he deleted the addition of RS.2.15 crores and Rs.609.91 lakhs made in AY 2014-15 and 2016-17 respectively.

49.4 We have heard the parties and perused the record. We have held that the information found in the pen drive/laptop of employees cannot be considered as credible evidences, unless they have been corroborated with any other evidence. Accordingly, no credence could be given to the abstract entries made in the pen drive/laptop. Accordingly, we are of the view that the AO could not have made additions on the basis of those information. Accordingly, we confirm the decision of Ld CIT(A) in deleting the additions in both the years for the reasons discussed above.

50. The revenue is aggrieved by the decision of Ld CIT(A) in deleting the addition of Rs.65.00 lakhs, being the cash seized from Shri Bhagirath Patil. We noticed earlier that Shri Bhagirath had originally stated that he has received the above said amount from Smt Shivani Patil for keeping it in safe custody one day prior to the date of search. Later, he retracted his statement and submitted the same represents his money accumulated out of savings and agricultural income. He also revised his return of income relating to AY 2016-17 in order to show availability of cash. The AO did not accept the revised version of Shri Bhagirath Patil. He noticed that Smt. Shivani had stated that she has received a sum of Rs.60.00 lakhs from Mr Pratap Patil one week prior to the date of search. The AO took the view that the amount received from Pratap Patil is out of capitation fees. Accordingly he took the view that the amount of Rs.65 lakhs given to Shri Bhagirath Patil consisted of Rs.60 lakhs said to have been received from Shri Pratap Patil. Accordingly, the AO held that the amount of Rs.65 lakhs given to Shri Bhagirath Patil is also part of capitation fees only. Accordingly, he assessed the amount of Rs.65.00 lakhs as income of the assessee in AY 2017-18.

50.1 Before Ld CIT(A), the assessee contended that the above said amount of Rs.65.00 lakhs belongs to Shri Bhagirath Patil only. It was submitted that Smt Shivani Patil has also retracted her statement and hence no credence should be given to her statement. It was submitted that Shri Bhagirath Patil

has revised his return of income disclosing availability of cash balance and the said return of income has been accepted. Accordingly, it was contended that no addition is called for. In the alternative, it is submitted that the assessing officer should not have added the above said amount, once he has taken the view that the same has been sourced from capitation fees. The Ld CIT(A) accepted the alternative contention of the assessee and accordingly, he deleted the addition of Rs.65.00 lakhs.

50.2 We heard the parties on this issue and perused the record. First of all, we notice that it was a transaction between Smt Shivani Patil and Shri Bhagirath Patil. Nowhere, it is mentioned by both of them that this amount of Rs.65.00 lakhs has got any connection with the assessee trust. The AO has given credence to the statement of Smt Shivani Patil, wherein she had said that she received a sum of Rs.60.00 lakhs from Shri Pratap Patil one week earlier to the date of search. The submission of the assessee is that the records maintained by Shri Pratap Patil do not show any such payment to her. It is not the case of the AO that Shri Pratap Patil has also confirmed the said payment of Rs.60 lakhs made to Smt Shivani Patil, meaning thereby, the statement of Smt Shivani Patil remains uncorroborated. We also notice both Smt Shivani Patil and Bhagirath Patil have retracted their respective statements. In any case, it is submitted that Shri Bhagirath Patil has shown availability of cash through his return of income. In the absence of any material establishing any connection between the assessee and the above said cash balance, we are of the view that there is no reason to assess the amount of Rs.65.00 lakhs in the hands of the assessee. Accordingly, we confirm the relief granted by Ld CIT(A) on this issue for the reasons discussed above.

51. The assessee has raised certain legal contentions in all the years. However, the Ld A.R did not advance any argument on those legal issues. Accordingly, we do not find it necessary to adjudicate the same. They are left open.

52. In the result, all the appeals of the assessee are allowed and all the appeals of the revenue are dismissed.

Order pronounced on 04.01.2024.

Sd/-  
(Pavan Kumar Gadale)  
Judicial Member

Sd/-  
(B.R. Baskaran)  
Accountant Member

Mumbai.; Dated : 04/01/2024

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai.
6. Guard File.

//True Copy//

PS

BY ORDER,

(Assistant Registrar)  
ITAT, Mumbai